SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 16, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, Kapnick, JJ.

10903 Tatiana Cheeks, Index 21962/99
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

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Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

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Judgment, Supreme Court, Bronx County (John A. Barone, J.), entered on or about December 22, 2011, upon a jury verdict, awarding plaintiff damages on her causes of action for false arrest and malicious prosecution, reversed, on the law, the facts and in the exercise of discretion, without costs, and the matter remanded for a new trial.

Friedman, J.P. and Sweeny, J. concur in a separate memorandum by Friedman, J.P.; Kapnick, J. concurs in a separate memorandum; and Acosta and Manzanet-Daniels, JJ. dissent in a memorandum by Acosta, J. as follows:

FRIEDMAN, J.P. (concurring)

Plaintiff Tatiana Cheeks was the sole custodian and caregiver of her daughter Cha-Nell, who was born in healthy condition on February 16, 1998. Early in the morning of March 27, 1998, plaintiff found 5½-week-old Cha-Nell unresponsive and not breathing; the infant was taken to the hospital and pronounced dead on arrival. The cause of the little girl's death was not immediately clear — although the emergency room doctor remarked at the time that the "child presents as malnourished" — and an autopsy was performed. Two months later, on May 26, 1998, the New York City medical examiner's office issued its determination — based on extensive physical and chemical observation, measurement and analysis recorded in the 48-page autopsy report — that the infant had, indeed, died of malnutrition, and that the malnutrition was not due to any detectable defect in her digestive system.[1] This conclusion has never been questioned, not even by plaintiff or the medical

[1]In support of the conclusion that the infant died of malnutrition, the first page of the report states that the infant's "weight at autopsy [was] below birth weight and well below 5th percentile for [her] age"; that the infant had "scant body fat" and her "organ weights [were] below expected for [her] age"; and that the body evidenced "fat and other organ atrophy histologically."

expert who testified on her behalf in this action.[2]

Based on the medical examiner's determinations, Detective Donald Faust of the New York City Police Department reopened the investigation of Cha-Nell's death, took plaintiff into custody and arrested her on suspicion of having caused her daughter's death through neglect of the infant's feeding. On May 29, 1998, plaintiff was arraigned on charges of criminally negligent homicide (Penal Law § 125.10) and reckless manslaughter (Penal Law § 125.15[1]).[3] On July 1, 1998, however, the charges against plaintiff were dropped. The reason for the district attorney's

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[2]Plaintiff's expert testified under cross-examination as follows:

> "Q. Ultimately, . . . the medical examiner . . . determined conclusively that the baby died of malnutrition; correct?
>
> "A. Correct.
>
> "Q. And you are not disputing that opinion; correct?
>
> "A. No, I am not disputing that."

[3]Upon arresting plaintiff, Detective Faust had charged her with depraved indifference second-degree murder (Penal Law § 125.25[2]). The district attorney's office omitted that charge from the arraignment. As the detective testified, it is police practice to charge a suspect upon arrest with the most serious offense deemed potentially applicable, after which the prosecutors often reduce the charge to a lesser offense (or offenses) upon arraignment, as occurred here.

voluntary dismissal of the case does not appear in the record. Plaintiff subsequently commenced this action against the City of New York for false arrest and malicious prosecution.

As more fully discussed later in this opinion, the City's liability in this matter hinges on whether Detective Faust, when he arrested plaintiff without a warrant, had probable cause to believe that she had caused her daughter's fatal malnutrition through neglect. That is to say, the ultimate issue in the case is not whether plaintiff actually neglected her daughter but whether the detective reasonably concluded, based on the evidence available to him at the time of the arrest, that she probably had done so. Thus, it is not legally relevant that a factfinder, or a reviewing court, might be persuaded by a trial record created 13 years after the arrest that plaintiff was not, in fact, responsible for the infant's death. Rather, to prevail, plaintiff was required to prove that it had not been reasonable for the detective to infer, from the information available to him when the arrest was made in 1998, that the infant's death probably had been caused by her mother's neglect.

This tort action went to trial after the City's motion for summary judgment was denied as untimely under applicable

procedural rules.[4] Plaintiff, who had breast-fed her daughter, did not deny that she had been the baby's sole custodian and, to reiterate, her medical expert did not take issue with the medical examiner's conclusion that the baby had died of malnutrition and that the malnutrition had not been caused by any observed physical or chemical defect. Rather, the expert offered the theory that the baby could have starved to death in spite of diligent feeding due to the "failure to thrive" syndrome, in which, unbeknownst to the nursing mother, her ostensibly healthy baby fails, for undetermined reasons, to ingest sufficient breast milk to sustain life.

Detective Faust, for his part, testified that he had arrested plaintiff in reliance on the medical examiner's conclusions that the child had died of malnutrition and that there was no medical cause for the malnutrition. From those findings of the medical examiner (which, again, have never been disputed), the detective inferred that it was probable that the child's malnutrition had resulted from the neglect of her feeding by her caregiver (plaintiff), and that such neglect constituted a

[4]While the dissent sees fit to take the City to task for having filed an untimely summary judgment motion, I observe that the City made that motion during one of the many periods during which the action was marked off-calendar.

crime. In this regard, Detective Faust — who said that seeing Cha-Nell's body had made an "indelible" impression on him and had "impacted [him] in th[e] same manner" as "seeing the World Trade Center fall" — testified as follows:

> "Q. . . . Is there any indication [in the final diagnosis set forth on the first page of the autopsy report] that the medical examiner found a digestive problem that led to malnutrition listed on his final diagnosis?
>
> "A. No.
>
> "Q. Is there anything from the medical examiner indicating that there was something biologically or medically wrong with the baby leading to the conclusion of malnutrition?
>
> "A. No.
>
> "Q. Based upon the absence of those terms, in conjunction with your conversation with the medical examiner, did you reach an understanding as to whether the malnutrition was a result of a lack of proper feeding or whether it was due to something wrong with the baby in some way, shape or form?
>
> "A. I found that there was nothing wrong with the baby and it was due to a lack of feeding.
>
> "Q. Now, when you say you found, that is based on what?
>
> "A. Based on the medical examiner's determination that there was nothing wrong with the baby. The baby was born perfectly healthy and yet the baby died of malnutrition.
>
> "Q. So, you did not make your own medical conclusion about the condition of the baby?

"A. No.

"Q. You didn't make your own medical conclusion at the time you observed the baby at the hospital; correct?

"A. No.

"Q. You did not make your own medical conclusions at the time you were present at the autopsy; correct?

"A. No.

. . .

"Q. Were medical conclusions presented to you at some point in time?

"A. Yes.

"Q. And when were they presented to you?

"A. They were presented to me on May 26th, 1998.

"Q. And based upon those medical conclusions what did you do?

"A. Based upon those medical conclusions I reopened the case, changed the qualification from investigate D.O.A. to possible homicide, investigate homicide, and continued the investigation."[5]

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[5]Earlier in the proceedings, Detective Faust had testified to similar effect as follows:

"Q. And in what way did [plaintiff] improperly feed the infant?

"A. She fed the infant not enough to keep the infant alive and caused the infant to die of malnutrition, because the infant was born perfectly healthy and it cannot feed itself, it cannot say I

Detective Faust concluded his testimony by stating that, once he had reopened the case as a homicide investigation, he identified plaintiff as the person responsible for Cha-Nell's death because plaintiff "had total custody and control of the child and was responsible for the feeding and nurturing of the child." That point is undisputed.

Plaintiff presented no evidence to show that Detective Faust, when he decided to make the arrest in 1998, had any reason to be aware of the "failure to thrive" theory, which plaintiff's expert propounded at trial in 2011. Plaintiff's case against the

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> don't want food, it can't commit suicide, so she was charged . . . ."

Similarly, at another point in the trial, Detective Faust gave the following testimony:

> "Q. . . . Based upon the medical examiner's autopsy, was there anything biologically wrong with this child before it died?
>
> "A. No.
>
> "Q. Was there any disease that it suffered from?
>
> "A. No.
>
> "Q. Was there any reason that it should not have been able to thrive had it been provided enough food in its stomach?
>
> "A. No."

City boiled down to the claim that, after Detective Faust received the official autopsy report concluding that the child had died of malnutrition for which the medical examiner was "unable to find a medical explanation" (as written in a note, dated May 7, 1998, included in the report), the detective — although a layman in medical matters — should have intuited the "failure to thrive" theory on his own.[6] Based on that theory, plaintiff contended, Detective Faust should have credited plaintiff's uncorroborated self-exculpatory claims (which she repeated in her trial testimony) that she had diligently fed the

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[6]Justice Acosta, in his dissent, faults the medical examiner for writing in the above-quoted note of May 7, 1998, that he inferred that the case was likely "a homicide" because, "with most of the test results [then] in [he was] unable to find a medical explanation" for the child's malnutrition. This inference was entirely reasonable, but even if the medical examiner's report could be professionally criticized in some way, plaintiff's claims against the City are *not* based on the conduct of the medical examiner; indeed, on this record, no claim against the City based on the medical examiner's conduct would lie (*see Lauer v City of New York*, 95 NY2d 95, 100-102 [2000]). Rather, plaintiff's claims are based entirely on the determinations to arrest and prosecute her, which were made by police and prosecutorial personnel who were not medical professionals and, therefore, had no choice but to rely on the medical examiner's findings about the medical aspects of the case in doing their jobs. In this regard, Detective Faust testified that "[t]he determination of cause of death is solely the responsibility of the medical examiner" — in other words, that, in conducting the investigation, he was obligated to accept the medical examiner's findings.

baby and, until the morning she found her without breath or pulse, had not had any idea that her daughter was slowly starving to death.[7]

The jury returned a verdict for plaintiff, finding that there had not been probable cause for the arrest in spite of the detective's reliance on the medical examiner's undisputed conclusion that the infant had died of malnutrition. For reasons more fully discussed later in this writing, Justice Sweeny and I believe that this verdict is legally insupportable on the trial record, even if one excludes from consideration the medical examiner's conclusion, not only that the baby had died of malnutrition, but that the "manner of death" had been "parental neglect," a statement that was redacted erroneously, but without objection by the City, from the autopsy report as received into evidence. Accordingly, Justice Sweeny and I believe that, on the instant appeal by the City, we should reverse the judgment for

[7]The dissent may deny taking the position that the detective should have intuited the failure to thrive theory, but that was assuredly plaintiff's position at trial and continues to be her position on appeal. The findings of malnutrition and of no evidence of an internal defect are both undisputed. Accordingly, to have any claim against the City based on her arrest, plaintiff had to posit some cause of the infant's malnutrition, other than her own negligence as sole caregiver, of which the detective should have been aware. On this record, she failed to do that.

plaintiff, grant the City's motion for judgment notwithstanding the verdict and dismiss the complaint, and we disagree insofar as the full bench fails to do so. However, since a majority of the panel is not inclined to dismiss the complaint, Justice Sweeny and I concur with Justice Kapnick insofar as we are reversing the judgment and granting the City a new trial based on the court's error in failing to admit the unredacted autopsy report into evidence to cure the prejudice accruing to the City from an improper line of inquiry pursued by plaintiff's counsel, as more fully discussed toward the end of this writing.

Before turning to the legal analysis of the issues raised by this appeal, I believe it necessary to point out a number of mischaracterizations of the record and of the law in the dissenting opinion.

1. In its very first paragraph, the dissent asserts — as if Detective Faust had no basis for concluding otherwise at the time of plaintiff's arrest — that the infant died "despite the best efforts of her attentive mother to nourish and care for her." In fact, the only support for characterizing plaintiff as an "attentive mother," either at the time of the relevant events or at trial, were plaintiff's own

uncorroborated self-exculpatory claims. Although plaintiff's medical expert purported to opine that plaintiff actually had diligently fed the baby, that opinion was legally irrelevant because (1) the expert's opinion, unlike the medical examiner's autopsy report, was unavailable to Detective Faust when he arrested plaintiff in 1998 and thus cast no light on the presence or absence of probable cause for the arrest, and (2) the opinion was based entirely on the witness's nonexpert determination to credit plaintiff's pretrial self-exculpatory testimony and was therefore inadmissible as expert testimony (*see People v Eberle*, 265 AD2d 881, 882 [4th Dept 1999] [expert testimony was not admissible where it "was not based on professional or medical knowledge but rather was based on inferences and conclusions drawn from various statements presented to (the expert)"]).[8]

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[8]There is no dispute that plaintiff's expert was competent to give testimony positing an alternative explanation for the infant's malnutrition that did not involve fault on plaintiff's part. The expert's competence to offer such an alternative explanation for the child's death, however, did not render him competent to address the factual issue of which of the two explanations was correct, given that he failed to identify any medical evidence supporting one theory over the other. As the

2. The dissent baselessly attributes the infant's death to her having been "neglected and ignored by" a murky entity denominated "the local medical establishment." The record shows that plaintiff knew that, until she obtained a Medicaid card for the baby (which she never did), she could take the baby to an emergency room for any urgently needed attention. Apart from taking the baby to a clinic one time, a week after she was born (from which plaintiff was turned away, after a quick examination, for lack of a Medicaid card for the baby or $25), plaintiff never sought any medical attention for the baby until she died. Contrary to Justice Acosta's accusation that I discuss these matters "to insinuate that [plaintiff] was responsible for her child's death," I refer to the history of plaintiff's seeking medical attention for the infant only to respond to the dissent's baseless attempt to place blame for Cha-Nell's death on "the

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expert himself admitted, the presence of food and stool in the child's digestive tract at death did not show whether she had been adequately fed for the preceding 5½ weeks. Again, plaintiff's credibility as a witness was not a proper issue for expert testimony.

local medical establishment." In a case concerning an arrest for the death-by-starvation of an anatomically and physiologically normal infant, this effort to shift attention to the alleged deficiencies of the City's public health institutions is a red herring. As Detective Faust testified, he arrested plaintiff "[b]ecause she did not adequately feed the baby and it cause[d] the baby to die."

