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COURT OF APPEALS

STATE OF NEW YORK

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NANDKUMAR RAMKUMAR,

Appellant,

-against-

No. 170

GRAND STYLE TRANSPORATION  
ENTERPRISES, INC., ET AL.,

Respondent.  
-----

20 Eagle Street  
Albany, New York 12207  
September 12, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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David Rutt  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 170, Ramkumar.

2 MR. COHEN: May it please the Court - - -

3 CHIEF JUDGE LIPPMAN: Yeah, one second, counsel,  
4 a lot of people leaving the courtroom. Okay. Give us a -  
5 - - a few more seconds.

6 Okay. Counselor, go ahead. You want - - -

7 MR. COHEN: Your Honors, I would like - - -

8 CHIEF JUDGE LIPPMAN: You want rebuttal time?

9 MR. COHEN: - - - two minutes of rebuttal time.

10 CHIEF JUDGE LIPPMAN: Two minutes. Sure. Go  
11 ahead.

12 MR. COHEN: May it please the Court, my name is  
13 Judah Cohen, and I represent the plaintiff/appellants in  
14 this particular matter.

15 We believe that there are two factors that  
16 militate in favor of warranting a reversal - - -

17 CHIEF JUDGE LIPPMAN: Tell us about the gap.  
18 Tell us about the gap in treatment.

19 MR. COHEN: The gap in treatment, two years  
20 approximately, you can call it a gap in treatment or a  
21 cessation of treatment, as this Court has determined in  
22 the past, but nevertheless, in order to explain away a gap  
23 in treatment, as this Court has enunciated previously,  
24 "some reasonable explanation".

25 JUDGE READ: What was the reasonable explanation

1 here?

2 MR. COHEN: The reasonable explanation, if we  
3 assume that he was simply talking about the fact that his  
4 no-fault benefits were cut off, that he was cut off five  
5 months subsequent to the fact after his accident.

6 JUDGE READ: But did he put in any kind of an  
7 affidavit to that effect?

8 MR. COHEN: He did not. That was his sworn  
9 testimony of his deposition, and that's in the record.

10 CHIEF JUDGE LIPPMAN: What - - -

11 JUDGE READ: And that comment's not ambiguous at  
12 all?

13 MR. COHEN: Pardon?

14 JUDGE READ: That comment's not even ambiguous  
15 at all?

16 MR. COHEN: If you want to say that that comment  
17 is ambiguous, then the test as to whether that particular  
18 comment constitutes some reasonable explanation, that's  
19 for the trier of fact.

20 JUDGE GRAFFEO: But we're going to be issuing -  
21 - -

22 JUDGE READ: Well, he could put in an affidavit,  
23 couldn't he?

24 MR. COHEN: That was his sworn testimony.

25 JUDGE READ: I mean, he could have put in an

1 affidavit to clear it up.

2 MR. COHEN: He wasn't asked at his deposition  
3 what did that mean, and beyond Pommells' explain - - -  
4 Pommells' definition of some reasonable explanation, there  
5 was nothing further required.

6 CHIEF JUDGE LIPPMAN: What do you think "some  
7 reasonable explanation" means? How do we decide this? Go  
8 ahead.

9 MR. COHEN: That is for this august body to  
10 decide as to what "some reasonable explanation" is. What  
11 is that criteria?

12 CHIEF JUDGE LIPPMAN: Yeah.

13 MR. COHEN: You and I may differ as to what is a  
14 reasonable explanation on many things.

15 JUDGE GRAFFEO: Well, we're going to be issuing  
16 a decision that affects a lot of no-fault cases.

17 MR. COHEN: No question about that.

18 JUDGE GRAFFEO: And I mean, obviously, we've  
19 been trying to set some boundaries so that the courts are  
20 aware of what falls within and what falls without. So  
21 could you at least suggest something to us in terms of  
22 what would be satisfactory, a satisfactory explanation for  
23 a cessation of benefits? All the person has to do is just  
24 say - - - I mean, should he at least have said that he  
25 couldn't afford the premiums for the - - - or afford to

1 continue to receive the medical treatment or the  
2 chiropractic treatment?

3 MR. COHEN: Well, we belief, in the first  
4 instance, that simply stating for a person who had no  
5 insurance, who had no medical insurance whatsoever, who  
6 was earning 450 dollars a week, as the defense points out,  
7 that by stating the purpose of benefits is in order to  
8 satisfy his immediate medical needs. Once those benefits  
9 run out, is now a plaintiff supposed to come forward and  
10 now prove through his tax returns on what his tuition is,  
11 his mortgage payments are?

12 JUDGE GRAFFEO: I'm not asking --

13 JUDGE READ: Isn't there some middle ground  
14 there? Isn't there something in between coming in with  
15 tax returns and saying cut off five months ago in a  
16 deposition, which could mean after five months or five  
17 months ago?

18 MR. COHEN: That's true.

19 JUDGE READ: So isn't there some middle ground  
20 between something like tax returns and that, which is - -  
21 - I think Judge Graffeo is asking you, what kind of a  
22 showing do you have to make? How do you make the  
23 reasonable explanation?

24 MR. COHEN: When a person's treatments have  
25 ceased, I believe that that is a reasonable explanation in

1 and of itself.

