SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 15, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10787 The People of the State of New York, Respondent, Index 3662/07

-against-

Franklin Medina-Gonzalez, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Jonathan Garelick of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Catherine M. Reno of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Analisa Torres, J.), rendered June 29, 2009, as amended July 17, 2009, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the second and third degrees, criminally using drug paraphernalia in the second degree and unlawful possession of marijuana, and sentencing him to an aggregate term of six years, with five years' postrelease supervision, affirmed.

Defendant contends he was deprived of effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]) when his attorney did not move during trial to

reopen a suppression hearing based on new evidence, belatedly disclosed by the prosecution, that the attorney used in an effort to discredit the arresting officer's testimony at trial. The new evidence consisted of photographs of the car defendant was driving when stopped by the police; the photographs arguably contradicted the police testimony that the windows were highly tinted in violation of the Vehicle and Traffic Law. Instead, counsel did not raise the issue until he moved to set aside the verdict pursuant to CPL 330.30(1).

In its decision denying defendant's motion to set aside the verdict, the trial court stated that the photos "contradict the officer's description of both vehicles, and cast serious doubt on his credibility." It further indicated that "[t]he potential impeachment value of the photographs [was] obvious and the prosecution erred in not disclosing them beforehand." Nevertheless, the court denied the motion because the issue should have been raised by a motion during trial to reopen the suppression hearing. The court indicated that had counsel so moved, it "would have granted the application and re[]opened the hearing." Although there had not yet been any record made as to why counsel failed to do so, the court concluded that "[d]efendant waived his right to a hearing on these issues, when he made the strategic decision not to move to re[]open the

hearing or seek any other remedy at the time he found out about the pictures." The court's characterization of defense counsel's failure to ask the court to reopen the suppression hearing as a "strategic decision" was not based on anything appearing in the then-existing record. Indeed, it is unclear how the court could conclude at that juncture that this oversight was a conscious decision at all, let alone strategic. It was only when the case came on for sentencing, after the court's decision finding that the issue had been strategically waived, that counsel stated, for the first time, "there was a strategy in not" moving to reopen the hearing because he was concerned he would "lose that jury" and the witness "was on the ropes" and therefore the jury would acquit defendant.

The issue of effective assistance of counsel is generally not reviewable on direct appeal, because it involves facts dehors the record, such as trial counsel's strategy *(People v Reyes*, 84 AD3d 426 [1st Dept 2011], *lv denied* 18 NY3d 927 [2012]). Accordingly, a defendant who seeks to bring an ineffective assistance of counsel claim usually must first expand the record by way of a CPL 440.10 motion before this Court can consider it (*People v Cosby*, 271 AD2d 353, 354 [1st Dept 2000], *lv denied* 95 NY2d 904 [2000]). However, there are rare instances where the full record is sufficient to resolve the issue of counsel's

effectiveness without a 440.10 motion (*see e.g. People v Brown*, 45 NY2d 852 [1978]). This is not one of those rare cases.

In *Brown,* the Court of Appeals held that on that case's record it was "beyond cavil" that defense counsel was ineffective "throughout the prosecution" (45 NY2d at 853). However, it went on to state, "in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10" (*id.* at 853-854).

Here, the record is ambiguous and it is not "beyond cavil" that counsel was ineffective or effective. The extant record potentially supports a finding that counsel fundamentally misunderstood the necessity of making the motion to reopen the suppression hearing during trial, rather than waiting for a motion to set aside the verdict, in the event of a conviction. Defense counsel's remarks at sentencing, seemingly prompted by the court's denial of the motion to set aside the verdict, were a belated attempt to explain counsel's failure to move to reopen the hearing. Whether defense counsel was effective or not necessarily requires an evaluation of the credibility and logic of the proffered explanation, that defense counsel was afraid he would "lose that jury" and that he believed the witness "was on

the ropes." Although defense counsel may have genuinely been hopeful that the jury would acquit his client, this explanation cannot be accepted at face value. After all, as the trial court's decision indicates, had defense counsel timely moved to reopen the suppression hearing, the application would have been granted, and the court could have quickly ruled upon it while giving the jury a short recess. The "witness" referred to was the arresting officer, and was available. On the other hand, there may have been legitimate concerns about the jury undeveloped on this record. In short, we cannot decide on the extant record whether defense counsel's failure to move to reopen the hearing was truly "strategic."

Given that the existing record does not permit meaningful review of defense counsel's representation, we are compelled to affirm the conviction without prejudice to further proceedings in the trial court pursuant to CPL 440.10.

All concur except Tom, J.P. who concurs in part in a memorandum as follows:

TOM, J.P. (concurring in part)

I respectfully disagree with the majority and conclude that the record clearly shows that defendant was not deprived of the effective assistance of counsel as a result of his trial counsel's strategic decision not to move to reopen the suppression hearing. Therefore, contrary to the majority's position, the affirmance of the judgment of conviction should be with prejudice.

Police Officer Angel Rivera testified that on August 24, 2007, at approximately 1:50 p.m., while on patrol in a marked police vehicle, he pulled over a Honda Accord in the Bronx because the vehicle had "highly tinted windows." The driver, defendant, lowered his window and Rivera detected the odor of marijuana coming from the Accord and saw what appeared to be a beer can in the front cup holder. Rivera also saw that defendant had watery, bloodshot eyes and smelled of alcohol. Defendant stated that he had been drinking, and Rivera ordered him out of the vehicle. Defendant got out, swayed a bit, and regained his balance by holding onto the driver's side door.

Rivera then arrested defendant and placed him in the rear of the patrol car. On the way to the precinct, Rivera noticed defendant moving around in the back seat. When they arrived at the precinct, Rivera observed a clear plastic bag of white powder

on the floor of the vehicle, near defendant's feet. Rivera stated that he had searched his vehicle that morning, and that there was nothing in the vehicle at that time. In an inventory search of the Accord, Rivera recovered the can of beer, three plastic bags of marijuana and a "sports bottle" of liquor. Rivera also found a brown bag containing small ziplock bags and a small notebook containing "names and dollar amounts."

Defendant was subsequently charged with criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree, criminal use of drug paraphernalia in the second degree, operating a motor vehicle while under the influence of alcohol/drugs, and unlawful possession of marijuana.

The court denied defendant's motion to suppress, finding that Rivera, "[d]uring training," had learned that if "he cannot see the driver" of a vehicle, the "windows are excessively tinted," and therefore illegal. Accordingly, the court concluded the stop was lawful, because the tint gave the officer probable cause to believe the windows represented an infraction. The court also found that Rivera's observations after stopping the vehicle, including the smell of marijuana, the odor of alcohol, defendant's bloodshot eyes and unsteady gait, gave him probable cause to arrest defendant, making the search of the car lawful.

At trial, Rivera offered testimony that was very similar to the testimony he provided at the suppression hearing. During Rivera's cross-examination, defense counsel entered a series of photographs into evidence. Rivera identified the photographs as being of the car defendant was driving at the time of his arrest. Rivera acknowledged that the photographs showed that the driver's side front seat could be seen clearly through the driver's side front window, placing his credibility in issue. Contrary to the photographic evidence, Rivera continued to state that there was excessive tint on the vehicle's window.

The jury convicted defendant of all counts charged, except for driving while his ability was impaired.

By notice of motion pursuant to CPL 330.30(1), defendant sought to set aside the verdict. Defendant argued that prior to the suppression hearing, the People had failed to provide him with any of the photographs of the Accord and maintained that the photographs contradicted Rivera's testimony, in that the front seats were clearly visible through the windows. Defendant argued that the withholding of the photographic evidence was clearly a *Brady* violation. Defendant asserted that if the stop was based solely on the tint and not another violation, the invalidity of the tint stop would render the resulting arrest and discovery of the contraband subject to suppression as "fruit of the poisonous

tree."

The trial court denied defendant's motion, but noted that the photos of the Accord taken from the side of the vehicle "[c]learly depicted . . . the entire driver's seat, the console, and a portion of the front passenger seat." The court stated that "[n]ot only are the contours of the undulating seat cushion well defined, but minute details, such as tiny wrinkles in the upholstery, are plainly visible." The court concluded that the photos "contradict[ed] the officer's description of both vehicles and cast serious doubt on his credibility." The court stated that "[t]he potential impeachment value of the photographs" was "obvious" and that the "prosecution erred in not disclosing them beforehand." Notwithstanding this finding, the court denied the CPL 330.30(1) motion on the ground that the issue should have been raised by a motion to reopen the hearing. The court stated that had defendant chosen "that path," it "would have granted the application and re-opened the hearing." The court stated that instead, "defendant decided to introduce the photos at trial for consideration by the jury" and that "[d]efendant waived his right to a hearing on these issues when he made the strategic decision not to move to re-open the hearing or seek any other remedy at the time he found out about the pictures."

The sole contention advanced by defendant on this appeal is that he was deprived of effective assistance of counsel due to his attorney's failure to interpose a motion to reopen the suppression hearing (CPL 710.40[4]) when confronted with photographic evidence undisclosed by the People until trial. Instead, counsel made a motion to set aside the verdict (CPL 330.30), which the court denied on the ground that, in failing to pursue a trial remedy, defendant waived his right to a hearing on the issue (citing *People v Brown*, 67 NY2d 555, 559 [1986], *cert denied* 479 US 1093 [1987]).

On the record before us, defendant was not deprived of effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]), and the strategy pursued by counsel was within "the wide range of professionally competent assistance" (*Strickland*, 466 US at 690). Furthermore, in proving counsel to be ineffective, the defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings (*People v Rivera*, 71 NY2d 705, 709 [1988]).

It is apparent that the circumstance about which defendant complains on appeal is a matter of trial strategy (*see People v Brown*, 28 NY2d 282, 287 [1971]), not a product of counsel's

incompetence. The sentencing minutes support counsel's statement that in denying the CPL 330.30 motion, the trial court had correctly noted that "there was a strategy in not raising it during the trial." Significantly, at defendant's sentencing, defense counsel remarked on the record that "with respect to the . . . 330.30 motion which was made subsequent to the verdict in this case, as your Honor noted, there was a strategy in not raising it during the trial" and that counsel was "afraid that" he would "lose th[e] jury" (i.e., need a new panel), and that "frankly" the witness "was on the ropes" and he thought the jury "would not believe him."

Indeed, defense counsel's strategy for discrediting Rivera was on display throughout the trial. First, in defense counsel's opening statement, he said that there were "a number of versions" of what occurred that day offered by Rivera: "[w]hat he said in his initial paperwork, what he says later on, and . . . what he now says at trial." Counsel told the jury that it would see photographs of the vehicle representing what the Honda "actually looked like" at the time of the incident. Counsel proceeded to then attempt to convince the jury, during his cross-examination of Rivera, that the officer's testimony was at odds with the appearance of the vehicle in the photographs. He also confronted Rivera with the inconsistencies in his testimony and paperwork.