3. The dissent attempts to create the appearance of a material issue of fact by taking out of context Detective Faust's statement, at the tail end of his testimony, that, "[b]y that one singular fact of the child dying from malnutrition, no, I would not make an arrest in that case" (which I will refer to as the "singular fact" statement). Contrary to the dissent's implication, the "singular fact" statement does not show that disputed information from outside the autopsy report (such as plaintiff's efforts to seek medical attention for Cha-Nell or what plaintiff's grandmother told the police) was essential to the determination to arrest plaintiff. Rather, when the "singular fact" statement is read in the context of the three pages of

the detective's testimony that immediately follow it (after which he was excused), it is plain that the detective meant that it was essential to his determination to make the arrest that the medical examiner found *both* that the death resulted from malnutrition *and* that the malnutrition did not result from any internal medical defect, and, moreover, that his investigation determined that plaintiff, by her own admission, had been the sole caregiver.[9] Contrary to the dissent's inaccurate assertions, neither the subject of plaintiff's grandmother's statements to the police, nor the subject of plaintiff's efforts to seek medical care for the baby, was raised again in the detective's brief remaining testimony after he made the "singular fact" statement. Further, as the trial record makes clear, those subjects were relevant only to whether the detective had grounds for believing that plaintiff had acted with depraved indifference or

[9]I have quoted the relevant testimony from the three pages of the trial record following the "singular fact" statement earlier in this writing, at the end of the paragraph above that begins, "Detective Faust, for his part . . . ." A mere perusal of this testimony refutes Justice Acosta's assertions and the inferences he seeks to draw.

recklessness to support a charge for murder (Penal Law § 125.25[2]) or manslaughter (Penal Law § 125.15[1]).[10] Since, as a matter of law, the autopsy report and plaintiff's admitted status as sole caregiver furnished probable cause for an arrest for criminally negligent homicide alone — a felony of which neither depraved indifference nor recklessness is an element (*see* Penal Law § 125.10; Penal Law § 15.05[4]) — any controversy concerning the grandmother's statements or plaintiff's efforts to seek medical attention did not warrant submitting the case to the jury. Further, while the

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[10]While Detective Faust never testified that the grandmother's statements and plaintiff's efforts to seek medical attention were necessary bases for suspecting plaintiff of criminal *negligence*, he testified that those matters did constitute the basis for suspecting her of *recklessness*:

> "Q. . . . I'm asking you factually, can you tell us factually what [plaintiff] did in your mind factually that you consider reckless conduct?
>
> "A. She failed to listen to other people's opinion who had nurtured and cared for children, who also had nurtured and cared for her, which was her grandmother. Her grandmother, in my statements it shows that, told her that the child was not — the child was too skinny, the child wasn't healthy, the child looked like it wasn't eating enough and she should take the child to the hospital. She refused. That's reckless."

record offers no support for the dissent's position that such matters were subjectively but mistakenly thought by the detective to have been essential to the determination to arrest plaintiff for criminally negligent homicide, the detective's subjective understanding could not change the fact that, as a matter of law, the medical examiner's opinion and plaintiff's admitted status as sole caregiver objectively provided probable cause for an arrest on that charge.[11]

4. The dissent asserts that plaintiff was the victim of a "rush to judgment" by the police department, which had only "a flimsy record" on which to base the decision to arrest her. In fact, there was no "rush to judgment." Plaintiff was not arrested until two months after the death of her daughter, when

[11]Notably, in the instrument the detective signed upon which plaintiff was arraigned, dated May 28, 1998, he referred to only two bases for the charges against her: (1) the medical examiner's opinion, after examining the infant's body, that she had died of malnutrition; and (2) plaintiff's "own statements that [she] is the mother of [the infant] and that [she] breastfed [sic] [the infant] and was the sole source of nourishment for [the infant]." The instrument makes no reference either to plaintiff's grandmother's statements or to any deficiencies in plaintiff's efforts to obtain medical attention for the baby.

the medical examiner's office issued the 48-page official autopsy report finding that the baby had died of malnutrition that was unrelated to any physical defect — a conclusion not challenged even by plaintiff's expert — but that was, in the medical examiner's opinion, probably due to parental neglect. *That*, in addition to other evidence discussed below, is the "flimsy record" to which the dissent refers.

5. There is absolutely no support in the record for the dissent's assertion that the charges against plaintiff were dropped because they were found to be "bogus." Further, the only medical opinion in the record attributing the death to "failure to thrive" syndrome is that of plaintiff's paid expert, and that opinion was offered in the course of this action, years after the relevant events. To reiterate, the record does not contain a shred of evidence tending to show that, at the time of the arrest, Detective Faust had any reason even to be aware of the "failure to thrive" theory, much less to accept it as the probable explanation of the baby's death.

6. The dissent accuses Detective Faust of

"ignor[ing] all the signs that pointed to a non-criminal cause of the infant's death" and of "blind[ly] following . . . the autopsy report notwithstanding the other evidence" supposedly tending to exonerate plaintiff. Upon analysis, these "signs" and "other evidence" amount to nothing more than plaintiff's own self-exculpatory statements, the medical examiner's initial visual impression that the deceased baby "appeared to be well fed," and the presence of some food in the baby's stomach and partially digested food and stool in the intestines upon her death. I am mystified by the dissent's reasoning that the medical examiner's initial visual impression of the body (which, as noted, the emergency room physician did not share) was more worthy of reliance than the medical examiner's ultimate finding, after extensive scientific analysis, that the baby had died of malnutrition — a finding disputed by no one, not even by the dissent.[12]

[12]While the baby's body initially appeared "well fed" to the medical examiner, as previously noted, the emergency room physician, Dr. Svetlana Bikvan, formed a different impression. As set forth in the hospital record (and acknowledged by plaintiff's expert at trial), Dr. Bikvan, upon viewing the baby's body, observed that "[the] child present[ed] as *malnourished*"

As to the presence of milk curds in the stomach, as previously noted, that showed only that the infant had been fed shortly before she died and revealed nothing about whether she had been adequately fed over the 5½ weeks she had been alive — as plaintiff's medical expert conceded at trial.[13] Similarly, the presence of

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(emphasis added), although she saw "no bruises" (which is irrelevant to this case, since plaintiff was never charged with having beaten the baby). Inexplicably, the dissent not only ignores Dr. Bikvan's observation that the child appeared to have been "malnourished" but misleadingly asserts that Detective Faust testified that "*two* medical professionals [presumably meaning Dr. Bikvan and the medical examiner] who viewed the child's body saw no apparent signs of abuse or neglect . . . and concluded that she appeared to be well fed" (emphasis added). In fact, the detective testified only that the *medical examiner*, not Dr. Bikvan, initially told him that the child "appeared" to have been "well fed" — an opinion that was abandoned, based on all of the available medical evidence, in the autopsy report issued two months later, which constituted the primary basis for plaintiff's arrest.

[13]Plaintiff's expert testified under cross-examination as follows:

> "Q. And to be clear, Doctor, although the baby had food in its stomach at the time of its death, it's not the feeding before its death that matters but what it had been fed from the time of birth up until the time of death that caused the malnutrition; correct?
>
> "A. It's the amount of milk, yes.
>
> "Q. So, the amount of milk from the date of birth, February 16th, 1998, until the date of its death, March 27th, 1998, that is the timeframe that matters;

partially digested food and stool in the intestines did not show that infant had been adequately fed for 5½ weeks.[14] Finally, in view of the established fact that the child died of malnutrition unrelated to any detectable medical defect, it was reasonable, as a matter of law, for Detective Faust to discredit plaintiff's uncorroborated attempts at self-exculpation.

7. The dissent highlights various portions of the autopsy report — quoting, for example, the paragraphs of the final summary report describing the digestive and musculoskeletal systems and recounting the finding of no drugs or alcohol in the blood — as if these somehow tend to negate the natural inference that malnutrition in a helpless infant, absent any evidence of an internal defect, likely resulted from neglect by

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correct?

"A. Yes."

[14]I am astonished by the dissent's statement that the autopsy report "indicat[es] that the child *was being fed*" (emphasis added), as if the report of the postmortem contents of Cha-Nell's digestive tract showed that she had been diligently fed throughout her short life, even though she ultimately had somehow starved to death.

the caregiver.[15] Similarly, the dissent makes the risible assertion — one not even made by plaintiff's expert witness — that "a careful reading of the report should have alerted the detective [who was not a medical professional] that the medical examiner's redacted opinion [that the malnutrition resulted from neglect] was not even supported by the contents of the report." What the dissent overlooks is the fact that all of the medical evidence in the autopsy report establishing that the infant died of malnutrition (as is undisputed), combined with the undisputed lack of evidence of any internal defect, constituted circumstantial evidence of neglect by the caregiver.[16]

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[15]Particularly mystifying, in a case where the issue is whether there was probable cause to believe that plaintiff had neglected the *feeding* of her daughter, is the dissent's quotation of the report's description of the infant's "clavicles, sternum, ribs, vertebral column, and pelvis" as "unremarkable" and having "no fractures." Equally mystifying is the dissent's view that an autopsy report expressly attributing the death of an otherwise normal infant to "malnutrition" contains "no evidence of any form of neglect or abuse." The dissent does not come to grips with the fact that neglect of an infant's feeding is a form of neglect.

[16]This is plainly what the author of the autopsy report, Acting Deputy Chief Medical Examiner Stephen de Roux, M.D., meant in writing in his aforementioned note of May 7, 1998, that the case was "heading in the direction of a homicide" because, "with

Thus, the dissent's assertion that there was a "lack of evidence indicating parental neglect" is simply inaccurate. Stated otherwise, the finding of malnutrition in an infant of Cha-Nell's age (completely undisputed), in the absence of evidence of an internal defect in the digestive tract (again, completely undisputed), sufficed, as a matter of law, to create probable cause to believe that plaintiff had neglected her daughter's feeding, even if one excludes from consideration the medical examiner's further conclusion that the malnutrition had resulted from "parental neglect." Again, the contents of the infant's stomach and intestines showed only that she had been fed at some points before her death, not that she had been adequately fed for the preceding 5½ weeks. In sum, contrary to the dissent's baseless assertion, nothing in the autopsy report corroborated plaintiff's claims that she had been "doing her best to feed her infant daughter," and — in light of the report's completely

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most of the test results now in, I am unable to find a medical explanation" for the infant's malnutrition. Inexplicably, the dissent takes exception to this logical statement by a professional medical investigator.

undisputed conclusion that the infant died of malnutrition — it was reasonable, as matter of law, for the detective to decline to take at face value plaintiff's understandable attempts to exonerate herself.[17]

8. The dissent asserts that "there was no indication that plaintiff had either intentionally, recklessly or negligently starved the infant."[18] Since the findings of malnutrition and lack of an internal digestive defect are entirely undisputed (even by the dissent), this statement inaccurately implies that the medical evidence somehow pointed to the "failure to thrive" theory posited by plaintiff's expert at trial 13 years after the fact. Again, the medical evidence

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[17]The dissent's assertion that "the contents of the [medical examiner's] report along with the other evidence did not provide probable cause" for plaintiff's arrest, as well as the dissent's denial of the detective's right to discredit plaintiff's account in the face of the autopsy report, amount to an attempt to wish away both logic and the evidence.

[18]The dissent apparently throws in the word "intentionally" for inflammatory effect, since it has no relevance to the case. Plaintiff was never charged with having intentionally caused her daughter's death, and Detective Faust specifically testified that he did not believe that plaintiff had intended to starve the baby.

established only that the infant died of malnutrition not connected to any observed internal defect — from which negligence by the caregiver could reasonably be inferred — and, for the reasons previously discussed, nothing in the medical evidence suggested the "failure to thrive" theory that was the sole basis of plaintiff's claim.[19] In any event, to reiterate, plaintiff did not even attempt to show that Detective Faust had any reason to be aware of the "failure to thrive" theory at the time of the arrest.

9. Because the issue in the case was the reasonableness of Detective Faust's inference from the information available to him in 1998 that the infant's death probably had resulted from plaintiff's neglect — not whether the jury believed, based on the trial record created in 2011, that plaintiff actually had neglected her daughter — the following attempted defense by the dissent of the jury's verdict is inapt:

[19]After all, as previously noted, given that the record establishes, without dispute, that the child died of malnutrition unrelated to any detectable internal digestive defect, plaintiff could not maintain this action unless she posited some cause of the malnutrition other than her own negligence as sole caregiver. Needless to say, the 5½-week-old baby could not feed herself.

> "The jury reasonably could have found that, at the time of arrest, there was no basis for a prudent person to believe that an offense had been committed. That is, that the mother did not act recklessly or negligently in feeding the child and/or not realizing that the child was malnourished, or did not in fact commit any offense whatsoever."

This passage is a legal sleight of hand. Through the use of the equivocal phrase "That is" at the start of the second sentence, the dissent seeks to equate a finding that "there was no basis for a prudent person to believe that an offense had been committed" with a finding that "the mother did not act recklessly or negligently in feeding the child and/or not realizing that the child was malnourished, or did not in fact commit any offense whatsoever." Again, whether "there was [a] basis for a prudent person to believe that an offense had been committed" (the question presented in this action) is a question entirely different from the question of whether plaintiff "act[ed] recklessly or negligently in feeding the child and/or not realizing that the child was malnourished, or did not in fact commit any offense whatsoever" (a question that is emphatically *not* presented in this action). The first

question — the relevant one — is conclusively answered in the City's favor by the official autopsy report, regardless of any trial evidence from which the jury could have answered the second question — the irrelevant one — in plaintiff's favor.