2 JUDGE GRAFFEO: What have other plaintiffs - - -

3 JUDGE RIVERA: All you have to do is come and  
4 say, my treatment ended - - - my insurance ran out?

5 MR. COHEN: I'm not suggesting that this is a  
6 magical incantation that is going to invoke the defeat of  
7 summary judgment simply by stating that "my benefits have  
8 run out."

9 JUDGE ABDUS-SALAAM: Counsel, so what kind of  
10 statements have been acceptable as reasonable explanations  
11 for gaps in treatment?

12 MR. COHEN: In both - - - in the First  
13 Department itself, and I cited it in my brief, and even  
14 the Defense Association of New York in their amicus brief  
15 have cited it, the simple statement alone that "I was cut  
16 off from benefits" sufficed to explain away a gap in  
17 treatment.

18 JUDGE SMITH: Well, how hard is it to do a  
19 little better than that to say, this is the name of my  
20 carrier, this is when they cut - - - this is why they cut  
21 me off, they didn't give me a reason, this is the reason  
22 they give me? I mean, in the face of this, he could have  
23 been cut off because they didn't tell you and he didn't  
24 submit the claim in the right form or because they didn't  
25 think he was really hurt.

1 MR. COHEN: I don't have the litmus test of what  
2 a reasonable explanation is or I don't have a list of  
3 them.

4 CHIEF JUDGE LIPPMAN: What do the cases say  
5 then? What do the cases say? What should we - - -

6 MR. COHEN: This case - - -

7 CHIEF JUDGE LIPPMAN: Are the cases all over the  
8 map or are they - - -

9 MR. COHEN: They are all over the map. They are  
10 basically - - - they come down to where they're cut in two  
11 essentially. Some cases say the simple statement alone  
12 suffices, and some cases say that the simple statement  
13 alone does not suffice, it must be corroborated by another  
14 statement. The other statement - - - the other magical  
15 incantation or invocation is, I couldn't afford to pay.  
16 There was never a requirement beyond that, in those cases,  
17 that a person would have to substantiate with documentary  
18 evidence as the First Department majority would suggest in  
19 this particular instance.

20 JUDGE GRAFFEO: And I don't think we're - - -

21 MR. COHEN: So there are - - - there does seem  
22 to be a dispute.

23 JUDGE GRAFFEO: - - - at least I'm not  
24 suggesting the documentary evidence, but I'm wondering,  
25 wouldn't a couple of more questions and answers here have

1 clarified this situation?

2 MR. COHEN: Based upon this Court's holding in  
3 Pommells as to "some reasonable explanation", the arena is  
4 left open, and therefore, at that particular time of this  
5 deposition, what more could have been done at that period  
6 of time? Instead of merely giving a reasonable  
7 explanation, we assume that that's not sufficient. Why is  
8 that alone not sufficient? I maintain that it is, and so  
9 did many other courts. "Some reasonable explanation."  
10 For instance, in this - - - this particular body of  
11 jurists at one time said, no explanation whatsoever did  
12 not suffice with respect to explaining away the gap in  
13 treatment. Nevertheless, by the same token, when the  
14 82-year-old individual in Perl, when his doctors refuted  
15 or contradicted the defendant's IME doctors, that alone  
16 was sufficient so - - -

17 JUDGE SMITH: What about the degenerative  
18 changes in your - - - where the defense expert said that  
19 his obesity led to degenerative - - - that what he was  
20 explaining about was a degenerative condition resulting  
21 from his obesity, did you say anything to refute that?

22 MR. COHEN: Dr. Vantilbano (ph.), who was the  
23 defendant's IME doctor, said that in conclusory fashion,  
24 assuming and adopting the IME review of Dr. Fisher, also  
25 performed by the defendants, that there was no joint



1           effusion, although that IME review did not say that there  
2           was degeneration, that this particular knee injury was  
3           likely the result of his morbid obesity. Nevertheless,  
4           there was no affirmative statement to that effect. On the  
5           other side - - -

6                     JUDGE SMITH: So you're saying they didn't meet  
7           their burden on that issue, their initial burden?

8                     MR. COHEN: They did not meet their burden and  
9           that - - -

10                    JUDGE SMITH: If they did, did you submit  
11           anything to refute it?

12                    MR. COHEN: Yes. The affidavits of the treating  
13           orthopedic surgeon who actually performed the surgery said  
14           there was nothing degenerative in there, and he said that  
15           I saw the tear and he was asymptomatic. If in Perl, an  
16           82-year-old individual who is asymptomatic of his back  
17           injuries was sufficient in order to refute the defendant's  
18           IME's doctors, then why isn't orthopedic surgeon in this  
19           particular instant sufficient to defeat the defendant's  
20           submission?

21                    CHIEF JUDGE LIPPMAN: But you're saying just  
22           conflicting experts?

23                    MR. COHEN: It is a battle of experts. And as  
24           this Court said in Toure, if I may sum up, as follows:  
25           The test is cross-examination. The battle is between the

1 experts, and the weight and the credibility, that is for  
2 the jury.