On summation, counsel launched a concerted attack on the officer's credibility by arguing that the photographs disclosed no more tint on the windows of defendant's vehicle than on the windows of the officer's patrol car. Counsel asserted that the reason the officer gave for stopping the vehicle was "a total fabrication on his part," that the officer's account was not "accurate" and "not . . . truthful," and that "we know now that the windows are not tinted." Thus, even in the absence of counsel's explanation for not moving to reopen the suppression hearing, the record is more than adequate to demonstrate "the existence of a trial strategy that might well have been pursued by a reasonably competent attorney" without any need to conduct a separate hearing into counsel's claimed ineffectiveness as urged by the majority (*People v Satterfield*, 66 NY2d 796, 799 [1985]).

Counsel, in not objecting to the late submission of the photographs at trial, took his chances with the jury, and was unsuccessful. That this strategy was unsuccessful does not demonstrate that defendant received ineffective assistance of counsel. Thus, "[i]t is not" for a court "to second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation" (*Satterfield*, 66 NY2d at 799-800). Here, defense counsel's strategy to zealously cross-examine

Rivera and his efforts to discredit the officer at every point in the trial demonstrate that defendant was afforded meaningful representation.

Furthermore, defendant has not established a reasonable probability that a reopened hearing would have actually led to suppression of the evidence. No testimony was received concerning the circumstances under which the photographs were taken, particularly the effect of lighting conditions, and readings taken by the arresting officer with a tint meter indicated that the windows did not provide the requisite 70% light transmissivity.

Accordingly, the judgment of conviction should be affirmed with prejudice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Friedman, J.P., Andrias, Richter, Manzanet-Daniels, JJ.

11113 Brian Hettich, Index 116525/07
Plaintiff-Appellant,

-against-

125 East 50th Street Co., LLC, et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

Proner & Proner, New York (Tobi R. Salottolo of counsel), for appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered October 1, 2012, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's motion for summary judgment on liability, unanimously modified, on the law, to deny defendants' motion, and otherwise affirmed, without costs.

Plaintiff was not injured by a dangerous condition that he had undertaken to fix (*see Wray v 654 Madison Ave. Assoc.*, 253 AD2d 394 [1st Dept 1998]). He was working on the replacement of a controller for a dumbwaiter; he was injured when the dumbwaiter's hoist cable broke, causing the dumbwaiter (with plaintiff inside) to plunge 40 feet. The limited maintenance contract between defendants and plaintiff's employer, third-party

defendant Nouveau Elevator Industries, Inc., included inspection of hoist cables, but it did not include replacement of a controller. Moreover, at Nouveau, maintenance and repair were separate departments, and plaintiff was not the regular maintenance mechanic whom Nouveau assigned to defendants' premises.

Nor was the ultimate cause of plaintiff's injury the manner of his work (i.e., climbing into the dumbwaiter and closing the door). The record shows that the breaking strength of the hoist cable was 4200 pounds and the combined weight of the dumbwaiter itself and plaintiff was 565 pounds. Thus, if the hoist cable had been functioning properly, it would not have snapped, even with plaintiff in the dumbwaiter. The ultimate cause of plaintiff's injury was a dangerous condition on defendants' property, namely, the malfunctioning hoist cable, and defendants may be held liable for plaintiff's injury under Labor Law § 200 and the common law if they either created or had notice of the dangerous condition (*Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]; *Bonura v KWK Assoc.*, 2 AD3d 207, 207-208 [1st Dept 2003]). Issues of fact preclude summary judgment to either side. For example, there is conflicting evidence as to whether the old, failing hoist cable was actually replaced before

plaintiff's accident (*see DiPilato v H. Park Cent. Hotel, L.L.C.*, 17 AD3d 191, 192-193 [1st Dept 2005]).

Issues of fact also preclude summary judgment to either side on the Labor Law § 240(1) cause of action (*see Garcia v Neighborhood Partnership Hous. Dev. Fund Co.*, Inc., 113 AD3d 494, 495 [1st Dept 2014]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Friedman, J.P., Renwick, Freedman, Feinman, JJ.

11189 William McKenzie, et al., Index 300986/07
Plaintiffs-Respondents,

-against-

The City of New York,
Defendant,

The New York City Housing Authority,
Defendant-Appellant.

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Cullen and Dykman, LLP, New York (Joseph Miller of counsel), for appellant.

Dinkes & Schwitzer, P.C., New York (Andrea M. Arrigo of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 12, 2013, which, insofar as appealed from, denied the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of NYCHA dismissing the complaint as against it.

After checking on a relative's parked car, plaintiff William McKenzie slipped and fell as he attempted to climb over a two-foot-high mound of plowed snow that covered the curb between the street and the sidewalk abutting defendant NYCHA's property. A NYCHA employee had cleared a snow-free path on the sidewalk,

causing the snow to pile up along the curb. However, plaintiff acknowledged that unimpeded access to the sidewalk from the street was available at the nearest street corner, where the curb cut-out had been cleared of snow. Plaintiff acknowledged that, although he could have walked the four or five car-lengths from his relative's car to the cleared cut-out at the corner, he chose instead to attempt to navigate the two-foot-high mound of snow adjacent to the car because "[i]t was the shortest way to get [to the sidewalk]."

On this record, NYCHA is entitled to summary judgment dismissing the complaint as against it. A property owner such as NYCHA has a duty to keep a sidewalk abutting its property sufficiently clear of snow and ice so that the sidewalk is maintained in a "reasonably safe condition" (*see* Administrative Code of City of NY § 7-210). The property owner will have discharged its duty if a snow-free path is cleared between the street and the sidewalk within a reasonable walking distance of the property, since it is not reasonably foreseeable that a person would attempt to climb over a significantly obstructive curbside mound of snow rather than walk to a nearby unobstructed path (*see Quintana v New York City Hous. Auth.*, 91 AD3d 578 [1st Dept 2012]; *cf. Dillard v New York City Hous. Auth.*, 112 AD3d 504, 505 [1st Dept 2013] [finding *Quintana* distinguishable

"because in (*Quintana*) NYCHA did clear snow from the public walkway, resulting in a mound of snow being piled along the curb, and the plaintiff unforeseeably walked over the mound of snow, outside the crosswalk, rather than using an available cleared path"]). Since plaintiff's accident resulted, by his own account, from his unforeseeable decision to climb over the knee-high heap of snow, it is of no moment whether he lost his footing before or after he planted his foot on the sidewalk. Moreover, unlike the facts of *Dillard*, here there was no failure to clear an established pedestrian walkway.

Finally, no triable issue arises from a nonparty witness's testimony that there was ice on the stretch of the street that plaintiff would have traversed had he walked from the car to the street corner, because NYCHA had no responsibility for the condition of the street.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11577 Kim McGuinness, Index 150236/09
Plaintiff-Respondent-Appellant,

-against-

Concentric Health Care LLC, et al.,
Defendants-Appellants-Respondents.

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Mango & Iacoviello, LLP, New York (Anthony G. Mango of counsel), for appellants-respondents.

Giskan Solotaroff Anderson & Stewart LLP, New York (Jason L. Solotaroff of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered March 26, 2013, which, to the extent appealed from, denied so much of defendants' motion for summary judgment as sought to dismiss the claim for age-based discrimination in violation of the New York City Human Rights Law, and granted so much of the motion as sought to dismiss the claim for retaliation, modified, on the law, to deny the motion as to the retaliation claim, and otherwise affirmed, without costs.

Defendants failed to demonstrate that they did not discriminate against plaintiff on the basis of her age (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113-114 [1st Dept 2012]). Plaintiff, who was 49 when she was hired by defendant Concentric Health Care LLC, was among the oldest of Concentric's approximately 70 employees, was qualified for her position of

billing manager, and was subjected to a disadvantageous employment action, i.e. termination. Defendant Ken Begasse, Jr. (Junior), a principal of Concentric, testified, in effect, that Concentric, an advertising agency serving the pharmaceutical industry, preferred to hire younger workers because they tended to be cheaper and advertising is generally a "young industry."

Defendants contend that they terminated plaintiff because they were in financial trouble and their independent consultant recommended terminating plaintiff and replacing her with an employee whose annual salary would be $40,000 less than hers. However, the independent consultant made this recommendation, and others, in February 2009, and, although defendants terminated a number of people based on these recommendations, they did not terminate plaintiff until November 2009, some nine months later. Moreover, Junior and defendant Michael Sanzen, another of Concentric's principals, testified that, in the months after the consultant made his report, new employees were hired and at least one existing employee was given a $20,000 raise. Thus, issues of fact exist as to whether defendants' proffered explanation of financial distress is pretextual (*see id.*).

Issues of fact also exist as to whether defendants' proffered explanation of poor performance is pretextual. The only documentary evidence of poor performance is a negative

review that plaintiff received in September 2009, and there is evidence that, by this time, defendants had already decided to terminate her. Indeed, the review prepared by plaintiff's immediate superior, Concentric's comptroller, was only mildly critical of plaintiff; defendant Ken Begasse, Sr. (another of Concentric's principals) intervened and added extensive negative comments. In an earlier employee review (December 2007), plaintiff had been lauded as "an outstanding professional with vast experience and very high standards," who "keeps the company's interest foremost in her mind," and "always seems to get the work done and done properly."

Defendants failed to demonstrate, in support of dismissing the retaliation claim, that plaintiff did not engage in a protected activity (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). In a May 2009 letter, plaintiff complained to Concentric's human resources (HR) director that she was being "scrutinized and held to a higher standard" because she is not "20 or 30 years of age" and does not like to drink alcohol. She also complained that "Concentric's culture is such that if you aren't 20 or 30 years of age and don't have the desire to drink alcoholic beverages, you simply don't fit [in]... I am the sole woman employed at Concentric who doesn't fit into the frat like atmosphere with the exception of Ken Sr. (in relation to age)."

Although the dissent characterizes this letter as plaintiff's expression of concern that the company is engaged in unethical business practices, the HR director viewed it as an "age discrimination documenting complaint[]." Thus, at the very least, issues of fact exist as to whether plaintiff's letter constitutes a complaint about age-related bias and was therefore a protected activity (*see Albunio v City of New York*, 16 NY3d 472, 479 [2011]).

All concur except Tom, J.P. and DeGrasse, J. who dissent in part in a memorandum by DeGrasse, J. as follows:

DEGRASSE, J. (dissenting in part)

I respectfully dissent because, in my view, the motion court properly granted defendants' motion for summary judgment with respect to the claim of unlawful retaliation in violation of the New York City Human Rights Law (the City HRL)(Administrative Code of the City of New York § 8-107 [7]). Where pertinent, the City HRL provides that "[i]t shall be . . . unlawful . . . to retaliate . . . in any manner against any person because such person has . . . opposed any practice forbidden under this chapter" (*id.*). In order to make out a claim of unlawful retaliation under the City HRL, a plaintiff must establish "that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]).[1]

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[1]After *Forrest* was decided, the New York City Council enacted the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 [2005] of City of NY), which requires that the City HRL be construed more broadly than and separately from its state and federal counterparts. In *Fletcher v Dakota, Inc.* (99 AD3d 43 [1st 2012]), this Court stated that the City Council "expressly rejected *Forrest's* application to claims brought under the City HRL . . . ." (*id.* at 52 n 2). Nonetheless, the definitions of retaliation under *Forrest* and *Fletcher* are indistinguishable with respect to the City HRL (*see Fletcher*, 99 AD3d at 51-52).