Turning to the legal analysis of this appeal, the error made by my three colleagues who decline to dismiss the complaint, based on the evidence in the trial record, is the same one that was recently made by the majority of the panel of this Court that affirmed a similar judgment for a plaintiff after trial, only to be summarily reversed on appeal to the Court of Appeals, in *Lewis v Caputo* (95 AD3d 262 [1st Dept 2012], *revd* 20 NY3d 906 [2012]). As the Court of Appeals stated in *Lewis*: "While different inferences as to plaintiff's guilt or innocence of the underlying crime are possible, only one reasonable inference could be drawn from the facts regarding probable cause. Therefore, the issue was not one properly presented to the jury for determination" (20 NY3d at 907). Those words are equally applicable to this case.[20]

[20]*See also Figueroa v Mazza*, ___ F Supp 3d ___, 2014 WL 4853408, *1, 2014 US Dist LEXIS 139212, *4 (ED NY 2014) (setting aside a jury verdict for the plaintiff on his claims for false arrest, inter alia, and granting the defendant police officers judgment as a matter of law, notwithstanding that the jury might have discredited the defendants, and although the "(c)harges

To reiterate, the underlying question of plaintiff's guilt or innocence of the crime for which she was initially charged is of no moment in this civil action against the City for false arrest and malicious prosecution. Further, assuming that the police were presented, at the time of the arrest, with conflicting evidence concerning how the infant's death came about (which is the sole basis for the position of three members of this panel that the complaint should not be dismissed), any such "conflicting evidence . . . [was] relevant to the issue of whether guilt beyond a reasonable doubt could have been proven at a criminal trial, *not* to the initial determination of the existence of probable cause" (*Agront v City of New York*, 294 AD2d 189, 190 [1st Dept 2002] [emphasis added]) — a principle recently reaffirmed by a panel of this Court that included the author of the dissent (*see Medina v City of New York*, 102 AD3d 101, 107 [1st Dept 2012] [citing *Agront* in support of summary judgment dismissing claims for false arrest and malicious prosecution]; *see also Williams v City of New York*, 114 AD3d 852, 854 [2d Dept 2014] [citing *Lewis, Medina* and *Agront* in support of summary judgment dismissing claims for false imprisonment and malicious

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against plaintiff were eventually dropped") (Weinstein, J.).

prosecution]). As the Court of Appeals has observed, any "discrepancies" in the authorities' case against an arrested person "may impair their ability to prove guilt beyond a reasonable doubt at trial, but they generally have little bearing at preliminary stages where the only relevant concern is whether there is sufficient evidence to show probable cause to believe the defendant committed the crime" (*Gisondi v Town of Harrison*, 72 NY2d 280, 285 [1988]).

"Probable cause exists if the facts and circumstances known to the arresting officer warrant a prudent person in believing that the offense has been committed" (*People v Baker*, 20 NY3d 354, 359 [2013] [internal quotation marks and brackets omitted]; *see also People v Bigelow*, 66 NY2d 417, 423 [1985] [probable cause requires "merely information sufficient to support a reasonable belief that an offense has been . . . committed"]). "The evidence necessary to establish probable cause to justify an arrest need not be sufficient to warrant a conviction" (*Veras v Truth Verification Corp.*, 87 AD2d 381, 385 [1st Dept 1982], *affd for reasons stated* 57 NY2d 947 [1982]). And, as previously discussed, conflicting evidence as to guilt or innocence, and discrepancies in the case being built against the arrested person, while relevant to the prosecution's ability to prove

guilt beyond a reasonable doubt at trial, are not relevant to the determination of whether there was probable cause for an arrest (*see Gisondi*, 72 NY2d at 285; *Williams*, 114 AD3d at 854; *Medina*, 102 AD3d at 107; *Agront*, 294 AD2d at 190). Further, "when the facts and circumstances are undisputed, when only one inference [concerning probable cause] can reasonably be drawn therefrom and when there is no problem as to credibility . . . , the issue as to whether they amount to probable cause is a question of law" (*People v Oden*, 36 NY2d 382, 384 [1975]). Since there is no dispute about either (1) plaintiff's status as the infant's sole custodian, (2) the contents of the autopsy report, or (3) the detective's reliance upon the autopsy report in making the arrest and initiating the subsequently aborted prosecution, probable cause for plaintiff's arrest and prosecution existed as a matter of law. It follows that this case should not have been submitted to the jury and that the City's motion for judgment notwithstanding the verdict should have been granted.

As previously discussed, the various factual matters discussed by the dissent — which matters the dissent generously characterizes as "other evidence that could have led a reasonably prudent person to conclude that plaintiff had committed no offenses even though the cause of death was malnutrition" —

simply cannot overcome the probable cause for the arrest established by the autopsy report. While the dissent (ignoring, as previously noted, the emergency room doctor's observation that the infant's body "present[ed] as malnourished") points to the medical examiner's initial impression that she "appeared to be well fed," plaintiff was not arrested on the basis of these first impressions but on the basis of the full autopsy report that became available two months later, which concluded, based on exhaustive measurement and analysis, that the cause of death was, in fact, malnutrition — as the emergency room doctor had immediately suspected. On the day the autopsy report was released, the medical examiner who authored it spoke to Detective Faust and, according to notes kept by an assistant district attorney who was also present for the interview, summarized the report's findings as follows: "[The] child was malnourished, had no baby fat, and the internal organs were beginning to lose muscle because of lack of nourishment. The baby weighed 2.8 kg in hospital [at birth] and at 5 weeks weighed only 2.6 kg."

Once the medical examiner's office issued its findings, based on the completed autopsy, that the cause of death was malnutrition, and that no defect in the child's digestive system had been detected, that determination in itself plainly

constituted circumstantial evidence of neglect and rendered obsolete the medical examiner's initial visual impression that the body did not show external "signs of neglect or abuse."[21] Further, in the face of the official autopsy report identifying malnutrition as the cause of death, the detective was not required to credit the statements plaintiff had made to him (before the autopsy report had been issued) in an attempt to exonerate herself from responsibility for her daughter's death. "An accused's exculpatory statement does not, of course, negate the existence of probable cause" (*Coleman v City of New York*, 182 AD2d 200, 205 n [1st Dept 1992]; *see also e.g. Baker v City of New York*, 44 AD3d 977, 980 [2d Dept 2007], *lv denied* 10 NY3d 704 [2008]; *Drayton v City of New York*, 292 AD2d 182, 183 [1st Dept 2002], *lv denied* 98 NY2d 604 [2002]).

Neither does the remaining purportedly exculpatory evidence recounted in the dissent negate the probable cause for plaintiff's arrest that was established as a matter of law by the

[21]Certainly, the medical examiner's uncontradicted conclusion that the infant died of malnutrition — the correctness of which neither plaintiff nor any justice on this bench questions, there being no basis in the record to support such questioning — establishes that the initial visual impression that the infant's body "appeared to be well fed" was simply mistaken and entitled to no weight.

autopsy report. The presence, at the time of death, of food in the child's stomach, and of partially digested food and stool in the intestines, showed only that plaintiff had sometimes fed the infant before she died, and revealed nothing about whether she had been adequately fed over the 5½ weeks she had been alive.[22] Any issue of fact as to the accusations plaintiff's grandmother made to the detective about plaintiff (as summarized in the following footnote) pales into insignificance in the face of the autopsy report, which was sufficient, standing alone, to provide probable cause for the arrest, given the undisputed fact that plaintiff was her daughter's sole custodian.[23] Finally, the

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[22]Indeed, the presence of food and stool in the stomach and intestines tends to undercut plaintiff's "failure to thrive" theory of her daughter's death. Under that theory, as explained by plaintiff's expert at trial, a breastfeeding baby fails to take in sufficient breast milk to sustain itself. Thus, the contents of the infant's digestive tract at death tend to show that she was capable of ingesting milk from her mother's breast when given an opportunity to do so.

[23]The notes of the grandmother's interview on the day the autopsy report was released reflect the following statements to Detective Faust, another detective and an assistant district attorney: "Witness saw baby was very small. She told [plaintiff] to drink more milk and nurse baby longer. Wit[ness] saw [plaintiff] try to pump milk from breast for long time obtaining very little milk and leaving the pumped milk around the house i.e. not giving it to baby. Wit[ness] stated she minded the baby for very short periods of time (an hour or so) and [plaintiff] did not leave food for the baby." Plaintiff does not challenge the veracity of this contemporaneous account — by the assistant

dissent blatantly mischaracterizes the record in asserting that the jury could find "malice" from the detective's supposed "disregard of evidence that the child was being fed and was not otherwise neglected or abused." The detective did not "disregard" the evidence to which the dissent refers, namely, the first impressions formed upon the initial examination of the infant's body, which were not the basis for the arrest. In fact, when those first impressions were the best evidence available to him, the detective did not think he had reason to believe that a crime had been committed. Those first impressions became academic, however, when the full autopsy report was produced two months later, setting forth the conclusion, after full consideration of all the forensic evidence, that the child had died of malnutrition.

While it is true that "the issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts *or the proper inferences to be drawn*

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district attorney, not Detective Faust — of what the grandmother told the investigators. Notwithstanding the dissent's best efforts to "spin" the record in plaintiff's favor, this uncontroverted account of what the grandmother told the arresting detective provides no support to plaintiff's claims against the City while strengthening the City's case that the detective had probable cause to arrest plaintiff.

from such facts" (*Parkin v Cornell Univ.*, 78 NY2d 523, 529 [1991] [emphasis added]), the dissent distorts the italicized phrase by suggesting throughout that the relevant "inferences" in this inquiry concern the underlying question of the arrested person's guilt or innocence. On the contrary, the "inferences" at issue in an action for false arrest concern whether the arresting officer had a reasonable (even if contestable) basis for concluding that the arrested person probably did commit an offense — in other words, an inference about the reasonableness of the inference the arresting officer drew about the arrested person's guilt or innocence. That the facts might give rise to conflicting inferences about an arrested person's guilt or innocence does not necessarily mean — and, on the record in this case, emphatically does *not* mean — that conflicting inferences could reasonably be drawn about the presence or absence of probable cause for the arrest. Here, the detective who arrested plaintiff did so on the basis of the best evidence that was available to him — the official autopsy report concluding that the 5½-week-old infant died of malnutrition and that the malnutrition had not been caused by any inborn defect. In view of this evidence, the only inference that could reasonably be drawn was that the detective had probable cause to believe that

plaintiff had neglected her child.

The dissent seems to believe that, even after the detective received the autopsy report, he was obligated to take at face value plaintiff's assertions that she had fed her daughter whenever she cried and had no idea that the infant was not receiving adequate nutrition. Of course, once he had the autopsy report in hand, the detective could reasonably infer that, since no physical defect in the infant's digestive system had been found, the truth more likely was that plaintiff had neglected the feeding of her daughter, contrary to her self-exculpatory statements, but fully consistent with what he had been told by plaintiff's grandmother, as recorded in the previously quoted notes of the assistant district attorney, and with plaintiff's own statement to investigators on the day of her arrest that "[the] child appeared small and thin and . . . [plaintiff's] grandmother kept after her to eat better to feed the baby better."[24] Again, the record is devoid of evidence that the failure-to-thrive theory to which plaintiff's expert testified at trial in 2011 was known to the detective when he arrested plaintiff in 1998. Further, the dissent misleadingly quotes

[24]These admissions by plaintiff are reflected in notes of the interview that were kept by an assistant district attorney.

plaintiff's expert as opining that plaintiff had done "a good job" of taking care of her daughter, ignoring the fact that this was a response to a hypothetical question seeking to elicit the opinion that the child could have become malnourished even if it were *assumed* that plaintiff had properly cared for the baby. As previously noted, while the expert could opine that it was possible for the baby to have become malnourished without neglect, he was not competent to testify that plaintiff had not neglected the infant — a factual matter completely outside his knowledge.

It bears emphasis that the primary basis for plaintiff's arrest was not an accusation made by a private individual but the official autopsy report produced by the Office of the Chief Medical Examiner of the City of New York.[25] The medical examiner's conclusions that the infant died of malnutrition, and that the malnutrition was not caused by any physically

[25]Notably, in the instrument upon which plaintiff was arraigned, Detective Faust averred in part as follows: "Deponent states, that deponent is informed by Stephen de Roux, M.D., that he is a medical examiner who examined the deceased body of Cha-Nell Coppedge and that the cause of death is malnutrition." Again, because the medical examiner's conclusions, by themselves, sufficed to create probable cause for the arrest, any factual issues concerning what plaintiff's grandmother told the police are irrelevant.

discernible inborn defect, have never been disputed. There is simply nothing in the record to negate the reasonableness of the detective's reliance on this autopsy report. Accordingly, the dissent misplaces reliance on decisions such as *Smith v County of Nassau* (34 NY2d 18 [1974]), *Sital v City of New York* (60 AD3d 465 [1st Dept 2009], *lv dismissed* 13 NY3d 903 [2009]), *Carlton v Nassau County Police Dept.* (306 AD2d 365 [2d Dept 2003]) and *Stile v City of New York* (172 AD2d 743 [2d Dept 1991]), which hold only that an issue of fact exists as to probable cause where the arrest was made in reliance on the accusation of a private individual or individuals whose credibility was, in view of the record, reasonably questionable. No such credibility issue exists in this case.

For the foregoing reasons, I believe that the City is entitled to reversal of the judgment and dismissal of the complaint based on the evidence submitted to the jury at trial. It bears noting, however, that the autopsy report provided even greater support for the existence of probable cause than the jury knew. As previously noted, at plaintiff's request, the autopsy report was received into evidence in redacted form, with one of its conclusions — that the infant's "manner of death" was "homicide (parental neglect)" — withheld from the jury's

consideration.[26] Although the City did not initially object to plaintiff's request for the redaction, it seems to me that redaction was plainly erroneous. The statement by the medical examiner in the official autopsy report that the death was the result of "homicide (parental neglect)" was obviously relevant to show that the detective had a reasonable basis for placing plaintiff under arrest. As Justice Kapnick correctly observes, the conclusion of the report was being offered, not for its truth, but "for the effect it had on the mind of the detective who made the arrest."[27] And, again, it was the reasonableness of

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[26]Justice Acosta disparages the medical examiner's conclusion that Cha-Nell became malnourished as a result of "parental neglect" as a "baseless, unsupported opinion." Here, again, my colleague seems to be engaged in wishing away the evidence, given that no one disputes either that the child died of malnutrition or that she was found not to have suffered from any internal medical defect. In any event, the City's liability depends on whether Detective Faust (who was not a medical professional) acted reasonably in relying on the medical examiner's conclusions, not on whether the medical examiner used due care in reaching those conclusions. Moreover, the record does not include any expert evidence impugning the medical examiner's report, and we on this Court are not professionally qualified to evaluate his conclusions.