3 CHIEF JUDGE LIPPMAN: Okay. Thanks, counsel.

4 MR. COHEN: Thank you for your time.

5 CHIEF JUDGE LIPPMAN: You'll have rebuttal.

6 Thank you.

7 MS. SPROAT: Good afternoon. May it please the  
8 Court, Ashley Sproat for the Bissessar defendant.

9 JUDGE READ: So - - -

10 CHIEF JUDGE LIPPMAN: Counsel - - - I'm sorry.  
11 Go ahead, Judge.

12 JUDGE READ: So why isn't - - - why isn't the  
13 statement in the deposition sufficient?

14 MS. SPROAT: The statement is insufficient  
15 because it doesn't say that no-fault was even cut off.  
16 That's an assumption that the plaintiff is asking this  
17 Court to make.

18 JUDGE GRAFFEO: Well, what else could he have  
19 meant when he said he was cut off?

20 MS. SPROAT: It could have meant that the  
21 physical therapy cut off his treatments for not - - -

22 JUDGE PIGOTT: Then why didn't you ask?

23 MS. SPROAT: - - - showing up for appointments.  
24 It wasn't asked, but the plaintiff had plenty of options.

25 JUDGE PIGOTT: Who has the burden of proof on a

1 motion for summary judgment?

2 MS. SPROAT: The defendant has to come forward  
3 with the proof.

4 JUDGE PIGOTT: All right. And so if he says  
5 "they cut" - - - "they cut me off, like, five months",  
6 who's "they"?

7 MS. SPROAT: Well, assuming it's the no-fault  
8 carrier - - -

9 JUDGE PIGOTT: No. I think you have the - - -  
10 don't you have an obligation to prove who it was and why,  
11 et cetera, and say, therefore he does not have a serious  
12 injury?

13 MS. SPROAT: It's the defendant's burden to  
14 raise the gap in treatment issue.

15 JUDGE PIGOTT: It's - - - no, it's the  
16 defendant's - - -

17 MS. SPROAT: It's the plaintiff's burden to  
18 overcome it.

19 JUDGE PIGOTT: It's the defendant's burden to  
20 establish its entitlement to judgment as a matter of law.

21 MS. SPROAT: Correct.

22 JUDGE PIGOTT: And you want to say, because he  
23 had this equivocal statement it therefore means that  
24 you're entitled to judgment as a matter of law, and I'm  
25 not sure that that follows because we don't know what that

1 statement means. And I'm asking you, what does that  
2 statement mean, then we can make that determination.

3 MS. SPROAT: What does the plaintiff - - - the  
4 plaintiff's statement in his deposition mean?

5 JUDGE PIGOTT: Right.

6 MS. SPROAT: Plaintiff could have told us  
7 through an affidavit.

8 JUDGE PIGOTT: No. I mean, what does it mean?

9 MS. SPROAT: "They cut me off, like, five  
10 months"?

11 JUDGE PIGOTT: Right.

12 MS. SPROAT: We don't know.

13 JUDGE PIGOTT: Well, then how can you say that  
14 it doesn't mean that he was cut off because he didn't have  
15 medical insurance, which he did testify to?

16 MS. SPROAT: Well, it could, but the point is,  
17 the defendant's raised the gap in treatment issue. It's  
18 the burden - - -

19 JUDGE SMITH: You didn't just raise the issue;  
20 you - - - it's undisputed that there was a gap in  
21 treatment, right?

22 MS. SPROAT: Correct. And I actually submit the  
23 gap - - -

24 JUDGE SMITH: So your position is once you've  
25 done that, it's his burden to provide the reason - - -

1 you've already shifted the burden, and he's got to provide  
2 the reasonable explanation.

3 MS. SPROAT: Correct. And he could have done  
4 that through an errata sheet following the deposition,  
5 clarifying his statement.

6 JUDGE PIGOTT: No - - - well, why isn't it  
7 insufficient for him to say "they cut me off"?

8 MS. SPROAT: Because that's not enough. An  
9 insurance company's independent determination that they no  
10 longer need to pay for someone's medical benefits - - -

11 JUDGE PIGOTT: Well, can't somebody look it up?  
12 I mean, you represent the carrier, right?

13 MS. SPROAT: Right.

14 JUDGE PIGOTT: Couldn't - - - didn't you know  
15 from the no-fault - - -

16 MS. SPROAT: Well, I represent the Bissessar  
17 clients - - -

18 JUDGE PIGOTT: I know, right, but - - -

19 MS. SPROAT: - - - not the carrier.

20 JUDGE PIGOTT: - - - I mean, isn't there  
21 somewhere in these records that somebody would know either  
22 that he was - - - he didn't have health insurance, that  
23 his no-fault cut him off or that there's only a certain  
24 number - - - it always seemed to me in this cases that  
25 physical therapy will cut you off just about the last time

1 that no-fault says they're going to provide coverage, and  
2 all of a sudden, they - - - it's like you went to Lourdes  
3 and you're cured. But he said "they cut me off", and it  
4 would seem to me that most people know what that means is  
5 one of those things happened. It wasn't that he said, I  
6 felt great so I stopped going.