Here, plaintiff claims to have engaged in a protected activity by making complaints in a May 18, 2009 letter that she delivered to Rena Martinez, defendant Concentric Health Care, LLC's human resources director, and Robert Gomes, its senior vice president and controller. I disagree with the majority's conclusion that the letter constituted a complaint about age-related bias and was therefore a protected activity. The letter did not set forth any grievance about age discrimination or any other practice forbidden by the City HRL. Instead, plaintiff complained about business practices she considered unethical and what she described as Concentric's "frat like atmosphere" that made her feel uncomfortable. Contrary to the majority's interpretation, plaintiff did not state in the letter that she was scrutinized and held to a higher standard because of her age. In that regard, the letter reads as follows:

> "I, on the other hand, am always here on time, never call in sick, certainly never had a day I couldn't function due to the after effects of excessive drinking, always complete my work in a timely fashion, strive for perfection with every facet of my job, work late when necessary, etc. *One would think this would be a partner's dream employee yet I am scrutinized and held to a higher standard. Why? I leave at 5:00 p.m. when my work is completed*" (emphasis added).

Although the letter expressed grievances, it did not constitute protected activity. The term "protected activity" refers to measures taken to protest or oppose statutorily

prohibited discrimination (*see Serdans v New York & Presbyt. Hosp.*, 112 AD3d 449, 450 [1st Dept 2013]; *see also McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676, 677 [2d Dept 2006]). The tenor of the letter is shown by its content as well as plaintiff's deposition. When questioned about her reasons for issuing the letter to Martinez and Gomes, plaintiff gave the following testimony:

> "Q. So I believe you just answered in response to my question, which was did you take any action to protect your job, and your answer is that you wrote a memo to Rena, and that was with the express purpose of protecting your job, correct?
>
> "A. It was to express what was going on and my concerns about what was going on in Concentric, and being asked to do fraudulent billing and things that I'm uncomfortable doing, illegal acts . . .
>
> "Q. Why would you have cc'd Mr. Gomez [sic] on this letter?
>
> "A. Because I still go back to my career in advertising, and any SVP comptroller, in my opinion, should be aware when these type [sic] of fraudulent activities are going on with respect to finance. And I couldn't wrap my brain around how someone with that title could not be concerned about that. It was just mind-boggling to me.
>
> "So I was once again trying to reach out to him, being Rob, to understand exactly what I was being asked to do and how illegal it was, fraudulent it was, that I couldn't believe that an SVP comptroller could condone this type of mandate from a partner to do these types of things to your [sic] client."

Plaintiff is clearly in the best position to interpret her own writing. Plaintiff's testimony and the letter itself demonstrate that she made no complaint about age discrimination. The majority therefore misplaces its reliance on the inconsequential fact that after receiving the letter, Martinez stated in a memorandum that Concentric's counsel "should be informed of in general age discrimination documenting complaints etc [sic]."

For the reasons stated by the majority, summary judgment was properly denied with respect to the age discrimination cause of action. I would therefore affirm the order entered below.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11690 In re Mary Encarnacion Grant, Index 106199/11
Petitioner-Respondent,

-against-

The New York City Housing Authority,
Respondent-Appellant.

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Kelly D. MacNeal, New York (Laura R. Bellrose of counsel), for appellant.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 16, 2012, which granted the petition brought pursuant to CPLR article 78, to the extent of vacating the May 11, 2011 determination of respondent New York City Housing Authority (NYCHA), terminating petitioner's tenancy, and remanded the matter to NYCHA for imposition of a lesser penalty, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioner resides in a public housing unit with her five children, two of whom are minors. NYCHA initiated termination proceedings after police recovered from the apartment a significant amount of marijuana, a bottle of oxycodone pills and a loaded and operable firearm. Petitioner was not present at the time of the search, and there is no evidence that she had

specific knowledge of the presence of the weapon or the drugs, which apparently were brought into the apartment by her older children and their friends. However, she acknowledged that one of her older sons is a habitual marijuana user, and that she had encouraged him to seek treatment. Petitioner also testified that she could only control activities in the apartment when she was physically there.

Based on the fact that petitioner had dominion and control over her apartment and was responsible for the activities therein whether she was present or not, the hearing officer sustained the charges of nondesirability and breach of rules. The hearing officer noted that petitioner did not offer any assurance that narcotics and guns would never again be found in the apartment, and concluded that NYCHA "has an obligation to its residents to terminate tenancies which permit such possession." NYCHA approved the hearing officer's finding and determination, and imposed termination of petitioner's lease as the sanction.

In seeking reversal of the determination from the Article 78 court, petitioner did not dispute that the narcotics and firearm were found in her apartment. Rather, she asserted, inter alia, that the penalty of termination shocks the conscience because she had lived in the apartment for 23 years and served on the Tenants' Association Board for the past 5 years; she is a single

mother and it would be unfair for her younger children to be evicted based on their older siblings' conduct; she was not home at the time of the search; and she was trying to encourage her older children to move out at the time of the incident. The court agreed with her, stating: "Given petitioner's unblemished record, long-time residency in the Subject Apartment for over 20 years, and petitioner's minor children, whom she is supporting, the Decision shocks the conscience and must be vacated."

The Article 78 court relied in part on *Matter of Perez v Rhea* (87 AD3d 476 [1st Dept 2011], *revd* 20 NY3d 399 [2013]), particularly the statement in that case that "the forfeiture of public housing accommodations is a drastic penalty because, for many of its residents, it constitutes a tenancy of last resort" (87 AD3d at 479). There, a public housing resident under-reported her income and, after NYCHA confronted her with that fact, she agreed to reimburse it for the difference between her actual rent and what would have been charged had her rent statements been accurate. This Court found the imposed penalty of termination of the tenancy to be excessive, because there were several mitigating circumstances, including the facts that the petitioner's residency was otherwise unblemished, she had made efforts to resolve the issue, and the record indicated that the petitioner, and her two young and disabled children, would likely

become homeless if her subsidy was terminated (87 AD3d at 479-480).

After the Article 78 court ruled, the Court of Appeals reversed this Court's decision in *Matter of Perez* (20 NY3d 399 [2013]). The Court first noted that the record contained no evidence from the petitioner that if she were evicted she would not have the means to afford alternative housing. It further took exception with this Court's statement concerning public housing as a tenancy of last resort, for fear that it would create a presumption that public housing tenants could never be evicted, and emphasized that "reviewing courts must consider each petition on its own merit" (20 NY3d at 405).

Guided as we must be by the Court of Appeals' ruling in *Matter of Perez*, we review the sanction of termination in accordance with the standard set forth in *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County* (34 NY2d 222 [1974]). There, the Court of Appeals defined a penalty that is unsustainable as "shocking to one's sense of fairness" as one which

> "is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the

> individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly [situated]" (34 NY2d at 234).

Applying this standard, we find that the facts here support petitioner's eviction. Eviction is undoubtedly a "grave" sanction. However, in permitting drugs and a lethal weapon to be present in her apartment, petitioner committed a serious breach of the code of conduct that is critical to any multiple dwelling community, and which warrants the ultimate penalty (*see e.g. Matter of Zimmerman v New York City Hous. Auth.*, 84 AD3d 526 [1st Dept 2011]; *Matter of Bell v New York City Hous. Auth.*, 49 AD3d 2824 [1st Dept 2008]). Petitioner's neighbors have a right to live in a safe and drug-free environment, and petitioner significantly compromised their ability to do so, her alleged ignorance of the activities in her apartment notwithstanding (*see Walker v Franco*, 275 AD2d 627, 628 [1st Dept 2000], *affd* 96 NY2d 891 [2001]).

We further note that petitioner provided no evidence to support the Article 78 court's implication that she and her younger children would not have the means to find other housing. Thus, we do not have the factual basis to conclude that eviction will actually lead to that result, as required by *Matter of Perez*

(20 NY3d at 404). For the foregoing reasons, we find that NYCHA acted within the bounds of its discretion in terminating petitioner's tenancy, and that the Article 78 court improperly substituted its judgment for that of NYCHA (*see Pell*, 20 NY2d at 405).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12204 The People of the State of New York, Ind. 5042/10
Respondent,

-against-

Clayton Hough,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lauren Springer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J., at plea; Charles H. Solomon J., at sentencing), rendered on or about September 20, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: APRIL 15, 2014

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12205 Jose Patino, Index 103348/11
Plaintiff-Respondent,

-against-

Millard Drexler, et al.,
Defendants-Appellants.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Jessica M. Serva of counsel), for appellants.

Daniel J. Hansen, New York, for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 9, 2013, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The court properly declined to deny defendants' summary judgment motion under CPLR 3212(f). Although the motion was filed before discovery, this was due to plaintiff's failure to timely submit discovery demands, and plaintiff was not prejudiced since he was able to adjourn the motion twice and was in possession of defendants' responses for approximately two months before submitting his opposition papers. Based on the responses by defendants, as well as plaintiff's personal knowledge as to

whether defendants supervised his work, he possessed sufficient facts to address defendants' motion. To the extent plaintiff argues that discovery is needed to determine whether the premises were used for commercial or investment purposes, such argument is unpreserved, and, in any event, is based on speculation (*see Oates v Marino*, 106 AD2d 289, 291-292 [1st Dept 1984]).

The motion court erred however in denying defendants' motion on the merits. Under the homeowner exemption, "owners of one and two-family dwellings who contract for but do not direct or control the work" are exempt from liability under Labor Law § 241(6). Here, defendants established that the premises was a single-family dwelling by submitting affidavits stating that they purchased the premises solely as a second residence for use by family and guests, that they had never used any of the portion of the premises for a commercial purpose, and that the barn in which plaintiff was injured was being converted into a recreational room for personal use (*cf. Nudi v Schmidt*, 63 AD3d 1474, 1475-1476 [3d Dept 2009]). Moreover, the affidavits of plaintiff's employer and supervisor stating that they supervised plaintiff's work and provided plaintiff with the tools for his work, including the saw that caused his injuries, along with defendants' affidavits stating that they were not on site during the construction work, show that defendants did not direct,

supervise, or control plaintiff's work (*see Affri v Basch*, 13 NY3d 592, 596 [2009]; *Chambers v Tom*, 95 AD3d 666 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact. His affidavit submitted in opposition to defendants' motion was not notarized and does not appear to be signed by him. In any event, even if the affidavit was properly notarized and signed, it is insufficient to raise a triable issue of fact. To the extent plaintiff's affidavit states that three different unrelated families, including defendants' family, the household staff, and the groundskeeper, lived at the premises, such is insufficient to negate a finding of a single-family dwelling. Under the circumstances presented, defendants and their staff were "living together and maintaining a common household" (*Hossain v Kurzynowski*, 92 AD3d 722, 723 [2d Dept 2012] [internal quotation marks omitted]; *compare Lenda v Breeze Concrete Corp.*, 73 AD3d 987 [2d Dept 2010]). Furthermore, the certificate of

occupancy lists all of the buildings under one address, and the alteration work on all of the buildings was covered by one building permit, also listing one address (*cf. O'Brien v Shi Chih*, 236 AD2d 236 [1st Dept 1997]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12206 The People of the State of New York, Respondent,

-against-

Rodney Young, Defendant-Appellant.