[27]In this regard, Justice Kapnick aptly cites *Rivera v City of New York* (200 AD2d 379 [1st Dept 1994]), a medical malpractice action in which we held that a statement concerning the plaintiff's cocaine use made by her niece to an emergency medical technician was admissible because it was offered not for the truth of the matter asserted "but for the purpose of showing the technician's state of mind with respect to plaintiff's condition"

the detective's decision to arrest in light of the information in his possession at the time — not the underlying question of whether plaintiff had neglected the infant — that was at issue at the trial of this matter. Indeed, even if the question of how Cha-Nell came to be malnourished had been at issue here (which it was not), the medical examiner's opinion that the malnutrition resulted from neglect, based on his exclusion of any medical defect, would have been admissible (*see Broun v Equit. Life Assur. Socy. of U.S.*, 69 NY2d 675, 676 [1986] [the exclusion of the medical examiner's opinion that the decedent had committed suicide, based on his examination of matters outside the jury's ken, constituted reversible error]; 58A NY Jur 2d, Evidence and Witnesses § 732). The dissent's view that the autopsy report's conclusion on the manner of death was inadmissible logically carries with it the disturbing implication that law enforcement authorities are not entitled to rely on the conclusions of the official written report of a medical examiner's office in

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(*id.*; *see also Fleisher v City of New York*, 120 AD3d 1390, 1391-1392 [2d Dept 2014] [in a personal injury action, the "Big Apple" map was admissible "for the nonhearsay purpose of establishing that the City had notice of the alleged defect," not for the map's truth, and the plaintiffs therefore were not required to establish that the map qualified as a business record]).

deciding whether to make an arrest.[28]

Given that a majority of this bench declines to dismiss the complaint, Justice Sweeny and I concur with Justice Kapnick in reversing to grant the City a new trial based on the court's error in denying the City's application to reconsider the redaction of the autopsy report. After plaintiff's counsel questioned the detective, over the City's objection, about the possibility for malnutrition to result from a medical defect, the City applied to have the autopsy report published to the jury without redaction of the conclusion that the death was the result

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[28]Since the issue in this case was whether the detective had probable cause to arrest plaintiff — not whether plaintiff was actually guilty or innocent of causing the death of her child through neglect — the dissent misplaces reliance on *Schelberger v Eastern Sav. Bank* (93 AD2d 188 [1st Dept 1983], *affd* 60 NY2d 506 [1983]) and *Welz v Commercial Travelers Mut. Acc. Assn. of Am.* (266 App Div 668 [2d Dept 1943]). In each of those cases, the autopsy report's conclusion that the plaintiff's decedent had committed suicide (as claimed by the defendant insurer) was excluded because whether or not the death actually was a suicide was the ultimate issue to be resolved by the jury. Another decision inaptly cited by the dissent in this connection, *People v Eberle* (265 AD2d 881 [4th Dept 1999], *supra*), did not concern the admissibility of an autopsy report at all. The expert's testimony opining on the manner of the victim's death in *Eberle* was excluded because it "was not based on professional or medical knowledge but was rather based on inferences and conclusions drawn from various statements presented to her by the police" (*id.* at 882). Here, the medical examiner concluded that the infant's death was caused by "parental neglect" because the autopsy did not reveal any other possible cause of malnutrition.

of "homicide (parental neglect)." Plainly, the City was grievously prejudiced by plaintiff's suggestion that the infant had become malnourished as the result of some internal defect when the detective had acted in reliance on the professional opinion of the Office of the Chief Medical Examiner that the malnutrition was the result of parental neglect, implicitly rejecting plaintiff's theory of an internal defect. The court ultimately denied the City's application on the ground that the City had not called a medical expert to testify concerning the cause of the infant's death. In so doing, the court overlooked that the issue for the jury to determine was the reasonableness of the detective's decision to arrest plaintiff, in light of the information in his possession at the time, not whether the death of plaintiff's daughter resulted from neglect or from some other cause.

I am astonished by the dissent's view that, in a case concerning the existence of probable cause for an arrest for homicide by parental neglect, the medical examiner's conclusion that the manner of the infant's death was "homicide (parental neglect)" was too "unduly prejudicial" to be published to the

jury.[29] The statement was "prejudicial" to plaintiff's case only in the sense that it was highly probative — dispositive, in fact — of the question of whether Detective Faust had probable cause to arrest plaintiff. Otherwise admissible evidence bearing directly on the ultimate question to be determined at trial — as the medical examiner's conclusion did here — does not become subject to exclusion simply because it is devastating to the position of the party seeking to exclude it. As the question at trial was whether Detective Faust had probable cause to arrest plaintiff for criminally neglecting her daughter, the medical examiner's conclusion about the manner of the child's death went to the very heart of the case. The conclusion of the medical examiner, on which the detective indisputably relied in making the arrest, constituted direct evidence of the grounds for his action, and was not subject to exclusion for being more prejudicial than probative, as if it were merely collateral evidence of some kind. In this case, any prejudice of the evidence in question arises precisely from its extremely probative nature. Moreover, as noted by Justice Kapnick, since

[29]As noted by Justice Kapnick, Justice Acosta's theory that the redacted material was "unduly prejudicial" to plaintiff was not the basis on which the trial court denied the City's application to undo the redaction.

the jury necessarily knew that plaintiff had been arrested for causing her daughter's death through neglect, it is difficult to see how the medical examiner's conclusion would have caused her further prejudice, as opposed to explaining the basis on which the challenged arrest was made.[30]

Putting aside that the redaction of the autopsy report was an error in the first instance, the denial of the City's subsequent application to publish the unredacted report to the jury constitutes an independent ground for reversal and granting of a new trial. At a minimum, plaintiff's counsel's pursuit of a theory of internal defect in her examination of the detective opened the door to the admission of the unredacted autopsy report, excluding internal defect as the cause of the

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[30]If the autopsy report's conclusion that Cha-Nell died as a result of "parental neglect" was correctly excluded from evidence on the ground that it was unduly prejudicial to plaintiff, as the dissent contends, then it would appear that this Court incorrectly decided *Campbell v Manhattan & Bronx Surface Tr. Operating Auth.* (81 AD2d 529 [1st Dept 1981]). In *Campbell*, an action arising from a collision between a car and a bus, we reversed a judgment after trial for\ the plaintiff (a passenger in the car) against the defendant bus company on the ground that the trial court had improperly excluded from evidence a post-accident hospital record indicating that the driver of the car (also a defendant in the case) had been intoxicated (*id.* at 529-530), notwithstanding any prejudice that may have accrued to the plaintiff or the driver of the car from the admission of the hospital record.

malnutrition, upon which the detective relied in making the arrest. The other testimony to which the dissent refers in connection with this issue was not sufficient to cure the prejudice that accrued to the City from plaintiff's counsel, through her examination of the detective, having deliberately exploited the redaction of the autopsy report to suggest to the jury a theory of the manner of the infant's death (internal defect) that was contradicted by the redacted portion of the autopsy report, and that was not even supported by plaintiff's own expert.[31] Further, the dissent's theory (refuted by *Fleisher* [120 AD3d 1390] and *Rivera* [200 AD2d 379]) that the City should have called a medical examiner to give live testimony, on the ground that the autopsy report was "inadmissible hearsay," would have required exclusion of the report in its entirety, and is contrary to CPLR 4518 and 4520 (*see Broun*, 69 NY2d at 676 [the redaction of an autopsy report "to omit the (medical examiner's)

[31]Plaintiff's counsel asked the detective whether he knew that "malnutrition can be caused from defective digestion" and that "malnutrition could be caused by defective assimilation of foods." Unmistakably, these questions evince an intention by counsel to suggest to the jury the possibility that the infant died as a result of an internal defect of her digestive system, contrary to both the undisputed facts and the medical examiner's actual conclusion — withheld from the jury's consideration — concerning the manner of death.

'suicide' conclusion was error" under CPLR 4520, inter alia]; *Walters v State of New York*, 125 Misc 2d 604, 604-605 [Ct Cl 1984]).[32]

Justice Acosta accuses the three justices joining in the determination to remand the case for a new trial (Justice Sweeny, Justice Kapnick and myself) of "adopt[ing] a position . . . that is wrong on the law, barren of common sense and at odds with our duty to determine cases in accordance with fundamental principles of fairness and justice." This accusation is both intemperate and inaccurate. Plainly, the City's failure to object in the first instance to plaintiff's request to redact the "parental

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[32]Contrary to the dissent's position, *Walters* supports admitting the medical examiner's conclusion that the infant's death resulted from parental neglect. The finding of neglect was not a conclusion about the caregiver's intent or state of mind but simply a medical finding that, as a matter of fact, the malnutrition of which the infant died resulted from neglect of her feeding, not from any internal medical condition. This differs from a finding of "suicide," which necessarily implies that the decedent intended his or her own death. I observe that the dissent's position that the medical examiner's neglect finding was inadmissible is inconsistent with his view that plaintiff's medical expert was properly allowed to opine — based on nothing more than plaintiff's own self-serving account — that she had not neglected her daughter's feeding. In any event, and to reiterate, the question in this case was whether the medical examiner's report gave the detective, who was not a medical professional, a reasonable basis for believing that plaintiff had neglected her daughter, not how the baby had come to be malnourished.

neglect" statement from the report bars the City from obtaining a new trial based on the initial grant of the requested redaction. The City's initial failure to object did not bar it, however, from seeking to undo the redaction to cure the prejudice caused to the defense by plaintiff's counsel's improper suggestion to the jury that the child's malnutrition might have resulted from an internal defect in her digestive system — a possibility that the medical examiner had excluded, unbeknownst to the jury because of the redaction. The City, like any other litigant, is entitled to a fair trial. Further, the "opening the door" theory on which the City relies in arguing for undoing the redaction of the autopsy report "must necessarily be approached on a case-by-case basis" and, therefore, "this principle is not readily amenable to any prescribed set of rules" (*People v Melendez*, 55 NY2d 445, 452 [1982]).

Justice Acosta finds "incongruous" my view that the City was seriously prejudiced by plaintiff's counsel's use of her examination of Detective Faust to suggest to the jury that a medical defect might have been involved in the infant's death when, as I have noted several times, plaintiff did not otherwise contend that the infant had suffered from a medical defect. Any supposed incongruity melts away when one considers that it was

precisely the lack of evidence of any medical defect that rendered counsel's suggestion improper. While Justice Acosta accuses me of "switch[ing] gears" in this opinion, it was in fact plaintiff's counsel who tried to have it both ways at trial by suggesting through her questioning of the detective a theory for which — as conceded by her own expert — there was no evidence. Such prejudicial gamesmanship required a more effective remedy than counsel's "mov[ing] on" upon the City's objection to her line of questioning, and thus opened the door to the admission of the "parental neglect" finding previously redacted (erroneously, but without objection) from the autopsy report. In my view, the trial court abused its discretion as a matter of law in failing to grant the City this relief, and the error, which concerned a matter at the heart of the case, cannot be deemed harmless.

Justice Acosta makes much of the principle that the resolution of evidentiary issues arising at trial, when not dictated by statutory language or directly applicable precedent, is committed to the discretion of the trial court. That principle is beyond question, as is the proposition that a reviewing court should accord a large measure of deference to a trial court's exercise of its discretion in such matters. But that a determination lies within the scope of the trial court's

discretion does not mean that the discretion cannot be abused. And when an appellate court determines that the trial court abused its discretion in ruling on an evidentiary issue and thereby caused substantial prejudice to the appealing party, it is the appellate court's duty to direct that the case be retried (*see e.g. People v McLeod*, 122 AD3d 16, 18 [1st Dept 2014] [reversing the judgment on the ground that "the trial court improvidently exercised its discretion by precluding (a) proposed line of questioning . . . because the probative value of the questions . . . was not outweighed by any purported prejudice against the People"] [Acosta, J.]).

Here, plaintiff's verdict is tainted by her counsel's misleading suggestion to the jury of a possible cause of the infant's malnutrition that had been ruled out by a portion of the autopsy report that had been excluded from evidence. The trial court should have cured the prejudice to the City resulting from counsel's misleading suggestion by granting the City's application to publish the previously redacted portion of the autopsy report to the jury. Given that the evidence in question went to the heart of the case, a majority of this panel holds that the trial court's refusal to grant the City this relief was an abuse of discretion warranting reversal of the judgment and a

new trial.

Moreover, as even the justices dissenting from the reversal concede, "[t]he Appellate Division, as a branch of Supreme Court, is vested with the same discretionary power and may exercise that power, even when there has been no abuse of discretion as a matter of law by the nisi prius court" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52-53 [1999]; *see also Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]; 11 Carmody-Wait 2d § 72:142). To be sure, appeals on such grounds are not encouraged, and we exercise our power of substitution sparingly. However, where we are presented with a plainly improvident exercise of discretion by the trial court by which a party has been prejudiced on a pivotal issue in the case, reversal is appropriate even if the court arguably did not err as a matter of law. The power of the Appellate Division to substitute its discretion for that of the trial court extends to rulings on evidentiary issues (*see e.g. People v Agina*, 103 AD3d 739, 740-741 [2d Dept 2013] [reversing the judgment "on the facts and as a matter of discretion" because the trial court "improvidently exercised its discretion" in admitting *Molineux* evidence, the "probative value (of which) . . . was outweighed by its unfair prejudicial effect"]; *see also id.* at 743; *Barnes v*

City of New York, 296 AD2d 330, 332 [1st Dept 2002] [reversing a judgment after trial based on the exclusion of relevant evidence, which this Court found, contrary to the view of the trial court, to have "probative value (that) outweighs any incidental prejudicial effect"]; *cf. Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745-746 [2000] [in a lead-paint personal injury action, affirming, as an exercise of the Appellate Division's power to substitute its discretion for that of the trial court, this Court's reversal of an order granting a defense request for discovery of the plaintiff mother's IQ]).