7 MS. SPROAT: Right. Even if no-fault cuts  
8 someone off, that still doesn't constitute a reasonable  
9 explanation. It tells us nothing about - - -

10 CHIEF JUDGE LIPPMAN: Who does? What does?

11 MS. SPROAT: An affidavit from a person  
12 explaining - - -

13 JUDGE ABDUS-SALAAM: And when have we ever  
14 required that, counsel, under Pommells?

15 MS. SPROAT: Pommells made it quite clear that  
16 it's the plaintiff's burden to come forward with the  
17 evidence explaining the gap in treatment.

18 JUDGE ABDUS-SALAAM: But you're not answering my  
19 - - - when have we ever required an affidavit or  
20 documentation of a statement like that?

21 MS. SPROAT: Pommells did not say documentary  
22 evidence, but the cases that have interpreted Pommells,  
23 there is one thing consistent in all of them, and it's  
24 that the plaintiff submitted an affidavit explaining --  
25 providing the complete explanation as to why they're no

1 longer treating him.

2 JUDGE PIGOTT: What, if your view, should his  
3 explanation have said?

4 MS. SPROAT: It should have said, no-fault cut  
5 me off, first of all.

6 JUDGE PIGOTT: So "they" could have meant  
7 no-fault?

8 MS. SPROAT: It could have.

9 JUDGE PIGOTT: Or?

10 MS. SPROAT: Or "I didn't have health insurance  
11 and I couldn't afford to continue treatments" or - - -

12 JUDGE PIGOTT: You said he didn't have health  
13 insurance, right?

14 MS. SPROAT: He didn't say that. Or the  
15 plaintiff's physician could have said he's reached maximum  
16 medical improvement and doesn't need to continue  
17 treatment.

18 JUDGE PIGOTT: He testified he had no health  
19 insurance at the time of the accident.

20 MS. SPROAT: At the time of the accident, but  
21 not at the time he stopped treating. He got a job prior  
22 to his deposition date and was working, living at home  
23 with his parents.

24 JUDGE PIGOTT: And he had health insurance?

25 MS. SPROAT: Presumably. We don't know for

1 sure.

2 CHIEF JUDGE LIPPMAN: Don't you think the cases  
3 are inconsistent as to what - - -

4 MS. SPROAT: Excuse me?

5 CHIEF JUDGE LIPPMAN: Don't you think the cases  
6 are inconsistent - - -

7 MS. SPROAT: I think they're consist - - -

8 CHIEF JUDGE LIPPMAN: - - - as to what a  
9 reasonable explanation is?

10 MS. SPROAT: I think they're consistent in that  
11 in all of the cases that have interpreted Pommells, there  
12 has been an affidavit from the plaintiff, A, setting forth  
13 that no-fault cut me off and, B, that I couldn't afford  
14 further treatment, or that a doctor said I didn't need  
15 further treatment because I've reached maximum medical  
16 improvement.

17 JUDGE ABDUS-SALAAM: So is that the rule that  
18 you would ask us here to impose now that there have to be  
19 an affidavit that no-fault cut me off and that I can't  
20 afford - - -

21 MS. SPROAT: Well, I think it could take  
22 multiple forms.

23 JUDGE ABDUS-SALAAM: - - - insurance.

24 MS. SPROAT: It could take the form of an  
25 affidavit. It could take the form of deposition testimony



1 that's clear and unequivocal via testimony itself or an  
2 errata sheet.

3 JUDGE PIGOTT: Well, when he said that, when he  
4 said "they cut me off", who was asking the questions?

5 MS. SPROAT: One of the defendant's attorneys.

6 JUDGE PIGOTT: All right. And did they  
7 understand what was meant or did they pursue that further  
8 to find out what he meant when he said that?

9 MS. SPROAT: He didn't, but again, it's not  
10 their burden on the motion for summary judgment.

11 JUDGE PIGOTT: I understand that, but what  
12 you're saying is they must have understood sufficiently  
13 that they didn't pursue it any further.

14 MS. SPROAT: I think that's speculative. They  
15 could have.

16 JUDGE PIGOTT: I agree with you.

17 MS. SPROAT: They could have but - - -

18 JUDGE ABDUS-SALAAM: But why isn't that enough  
19 for a jury to determine? Why shouldn't he get an  
20 opportunity - - - he hasn't raised some issue of fact  
21 regarding the gap in treatment?

22 MS. SPROAT: We don't believe that he has  
23 because he hasn't even established that no-fault cut him  
24 off in this case.

25 JUDGE PIGOTT: But suppose they did?

1 MS. SPROAT: Suppose they did? It's still not a  
2 sufficient explanation - - -

3 JUDGE PIGOTT: You haven't proven - - -

4 MS. SPROAT: - - - because it doesn't tell us -  
5 - -

6 JUDGE PIGOTT: But you didn't prove that they  
7 didn't and you didn't prove that he didn't have insurance  
8 and you - - - so you haven't proven that the gap in the -  
9 - - the gap is because he's healthy again or that he has  
10 received the max - - - and even if he had received the  
11 maximum treatment, that does not necessarily mean that  
12 he's cured; it just means they can't help him anymore,  
13 right?