Ind. 386N/12

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. Conviser, J. at suppression hearing; Roger S. Hayes, J. at plea and sentencing), rendered July 20, 2012, as amended September 4, 2012, convicting defendant, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of four years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248 [2006]). Not only did the court separate the right to appeal from the rights automatically forfeited as the result of a guilty plea (*compare People v Williams*, 59 AD3d 339, 340 [2009], *lv denied* 12 NY3d 861 [2009]), it expressly stated that by pleading guilty a defendant does not give up the right to appeal. It then explained that, in return

for the negotiated plea and sentence, defendant was additionally agreeing to waive his right to appeal, and defendant acknowledged that he understood (*see People v Chavez*, 84 AD3d 630 [1st Dept 2011], *lv denied* 17 NY3d 858 [2011]).

This waiver forecloses defendant's suppression claims. As an alternative holding, we also reject them on the merits. Defendant was lawfully arrested pursuant to the fellow officer rule, and the identification was confirmatory.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12208 Lenart Realty Corp., Index 303402/12
Plaintiff,

-against-

Petroleum Tank Cleaners, Ltd.,
Defendant,

Castle Oil Corporation,
Defendant-Respondent,

Crystal Transportation Corp.,
Defendant-Appellant.

_____

Clausen Miller P.C., New York (Daniel R. Bryer of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Joshua Cash of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered April 9, 2013, which granted the motion of defendant Castle Oil Corp. (Castle) for summary judgment on its cross claims for contractual indemnification and breach of contract against defendant Crystal Transportation Corp. (Crystal), unanimously modified, on the law, to deny the motion as to the contractual indemnification cross claim, and otherwise affirmed, without costs.

This action arises out of an oil spill that occurred while Crystal was making a delivery of oil to a building owned by plaintiff pursuant to a delivery agreement under which Crystal

delivered oil to Castle's customers. The delivery agreement contained an indemnification provision which provided in pertinent part:

> "[Crystal] is responsible . . . for any damage or loss to the equipment or premises of a Castle customer to the extent caused by [Crystal]'s acts or omissions.
>
> [Crystal] shall indemnify and hold harmless Castle [] from any and all claims, losses, costs, liability, damages, penalties, or violations of any nature arising out of or relating to the performance or breach of this agreement or any acts or omissions of [Crystal] in connection therewith.
>
> [Crystal] shall be solely responsible for all claims, losses, liability, damages, penalties, or violations resulting from [Crystal]'s oil spills or erroneous deliveries . . ."

The delivery agreement also required Crystal to obtain comprehensive liability coverage for its fuel delivery vehicles, including for oil spills and environmental cleanup and remediation, naming Castle as an additional insured. Crystal procured a policy with the required limits from Zurich American Insurance Company, but did not name Castle an additional insured.

Plaintiff asserted causes of action for negligence and strict liability against Castle, Crystal and the entity that allegedly maintained the fuel storage tank. The fourth cause of action also alleged that Castle was vicariously liable for Crystal's negligence. Each defendant cross-claimed against the others, and Castle tendered its defense of the action to Zurich under the policy procured by Crystal. Zurich accepted tender

only with regard to the fourth cause of action alleging that Castle was vicariously liable for Crystal's negligence, but refused to provide coverage to Castle, for its own negligence or strict liability. Castle moved for summary judgment on its cross claim against Crystal for contractual indemnification and breach of contract for failure to procure insurance, and Supreme Court granted the motion.

Citing the second and third paragraphs of the indemnification provision, Castle asserts that it is not required to prove that the alleged oil spill resulted from Crystal's negligence, but only that it resulted from Crystal's performance of the delivery agreement or any act in connection with the agreement. However, such an interpretation renders meaningless the first paragraph of the indemnification provision (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [1st Dept 2007]).

"'[W]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give them both effect'" (*Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 987 [1st Dept 2009]). Thus, the first paragraph of the indemnification provision must be read as limiting the subsequent paragraphs upon which Castle relies. As properly construed, the delivery agreement requires Crystal to

indemnify Castle for damage to customers' property only where such damage resulted from Crystal's acts or omissions. Because no determination of the negligence of each party has been made, it was premature to hold that Crystal was obligated to indemnify Castle under the delivery agreement.

Supreme Court correctly concluded that Crystal breached the contract by failing to procure insurance naming Castle as an additional insured. Crystal argues that it was only required to obtain insurance covering Castle to the extent that Castle was vicariously liable for Crystal's negligence. However, the insurance procurement provision contains no such limitation and the provision limiting indemnification to Crystal's acts or omissions does not similarly limit the insurance Crystal was required to procure (*see Spector v Cushman & Wakefield, Inc.*, 100 AD3d 575 [1st Dept 2012]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12209 The People of the State of New York, Respondent,

-against-

Eddie Torres, Defendant-Appellant.

Ind. 4369/10

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered on or about October 18, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12210 Aetna Health Plans, as assignee of Luz Herrera, Plaintiff-Appellant, Index 303241/12

-against-

Hanover Insurance Company, Defendant-Respondent.

_____

Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for appellant.

Crisci, Weiser & McCarthy, New York (Jayashri C. Srinivasan Cuffey of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about January 7, 2013, which granted defendant's cross motion to dismiss the complaint, and denied plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, with costs.

11 NYCRR 65-3.11(a) provides, in relevant part, for the payment of no-fault benefits "directly to the applicant . . . or, upon assignment by the applicant . . . to [the] providers of health care services." Plaintiff Aetna Health Plans is not a "health care provider" under the statute, but rather a health care insurer (*see A.M. Med. Servs., P.C. v Progressive Cas. Ins. Co.*, 101 AD3d 53, 62 [2d Dept 2012]; *Craig Antell, D.O., P.C. v New York Cent. Mut. Fire Ins. Co.*, 11 Misc 3d 137[A], 2006 NY

Slip Op 50521[U] [App Term, 1st Dept 2006]).

While the No-Fault Law provides a limited window of arbitration between no-fault insurers (*see* Insurance Law §§ 5105, 5106[d]; *Eagle Ins. Co. v ELRAC, Inc.*, 291 AD2d 272 [1st Dept 2002]), the statutory language does not pertain to a health insurer such as Aetna. Thus, Aetna cannot maintain a claim against defendant under the principle of subrogation (*see Health Ins. Plan of Greater N.Y. v Allstate Ins. Co.*, 2007 WL 4367045, 2007 NY Misc LEXIS 9034 [Sup Ct, NY County 2007]). Nor may Aetna assert a breach of contract claim against Hanover, since it is not in privity of contract with Hanover, and there has been no showing that it was an intended third-party beneficiary of the contract.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12211- Ind. 1348/10
12211A The People of the State of New York, 1433/10
Respondent,

-against-

Frederick Norwell,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lauren Springer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Bonnie G. Whittner, J.), rendered on or about November 29, 2011,

Said appeals having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgments so appealed from be and the same are hereby affirmed.

ENTERED: APRIL 15, 2014

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12213 Sarah Cruz, et al., Index 600695/05
Plaintiffs-Appellants, 602024/07

-against-

Town Sports International, doing business as New York Sports Club,
Defendant-Respondent.

_____

Outten & Golden LLP, New York (Molly A. Brooks of counsel), for appellants.

Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York (Jordan E. Stern of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered February 4, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motions to dismiss the class claims, unanimously affirmed, without costs.

The court properly granted defendant's motion to dismiss plaintiffs' class claims since plaintiffs failed to move for class certification (*see* CPLR 902; *Shah v Wilco Sys., Inc.*, 27 AD3d 169 [1st Dept 2005], *lv dismissed in part and denied in part* 7 NY3d 859 [2006]). Even if plaintiffs had made an untimely motion or had sought an extension of their time to make the

motion beyond the agreed-upon deadline, they failed to demonstrate good cause warranting an extension (*cf. Galdamez v Biordi Constr. Corp.*, 50 AD3d 357 [1st Dept 2008]; *Argento v Wal-Mart Stores, Inc.*, 66 AD3d 930 [2d Dept 2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12214-
12215 Miji Kang,
Plaintiff-Appellant,

-against-

Martin Almanzar, et al.,
Defendants-Respondents.

Index 303682/11

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about June 18, 2013, which, upon renewal, adhered to a prior order, same court and Justice, entered on or about March 25, 2013, granting defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny defendants' motion to the extent plaintiff alleged a serious injury consisting of a significant limitation in use of her right shoulder, and otherwise affirmed, without costs. Appeal from the order entered on or about March 25, 2013, unanimously dismissed, without costs, as superseded by the appeal from the subsequent order.

Defendants made a prima facie showing that plaintiff did not suffer a serious injury to her cervical and lumbar spine or right shoulder. Defendants submitted an orthopedic surgeon's affirmation finding normal range of motion in each part, and reports of expert radiologists stating that the MRIs of plaintiff's spine showed no disc herniations or bulges and no evidence of traumatic injury, and that the MRI of her right shoulder showed degenerative changes unrelated to the motor vehicle accident (*see Frias v Son Tien Liu*, 107 AD3d 589, 589 [1st Dept 2013]; *Thomas v City of New York*, 99 AD3d 580, 581 [1st Dept 2012], *lv denied* 22 NY3d 857 [2013]). Plaintiff failed to preserve her argument that defendants' expert orthopedist skewed his range-of-motion testing by selecting normal values that were substantially lower than those used by him in other cases (*see Luetto v Abreu*, 105 AD3d 558, 559 [1st Dept 2013]). In any event, absent supporting medical evidence, the argument raises an issue of credibility for the factfinder (*see id.*).

In opposition, plaintiff did not submit evidence of a recent examination of her right shoulder, and therefore did not raise an issue of fact as to whether she sustained a permanent consequential limitation in the shoulder (*see Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]). However, plaintiff raised an issue of fact as to whether she suffered a

significant limitation in the shoulder, by submitting the affirmation of her treating orthopedic surgeon, who found qualitative limitations that persisted for almost two years after the accident, and required arthroscopic surgery to repair, following conservative treatment (*see Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613, 614 [1st Dept 2013]; *Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]; *see also Trezza v Metropolitan Transp. Auth.*, 113 AD3d 402, 403 [1st Dept 2014]). The surgeon's opinion as to causation, based on his examination of plaintiff, his review of her medical records, and his observations of her during surgery, was sufficient to raise an issue of fact (*see Thomas*, 110 AD3d at 614-615; Daniels v S.R.M. Mgt. Corp., 100 AD3d 440, 441 [1st Dept 2012]).