Here, as noted, a majority of this panel concludes that the trial court abused its discretion as a matter of law in refusing to permit the jury to see key evidence bearing on the existence of probable cause after plaintiff's counsel took advantage of the redaction of that evidence to mislead the jury about the medical examiner's conclusions. Even if this ruling did not constitute error as a matter of law (which it did), an exercise of judicial discretion so unwise, and so prejudicial to the aggrieved party, would warrant reversal on the facts, in the exercise of this Court's own discretion.[33]

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[33]We reject the dissent's assertion that it is somehow "unfair" or "smack[ing] of arbitrariness" to require a retrial

I conclude by observing that the refusal of a majority of this bench to dismiss the complaint rests on the premise that it could be rationally concluded that the medical examiner's official finding that an infant, anatomically and physiologically normal at birth, starved to death after only 5½ weeks of life, did not provide probable cause for charging the infant's sole care-giver with criminal neglect. I cannot accept this premise, and therefore believe that we should reverse the denial of the City's motion for judgment dismissing the complaint notwithstanding the verdict. Given, however, that a majority has not voted to grant the City the judgment as a matter of law to which it is entitled, I concur with Justice Kapnick in granting the City the alternative relief for which it argues, namely, a new trial based on the trial court's prejudicial error, as previously discussed, in failing to publish to the jury the medical examiner's conclusion that the "manner" of plaintiff's infant daughter's death was "homicide (parental neglect)."

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when the first trial was itself unfair to the losing party as a result of the trial court's unwise application of its discretionary power. Nor do we understand the dissent's contention that it is somehow "inconsistent" with the trial-by-jury system for this Court to reverse and remand for a new trial — which will be conducted, like the previous trial, before a jury — based upon an erroneous and prejudicial evidentiary ruling by the court at the first trial.

KAPNICK, J. (concurring)

While I agree with Justices Acosta and Manzanet-Daniels that the issue of whether or not there was probable cause to arrest plaintiff was properly submitted to the jury because there was "'conflicting evidence, from which reasonable persons might draw different inferences . . .'" (*Parkin v Cornell Univ.*, 78 NY2d 523, 529 [1991], quoting *Veras v Truth Verification Corp.*, 87 AD2d 381, 384 [1st Dept 1982], *affd* 57 NY2d 947 [1982]), I believe that the trial court's denial of defendant's application to admit the unredacted medical examiner's report into evidence was reversible error. The redacted portion of the report contained the medical examiner's conclusion that the manner of death was "homicide (parental neglect)." While this evidence was properly redacted in the first instance, in light of defendant's failure to oppose plaintiff's motion in limine, it was error to keep it out when defendant subsequently moved for its admission after plaintiff "opened the door" and elicited testimony from Detective Faust suggesting that the baby's death resulted from malnutrition caused by defective digestion or some other underlying medical condition of the infant, when the autopsy report contained no such conclusions. To the extent that the trial court sustained the redaction because defendant did not

call an expert medical witness to testify as to the manner of death, this too was error since the redacted conclusion was not being offered for its truth, i.e., that the infant's manner of death was in fact "homicide (parental neglect),"[1] but rather, for the effect it had on the mind of the detective who made the arrest (*Rivera v City of New* York, 200 AD2d 379 [1st Dept 1994]). Therefore, an expert medical witness was not necessary and the trial court certainly could have given a limiting instruction to the jury on how to treat this evidence during deliberations.[2] Moreover, the dissent's conclusion that this statement was properly excluded because it states an inadmissible opinion as to the manner of death is supported by cases where the manner of death was the ultimate issue in the case, unlike here, where probable cause is the ultimate issue, as Justice Friedman aptly discusses in footnote 28 of his opinion.

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[1] It bears noting that the entire autopsy report, *except for these three words*, went into evidence without the testimony of a medical expert.

[2] While the criminal charges against plaintiff were ultimately dismissed, it was important that the jury have the opportunity to see what was available to the arresting officer at the time, to assist the jury in making its determination as to whether there was probable cause for the arrest or whether the arrest was made "on a flimsy record," as Justice Acosta suggests.

I respectfully disagree with the conclusion that even if the excluded statement was admissible to show the detective's state of mind at the time of the arrest, it was still properly excluded because it was more prejudicial than probative. While a trial court certainly may exercise its discretion to exclude otherwise technically admissible evidence when it finds that evidence to be more prejudicial than probative (*see People v Smith*, 22 NY3d 462, 467 [2013])[3], that analysis was not undertaken here. Rather, the trial court merely ruled that the autopsy report would remain redacted because "[t]here was no expert to testify that there was, in fact, poor parental neglect, and so, as a conclusion of law, not as a conclusion of medicine, I'm not permitting that portion of the medical examiner's report, the autopsy to be presented to this jury."

Nor can it be said that the words "homicide (parental neglect)" are so incendiary that their probative value on the issue of probable cause is "substantially outweighed by the danger that it will unfairly prejudice [plaintiff] or mislead the

[3] I note, however, that *People v Smith* does involve a different legal issue of whether redundant testimony regarding identification of the victim or alleged assailant, even if not hearsay, can be excluded if it is more prejudicial than probative.

jury" (*People v Marte*, 12 NY3d 583, 589 [2009] [internal quotation marks omitted], *cert denied* 559 US 941 [2010]). This is especially true here, where the fact that plaintiff was charged with homicide was not a secret to the jury, and in fact, the trial court charged the jury on the law of homicide. Moreover, the proposition for which the dissent cites *Matter of State of New York v Floyd Y.* (22 NY3d 95 [2013]) is inapposite here, where the evidence in question is not hearsay by definition because it would not be entered into evidence for its truth.

Finally, it cannot be said that the exclusion of this evidence was harmless error or that the excluded evidence would not have had a substantial influence in producing a different result (CPLR 2002; *see also Barbagallo v Americana Corp.*, 25 NY2d 655, 656 [1969] [directing a new trial where it could not be concluded that the jury would not have been influenced by details of excluded telephone conversations which were relevant to establish the duration and depth of the defendant's alleged fear, not for the truth of their contents]).[4] Therefore, although

[4] The case of *Matter of State of New York v John S. (*23 NY3d 326 [2014]), upon which Justice Acosta relies for the proposition that the trial court did not abuse its discretion when it decided not to admit the unredacted autopsy report is not dispositive of the issue at hand. *John S.* arises out of a Mental Hygiene Law article 10 proceeding and its discussion regarding evidentiary

conscious of the burdens a new trial will place upon plaintiff, I would nonetheless direct a new trial.

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rulings focuses specifically on the extent to which a court may admit hearsay evidence in such article 10 proceedings. While the Court in that case did remark that trial courts are "generally accorded broad discretion in making evidentiary rulings, which are entitled to deference on appeal absent an abuse of discretion," (*id.* at 344), it makes no reference to the applicability of CPLR 2002, which is essentially a codification of the "harmless error" doctrine in civil cases, is "applicable to appeals" and is used "most frequently in connection with a trial court's rulings on evidence" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2002).

ACOSTA, J. (dissenting)

Plaintiff Tatiana Cheeks, a young, poor, single mother living in the Bronx, and her infant daughter Cha-Nell, were so tragically neglected and ignored by the local medical establishment that baby Cha-Nell died, despite the best efforts of her attentive mother to nourish and care for her.

The mother's tragedy was then compounded by the rush to judgment by the New York City Police Department, which arrested her on a flimsy record and charged her with the depraved murder of her baby.

Once it was determined that these criminal charges were bogus, the charges were dropped.[1] To obtain a measure of justice, Tatiana brought a civil action for malicious prosecution against the City of New York, the employer of the detective who ignored all the signs that pointed to a noncriminal cause of the infant's death, and instead treated this grieving mother as unworthy of belief. An expert later testified that Cha-Nell most probably died as a result of what is medically known as a failure to thrive.

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[1]Although Justice Friedman takes issue with my characterization of the charges as "bogus," the fact remains that criminal charges were not pursued.

A Bronx jury finally recognized the injustice done and awarded plaintiff money damages. But now, on review, a majority of this panel reverses the hard-earned verdict Tatiana won, requiring her to tell her story in open court again (almost 16 years after the death of her child) and re-live those terrifying times once more in an expensive trial.[2] I dissent, perceiving no legitimate basis for awarding a new trial. In fact, I am troubled that my colleagues would grant a new trial on the basis of a discretionary evidentiary ruling supported by ample precedent and to which the City itself consented. I agree with the majority that we have an obligation to our oath of office, but that obligation does not require us to adopt a position advanced by the City that is wrong on the law, barren of common sense and at odds with our duty to determine cases in accordance with fundamental principles of fairness and justice. I do, however, believe that the amount of damages awarded by the jury was excessive.

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[2]Justice Friedman even goes so far as to insinuate that Tatiana was responsible for her child's death for failing to take her to the emergency room for "any urgently needed attention" instead of just attempting a follow-up visit at a clinic a week after the child was born. But, not only did a doctor at the clinic refuse to examine Cha-Nell because Tatiana did not have Medicaid, Tatiana testified that the nurse who attended Cha-Nell did only a cursory examination.

Facts

Plaintiff Tatiana Cheek's daughter, Cha-Nell, was born on February 16, 1998, weighing six pounds, five ounces. Plaintiff, who also had a 15-month-old son,[3] was a 21-year-old single mother. She lived with her grandmother and two younger siblings. Plaintiff was encouraged at the hospital to breast feed her daughter, which she did when she returned home. She was given an appointment to have the child seen at the clinic one week later. When she went to the clinic, she was told that the doctor would not see her because plaintiff did not have a Medicaid Card for her child or the $25 to pay the fee in the absence of a card. Instead, a nurse lifted the baby's shirt, gave her a cursory examination, and said nothing about her weight.

Plaintiff followed up with her public assistance worker, who told her it would take some time and additional documents to get a card. She was advised to contact the Department of Health

[3] After her arrest in the underlying case, the New York City Administration for Children's Services filed a petition in Kings County Family Court alleging derivative abuse with regard to her son. He was temporarily removed from her custody and placed in a relative's care. Plaintiff regained custody on March 23, 2000. In its decision, Family Court cited testimony of plaintiff's grandmother and step grandfather that Cha-Nell appeared "'small' but otherwise unexceptional just before her death," and concluded that "the child's malnourished condition was not evident to these ordinarily lay persons at that time."

regarding the child's vaccination shots because she did not think she would have the Medicaid card in time. She did so and was told to bring her child in for vaccination shots at six weeks.

Plaintiff testified that she continued to breast feed the child as often as she seemed hungry, approximately every 2 1/2 hours. She stated, "I thought I was feeding her like you feed a normal baby," meaning the "[b]aby cries and you feed the baby." Plaintiff testified that she did not realize the baby had not gained weight at three weeks old, or lost weight prior to her death. Her grandmother, who had spoken to the police just prior to plaintiff's arrest but was deceased by the time of trial, had commented that the baby was "puny," "a little thing just like [plaintiff]," "and her father [wa]s not bigger than a minute." Plaintiff did not take these comments as an indication that her grandmother thought the child was "unhealthy." Thus, it comes as no surprise that she never took Cha-Nell to an emergency room at a local hospital, but instead sought medical follow-up at a clinic. Cha-Nell died approximately 5½ weeks after she was born.

Detective Donald Faust of the New York City Police Department was assigned to lead an investigation into the baby's death. Faust saw the baby's body at the hospital and saw no signs of abuse, foul play, or anything abnormal at that time.

The emergency room doctor also found no apparent signs of abuse, nor did the medical examiner who conducted the autopsy the next day, on March 28, 1998. The medical examiner further told Faust on March 28 "that the baby appeared to be well fed." The medical examiner also told Detective Faust that he found milk curd ("white curd") in the baby's stomach and "partially digested food in the intestinal track."

Plaintiff was "cooperative" and forthcoming when Detective Faust questioned her later that day. Plaintiff told him that she breastfed the baby the night before and she recounted how they slept on the sofa together, and she discovered the next morning that the baby was not breathing. At that time, he had no basis for believing a crime had been committed, and Faust considered the case "closed."

On May 26, 1998, Detective Faust received the medical examiner's autopsy report, which concluded that the cause of death was "malnutrition" based on various physical findings, including that the baby's weight at the autopsy was below her birth weight and well below the fifth percentile for her age. At birth, the baby's weight was in the 25th percentile. The report also noted that she had scant body fat, low organ weight, and atrophy of her organs.

Other than the medical examiner's unsubstantiated statement "manner of death: homicide (parental neglect)," an opinion redacted from the autopsy report at trial without objection from the City, there was no indication in the report that plaintiff intentionally, recklessly or negligently starved Cha-Nell to death. Indeed, on page 3 of the report, under the sub-heading "Digestive System," the report states:

> "The esophagus is unremarkable. The unremarkable stomach contains 20 gm of curdy, white material. The small intestines, large intestines, and appendix are unremarkable. The small intestines contains abundant yellow chyme. The proximal portion of the colon contains mostly liquified yellow stool. The distal portion of the colon contains more formed, yellow-brown stool. The stool is abundant. The pancreas has normal external architecture. The parenchyma is brown" (emphasis added).

These findings, rather than suggesting malnutrition due to parental neglect, seem to indicate the opposite. That is, that plaintiff was in fact doing her best to feed her infant daughter. Thus, plaintiff's assertion that she had been breast feeding her daughter is hardly an "uncorroborated self-exculpatory claim" as Justice Friedman states. Significantly, the report also does not reflect that any scans were conducted to determine metabolic disorders.

Further, under the sub-heading "Musculoskeletal System," the

report notes:

> "The clavicles, sternum, ribs, vertebral column, and pelvis are unremarkable. There are no fractures. The red-brown skeletal muscles have a normal architecture. There are no areas of subcutaneous or intramuscular hemorrhage"

Again, there is no indication of parental neglect.[4] Page five indicates that no drugs or alcohol were found in the infant's blood. Pages 7 to 9 indicate that the brain had no abnormalities except for some congestion, but does not otherwise state that this congestion was due to neglect. Although on page 33 of the report, the ME notes that he learned from ACS that plaintiff was a drug abuser and that 13 months earlier, she had left her then five-month-old son home alone, ACS also reported that there have been "no further problems." Notwithstanding the lack of evidence indicating parental neglect, the ME nonetheless notes on page 36 of the report that the "case is currently heading in the direction of a [h]omicide due to malnutrition" because with "most of the test results now in[, he] was unable to find a medical explanation." In other words, since the ME could not find a medical reason for the child's death, the mother must have

[4]In quoting this section of the autopsy report, my intent was not to mystify my colleague, but merely to show that there was no evidence of any form of neglect or abuse in the report.

neglected to nourish the child despite evidence to the contrary.