14 MS. SPROAT: Right. Again, but that's not our  
15 burden of proof. That's the plaintiff's burden.

16 JUDGE PIGOTT: Well, you just say, gap, I win,  
17 unless he can explain the gap.

18 MS. SPROAT: Unless he can explain the gap,  
19 which is what Pommells said.

20 JUDGE PIGOTT: He says they cut me off, you say  
21 that's not sufficient for me, and I think one of the  
22 questions here is, why shouldn't the jury decide that.

23 MS. SPROAT: Well, it's not sufficient because  
24 it doesn't tell us - - - that's exactly the issue on the  
25 motion for summary judgment. The purpose of the law is to

1 get rid of these cases that - - - that don't belong in the  
2 court system.

3 JUDGE PIGOTT: But don't we want to keep the  
4 ones that do?

5 MS. SPROAT: Well, correct, but in this case, it  
6 tells us nothing about the plaintiff's medical condition  
7 at the time he stopped treating, and the lack of treatment  
8 suggests that the injuries have resolved.

9 JUDGE ABDUS-SALAAM: Didn't his doctors say that  
10 he had a permanent injury after his surgery?

11 MS. SPROAT: Correct. And there's actually a  
12 case that says permanence is a medical determination  
13 requiring an objective basis, and mere repetition of the  
14 word "permanent" in a medical record is insufficient. And  
15 I'd suggest that - - -

16 JUDGE GRAFFEO: It wasn't just medical records.  
17 Didn't his surgeon indicate that he was going to have  
18 continuing problems?

19 MS. SPROAT: His surgeon's own operative report  
20 notes a finding of chondromalacia which brings up the  
21 degenerative condition.

22 JUDGE SMITH: How do we know that? I mean, you  
23 say in your brief that that's a degenerative condition.  
24 Is there something - - - are we supposed to take judicial  
25 notice of that? I never heard of it before.

1 MS. SPROAT: Of the preexisting condition?

2 JUDGE SMITH: What chondro- - - whatever - - -  
3 what, chondromacia (sic)?

4 MS. SPROAT: Fair enough. But the defendant's  
5 physician raised the issue of the extreme morbid obesity  
6 and goes into great detail actually to explain how that  
7 condition directly impacted this plaintiff in his lumbar  
8 spine and in his knees.

9 JUDGE PIGOTT: This is - - - this is your  
10 defense doctor?

11 MS. SPROAT: Correct.

12 JUDGE PIGOTT: - - - who had never seen him  
13 before and who testified that it was degenerative?

14 MS. SPROAT: He had never - - - right, but we're  
15 entitled to an independent medical examination.

16 JUDGE RIVERA: And he submits a conflicting - -  
17 -

18 MS. SPROAT: Excuse me?

19 JUDGE RIVERA: And he submits conflicting  
20 medical - - - a medical doctor's affidavit, so why doesn't  
21 that get you to the jury?

22 MS. SPROAT: Because it's conclusary. He's - -  
23 - it's sign linked on the issue of the degenerative  
24 condition that was raised by the defendant's IME doctor.

25 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks.

1 MS. SPROAT: Thank you.

2 MR. NAPARTY: Good afternoon, Your Honors. May  
3 it please the Court - - -

4 CHIEF JUDGE LIPPMAN: Counselor.

5 MR. NAPARTY: - - - Matthew Naparty for Grand  
6 Style and Tandia defendants.

7 JUDGE PIGOTT: You're the no-fault carrier?

8 MR. NAPARTY: No, I'm not. Actually, Ms. Sproat  
9 is the no-fault carrier.

10 JUDGE PIGOTT: You're the no-fault carrier. Got  
11 you straight. Okay.

12 MR. NAPARTY: I want to just put things into  
13 perspective here a little bit. In Pommells, this Court  
14 said that no explanation is not good; you have to have an  
15 explanation. Where the plaintiff doesn't tell you and his  
16 doctor doesn't tell you, it's not enough.

17 JUDGE GRAFFEO: You mean for cessation of  
18 treatment?

19 MR. NAPARTY: When there's a gap or cessation of  
20 treatment, no explanation means you're out. You have to  
21 provide a reasonable explanation. In the companion case  
22 of Brown, this Court said that if you have a doctor who  
23 says you've reached the maximum medical improvement and  
24 that's why you terminated therapeutic measures, that's  
25 fine. And that makes perfect sense because it doesn't

1 matter if your benefits were cut off if you've reached the  
2 maximum medical improvement. All that we care about is  
3 that you stopped treatment because there was a reason, and  
4 that reason was your doctor said you don't need it anymore  
5 or it's not going to be beneficial.

6 JUDGE PIGOTT: For maximum medical - - -

7 MR. NAPARTY: It's not going to be beneficial to  
8 you anymore.

9 JUDGE PIGOTT: Yeah. It doesn't mean you're  
10 cured; it just means - - -

11 MR. NAPARTY: Doesn't mean you're cured.

12 JUDGE PIGOTT: - - - we can't do anything more  
13 for you.

14 MR. NAPARTY: Right. It means you still have an  
15 injury.

16 JUDGE PIGOTT: If you lost your leg, it's - - -  
17 you can reach a maximum, but your leg is still missing.

18 MR. NAPARTY: Absolutely, Your Honor. But this  
19 case is a little bit different. This is a situation where  
20 you have a plaintiff who's claiming that he had an ongoing  
21 continuing disability that qualified as a serious injury  
22 under the statute.