Plaintiff did not present evidence of permanent or significant limitations to her cervical or lumbar spine. However, if a "jury determines that plaintiff has met the threshold for serious injury [based on her shoulder injury], the

jury may award damages for all of plaintiff's injuries causally related to the accident, even those not meeting the serious injury threshold" (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12216 The People of the State of New York, Respondent, Ind. 27/10

-against-

David Delgado, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered August 1, 2012, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 20 years, and otherwise affirmed.

The court properly declined to submit the lesser included offense of second-degree manslaughter, or the defense of intoxication. Neither was supported by a reasonable view of the evidence, viewed most favorably to defendant.

Defendant admitted he acquired a knife in preparation for possible confrontation with the deceased, although defendant asserted he was in fear of being attacked.

There was no reasonable view of the evidence that defendant

acted with anything less than intent to cause serious injury (*see e.g. People v Castro*, 76 AD3d 421, 425 [1st Dept 2010], *lv denied* 15 NY3d 892 [2010]; *People v Cesario*, 71 AD3d 587 [1st Dept 2010], *lv denied* 15 NY3d 803 [2010], *cert denied* 562 US __, 131 S Ct 670 [2010]). Furthermore, although defendant described his alcohol consumption in detail, his behavior was entirely purposeful, and there was no reasonable view of the evidence that he was so intoxicated as to be unable to form the requisite intent (*see People v Beaty*, 22 NY2d 918, 921 [2013]; *People v Sirico*, 17 NY3d 744, 745 [2011]). Even if defendant's testimony may have supported a jury instruction on the defense of justification, which the court granted, that testimony did not support instructions on intoxication or second-degree manslaughter.

However, we find the sentence excessive to the extent indicated.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12217 In re Paulo Maluf, et al., Index 100807/10
Petitioners-Appellants,

-against-

Cyrus V. Vance, Jr., etc.,
Respondent-Respondent.

_____

Kostelanetz & Fink, LLP, New York (Bryan C. Skarlatos of counsel), for appellants.

Cyrus R. Vance, Jr., District Attorney, New York (Marc Frazier Scholl of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered April 25, 2012, which denied the petition seeking, among other things, a writ of prohibition prohibiting respondent Cyrus V. Vance, Jr., New York County District Attorney (DA), from continuing to prosecute a pending criminal action against petitioners, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In this action for a writ of prohibition directing the DA to stay the prosecution of petitioners, Brazilian citizens (the former mayor of São Paolo and his son) who have been indicted in New York for crimes relating to the theft of more than $11 million in Brazilian public funds that were allegedly transferred to petitioners' account in a bank located in New York, the

petition was properly denied. The extraordinary remedy of prohibition is not available to petitioners, who assert that the underlying criminal action violates their statutory and constitutional rights to a speedy trial and their right to due process, or, in the alternative, that the indictment should be dismissed either in furtherance of justice pursuant to CPL 210.40(1) or under principles of international comity. These claims allege errors of law for which petitioners have adequate alternative remedies, including filing pretrial motions in the underlying criminal action and challenging any conviction on appeal (*Matter of Veloz v Rothwax*, 65 NY2d 902, 904 [1985]; *Matter of Lopez v Justices of Supreme Ct. of N.Y. County*, 36 NY2d 949 [1975]; *Matter of Neal v White*, 46 AD3d 156, 159-160 [1st Dept 2007]). That petitioners would have to voluntarily leave their home country to appear for arraignment since Brazil will not extradite its own citizens before availing themselves of such remedies does not render them inadequate (*see Matter of Rush v Mordue*, 68 NY2d 348, 354 [1986]["the ordeal of a criminal trial and the possibility of conviction, by themselves, are

insufficiently harmful to warrant use of the writ"). Moreover, petitioners have failed to meet their burden of demonstrating a "clear legal right" to any of the relief sought (*Matter of Haggerty v Himelein*, 89 NY2d 431, 435 [1997]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12220 In re Carlil M., etc.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for presentment agency.

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about April 12, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of reckless endangerment in the second degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's motion to suppress a showup identification. The showup, conducted in very close spatial and temporal proximity to the crime, was justified by the interest of making a prompt determination of whether the witness could identify the suspect (*see People v Love*, 57 NY2d 1023, 1024 [1982]), and the circumstances were not unduly suggestive (*see People v Duuvon*, 77 NY2d 541, 544 [1991]). "[T]he overall effect

of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup" (*People v Brujan*, 104 AD3d 481, 482 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]).

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the conclusion that appellant forced the victim into heavy traffic on the Grand Concourse, repeatedly placing the victim in danger as well as creating the risk of automobile accidents.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12221-
12222 Marbilla, LLC,
Plaintiff,

-against-

143/145 Lexington LLC, et al.,
Defendants.

- - - - -

[And Other Third-Party Actions]

- - - - -

M&R European Construction Corp.,
Sixth Third-Party Plaintiff-Respondent,

-against-

Skyscraper Steel Corp.,
Sixth Third-Party Defendant-Appellant.

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143/145 Lexington Avenue LLC,
Plaintiff,

-against-

M&R European Construction Corp., et al.,
Defendants.

- - - - -

[And Third-Party Actions]

- - - - -

M&R European Construction Corp.,
Third Third-Party Plaintiff-Respondent,

-against-

Skyscraper Steel Corp.,
Third Third-Party Defendant-Appellant.

Index 590961/07
591166/07
590387/08
590398/08
117132/06
603831/08
590571/10
591144/10

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Hannum Feretic Prendergast & Merlino, LLC, New York (Sean M. Prendergast of counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered February 7, 2013, which denied sixth third-party defendant Skyscraper Steel Corp.'s (Skyscraper) motion pursuant to CPLR 1010 to dismiss the sixth third-party complaint and all cross claims against it or, in the alternative, pursuant to CPLR 603 and 1010 to sever the sixth third-party action, unanimously affirmed, without costs. Order, Supreme Court, New York County (Louis B. York, J.), entered January 25, 2013, which denied third third-party defendant Skyscraper's motion pursuant to CPLR 1010 to dismiss the third third-party complaint and all cross claims against it or, in the alternative, pursuant to CPLR 603 and 1010 to sever the third third-party action, unanimously affirmed, without costs.

The motion court properly denied Skyscraper's motions to dismiss or sever. The third-party actions will not unduly delay the determination of the main action or prejudice the substantial rights of Skyscraper or any other party, and Skyscraper's discovery rights have been accommodated (*see Nielsen v New York State Dormitory Auth.*, 84 AD3d 519 [1st Dept 2011]; *Erbach Fin. Corp. v Royal Bank of Can.*, 203 AD2d 80 [1st Dept 1994]). The third-party actions present questions of law and fact in common with the main action, and thus a joint trial is preferable (*see Rothstein v Milleridge Inn*, 251 AD2d 154 [1st Dept 1998]).

Defendant M&R European Construction Corp. provided a reasonable justification for bringing the third-party actions more than six years after the initial action was filed, i.e. that it was unaware of Skyscraper's potential liability until the deposition of a previously unavailable witness was taken.

We have considered Skyscraper's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

CORRECTED ORDER - APRIL 16, 2014

Tom, J.P., Acosta, Freedman, **Kapnick**, JJ.

12223 In re New York City Asbestos Litigation — Index 190421/11

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Alice Kestenbaum, etc.,
Plaintiff-Respondent,

-against-

Durez Corp., et al.,
Defendants,

Union Carbide Corporation,
Defendant-Appellant.

Mayer Brown LLP, New York (Scott A. Chesin of counsel), for appellant.

Levy Konigsebrg, LLP, New York (Brendan J. Tully of counsel), for respondent.

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered January 6, 2014, which denied defendant Union Carbide Corporation's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff commenced this action to recover for injuries and resulting death suffered by her decedent husband allegedly due to exposure to products containing asbestos. Although defendant Union Carbide Company did not actually manufacture the finished laminate product, it was alleged to have been the supplier of the asbestos-containing product of which the laminate sheets consisted.

Even assuming defendant met its initial burden of establishing prima facie that its product could not have contributed to the causation of plaintiff decedent's asbestos-related injury (*see Comeau v W.R. Grace & Co.-Conn.*, 216 AD2d 79, 80 [1st Dept 1995]; *Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1st Dept 1995]), plaintiff met her burden of alleging facts and conditions from which defendant's liability may reasonably be inferred (*id.*).

Plaintiff's evidence established that, during the course of his employment, the decedent was exposed to injury-causing asbestos dust, caused by defendant's product in the laminated sheets with which he worked on a regular basis (*see Lloyd v W.R. Grace & Co.- Conn.*, 215 AD2d 177 [1st Dept 1995]). The deposition testimony of both the decedent and defendant's own witness established that it is "reasonably probable" (*Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601-602 [1996]) that the plastic laminated sheets, sold under the trade name Bakelite, contained asbestos from defendant's product. We note that plaintiff is not required to show the precise cause of his injuries (*see Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 188 AD2d 214, 225 [1st Dept 1993] *affd* 82 NY2d 821 [1993]).

We have considered defendant's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Acosta, Freedman, Kapnick, JJ.

12224 The People of the State of New York, Ind. 4326/02
Respondent,

-against-

Carlton Evans,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel Conviser, J.), rendered July 31, 2012, resentencing defendant, as a second felony offender, to an aggregate term of 40 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2014

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9581 Kamel R. Sadek, Index 108589/07
Plaintiff-Appellant,

-against-

Jenkins A. Wesley, et al.,
Defendants-Respondents.

_____

Robert A. Skoblar, Nyack, for appellant.

Landman Corsi Ballaine & Ford P.C., New York (Gerald T. Ford of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about November 3, 2011, reversed, on the law and the facts and in the exercise of discretion, without costs, and the matter restored to the trial calendar.

Opinion by Saxe, J. All concur except Moskowitz, J. who concurs in a separate Opinion and Tom, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
David B. Saxe
Karla Moskowitz
Sallie Manzanet-Daniels, JJ.

9581
Index 108589/07

_____x

Kamel R. Sadek,
Plaintiff-Appellant,

-against-

Jenkins A. Wesley, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from a order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about November 3, 2011, which precluded the testimony of his neurological expert and directed that judgment be entered dismissing the complaint, and which brings up for review an earlier ruling precluding the testimony of his first-proposed neurological expert.

Robert A. Skoblar, Nyack, for appellant.

Landman Corsi Ballaine & Ford P.C., New York (Gerald T. Ford and Diane J. Ruccia of counsel), for respondents.

SAXE, J.

The question raised by this appeal is whether the trial court properly granted defendants' in limine motions and precluded plaintiff's neurological experts from testifying, on the grounds that the first expert's theory of causation was negated by a supplemental report and that the second expert's theories of causation either failed to pass the *Frye* test or were untimely raised. We hold that the proposed testimony by plaintiff's experts should not have been precluded. The essence of these witnesses' position on causation -- the unremarkable premise that the physical trauma caused by the motor vehicle collision was a competent producing cause of plaintiff's embolic stroke -- did not require a formal *Frye* hearing. Moreover, even if a *Frye* hearing was appropriate, the evidence before the court was sufficient under *Frye* to avoid preclusion of the testimony.