After Faust received the autopsy report, he interviewed plaintiff's grandmother on May 26, 1998, the day before plaintiff's arrest. The assistant district attorney audiotaped the statement and kept the tape. At trial, which occurred 13 years later, Faust recalled certain statements made by the grandmother at that interview. Plaintiff's grandmother told him "that the baby had little rabbit legs," and that she did not trust plaintiff to watch plaintiff's younger siblings because "'I wouldn't let her watch my cat, and I don't like cats.'" Faust also recalled the grandmother's statements that she told plaintiff to take the baby to the hospital because she looked sick, was too skinny and was not gaining weight, and that plaintiff refused to do so. He acknowledged, however, that the grandmother's statements about the "little rabbit legs," about not allowing plaintiff to watch a cat, and that she advised plaintiff to get the child medical attention were not contained in the summary of the audiotape recorded 13 years earlier.

On May 27, 1998 plaintiff voluntarily went to the precinct for questioning and gave a statement. She stated that her grandmother told her that she needed to drink more milk "so I told her . . . that I would ask the doctor if my breast milk was

good and if not I would give her . . . Enfamil." She also recounted her efforts to have Cha-Nell be seen at a clinic a week after her birth only to be turned away for lack of cash or a Medicaid card, her efforts to obtain that card and conversations with the Board of Health regarding vaccines for the baby. She was arrested later that evening without a warrant and charged with the death of her daughter. Detective Faust testified that the baby's death from malnutrition was not the sole basis for the arrest: "By that one singular fact of the child dying from malnutrition, no, I would not make an arrest in that case." Although he also took into consideration that the malnutrition did not result from any internal medical defect in deciding to re-open the investigation, he testified that the grandmother's statements also entered into his decision to arrest plaintiff:

> "Q. Anything that the grandmother told you, sir, was that your basis for believing that a crime had been committed?
>
> "[Defendants' counsel]: Objection
>
> "THE COURT: Was that his basis? Well, do you mean was it his sole basis?
>
> "Q. Was it one of the bases in which you believed that a crime had been committed?
>
> "A. Yes."

Earlier in Detective Faust's testimony, the Court posed the

question:

> "THE COURT: All right, so you based your decision to arrest based on the Medical Examiner's statement?
>
> "THE WITNESS: Not, only, sir.
>
> "THE COURT: In addition to the Medical Examiner's.
>
> "THE WITNESS: Yeah, it was part of the Medical Examiner's statement, it was part of my investigation, it was part of [the] statement from the [plaintiff] herself at the time."

The charges against plaintiff were eventually dismissed.

Dr. Harold Raucher testified on plaintiff's behalf. At the time of trial, he was a board certified, practicing pediatrician, and had been teaching at Mt. Sinai Hospital's pediatrics department throughout his 29 years of private practice. He was also president of the New York Pediatrics Society. According to Dr. Raucher, most newborn babies lose five to ten percent of their weight in the "first few days," and most breastfed babies don't receive much milk "because the mother's milk hasn't come in yet." Infants start to gain weight after three to four days, but they generally do not attain their birth weight until they are close to two weeks old.

Dr. Raucher explained a concept known as "failure to thrive," which is essentially a failure to grow, physically or

psychologically. In such cases, unlike a mother who bottle feeds a baby, a breastfeeding mother "has no idea as to the amount of milk that is transferred from her to the baby," so if the amount of milk is insufficient, "they usually don't know it." The only way to know is to weigh the baby before and after feeding. Dr. Raucher further testified that there are no "classic signs" of malnutrition, such as crying or sleeping long hours.

Dr. Raucher ultimately opined that Cha-Nell died of malnutrition, because "the mother was unaware that the child was not getting enough calories, and the cause of the malnutrition was a low quantity of breast milk." Based on autopsy evidence of milk in the stomach, he concluded that the baby was being fed prior to her death. Thus, "if there was malnutrition, the only way that it was going to happen was if the baby was not receiving enough calories . . . . T]he mother was breastfeeding the right number of times and [the] right way, the right schedule . . . . [T]here was just not enough milk. There was some – there just wasn't enough to grow on." He said, "[E]verything that I saw led me to the conclusion that [plaintiff] had done a good job. She had done what a mother is supposed to do." Dr. Raucher found "no

evidence of improper care on the part of the mother."[5]

The City did not call the medical examiner nor any medical experts to testify at trial. In fact, although the City's main argument on appeal is whether the issue of probable cause to arrest should have been decided as a matter of law and not by a jury, the City failed to seek dismissal by filing a timely motion for summary judgment. Instead, it placed the issue before a jury, lost, and now it is complaining that the issue should never had gone to the jury in the first place. At trial, the City defended its strategy by noting that it had sought dismissal by filing an untimely summary judgment motion. The untimely filing, however, had the same affect as not filing a motion at all (*see Brill v City of New York*, 2 NY3d 648 [2004]); this is especially true when the denial of the untimely motion is not before us on appeal. The City should not be commended or rewarded for failing to follow procedural rules that have been in place for quite some time (*see also John v Bastien*, 178 Misc 2d 664 [Civ Ct, Kings County 1998], [cited by *Brill* at 652, with approval]).

Analysis

[5]Although Justice Friedman asserts that this evidence was inadmissible expert testimony, the City never objected to it at trial.

The Issue of Probable Cause Was Properly Submitted to the Jury

Contrary to the view of Justices Friedman and Sweeny, the court properly denied defendant's motion for judgment notwithstanding the verdict as a matter of law. Viewing the evidence in the light most favorable to plaintiff, there was a permissible inference that could lead a rational jury, as it did here, to conclude that there was no probable cause to arrest plaintiff (*see Parkin v Cornell Univ.*, 78 NY2d 523, 529 [1991] ["the issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn from such facts"], citing *Veras v Truth Verification Corp.*, 87 AD2d 381, 384 [1st Dept 1982], *affd* 57 NY2d 947 [1982]). "Where there is 'conflicting evidence, from which reasonable persons might draw different inferences . . . the question [is] for the jury'" (*Parkin*, 78 NY2d at 529, quoting *Veras*, 87 AD2d at 384; *see Sital v City of New York*, 60 AD3d 465 [1st Dept 2009], *lv dismissed* 13 NY3d 903 [2009]). Thus, in the absence of a defense to either claim as a matter of law (*see e.g. Hernandez v City of New York*, 100 AD3d 433 [1st Dept 2012], *lv dismissed* 21 NY3d 1037 [2013]), the claims of false arrest and malicious prosecution were properly

submitted to the jury.

The evidence demonstrated that notwithstanding the conclusion in the autopsy report that the child died of malnutrition, the detective testified that two medical professionals who viewed the child's body saw no apparent signs of neglect or abuse, found food in the child's stomach, and concluded that she appeared to be well fed. Thus, there was no indication that plaintiff had either intentionally, recklessly or negligently starved the infant. The jury reasonably could have found that, at the time of arrest, there was no basis for a prudent person to believe that an offense had been committed. That is, that the mother did not act recklessly or negligently in feeding the child and/or not realizing that the child was malnourished, or did not in fact commit any offense whatsoever. The jury also reasonably could have rejected the detective's testimony that the grandmother told him that plaintiff had refused the grandmother's request that she take the child to the hospital because she appeared too thin. He kept no record of that statement, made 13 years before trial, and the City failed to introduce the audiotape purportedly containing that statement. Although Justice Friedman accuses me of raising a "red herring" by citing to plaintiff's failed attempt to have Cha-Nell seen by

a doctor at a clinic, I believe that her efforts to have Cha-Nell seen by a doctor are relevant to the issue of probable cause. Indeed, Detective Faust admitted he would not have arrested plaintiff based on the "singular fact of the child dying from malnutrition," and, after extensive questioning, he admitted that plaintiff explained her failed attempt to have Cha-Nell seen by a doctor prior to her arrest. Thus, it is not my position that the detective should have "intuited" failure to thrive as the cause of death, but rather, that the contents of the report along with the other evidence did not provide probable cause to believe that a crime had been committed. Moreover, under the circumstances of this case, it cannot be said that "it was reasonable, as a matter of law," for the detective to discredit plaintiff's account.

As the jury could have reasonably concluded there was no probable cause, it also could have inferred malice from these same facts, particularly the detective's reliance on the grandmother's statements and his disregard of evidence that the child was being fed and was not otherwise neglected or abused (*see Fortunato v City of New York*, 63 AD3d 880 [2d Dept 2009]).

Justice Friedman, citing *Lewis v Caputo* (95 AD3d 262 [1st Dept 2012], *revd* 20 NY3d 906 [2012]), concludes that three facts known to the detective at the time of arrest conclusively

established probable cause as a matter of law, namely: that the autopsy report stated that cause of death was malnutrition; that plaintiff was the child's sole custodian; and that there was no indication in the report that the child's digestive system was defective. It is true that in *Lewis v Caputo*, where only one reasonable inference could be drawn from the facts regarding probable cause, it was held that the issue of probable cause should not go before the jury. However, the detective here was privy to other evidence that could have led a reasonably prudent person to conclude that plaintiff had committed no offenses even though the cause of death was malnutrition. This is particularly so in this case because the detective, in addition to having been told by two medical professionals that there was no sign of neglect or abuse, was informed by the mother, before he placed her under arrest, that she was breast-feeding the child since being discharged from the hospital, had attempted to have her child seen by a doctor four weeks later but was rejected because she had no insurance, made efforts to obtain Medicaid, and contacted the Board of Health regarding vaccinations. In fact, a careful reading of the report should have alerted the detective that the medical examiner's redacted opinion, "homicide (parental neglect)," was not even supported by the contents of the report.

Contrary to Justice Friedman's conclusion, *Agront v City of New York* (294 AD2d 189 [2002]) does not dictate a different result. Justice Friedman concludes that, pursuant to *Agront*, any conflicting evidence as to how the child died was relevant only to the issue of whether guilt beyond a reasonable doubt could have been proven at a criminal trial, but not to the initial determination as to the existence of probable cause. However, *Agront* makes very clear that finding probable cause as a matter of law is not only "based upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe that plaintiff had committed the [crime] as a matter of law," it also requires that "the facts leading up to the arrest, and the inferences to be drawn therefrom, . . . not [be] in dispute" (*id.* at 189 [internal quotation marks omitted], citing *Parkin*, 78 NY2d at 529). Where the inferences are in dispute, however, the issue is for the jury to decide as there can be no finding of probable cause as a matter of law. Indeed, as noted above, the Court of Appeals has repeatedly held that "[w]here there is 'conflicting evidence, from which reasonable persons might draw different inferences . . . the question [of probable cause is] for the jury" (*Parkin*, 78 NY2d at 529, citing *Veras*, 87 AD2d at 384, affd 57 NY2d 947).

Agront and *Lewis v Caputo* do not hold otherwise. In fact, the Court of Appeals in *Caputo* cited to its *Veras* decision with approval (20 NY3d at 207). Thus, the fact that in *Caputo*, a possession of stolen property case, probable cause should have been decided as a matter of law given its particular facts says nothing as to whether probable cause should have gone to the jury or been decided as a matter of law in this case. Significantly, the Court tempered its holding in *Caputo* by also citing, as comparative authority, to *Smith v County of Nassau* (34 NY2d 18, 25 [1974]), where it held that "because the evidence gave rise to inferences on which reasonable people might differ, the Trial Judge properly submitted the question of reasonable cause to the jury" (*Smith,* 34 NY2d at 25

Here, as noted above, the inference that the child's death was caused by any criminal conduct on the mother's part was clearly in dispute. The dissent misses the point by relying on the detective's blind following of the autopsy report notwithstanding the other evidence, including the autopsy findings that "[t]he small intestines contains abundant yellow chyme[,]" "[t]he proximal portion of the colon contains mostly liquified yellow stool[,]" "[t]he distal portion of the colon contains more formed, yellow-brown stool[,] and that "[t]he stool

is abundant" indicating that the child was being fed. Although these finding do not show that Cha-Nell had been "'diligently fed throughout her short life," as my colleague notes, it certainly lends credence to plaintiff's assertion that she was breast feeding her child.

A detective may not ignore compelling evidence that plaintiff had not engaged in any criminal conduct. For example, in *Sital v City of New York* (60 AD3d at 466), where the arresting officer had doubts about the credibility of the identified citizen complainant who had accused the plaintiff of a fatal shooting, and the identification by the complainant was arguably contradicted by physical evidence at the crime scene that was consistent with the conflicting statement of an independent eyewitness, the Court observed that the officer's failure to make further inquiry of potential eyewitnesses was unreasonable under the circumstances, and evidenced a lack of probable cause. Similarly, in *Stile v City of New York* (172 AD2d 743 [2d Dept 1991]), a false arrest claim was upheld where the plaintiff was arrested without a warrant based on a claim by friends of the detective that the plaintiff had stolen a ring while visiting their home, and the detective had ignored not only the plaintiff's protestations of innocence, but also his attorney's

insistence that the detective should investigate an earlier incident in which his friends had similarly accused another man of stealing a ring and later dropped the charges. And, in *Carlton v Nassau County Police Dept.* (306 AD2d 365 [2d Dept 2003]), the Court found an issue of fact as to whether police officers had probable cause to arrest the plaintiff at his home without a warrant for theft of services, where although the restaurant owner had provided an affidavit stating that the plaintiff left the restaurant without paying the bill, the arresting officers knew that the bill was disputed and that the plaintiff had provided his business card to the restaurant owner, facts that the Court said would have prompted a reasonable person to make further inquiry.

These rulings are particularly applicable in this case, where the detective knew that plaintiff, a young mother, was breast-feeding her child, as opposed to using formula, and was therefore unable to monitor the child's intake of nutrients. The trial court's decision to leave the issue of probable cause to the jury, and the jury's determination of that issue, were both proper.

The record also demonstrates that the verdict was not against the weight of the evidence (*see McDermott v Coffee*

Beanery, Ltd., 9 AD3d 195, 206 [1st Dept 2004]). Nor is there any other legitimate reason to order a new trial.