23 JUDGE PIGOTT: The one thing I worry about, and  
24 maybe I'm alone and maybe it's my problem, but when  
25 someone asks why did you stop treating and you say they

1 cut me off, and then you - - - and you're on the defense  
2 side, and you don't pursue that because - - - this would  
3 be me if I was - - - if I was on the defense side - - -  
4 there's only one question - - - one answer that's going to  
5 come out of this and it's going to hurt me, I'm going to  
6 move on and I'm going to leave it the way it is, that they  
7 cut me off, and then when I make my motion, I can say he  
8 didn't explain the gap and now I can win my case because I  
9 don't know what "they" was, when I could have asked that  
10 question immediately thereafter and said what did you mean  
11 when you said they cut me off and he could have said any  
12 number of things that may have - - - I understand an  
13 affidavit can do the same thing.

14 MR. NAPARTY: I understand your concern and - -  
15 - but the thing there is that, as Your Honor just pointed  
16 out, the answer is - - - the answer could be obvious or  
17 the answer could not be obvious. I would submit that the  
18 answer in this case is not obvious because - - -

19 JUDGE PIGOTT: Well, then somebody should have  
20 pursued it. The - - -

21 MR. NAPARTY: But what - - - I'm sorry.

22 JUDGE PIGOTT: Isn't the dilemma here this, that  
23 if you're right and because there's an affidavit missing  
24 or something, a good case is going to get thrown out of  
25 court, or we could say why don't we just let a jury

1           decide, and if it's a bad case they're going to throw it  
2           out anyway and we're done? But to run the risk of saying  
3           but for a nail the shoe was lost here, someone who may be  
4           actually entitled to it, because he said they cut me off,  
5           should at least get his day in court and let the jury  
6           decide.

7                       MR. NAPARTY: I understand. I understand your  
8           concern and I understand your point. But respectfully,  
9           Your Honor, it's the plaintiff's burden in opposition to  
10          summary judgment to lay bare their proof.

11                      JUDGE PIGOTT: Once the gap happens.

12                      MR. NAPARTY: Once the gap arises. And in fact,  
13          it was the plaintiff's own submissions that brought the  
14          gap to light. The plaintiff submitted the 620 - - - I'm  
15          sorry - - - the 7-5 report of Dr. Manouel, and the  
16          plaintiff then - - - if you turn the page in the record,  
17          page 259 to 260, there's the gap. You have Dr. Manouel  
18          saying a couple of weeks after the surgery or a week or  
19          two after the surgery that the plaintiff has mild  
20          limitations and then he disappears, there's no more  
21          treatment.

22                      CHIEF JUDGE LIPPMAN: Counsel, you say though if  
23          his answer could be characterized as a little ambiguous.

24                      MR. NAPARTY: Right.

25                      CHIEF JUDGE LIPPMAN: It's not like he gives an



1 answer that is totally like a nonanswer. He's given an  
2 answer clearly referring to something; let's characterize  
3 it as ambiguous. Is there still no obligation to - - - on  
4 your part, to follow up and say, gee, what exactly did you  
5 mean like - - - by that, because there is some - - - most  
6 of us could guess what it might be, as we've been doing in  
7 this argument. In that kind of case, does it change it?  
8 You know what I mean? If he says something that's totally  
9 unintelligible and we have no idea what he's referring to  
10 is one thing. When it's somewhat ambiguous, you got a  
11 general sense of what he's probably saying - - -

12 MR. NAPARTY: Your Honor - - -

13 CHIEF JUDGE LIPPMAN: - - - then is there any  
14 obligation or it's still he's got to lay it out  
15 completely?

16 MR. NAPARTY: There's no obligation, Your Honor.  
17 It is not the defendant's obligation to ask a question  
18 that either you don't know the answer to or you expect  
19 that perhaps the answer is going to help the plaintiff  
20 prove their case. That is - - - that is why a plaintiff's  
21 attorney doesn't generally depose their own client because  
22 - - -

23 JUDGE PIGOTT: Well, is that why the question  
24 wasn't asked because you were afraid it was going to help  
25 the plaintiff?

1 MR. NAPARTY: Your Honor, the bottom line here  
2 is that my adversary did not even believe that that  
3 statement provided a reasonable explanation to the gap in  
4 treatment. That issue was never raised. That statement,  
5 "they cut me off, like, five months", appears one time in  
6 this record, and it's in the plaintiff's deposition  
7 testimony. But I just want to point out before I just  
8 tell you what - - -

9 JUDGE SMITH: Your point is that it would not  
10 have been so hard for them to put in an affidavit - - -  
11 whatever happened at the deposition, they can always put  
12 in an affidavit in opposition to summary judgment?