This action arose out of a motor vehicle accident that occurred on October 2, 2006 between a limousine driven by plaintiff Kamal Sadek and a Greyhound bus operated by defendant Aaron Jenkins (s/h/a Jenkins A. Wesley). Plaintiff asserts that during the accident his head slammed against his side window. After both drivers exited their vehicles and began an angry verbal exchange, plaintiff became faint and dizzy, started to shake, and found that he needed to sit down. He then became

unresponsive, and was transported to St. Luke's Roosevelt Hospital, where he was diagnosed with an embolic stroke, also called a cerebral vascular accident (CVA). A report from St. Luke's Roosevelt Hospital dated October 4, 2006 described the results of two tests performed on plaintiff: a transesophageal echocardiogram disclosed a mobile thrombus (a large blood clot) anchored to the left subclavian artery, and a magnetic resonance angiogram reportedly disclosed atheroma (plaque) in the aortic arch. Plaintiff was placed on aspirin and Plavix.

Plaintiff brought this action against the bus company and the bus driver, alleging that the accident was caused by the negligence of the driver, and that it precipitated the embolic stroke, or "aggravated, activated and/or precipitated any underlying ... circulatory, arterial, venous or systemic condition, which was asymptomatic prior to the accident."

Plaintiff designated Dr. Nabil Yazgi as his neurological expert. His CPLR 3101(d) notice stated that Dr. Yazgi, a neurologist who served as director of the Stroke Center at New York Presbyterian Hospital, would testify at trial in conformity with his report dated September 23, 2010. In that report, Dr. Yazgi stated that there was a "probable causal relationship" between the motor vehicle accident and the CVA.

However, in a supplemental report dated June 28, 2011, Dr. Yazgi pointed out that a medical report dated November 28, 2006, some eight weeks after the original October 4, 2006 report, stated that the thrombus and atheroma observed in the October 4, 2006 report were no longer evident. Dr. Yazgi stated that "[t]his is physiologically unlikely[,] which suggests the first report was possibly artifact,"[1] although he then remarked that "[a]ssuming this clot was present on the first report, trauma could feasibly have dislodged it, or a portion of it, causing an embolic stroke."

When the matter came on for trial, after the jury was empaneled on October 13, 2011, defense counsel served seven motions in limine seeking to preclude each one of plaintiff's expert witnesses: his expert on liability, and his primary care physician, life care expert, lost earnings expert, speech therapist, vocational rehabilitation expert, and neurologist. After hearing argument, the trial court reserved its ruling as to the other six challenged experts, but granted the motion as to Dr. Yazgi.

[1] An artifact is a blemish or image in the radiograph that is not present in the roentgen image of the object (http://medical-dictionary.thefreedictionary.com/artifact).

The trial court reasoned that Dr. Yazgi's first report was negated by his supplemental report dated June 28, 2011 stating that there was no thrombus present on November 28, 2006, and that the supplemental report failed to sufficiently establish causation, since in it, Dr. Yazgi stated merely that trauma "could have" caused the embolic stroke. The court then granted plaintiff a four-day continuance, so that he could locate another neurologist, with the proviso that the new expert could not rely on a new theory. Plaintiff retained a second neurological expert, Dr. Sang Jin Oh, on October 20, 2011, and provided defendants with a new 3101(d) notice stating that Dr. Oh was prepared to testify that the cause of plaintiff's embolic stroke on October 2, 2006 was the motor vehicle accident that day, and further stating that he adopted the opinion stated in Dr. Yazgi's September 23, 2010 report.

The next day, defendants challenged the use of Dr. Oh's proposed testimony, relying partly on the same ground as their challenge to Dr. Yazgi and partly on the ground that, according to their own neurological expert, Dr. Alan Segal, an embolic stroke cannot be caused by trauma and plaintiff's expert was relying on a novel theory of causation. The court granted defendants' application for a *Frye* hearing (*see Frye v United States*, 293 F 1013 [DC Cir 1923]).

In an affidavit by Dr. Oh dated November 2, 2011, supplied to counter Dr. Segal's assertion that plaintiff's theory of causation was novel, Dr. Oh cited two studies. He reported that the results of an Israeli study, assessing potential stroke-triggering effects, including emotional stress and sudden changes in body position, indicated that in more than 20% of stroke patients studied, abrupt changes in body positions had occurred within two hours of stroke onset. The authors of the study concluded that sudden changes in body position are among the possible triggers of an embolic stroke. Dr. Oh listed nine professional journal articles that cited or discussed the study.

Dr. Oh also cited a Finnish study based on about 2,303 male volunteers over a period of 11 years that found that men who were under stress and who experienced an increase in systolic blood pressure also experienced an incremental increase (1.5% for every 1 point increase in systolic pressure) in their risk of having a stroke over that 11 year period. Dr. Oh indicated that a sudden spike in systolic pressure would cause damage to the outer layer of the blood vessel, causing the formation of plaque, and that if plaque buildup is already present, a spike in systolic pressure can cause plaque to rupture and emboli to break off.

At the *Frye* hearing Dr. Oh testified to the same effect, concluding within a reasonable degree of medical certainty that

the accident was a competent producing cause of plaintiff's embolic stroke.

The defense emphasized that Dr. Yazgi had never referred to stress or a spike in blood pressure as factors contributing to plaintiff's stroke, and argued that Dr. Oh was offering at least four new theories of causation, namely, that plaintiff's stroke was caused by (1) a spike in blood pressure; (2) the trauma of the motor vehicle accident; (3) the "drama" resulting from the verbal altercation between plaintiff and the bus driver; and (4) plaintiff's banging his head during the accident. Defendants argued that none of these theories was identified in Dr. Yazgi's report, which had now been adopted by Dr. Oh.

At the conclusion of the *Frye* hearing, the court precluded Dr. Oh from testifying. First, the court reasoned that Dr. Oh's theory regarding two mechanisms that caused the embolus to detach, namely, an abrupt change in body movement and a spike in blood pressure, constituted new theories of causation. Second, the court held that Dr. Oh failed to show that these theories had gained general acceptance in the medical community. The court also noted that Dr. Oh suggested that the spike in blood pressure caused shearing within the vessel, which detached a piece of the thrombus, causing the embolism, but remarked that shearing was not mentioned in the relied-on studies.

The preclusion of Dr. Oh's testimony forced plaintiff to concede that he would be unable to establish a causal connection between the accident and his stroke, and since he had already withdrawn his claims for orthopedic injuries, he was left without proof of serious physical injury caused by the accident. Consequently, the court dismissed the complaint.

Discussion

At the heart of this appeal is a dispute as to whether the accident could have caused the embolic stroke plaintiff experienced. Although the trial court has broad discretion to rule on the admissibility of evidence, we agree with plaintiff that the trial court should not have granted the part of defendants' motion in limine seeking to preclude plaintiff's neurological experts from testifying, thereby preventing plaintiff from making his case.

Initially, we find that the preclusion of Dr. Yazgi's testimony was erroneous. Dr. Yazgi's assertion, in his first report, dated September 23, 2010, that there was a "probable causal relationship" between the motor vehicle accident and plaintiff's embolic stroke, citing the October 4, 2006 report from St. Luke's Roosevelt Hospital describing a mobile thrombus anchored to the left subclavian artery and plaque in the aortic arch, provided a sufficient basis for permitting him to testify

as to the cause of plaintiff's embolic stroke. While Dr. Yazgi's supplemental report certainly provided grounds with which to impeach his anticipated trial testimony about where the embolus that caused the stroke had been formed, it did not absolutely invalidate Dr. Yazgi's proposed testimony regarding the cause of plaintiff's stroke; it merely created some doubt as to the initial source of the embolus.

Nor could defendants' motion properly be granted based on their other argument, namely, that Dr. Yazgi's CPLR 3101(d) statement failed to sufficiently set forth the mechanism by which the stroke occurred. Dr. Yazgi's 3101(d) statement with narrative report was served more than a year before trial. Defendants had the option of moving for an amplification or to require the witness to provide a more complete explication of his theory of causation (*see e.g. Mead v Dr. Rajadhyax' Dental Group*, 34 AD3d 1139 [3d Dept 2006]). Their motion in limine on the eve of trial to entirely preclude the witness on that basis was unnecessary and improper.

Moreover, the so-called mechanism of plaintiff's embolic stroke, by definition, involved some sort of clotted blood dislodging and making its way to the brain. Any uncertainty as to the exact location of the embolus before it dislodged did not invalidate the claim that it was the accident that caused it to

dislodge. Defendants were free to challenge the expert's assertion that the embolus dislodged as a result of the collision, but plaintiff's right to proceed on that claim was not dependent on the expert's ability to map the exact path the embolus traveled.

The testimony of plaintiff's second neurological expert, Dr. Oh, also should not have been precluded. While it is appropriate for a trial court to preclude testimony setting forth an entirely new theory of causation (*see 1861 Capital Master Fund, LP v Wachovia Capital Mkts., LLC*, 95 AD3d 620 [1st Dept 2012]), Dr. Oh's proposed testimony did not entirely concern a new theory. Plaintiff's theory of causation, as disclosed to defendants, had always been that the accident caused an embolus to dislodge and travel to the brain. Even accepting, for argument's sake, that Dr. Oh raised an entirely new theory by claiming that the accident caused a spike in plaintiff's blood pressure, which in turn caused the embolus to shear off, Dr. Oh was also prepared to testify that the physical trauma to plaintiff's body during the accident was a probable cause of the embolus's breaking away; to that extent his theory of causation was certainly not new.

We reject the trial court's determination that a *Frye* hearing was necessary. In the first place, defendants' moving papers failed to justify the need for a *Frye* hearing at all. The

affidavit by defendants' expert in support of the motion merely asserted that the expert had "conducted a search of the relevant medical literature" and had found no support for plaintiff's theory that the trauma from a motor vehicle collision caused the embolic stroke. Notably, defendants' expert did not even point to literature or studies *disproving* such a link. Therefore, when, in response, plaintiff's expert provided proof that literature supporting the theory existed and had been published in reputable professional journals and cited or discussed in others, the basis for defendants' claim was negated; no factual issue was presented. At that point, it was up to the jury to decide whether to accept the assertion that the physical impact experienced by plaintiff in this accident was a competent producing cause of the embolic stroke.

Contrary to the dissent's assertion, the opinion of plaintiff's expert that the impact of the collision was a competent producing cause of the dislodgement of a clot, resulting in his stroke, is not the type of novel theory of causation that necessitates a *Frye* hearing; it was merely an opinion explaining the physiological process that caused the stroke plaintiff suffered.

Even assuming that the assertion by defendants' expert warranted an evidentiary hearing to assess the reliability of

plaintiff's expert's causation claims, the evidence presented at the *Frye* hearing sufficiently established the reliability of those claims.