Plaintiff Did Not Open the Door to Admission of the Unredacted Autopsy Report

While Justice Kapnick agrees with me that the issue of probable cause was properly submitted to the jury, thus forming a majority on this issue (Acosta, Manzanet-Daniels and Kapnick), she joins Justices Friedman's position (now a majority with Justice Sweeny) that the City is nonetheless entitled to a new trial because of a discretionary evidentiary ruling. According to the majority on this issue, the trial court erred when it denied the City's request to allow the medical examiner's baseless, unsupported opinion, "homicide (parental neglect)," to go before the jury even though the City agreed to the redaction in the first instance and plaintiff did not thereafter open the door to its introduction.[6] I fail to see how plaintiff opened

[6]Justice Friedman, with Justice Sweeny's acquiescence, unfairly characterizes, as "intemperate and inaccurate" my assertion that the majority, in essence, is trying the case for the City. My comment was meant to highlight the fact that the majority is granting the City a reversal of a jury determination based on a trial judge's discretionary ruling (that is, declining to unredact the autopsy report), where the City charted its own course by consenting to the redaction of the autopsy report in the first instance. While my choice of words may seem sharp, the majority's substitution of its discretion in this case is not only unfair to the trial court, the jury, and plaintiff, but

the door by plaintiff's brief questioning of Detective Faust regarding whether the child might have died from malnutrition due to an underlying medical condition. Not only did plaintiff's counsel move on after the City objected, but Detective Faust testified that he concluded from his conversation with the medical examiner that "the baby did not die from . . . some preexisting congenital condition." Indeed, as Justice Friedman noted in the first paragraph of his writing, the conclusion that the infant "died of malnutrition, and that the malnutrition was not due to any detectable defect in her digestive system. . . has never been questioned, *not even by plaintiff* or the medical expert who testified on her behalf in this action" (emphasis added). He went on to "reiterate [later on in his opinion that plaintiff's] medical expert did not take issue with the medical examiner's conclusion that the baby had died from malnutrition and that the malnutrition had not been caused by any observed physical or chemical defect." It seems incongruous for Justice Friedman to later switch gears to claim that "the City was grievously prejudiced by plaintiff's suggestion that the infant

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unsupported by applicable law. The trial court simply did not abuse its discretion so significantly (if at all) that it warrants the extraordinary remedy of setting aside the jury verdict (*Matter of State v John S.*, 23 NY3d 326 [2014]).

had become malnourished as the result of some internal defect . . . ." To be sure, the majority cannot complain that plaintiff opened the door by suggesting that the infant died of a digestive problem while simultaneously acknowledging that the issue was never in dispute. Thus, refusing the City's request to vacate the trial court's earlier ruling under these circumstances simply does not come close to being an abuse of discretion (*People v Massie*, 2 NY3d 179, 184 [2004] ["a trial court should decide 'door-opening' issues in its discretion, by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression"]; *Matter of Virginia C. [Sharri A.]* 88 AD3d 514 [1st Dept 2011] [same]; *Kane v Triborough Bridge & Tunnel Auth.*, 64 AD3d 544 [2d Dept 2009] [same]). On appeal, our focus should be on whether the court abused its discretion so significantly in refusing the City's request to allow a previously excluded statement (without objection from the City) to come into evidence as to warrant the extraordinary remedy of setting aside a jury verdict (*Matter of State v John S.*, 23 NY3d 326, 344 [2014], *supra* [trial courts are "generally accorded broad discretion in making evidentiary rulings, which

are entitled to deference on appeal absent an abuse of discretion"]; *see also General Elec. Co. v Joiner*, 522 US 136, 142 [1997] [an "appellate court will not reverse [based on an evidentiary ruling], unless the ruling is manifestly erroneous"] [internal quotation marks omitted]; *Old Chief v United States*, 519 US 172 [1997]).

Moreover, this type of opinion evidence is ordinarily inadmissible (*see Welz v Commercial Travelers Mut. Acc. Assn. of Am.*, 266 App Div 668 [2d Dept 1943]; *see also Schelberger v Eastern Sav. Bank*, 93 AD2d 188, 198 [1st Dept 1983] ["the conclusion set forth in the report of the medical examiner, which opined that death resulted from suicide, is of no avail since the opinion expressed in the autopsy as to the cause of death is inadmissible as hearsay"], *affd* 60 NY2d 506 [1983]). Indeed, *Walters v State of New York* (125 Misc 2d 604 [Ct Cl 1984]), cited by Justice Friedman, supports this position. In *Walters*, the court distinguished *Schelberger*, noting that it

> "involved a conclusion in an autopsy report to the effect that the cause of death was suicide. A coroner is not qualified, based merely on his dissection of a cadaver, to render an opinion concerning a deceased's intention to take his own life. He is, however, competent to state, if he can, his diagnosis as to the medical cause of death (125 Misc 2d at 605).

Here, likewise, the conclusion in the autopsy report that Cha-

Nell died of malnutrition was admissible, but not the conclusion that malnutrition was due to "homicide (parental neglect)."

I am troubled by the suggestion that the unredacted report should have been admitted into evidence in any event because it was relevant and would have provided even greater support for the existence of probable cause. In fact, as the trial court noted, the City made no "attempt[s] to reach a medical examiner or at least an expert witness, if not at trial, at least with a motion for summary judgment." The court went on to note that at trial, the City "could have subpoenaed a medical examiner, or if the medical examiner was unavailable, an examining physician to review the records as to the conclusion reached by the medical examiner." Having failed to properly present at trial the evidence it now claims was lacking, the City should not be permitted by the majority to avoid the repercussions of its choice. To be sure, however, whether the City had a legitimate basis for admission of the unredacted report in this case is of no moment inasmuch as it consented to the redacted version (unlike *Broun v Equit. Life Assur. Socy. of U.S.*, 69 NY2d 675 [1986], cited by Justice Friedman, where it appears that defendant did not consent to the redaction). The issue, therefore, is whether plaintiff later opened the door through

improper questioning, which she clearly did not. Thus, it is irrelevant whether the redacted version could have come in for a nonhearsay purpose (*see Rivera v City of New York*, 200 AD2d 379 [1st Dept 1994] *and Fleisher v City of New York* 120 AD3d 1390 [2d Dept 2014]) or pursuant to the reasoning in *Campbell v Manhattan & Bronx Surface Tr. Operating Auth.* (81 AD2d 529 [1st Dept 1981]).

Although this Court has the power to substitute its discretion for that of the nisi prius court even when there has been no abuse of discretion as a matter of law (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52-53 [1999]), I fail to see the wisdom in doing so in this case. To be sure, for this Court to vacate a jury determination after the parties have been subjected to a long, expensive and arduous jury trial (including any hardship endured by the jurors) not because a trial judge erred, but solely because this Court has the power to do so, is not only unfair to the prevailing party and the bar and a waste of judicial time and resources, but smacks of arbitrariness.[7]

[7]Justice Friedman misconstrues my position by citing to *Barnes v City of New York* (296 AD2d 330 [1st Dept 2002]), where this Court found that the trial court erred in excluding certain evidence. I do not dispute that this Court reverses when there has been trial error and the error is deemed not to be harmless in the facts of the case. What I am saying is that we should

Moreover, it is inconsistent with our form of jurisprudence of having disputes settled by a jury of peers, a jurisprudence that is anchored on sound judicial and public policy considerations.

Here, the trial court clearly did not abuse its discretion inasmuch as plaintiff did not open the door for the admission of the unredacted report. In any event, allowing the opinion "homicide (parental neglect)" placed before a jury without having a medical examiner, subject to cross-examination, explain to the jury the basis and reasonableness of his conclusion (especially given that nothing in the report suggested neglect on the mother's part), would have been unduly prejudicial to plaintiff. Thus, even if, as my colleagues argue, the conclusion should have been admitted not for its truth, but to show the "effect it had

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review the trial court's decision regarding whether plaintiff opened the door under the abuse of discretion standard rather than simply substituting our discretion. I do not believe that our position should be that even though the trial court did not abuse its discretion or even exercised it improvidently we are reversing a hard earned verdict simply because we have the power to substitute our discretion for the trial court. Moreover, unlike *Barnes*, defendant in this case consented to the unredacted report. Indeed, substituting our discretion for the trial court when the City consented to the unredacted report in the first instance is an abuse of our discretion.
Andon v 302-304 Mott St. Assoc. (94 NY2d 740 [2000]), also cited by Justice Friedman, is consistent with this position inasmuch as it involved a pre-trial order rather than an alleged trial error.

on the mind of the detective" (citing to *Rivera v City of New York*, 200 AD3d 379 [1st Dept 1994], *supra*), the court properly precluded it given that, without a medical examiner subject to cross-examination, the statement's potential for prejudice far outweighed its probative value (*People v Smith*, 22 NY3d 462, 467 [2013]; *cf. Matter of State of New York v Floyd Y.*, 22 NY3d 95, 98 [2013] ["The Due Process Clause protects against the admission of unreliable hearsay evidence, where such hearsay is more prejudicial than probative, regardless of whether it serves as the basis for an expert's properly proffered opinion testimony"]; *People v Morris*, 21 NY3d 588 [2013]). In any event, as the trial court noted, it would have been "questionable" whether an expert could have testified "that the result of death was parental neglect" (*see Welz v Commercial Travelers Mut. Acc. Assn. of Am.*, 266 App Div at 668 [conclusory and hearsay statements in autopsy reports regarding the cause and manner of death, such as that death resulted from "accident," constitute inadmissible opinions that are within the province of the jury to determine]; *see also People v Eberle*, 265 AD2d 881, 882 [2d Dept 1999] [expert's statement that the victim died from "homicidal" suffocation "improperly states a conclusion regarding defendants' intent"]; *Schelberger v Eastern Sav. Bank*, 93 AD2d at 198).

In my opinion, we should modify the judgment solely to the extent of directing a new trial as to damages, unless plaintiff stipulates to decrease the awards to $250,000 and $250,000, respectively. Significantly, plaintiff concedes that the aggregate award of $2 million deviates materially from what would be reasonable compensation in this case and proposed an award of $750,000.

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

ENTERED: DECEMBER 16, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12354 The People of the State of New York, Ind. 2877/09
Respondent,

-against-

Keith Johnson,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered July 19, 2011, convicting defendant, after a jury trial, of robbery in the second degree, petit larceny, menacing in the second degree, and possession of an imitation pistol, and sentencing him to an aggregate term of five years, reversed, on the law, and the matter remanded for a new trial.

The issue presented is whether defendant's rights under *Bruton v United States* (391 US 123 [1968]) were violated by the admission into evidence of the codefendant's grand jury testimony at their joint trial. The People's case was founded primarily on the testimony of an undercover officer, who testified that he approached defendant and asked, "What's good?" mentioning "crack." After asking the undercover if he was a cop, defendant

told the undercover to follow him. Defendant got into the front passenger seat of a silver Jeep Liberty in which the codefendant sat in the driver's seat, and the undercover approached the open front passenger window. Defendant told the undercover, "Give [me] the money" and the undercover replied, "No, give me the stuff." Defendant reached into his groin area, creating the impression that he was retrieving drugs, and the codefendant asked to count the money. In the belief that he was about to receive narcotics from defendant, the undercover leaned into the car and reached past defendant to hand the codefendant $30 in prerecorded buy money. As the undercover leaned back out, expecting to take drugs from defendant, defendant pulled a pistol from his pants. Believing the gun to be real, the undercover stepped back, raised his hands slightly, and moved out of its path, shouting, "Gun, gun, gun," to alert the field team that a gun was being pointed at him. The Jeep pulled out, and as it did, defendant turned his body toward the open window and pointed the gun partway out of it, at the undercover, who drew his weapon and fired once, striking the rear passenger window.

During the subsequent stop of the vehicle and arrest of its occupants, the police recovered $30 in pre-recorded buy money from the codefendant's front pants pocket and an imitation pistol

resembling a Walther, covered in blood, from between the front passenger seat and the door.

The codefendant's grand jury testimony was, in essence, that on the night in question he was driving around with defendant in a Jeep, looking for defendant's car, which had recently been stolen. Around midnight, defendant said he wanted to get something to eat, so the codefendant stopped at 167th Street, near a couple of restaurants, and kept the car idling while defendant got out to get some food. The codefendant claimed not to be paying much attention until defendant got back into the car. After defendant closed the car door, "someone came to the vehicle talking about where is the stuff and reaching money out." That person "with money in his hand [was] talking about where is the stuff?" The codefendant testified that he then "knew it was time for me to leave." He claimed not to see what defendant was doing at that point and denied having seen a black plastic toy gun in the car. As the codefendant drove off, "[t]he money dropped in the car." The guy who had come to the window just "left it in my car." At the same time, a shot was fired, the back window of the car shattered, and defendant said, "I am hit." The codefendant admitted that when the car was subsequently stopped by the police, the $30 identified in court as prerecorded

buy money was in his pants pocket; he said he had taken the money and put it in his pants.

Under *Bruton v United States*, "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant" (*Richardson v Marsh*, 481 US 200, 207 [1987]). Since the rule only applies where the codefendant's statement was "incriminating on its face, and [not where it] became so only when linked with evidence introduced later at trial" (*Richardson*, 481 US at 208), the question before us is whether the codefendant's grand jury testimony was facially incriminating as to defendant, rather than incriminating only when linked to other evidence.

The court found that the codefendant's statement was not "facially incriminating as to Mr. Johnson" because nothing in the statement suggested that defendant was involved in any illegal conduct. We disagree.

Although the codefendant's grand jury testimony was intended as an innocent explanation of the events surrounding the alleged robbery, and admitted no wrongdoing, nevertheless it was "facially incriminating" as to defendant within the meaning of

Bruton.

The codefendant's narrative placed defendant with the codefendant throughout the relevant events and, specifically referring to defendant approximately 40 times, described defendant's conduct. Among other things, the statement recounted that, after defendant's return to the codefendant's car following an absence to "get food," the alleged robbery victim (an undercover officer) appeared at the car window, asked where the "stuff" was, and dropped prerecorded buy money (the property allegedly stolen in the charged robbery) into the car. This narrative suffices to create an inference that defendant, while outside the codefendant's vehicle, had purported to set up a deal for a sale of contraband that was to culminate in the vehicle, but did not fulfill the deal once he entered the vehicle.