13 MR. NAPARTY: Absolutely. That's why they don't  
14 depose their own client. If they're - - -

15 JUDGE GRAFFEO: So you're saying - - -

16 MR. NAPARTY: If there is - - -

17 JUDGE GRAFFEO: - - - there may have been an  
18 explanation but it wasn't a reasonable adequate  
19 explanation?

20 MR. NAPARTY: It's not even an explanation.  
21 What we submit that the rule should be, that this Court  
22 should articulate in its decision in this case, is that if  
23 the - - - if the explanation for the gap is that no-fault  
24 benefits have terminated, if that is the explanation for  
25 the gap, it should be a two-part test. The plaintiff has

1 to show that their no-fault benefits were terminated, and  
2 they cannot do so by bare assertions, conclusory  
3 assertions, unsupported by documentary evidence. That  
4 Court has - - -

5 CHIEF JUDGE LIPPMAN: Does that - - -

6 MR. NAPARTY: - - - that's - - -

7 CHIEF JUDGE LIPPMAN: Does that go further than  
8 anyone else has done here?

9 MR. NAPARTY: I'm not - - - I'm not even  
10 finished with the rule, Your Honor.

11 CHIEF JUDGE LIPPMAN: Is that a new requirement?

12 MR. NAPARTY: I would say yes. The ruling - - -

13 CHIEF JUDGE LIPPMAN: I mean, he's saying that's  
14 what we should do, add a new requirement that basically  
15 makes that clear, or is it in the requirements?

16 MR. NAPARTY: Part one of my rule, which I just  
17 articulated - - -

18 CHIEF JUDGE LIPPMAN: Right.

19 MR. NAPARTY: - - - that the plaintiff must show  
20 with documentary proof - - -

21 CHIEF JUDGE LIPPMAN: Right.

22 MR. NAPARTY: - - - that the no-fault benefits  
23 terminated, that does not go further. There is a split.

24 CHIEF JUDGE LIPPMAN: What's part two?

25 MR. NAPARTY: Part two is that it was otherwise

1 reasonable for the plaintiff to terminate all therapeutic  
2 measures. And what I mean by that is the plaintiff has to  
3 show - - - it's only - - - that's only part one. When a  
4 plaintiff says and proves or raises a question of fact  
5 that his no-fault benefits terminated, that doesn't  
6 complete the picture here.

7 JUDGE ABDUS-SALAAM: So are you saying - - -

8 MR. NAPARTY: That's not a full and reasonable  
9 explanation.

10 JUDGE ABDUS-SALAAM: On your part two, counsel,  
11 are you saying that in a situation not like this one where  
12 someone says I've been cut off, but they say my benefits  
13 ran out and I started doing physical therapy at home, some  
14 kind of exercises that I was shown, that's not sufficient?

15 MR. NAPARTY: No, it's not sufficient.

16 JUDGE ABDUS-SALAAM: It has to be documented?

17 MR. NAPARTY: The reason is that what Pommells  
18 says is that you have to have a reasonable explanation.  
19 What is a reasonable explanation? A reasonable  
20 explanation in this context is, if I'm a person who has a  
21 continuing disability for which I require medical  
22 treatment - - -

23 JUDGE PIGOTT: Well, doesn't no-fault know if  
24 they cut him off?

25 MR. NAPARTY: It doesn't matter, but what - - -

1 JUDGE PIGOTT: Well, it does, I mean, because  
2 no-fault's sitting there next to you saying that he didn't  
3 establish - - -

4 MR. NAPARTY: Well, I can tell you - - -

5 JUDGE PIGOTT: - - - he didn't establish why he  
6 wasn't getting treatment.

7 MR. NAPARTY: Judge Pigott, I can tell you for a  
8 fact that after the fact I have since confirmed that  
9 no-fault - - - Liberty Mutual had paid out a total of  
10 12,000 and - - - 12,060 dollars on this claim. And all  
11 this Court would need to do to confirm - - - and I know  
12 that's not in the record - - - but all this Court would  
13 need to do to know that the plaintiff's statement is  
14 absolutely not what the majority and the dissent assumed  
15 it meant, which is that he exhausted his benefits, that  
16 assumption is belied by this record by virtue - - -

17 JUDGE PIGOTT: Well, you're now adding facts  
18 that I don't think are in there.

19 MR. NAPARTY: Well, these are not - - - these  
20 are not - - - this is not a fact. This is - - - this is -  
21 - - this Court can take judicial notice of the fact - - -

22 JUDGE PIGOTT: Where did the 12,000 come from?

23 MR. NAPARTY: Well, 12,000 is a statement that's  
24 not in the record, but the Court doesn't need to look to  
25 that. This Court can just look - - -

1 JUDGE PIGOTT: Well, then why did you mention  
2 it?

3 MR. NAPARTY: This Court can look to - - -  
4 because it's a fact; it's a fact that came to light.

5 JUDGE PIGOTT: You stand up now and say  
6 something, well, by the way, what he meant by that was  
7 that he was - - - as Judge Abdus-Salaam suggested, he was  
8 doing things at home because they cut him off, and can we  
9 accept that?

10 MR. NAPARTY: Your Honor, I understand, and  
11 perhaps - - - perhaps that - - - perhaps I should have  
12 gone the no-fault fee schedule rate which this Court can  
13 take judicial notice of. The reality is is what we have  
14 in this record - - - all you have to do is look at the  
15 fact that the plaintiff had two months of physical  
16 therapy, a couple of office visits, which in the record we  
17 have a bill from Dr. Manouel showing that his office visit  
18 was 139 dollars. He had one arthroscopic surgery which is  
19 about 3,000 dollars under the no-fault payment schedule  
20 which this Court can take judicial notice of. And - - -

21 JUDGE PIGOTT: Well - - - okay.

22 MR. NAPARTY: And the reality is is that it is  
23 factually impossible from this record for anyone to  
24 reasonably assume that he exhausted his no-fault benefits.