Frye hearings are used "to determine whether the experts' deductions are based on principles that are sufficiently established to have gained general acceptance as reliable" (*Marsh v Smyth*, 12 AD3d 307, 308 [1st Dept 2004]). The test is particularly useful for newly minted or experimental processes or newly posited psychological theories, in order to weed out baseless and unreliable theories; a *Frye* hearing "should be held only if the basis for the expert's conclusion is novel" (*id.* [Saxe, J., concurring]). "[W]here the proposed expert testimony concerns a claim that the plaintiff's injury was caused by the actions taken by the defendants, the whole concept of the *Frye* analysis is of limited applicability" (*id.* at 311).

As the Second Department observed in *Zito v Zabarsky* (28 AD3d 42, 44 [2d Dept 2006]), "general acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions." There is no need here for the consensus the dissent claims is necessary.

As was the case in *Marsh v Smyth*, the dispute here concerns the mechanism of the injury, that is, the physiological process by which the damage came to occur. In contrast to the scientific community's approach to newly developed DNA tests or polygraph tests, new processes such as post-hypnotic recollection, or newly posited theories such as multiple chemical sensitivity syndrome, where the question is whether one physical event led to another physical event, it cannot be expected that numerous studies would quickly be conducted on the point (*id.* at 310-311). Therefore, the court's *Frye*-type inquiry, if any, needed only to address the "question of whether the proffered expert opinion properly relates existing data, studies or literature to the plaintiff's situation, or whether, instead, it is connected to existing data only by the *ipse dixit* of the expert" (*id.* at 312 [internal quotation marks omitted]). Plaintiff's expert showed that the conclusion he reached, that the vehicular collision caused the dislodgement of a blood clot, leading to plaintiff's embolic stroke, was supported by a "reasonable quantum of legitimate support" (*id.*), specifically, the Israeli study assessing stroke-triggering effects of sudden changes in body position, and the professional journal articles that cite or discuss the study, thereby satisfying the requirements of *Frye*.

The dissent not only asserts that plaintiff's theory of

causation is novel, and insufficiently accepted in the medical community, but, oddly, it also suggests that plaintiff's stroke could have happened before the accident, and actually caused the accident, although it fails to point to anything justifying such a suggestion. The facts themselves do not support that conclusion. Plaintiff exited from his vehicle and engaged in a verbal altercation with the driver of the bus before his stroke symptoms began to emerge. It is evident that the stroke happened within minutes *after* the accident.

In fact, the dissent's strange suggestion that plaintiff's stroke could have happened before the accident and caused the accident seems to be included more as a rhetorical device than as a real possibility. It seems to be offered as a springboard from which the dissenter can assert that he would not "presume to decide the question of whether there is a cause and effect relationship between the accident and the stroke as a matter of law." But, that is not the determination we are making. We merely hold that the causation question is one that may be decided by the jury.

The dissent also suggests that the stroke's occurrence so soon after the collision was simply coincidental, unrelated to the impact of the collision. That dubious notion does not properly counter the more likely scenario, based on the facts in

the record, that the collision of the massive bus into the much smaller vehicle, with the attendant head trauma to plaintiff, physically caused the dislodging of an embolus. In any event, the defense is free to proffer that alternative scenario to the jury as well.

We must also reject the dissent's suggestion that the impact of the collision was too "minor," at too slow a rate of speed, to have caused any such injury. It should be recalled that the vehicle with which plaintiff's vehicle collided was a *37,000-pound bus*. The impact of a collision with a vehicle of that weight, even at a slow rate of speed, would be substantial. While the dissent's argument in this regard would be appropriate to make to a jury, it is not a proper basis for rejecting plaintiff's causation claim as a matter of law.

Finally, we find it troubling that defendants waited until the day the jury was empaneled to serve seven in limine motions to preclude all seven of plaintiffs' expert witnesses, although the date on their motion papers indicates that they were ready to be served more than two weeks earlier. While the CPLR does not contain any time limitations applicable to in limine motions, and there are no rules about their content, there are circumstances when their use is improper (*see e.g. Downtown Art Co. v Zimmerman*, 232 AD2d 270 [1st Dept 1996]). Here, although

defendants' motions were intended to be, and turned out to be, dispositive, the means by which they were presented to the court reflects an intentional avoidance of the strictures of the CPLR's notice provisions for motions. In effect, defendants' strategic decision created something akin to an ambush.

The dissent's implication that the ambush was plaintiff's own fault, for advancing a novel theory on the eve of trial, distorts the facts. It was defendants' belated, eve-of-trial motion that caused plaintiff to buttress his theory, which defendants then challenged as a new theory first offered on the eve of trial. Trial courts should take care that the informal procedure of in limine evidentiary applications is not abused so as to unfairly tip the scales.

Accordingly, the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about November 3, 2011, which precluded the testimony of plaintiff's neurological expert and directed that judgment be entered dismissing the complaint, and which brings up for review an earlier ruling precluding the testimony of plaintiff's first-proposed neurological expert,

should be reversed, on the law and the facts and in the exercise of discretion, without costs, and the matter restored to the trial calendar.

All concur except Moskowitz, J. who concurs in a separate Opinion and Tom, J.P. who dissents in an Opinion.

MOSKOWITZ, J. (Concurring)

I concur with the majority that the trial court improperly precluded plaintiff's experts' testimony. I part ways with the majority, however, on the necessity for a hearing in this action. I believe that the court properly held a hearing to determine whether the opinion of plaintiff's expert – that is, the opinion that the collision caused plaintiff's stroke – was based on a proper foundation.

The majority's conclusion that no *Frye* hearing was necessary rests on the notion that plaintiff need offer no expert opinion for the "unremarkable" premise that the physical trauma caused by the motor vehicle collision was a competent producing cause of plaintiff's embolic stroke. I disagree with the majority's characterization of this premise as "unremarkable"; similarly, I disagree with the majority's premise that "no factual issue was presented." Indeed, defendants' expert, Dr. Alan Segal, stated to a reasonable degree of medical certainty that trauma from the accident was *not* a competent producing cause of plaintiff's embolic stroke and that his reading of the medical literature did not support the opinion that trauma could, in fact, cause an embolic stroke. In this context, there is no basis to simply tacitly accept, as the majority appears to do, that a sudden spike in systolic pressure could cause plaque to rupture and

emboli to break off immediately after a stressful event like a car accident. Thus, given the facts of this case, a hearing was necessary to determine whether a proper foundation supported Dr. Oh's proposed opinion.

Of course, courts may, in their discretion, hold a hearing to determine whether evidence should be placed before the jury; whether the hearings are actually *Frye* hearings, or whether they are hearings held under another rubric, is of no moment (*see e.g. Parker v Mobil Oil Corp.*, 7 NY3d 434 [2006]). A hearing was particularly appropriate here given the sharp disagreement between the parties' experts as to what caused plaintiff's stroke, and given Dr. Segal's assertion that he found no support whatsoever in the medical literature for Dr. Oh's opinion. If any error existed here, it was not in holding a hearing; rather, the error, if any, was in terming the hearing a *Frye* hearing rather than simply referring to it as an evidentiary hearing or a *Parker* hearing.

TOM, J.P. (dissenting)

Which came first, the accident or the stroke? The majority, deeming the etiology of an embolus to be established fact within common knowledge (*see Carter v Metro N. Assoc.*, 255 AD2d 251 [1st Dept 1998]; *Ecco High Frequency Corp. v Amtorg Trading Corp.*, 81 NYS2d 610, 617 [Sup Ct, NY County 1948], *affd* 274 App Div 982 [1st Dept 1948]), makes a daring leap of logic to construe plaintiff's theory that the accident caused the stroke as an "unremarkable premise" and to hold that Supreme Court both abused its discretion in precluding expert testimony in support of that premise and committed error in conducting a *Frye* hearing on the question of its reliability. In permitting a jury of laypersons to speculate as to the medical cause of plaintiff's stroke and decide the issue as a question of fact, the majority simply ignores *Frye* and dispenses with the analysis it requires.

At issue is whether it is generally accepted within the medical community that the trauma associated with a traffic accident – here, a relatively minor collision – can dislodge a portion of a thrombus, causing a stroke when the ensuing embolus or emboli travel to and lodge in arteries supplying the brain, thereby blocking the flow of blood and causing tissue damage. While the mechanism of an embolic stroke is well understood, the majority never addresses the question of whether plaintiff's

particular theory of causation is generally accepted, but concludes, anomalously, that the trial court erred in even conducting a *Frye* hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]). Their alternative conclusion, that, in any event, the court erred in preventing plaintiff from presenting his theory to the jury, is predicated on a single anecdotal study involving a mere 67, out of 150, largely elderly stroke patients who reported exposure to one of seven potential precipitating factors within the two hours preceding the onset of symptoms.[1] Plaintiff now conjectures that one or more of these factors may have been the cause of his stroke.

Ignoring, for the moment, the failure of plaintiff's original expert witness to identify any of the factors included in the study as the cause of plaintiff's stroke, it is axiomatic that correlation is not tantamount to causation, and a lone study does not a consensus make. The study does not establish that the particular factor identified by any participant actually caused that patient's stroke or, conversely, that the temporal proximity of the particular factor and the stroke were not merely

[1] The potential triggers included in the study were emotional stress (both positive and negative), anger, sudden posture change in response to a loud noise or other startling event, intense physical exertion, abrupt temperature change, and heavy eating.

fortuitous. More than half of the 150 stroke patients interviewed (average age 68) did *not* identify a precipitating factor. Plaintiff was only 46 years old at the time of the accident.

The majority's assertion that the conclusion of plaintiff's expert concerning the causation of plaintiff's embolic stroke was supported by a "reasonable quantum of legitimate support" is flawed. An isolated and inconclusive study suggesting that, in a minority of the patients interviewed, there was a correlation between a stroke and various possible causative factors is wholly inadequate to fulfill plaintiff's burden to demonstrate that it is *generally* accepted within the medical community that a stroke can be *caused* by a vehicular accident, such as the minor collision between the limousine plaintiff was driving and defendant's bus (*see Frye v Montefiore Med. Ctr.*, 100 ADd3d 28, 38 [1st Dept 2012]; *Stanski v Ezersky*, 228 AD2d 311, 312 [1st Dept 1996], *lv denied* 89 NY2d 805 [1996]). It is alleged that as the two vehicles were making left turns into the entrance of the Lincoln Tunnel, they came into contact causing the front of the limousine's bumper to lock with the rear bumper of the bus.