25 CHIEF JUDGE LIPPMAN: Okay. Thanks, counsel.

1 MR. NAPARTY: Can I just address one point, Your  
2 Honor?

3 JUDGE PIGOTT: Well, no. It just seems to me  
4 that that could have been put in an affidavit by the  
5 no-fault carrier that he did not exhaust.

6 MR. NAPARTY: But I think it's very important I  
7 address one more - - - one more point.

8 JUDGE PIGOTT: Well, I'm not the chief judge so  
9 whether you - - -

10 CHIEF JUDGE LIPPMAN: One quick thought. Go  
11 ahead, counsel. Finish up.

12 MR. NAPARTY: Now it's two. I apologize.

13 The reason that that - - - the reason this issue  
14 came to light, this unpreserved issue, and I'm going to  
15 tie them together, this issue is unpreserved because this  
16 Court handed down Perl after the briefing in this case but  
17 before the Appellate Division's decision, and Perl  
18 rendered the basis for the trial court's decision in this  
19 case no longer a valid basis for dismissal which was a  
20 lack of contemporaneous measurements, and this Court - - -  
21 the Appellate Division searched the record looking for any  
22 statement it could find on this unpreserved issue. And I  
23 would submit, as much as I would like this Court to  
24 consider this important issue, I would submit that under  
25 its recent decision in Hecker and also the case we cite,

1 Merrill, this issue is not properly before this Court.

2 CHIEF JUDGE LIPPMAN: Okay. Thank you, counsel.

3 Counselor, rebuttal. Counsel, what about his  
4 test for the gap?

5 MR. COHEN: I reject them categorically.

6 CHIEF JUDGE LIPPMAN: Why? Tell us.

7 MR. COHEN: There is no basis for engrafting  
8 onto 5102(d) a new evidentiary requirement in order to  
9 substantiate a deter - - - a medically determined injury.  
10 A medically determined injury is an injury that is  
11 determined by the doctor; it is not determined by a rigid  
12 set of evidentiary law to substantiate the fact that there  
13 was a gap in treatment. If my doctor comes forward two  
14 years later after my ACL tear for which I decided that I  
15 did not want to continue treatment any longer for whatever  
16 reason, maybe it's because that at fifty dollars a copay  
17 each time - - -

18 JUDGE SMITH: Well, but you don't have - - -

19 MR. COHEN: - - - I don't want to pay for it  
20 anymore.

21 JUDGE SMITH: Excuse me. You don't have a  
22 doctor saying there was an explanation for the gap in  
23 treatment. You have him saying they cut me off.

24 MR. COHEN: I don't have a doctor that is saying  
25 that there was an explanation for the gap in treatment. I



1 have a doctor who's saying that when he reexamined the  
2 plaintiff, at that moment in time, based upon his  
3 examination, based upon his surgery, and based upon what  
4 he observed at that moment in time in comparison to what  
5 his surgery revealed that he had a continuing debilitating  
6 injury, that - - - on that basis alone, this case should  
7 not ever have gotten as far as it's gone.

8 JUDGE SMITH: Well, wait - - - wait a minute.  
9 Haven't you just - - - I mean, doesn't Pommells say when  
10 there's a gap in treatment you've got to explain it?

11 MR. COHEN: It has - - - it says you have to  
12 have some. Pommells says the following: "while a gap in  
13 treatment is not dispositive". I don't believe and I  
14 don't believe that this Court or any other court should  
15 take the notion that simply because there was a gap in  
16 treatment that this is the sine qua non of dismissal.

17 JUDGE PIGOTT: Well, no, but the point that's  
18 getting made here is it would have been very simple for  
19 you folks to have finished this up in Supreme Court with  
20 an affidavit from your client.

21 MR. COHEN: There was no requirement - - -

22 JUDGE PIGOTT: I understand that.

23 MR. COHEN: - - - at that period of time - - -

24 JUDGE PIGOTT: What I'm - - -

25 MR. COHEN: - - - for my clients - - -

1 JUDGE PIGOTT: You're saying that, but - - -

2 MR. COHEN: - - - to have explained it away in  
3 any other shape or form.

4 JUDGE SMITH: But when you don't explain it away  
5 and if we're cynical about no-fault cases, which we have a  
6 couple of cases saying we should be, might we not infer  
7 that if you had an explanation it would have been there?

8 MR. COHEN: Isn't the skeptic's role more  
9 attributable and appropriate for the trial - - - for the  
10 trier of fact, especially on a medically determined injury  
11 in which there's a battle of experts?

12 JUDGE PIGOTT: I assume that's a rhetorical  
13 question.

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. COHEN: Thank you very much, Your Honors.

16 CHIEF JUDGE LIPPMAN: Thank you, all.

17 Appreciate it.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Ramkumar v. Grand Style Transportation Enterprises, Inc., No. 170 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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