It is a plaintiff's burden to establish general acceptance of a novel theory (*Nonnon v City of New York*, 32 AD3d 91, 101 [1st Dept 2006], *affd* 9 NY3d 825 [2007]), and expert testimony

will be precluded where the plaintiff fails to demonstrate that the underlying principles upon which the proffered testimony is based have gained general acceptance in the witness's particular field of expertise (*see Lara v New York City Health & Hosps. Corp.*, 305 AD2d 106 [1st Dept 2003]). Significantly, defendant's neurologist, Dr. Segal, performed a "literature search" for articles finding a relationship between embolic strokes and automobile accidents or minor trauma and was unable to locate any such article.[2] He further testified that Dr. Oh's theories – that a spike in blood pressure or stress due to the vehicles' impact could cause a piece of the thrombus to break off and travel to the brain and cause the stroke – do not exist in "literature or any kind of accepted physiology, scientific physiology that we would ever consider valid." Dr. Segal testified that there are no known "triggers" for having a piece of the thrombus break off. He was aware of the Finnish study, also referred to by plaintiff's expert, relating a spike in systolic blood pressure to increased risk of a stroke. He stated

[2] Remarkably, the majority accords no significance to the absence in the medical literature of any relationship between trauma and embolic strokes. Rather, it improperly shifts the burden to defendants to produce medical studies *disproving* any such relationship. Nothing in *Frye v United States* suggests that there is any affirmative burden on the opposing party to establish that a novel theory has been expressly rejected by the members of a particular field of expertise.

that the study demonstrated that patients who exhibited a tendency to spike their blood pressure, who were followed for 10 years, were at increased risk for having a stroke compared to patients that did not have that tendency. However, he opined that the study did not conclude that a spike in blood pressure itself directly causes a stroke. Under the circumstances, I agree with the decision of Supreme Court to preclude plaintiff from presenting a novel theory of causation to the jury (*see Price v New York City Hous. Auth.*, 92 NY2d 553, 558 [1998]). Certainly, it should not be faulted for conducting a *Frye* hearing to inform its determination (*cf. Frye v Montefiore Med. Ctr.*, 100 AD3d at 31 [opportunity to present witnesses at a *Frye* hearing declined]).

A second issue inexplicably avoided by the majority is that plaintiff advanced two different novel theories of causation on the eve of trial. The theory stated by his original expert was that plaintiff's stroke was brought on by the accident (by inference, and only by inference, as a result of the physical trauma experienced in the collision). The hypothesis appears as a conclusory opinion, expressed in the report of Nabil Yazgi, M.D., dated September 23, 2010, pursuant to CPLR 3101(d), that "there is [a] probable causal relationship between the Motor Vehicle Accident of 10/2/2006 and the symptoms associated with

the Cerebral Vascular Accident on 10/2/2006." The report makes no mention of the mechanism by which the stroke was induced, whether by trauma or otherwise.

Six months later, confronted with conflicting medical evidence, the doctor issued a supplemental report, resorting to rather tortuous reasoning that utterly fails to salvage his first, unsupported opinion. Dr. Yazgi's report dated June 28, 2011 concedes that two hospital vascular studies of plaintiff conducted less than two months apart are inconsistent, obliquely attributing the findings based on the earlier study to an anomaly in the radiological medium. Dr. Yazgi states that the hospital report of the first study "describes atheroma in the aortic arch and the presence of a long thrombus." Regarding the second report, the doctor states, "[T]his thrombus is not present and the aortic arch atheroma is not evident." He continues, "This is physiologically unlikely, which suggests that the first report was possibly artifact.[3] Assuming this clot was present on the first report, trauma could feasibly have dislodged it or a portion of it causing an embolic stroke." Summarily stated, "Trauma could cause a CVA of unclear etiology as evidenced by the

[3] "In radiology, a substance or structure not naturally present in living tissue, but of which an authentic image appears in a radiograph" (Dorland's Illustrated Medical Dictionary 162-163 [26th ed 1981]).

conflicting reports with regard to the vascular studies."

The opinion expressed by Dr. Yazgi is that the admittedly "unclear etiology" might conceivably be ascribed to trauma involving an *assumed* clot in the aortic arch. However, he concedes that this clot is not presently shown to exist and, assuming it ever existed, that its disappearance over a two-month period defies medical explanation. Thus, he attributes the abnormalities seen in the first study (on which his conclusion rests) to "artifact."

Contrary to the majority's view, Dr. Yazgi clearly acknowledged that the conclusory opinion expressed in his first report is unsupportable in light of the subsequent radiological study showing no evidence of the medical condition (a long thrombus in the aortic arch) that might have provided a foundation for his previous conclusion. The majority, like plaintiff's subsequently retained medical expert, does not attempt to portray Dr. Yazgi's second report as sufficient to state a coherent theory regarding the cause of plaintiff's injury. Rather, relying on *Mead v Dr. Rajadhyax' Dental Group* (34 AD3d 1139 [3d Dept 2006]), the majority imposes on the defense the burden to secure an exposition of such a theory of causation put forth by an expert on behalf of a plaintiff by seeking "amplification" or "a more complete explication" (*contra*

LaFurge v Cohen, 61 AD3d 426 [1st Dept 2009], *lv denied* 13 NY3d 701 [2009] [untimely supplemental expert disclosure]; *see also Barksdale v New York City Tr. Auth.*, 294 AD2d 210 [1st Dept 2002] [plaintiff precluded, after defendant's motion in limine, from offering evidence at trial respecting theory of liability not set forth in notice of claim]). In *Mead*, it was the plaintiff who sought to preclude the testimony of a defense witness for failure to provide sufficiently specific information regarding a medical expert's qualifications. It is clear, however, that the Third Department based its decision on the finding that despite the belated disclosure of the defense expert's qualifications, the plaintiff was adequately informed of the defendants' theory that the injuries he sustained were the result of recognized complications of anesthesia, as listed on the consent form he had signed (*Mead*, 34 AD3d at 1141 ["In light of plaintiff's awareness of the defense theory, as well as the information gleaned from the package insert, the listing of this complication on the consent form and the testimony elicited from both experts, we find no prejudice"]).

In the matter at bar, by contrast, no coherent theory relating the stroke sustained by plaintiff to the collision involving defendant's bus was provided before the hypotheses of plaintiff's present expert witness, Sangjin Oh, M.D., were

articulated in an affidavit dated October 2, 2011. The affidavit begins by defining trauma to include both psychic as well as physical injury. While this is indeed the dictionary definition, it should be noted that nothing in the affidavits previously furnished to the defense mentions psychological trauma as a cause of plaintiff's stroke.[4] Dr. Oh identifies two mechanisms by which the stroke could have been induced: "the sudden body movement associated with the trauma of the accident and the acute stress with resultant spike in blood pressure associated with the trauma of the accident. Either mechanism was sufficient to detach the embolism."

Unlike the *Mead* court, the majority points to nothing in the record sufficient to apprise defendants of the theories of causation ultimately expressed by Dr. Oh on the eve of trial. Thus, the failure to timely disclose these theories was prejudicial to the defense, and it was within the sound exercise of the trial court's discretion to preclude this testimony (*see 1861 Capital Master Fund, LP v Wachovia Capital Mkts., LLC*, 95

[4] As previously noted, Dr. Yazgi's original affidavit of September 23, 2010, which has been adopted by Dr. Oh, is silent as to the cause of plaintiff's stroke, including trauma. Dr. Yazgi's supplemental affidavit of June 28, 2011 which, though incomprehensible, does mention trauma that "could feasibly have dislodged [a clot] or a portion of it causing an embolic stroke," has *not* been adopted by Dr. Oh.

AD3d 620 [1st Dept 2012]). While it may be, as the majority supposes, that "Dr. Oh was also prepared to testify that the physical trauma to plaintiff's body during the accident was a probable cause of the embolus [*sic*] breaking away," it remains that the supporting affidavit submitted by Dr. Oh confines discussion of the potential cause of plaintiff's stroke to "sudden body movement" and "acute stress with the resultant spike in blood pressure." It is not error to issue a ruling of preclusion based on the theories actually propounded to the court by the expert.

Given that the first notice of plaintiff's theories of causation was given in Dr. Oh's affidavit dated October 2, 2011, that jury selection commenced on October 11, and that defendants served their motion to preclude Dr. Oh's testimony on October 13, the majority's expression of distress at the timing of the defense motion is difficult to fathom. It is well settled that the burden rests on the proponent of a novel theory advanced on the eve of trial to demonstrate good cause for its admission, especially where a new 3101(d) response notices a new expert in support of the novel theory (*see Lissak v Cerabona*, 10 AD3d 308, 309-310 [1st Dept 2004]; *Kassis v Teachers Ins. & Annuity Assn.*, 258 AD2d 271 [1st Dept 1999]). Failure to meet that burden properly results in preclusion.

The effect of the majority's contrary decision is to eviscerate the *Frye* rule and permit plaintiff to present to the jury an untested theory that has not gained acceptance in the medical community. The theory proposed by plaintiff's expert invites the jury to speculate that it was the accident that caused his stroke, without making any attempt to rule out the alternative explanation that it was a stroke that may have caused the accident. While plaintiff presents an isolated study that inconclusively supports his expert's position, the contrary proposition that a stroke impairs function and that a driver's impaired functionality is likely to cause a vehicular accident is not subject to dispute. Thus, it is equally likely that the onset of plaintiff's stroke impaired his ability to drive, resulting in the collision, and that his symptoms became more acute as the stroke progressed – to feeling faint and dizzy, starting to shake, and, finally, requiring transport to the hospital in an unresponsive state. Of course, had such a theory been advanced by the defense, it would have been equally appropriate to require expert medical testimony concerning the onset and progression of stroke symptoms and the ensuing impairment of the patient's mental and physical functions. Similarly, the court might have exercised its discretion to inquire whether the progression of stroke symptoms is generally

accepted in the medical community. Unlike the majority, I do not presume to decide the question of whether there is a cause and effect relationship between the accident and the stroke as a matter of law. To the contrary, whether a particular event is generally accepted to be a factor in the onset of a medical condition is a matter that eclipses the knowledge and experience of the average jurist and warrants a *Frye* hearing to decide whether the proffered theory of causation should be presented to the trier of fact. Furthermore, if traffic accidents tend to precipitate embolic strokes, as the majority concludes, why is it, given the millions of accidents occurring annually, that plaintiff's experts have not cited any reports of such a connection in the medical literature?

What the majority ultimately fails to acknowledge is that the facts of this matter establish only a correlation – proximity in time – between the accident and the stroke, not causation sufficient to dispel the possibility that the two events are merely coincidental. Defendants are under no obligation to demonstrate that it was plaintiff's stroke that caused the accident. To recover in this action, plaintiff must establish the contrary proposition that the accident was the immediate cause of his stroke, and before he may place that proposition before the jury, he must provide a foundation for his theory by

showing that it has gained general acceptance in the medical community. This he has utterly failed to do. Thus, plaintiff has demonstrated no nonspeculative basis upon which a jury could determine that the vehicular accident of October 2, 2006 was an immediate and proximate cause of his stroke, and the complaint was correctly dismissed. As stated by the Court of Appeals in *Bernstein v City of New York* (69 NY2d 1020 [1987]), "If there are several possible causes of injury, for one or more of which defendant is not responsible, plaintiff cannot recover without proving the injury was sustained wholly or in part by a cause for which the defendant was responsible" (at 1022 [internal quotation marks omitted]; *see also Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42 [1st Dept 2008]). Moreover, since plaintiff failed to give defendants notice of either of Dr. Oh's theories of causation until the eve of trial, his testimony was properly precluded (*1861 Capital Master Fund*, 95 AD3d at 621).

Accordingly, the order dismissing the complaint should be affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 15, 2015

CLERK