In *People v Martin* (58 AD3d 519 [1st Dept 2009], *lv denied* 12 NY3d 818 [2009]), we found that a codefendant's statement was violative of *Bruton* under analogous circumstances, even though the "brief references merely placed defendant at the scene, and his presence at the scene was essentially consistent with the defense theory of the case" (*id.* at 519). The incriminating implications against defendant are far stronger here.

Although in *Martin* we found the error to be harmless, here,

we cannot say that admission of the codefendant's statement was harmless beyond a reasonable doubt, in view of the extensive references to defendant and the indications that defendant had purported to set up a drug deal with an individual whom he then led back to the car (*see People v Hamlin*, 71 NY2d 750, 760 [1988]). As defendant points out, there were numerous inconsistencies, gaps, and allegedly problematic aspects of the People's evidence that, although plausibly characterized as innocuous by the People, might have been relied upon to create reasonable doubt in a trial at which the codefendant's statement was not part of the evidence. Further, and most significantly in our view, in this case in which the defense claimed that the police fabricated a story of a sham drug sale leading to a robbery in order to excuse the undercover officer's improper shooting of defendant as the codefendant's car pulled away, the codefendant's statement was the only nonpolice evidence that the codefendant possessed the buy money when the car was stopped.

We also note that defense counsel made a timely application for preclusion of the codefendant's grand jury testimony,

deletion of all references to defendant, or a severance. Since we are ordering a new trial, we find it unnecessary to reach defendant's remaining arguments.

All concur except DeGrasse J. who dissents in a memorandum as follows:

DEGRASSE, J. (dissenting)

I dissent because I disagree with the majority's conclusion that the grand jury testimony of Rushing, defendant's codefendant, who did not testify at trial, was facially incriminating as to defendant under the standard articulated by the Supreme Court in *Bruton v United States* (391 US 123, 135-136 [1968]) and further explained by the Court in *Richardson v Marsh* (481 US 200, 207-209 [1987]).

Defendant's prosecution stems from an undercover drug buy-and-bust operation conducted by a team of police officers on July 8, 2009 in the vicinity of East 167th Street and Grant Avenue, in the Bronx, where defendant was encountered. The undercover police officer, UC 44, approached and told defendant that he was looking for $30 worth of crack. Defendant asked UC 44 if he was a cop. In response, UC 44 lifted his shirt to show that he was not armed or wired. As directed by defendant, UC 44 followed him around the corner. With UC 44 trailing, defendant got into the front passenger seat of a Jeep. UC 44 testified that defendant demanded the money, and he, UC 44, replied, "No, give me the stuff." Rushing, who was sitting in the driver's seat, asked to count the money, in response to which UC 44 leaned into the car, reached over defendant, and handed Rushing $30 in prerecorded buy

money. UC 44 testified that defendant then pulled an object, which later turned out to be a toy pistol, from his pants. UC 44 stepped away from the vehicle and signaled the presence of a weapon to the field team by exclaiming, "Gun, gun, gun!" over his Kel transmitter. Defendant pointed the toy pistol at UC 44 as Rushing drove away. UC 44 fired a shot from his own weapon that he had secreted on his hip. The bullet went through the rear passenger window and struck defendant's shoulder.

A few blocks away, the field team apprehended and removed defendant and Rushing from the Jeep. At this time, Sergeant Urena saw the toy pistol, covered in blood, between the front passenger seat and the door. Lieutenant Rodriguez and Detective Baldwin also saw the toy pistol inside of the Jeep. Detective Alston searched Rushing and recovered the buy money from his front pants pocket. All of the foregoing facts were established by evidence that did not include Rushing's grand jury testimony.

On the other hand, Rushing's relevant grand jury testimony is as follows: On the evening of July 7-8, 2009, Rushing was driving around in a Jeep with defendant, his friend. At around midnight, defendant said he wanted to get something to eat. Rushing stopped the vehicle at East 167th Street near a couple of restaurants, where defendant got out and got food. As defendant

went to get the food, Rushing saw no one walking with him. When defendant returned, "[another man] came to the vehicle [and stood at the window] talking about where is the stuff and reaching money out [sic]." Rushing did not see what defendant was doing at that time. As Rushing drove away, a shot was fired, striking defendant. The police stopped the vehicle at a traffic light and arrested defendant and Rushing. Rushing did not see any firearm or toy gun in the vehicle before the incident. Nor did he see defendant pull the gun on the person standing at the window. Before shooting defendant, the man who demanded the "stuff" left the money in the Jeep. Rushing put the money in his pants pocket, from which it was recovered upon his arrest.

Defendant and Rushing were charged in an indictment with the crimes of robbery in the second degree (aided by another actually present), robbery in the second degree (displayed what appeared to be a pistol), petit larceny, criminal possession of stolen property in the fifth degree, unlawful use of an imitation firearm, and menacing in the second degree. The jury convicted defendant of the charges under the robbery in the second degree (display of a weapon) count as well as the petit larceny, imitation firearm, and menacing counts. Defendant was acquitted of robbery under the aided by another count and of criminal

possession of stolen property. Rushing was convicted under the petit larceny and criminal possession of stolen property counts and acquitted of all other charges.

Defendant argues that the admission into evidence of Rushing's grand jury testimony violated his right to confront witnesses against him under the Confrontation Clause of the Sixth Amendment to the United States Constitution (*see Crawford v Washington*, 541 US 36 [2004]). Defendant also contends that he was implicated by Rushing's grand jury testimony and that its admission constituted prejudicial error even in light of the trial court's limiting instruction (*see Bruton*, 391 US at 135). *Crawford* "establishes that the Confrontation Clause generally prohibits the use of 'testimonial' hearsay *against a defendant* in a criminal case, even if the hearsay is reliable, unless the defendant has a chance to cross-examine the out-of-court declarant" (*People v Goldstein*, 6 NY3d 119, 127 [2005], *cert denied* 547 US 1159 [2006] [emphasis added]). Nonetheless, a codefendant whose testimony is introduced at a joint trial is not considered a witness "against" a defendant if the jury is instructed to consider the testimony only against the codefendant (*Marsh*, 481 US at 206). This principle set forth in *Marsh* was unaffected by *Crawford* (*see People v Pagan*, 87 AD3d 1181, 1183

[3rd Dept 2011], *lv denied* 18 NY3d 885 [2012]; *see also United States v Lung Fong Chen*, 393 F3d 139, 150 [2d Cir 2004], *cert denied* 546 US 870 [2005]). Accordingly, the Confrontation Clause is generally not implicated where a nontestifying declarant's statement is admitted against him or her alone (*People v Pagan*, 87 AD3d at 1184).

In *Bruton*, however, the Supreme Court held that a defendant is deprived of the Sixth Amendment right of confrontation when a facially incriminating confession of a nontestifying codefendant is introduced at a joint trial, even if the jury is instructed to consider the confession only against the codefendant (*Bruton*, 391 US at 135-136). Therefore, under the Supreme Court's interpretation of *Bruton* and *Marsh*, a codefendant's facially incriminating statement is so powerfully prejudicial that a limiting instruction would be of no use (*see Gray v Maryland*, 523 US 185, 192 [1998]). There is no reason to assume, however, that every statement by a codefendant is facially incriminating. A codefendant's statement is facially incriminating only when it directly inculpates the accused (*see People v Pagan*, 87 AD3d at 1184). On the other hand, a statement is not facially incriminating if it inculpates only when linked with other evidence (*see Marsh*, 481 US at 208-211). The admission of such a

statement with a limiting instruction would not constitute a *Bruton* or *Crawford* violation (*see People v Pagan*, 87 AD3d at 1184; *see also People v Bowen*, 309 AD2d 600 [1st Dept 2003], *lv denied* 1 NY3d 568 [2003]; *People v Johnson*, 162 AD2d 620 [2d Dept 1990], *lv denied* 77 NY2d 996 [1991]).

In this case, Rushing's grand jury testimony was not facially incriminating because it did not implicate defendant in any of the conduct underlying his conviction under the robbery, petit larceny, imitation firearm, and menacing counts. Specifically, Rushing made no mention of any interaction between defendant and UC 44 before the latter purportedly approached the Jeep and demanded the "stuff" before firing a shot. Rushing did not testify that defendant demanded or took possession of the buy money. Moreover, he asserted that he never saw a toy pistol. In sum, the bizarre encounter Rushing recounted in his grand jury testimony did not attribute any criminality to defendant.

Defendant's reliance on Rushing's particular testimony that the $30 was in his pocket is misplaced. Defendant argues that he was directly implicated by this evidence. However, as noted, a statement that inculpates only when linked with other evidence is not facially incriminating (*see Marsh*, 481 US at 208). For this reason, I disagree with the majority's position that Rushing's

grand jury testimony was facially incriminating insofar as it "suffice[d] to create an inference" and gave "indications" that defendant purported to set up a drug deal with UC 44 while away from the vehicle and outside of Rushing's presence. Such an inference does not arise from Rushing's testimony alone. Here, the identity of the money as the proceeds of the robbery could not have been established by Rushing's grand jury testimony alone. That link could only have been established through the testimony of the police witnesses.

Even if Rushing's grand jury testimony was erroneously admitted, the error was harmless beyond a reasonable doubt. I reach this conclusion on the basis of "two discrete factors: (1) the quantum and nature of the evidence against defendant if the error is excised and (2) the causal effect the error may nevertheless have had on the jury" (*see People v Hamlin*, 71 NY2d 750, 756 [1988]). With regard to the first factor, the quantum of other evidence I rely upon includes the recovery of the buy money and the toy pistol, the respective proceeds and instrument of the robbery. In addition, it is undisputed that defendant was apprehended shortly after and near the scene of his crime. In short, the evidence of defendant's guilt was generally

overwhelming (*see Bowen*, 309 AD2d at 601).[1] As to the second factor, I see no chance that the jury would have acquitted defendant but for Rushing's grand jury testimony (*see e.g. People v Latine*, 151 AD2d 279, 282 [1st Dept 1989], lv denied 74 NY2d 812 [1989]). The majority cites *People v Martin* (58 AD3d 519 [1st Dept 2009], *lv denied* 12 NY3d 818 [2009]) in which we held that the introduction of a nontestifying codefendant's statements constituted *Bruton* error that was nonetheless harmless because the statements' "brief references merely placed defendant at the scene, and his presence at the scene was essentially consistent with the defense theory of the case" (*id.* at 519). In an attempt to distinguish *Martin*, the majority posits that "[t]he incriminating implications against defendant are far stronger here." The majority's position on this issue is perplexing. As noted above, by Rushing's account, defendant had walked away from him and his vehicle during the time of the robbery described in UC 44's testimony. Had there been a *Bruton* error it would have

[1]Although the majority finds it significant, defendant's claim of a coverup with respect to the shooting is a red herring. The shooting occurred after defendant committed the robbery, and the evidence of his guilt was unrefuted. The majority's passing reference to unspecified "inconsistencies, gaps, and allegedly problematic aspects of the People's evidence" is equally unpersuasive.

been even more harmless in this case, where Rushing did not testify about any robbery committed in his presence. Therefore, the majority's attempt to distinguish *Martin* in its harmless error analysis is entirely unavailing.

I also find defendant's appellate argument that the prosecutor's summation undermined the limiting instruction to be unpreserved (*see People v Romero*, 7 NY3d 911 [2006]), and it does not merit review in the interest of justice. Alternatively, in my view, the prosecutor's comments on Rushing's grand jury testimony as well as the other evidence were appropriate and provide no basis for a reversal.

In addition, I find that after conducting a *Hinton* hearing, the court providently exercised its discretion in permitting UC 44 and UC 110, another police officer who acted as the "ghost," to testify anonymously, identifying themselves only by their shield numbers. Each undercover officer testified about concerns for his safety associated with his undercover work. By this testimony, the People established a need for anonymity as required by *People v Waver* (3 NY3d 748 [2004]). Specifically, UC 44 testified that he had made numerous undercover purchases in the vicinity of the robbery and expected to continue doing the same work in the area. In addition, he testified about narcotics

purchases from subjects who had yet to be apprehended. UC 110 testified that he had been working undercover for more than three years and had made numerous narcotics arrests. Moreover, defendant has made no showing that his knowledge of the undercover officers' names would have opened any "avenues of in-court examination and out-of-court investigation" (*Smith v Illinois*, 390 US 129, 131 [1968]) not already opened by knowledge of their shield numbers (*see People v Granger*, 26 AD3d 268 [1st Dept 2006], *lv denied* 6 NY3d 894 [2006]). I find no merit to defendant's remaining contentions and no basis for reducing the sentence.

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

ENTERED: DECEMBER 16, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12859- Index 350033/12
12860-
12861 Anonymous,
Plaintiff-Appellant-Respondent,

-against-

Anonymous,
Defendant-Respondent-Appellant.

_____

Cohen Rabin Stine Schumann LLP, New York (Harriet Newman Cohen and Bonnie E. Rabin of counsel), for appellant-respondent.

Boies, Schiller & Flexner LLP, New York (Charles F. Miller of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about May 10, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's request for an extension of time to challenge the parties' prenuptial agreement, limited plaintiff's award of counsel fees in accordance with the prenuptial agreement, limited defendant's obligation regarding payment of the costs of a car and driver used by plaintiff and the parties' children, and denied plaintiff's request for an order directing defendant to pay the expenses on the parties' Michigan house, modified, on the law and the facts, to the extent of vacating the limitation on plaintiff's award of counsel fees, and directing the court to determine at trial whether the counsel

fee provision in the prenuptial agreement is unenforceable, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about November 21, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to renew her request that defendant make all payments necessary for the use and upkeep of the car and driver, and granted plaintiff's motion for interim counsel fees to the extent of awarding her $300,000 in interim fees for the preparation of the custody trial subject to recoupment, unanimously affirmed, without costs. Order, same court and Justice, entered December 18, 2013, which, to the extent appealable, denied plaintiff's motion for a pendente lite order directing defendant to pay for the car and driver, unanimously affirmed, without costs.

In this matrimonial action plaintiff wife seeks, among other things, to set aside the parties' prenuptial agreement. The parties entered into a so-ordered stipulation on July 12, 2012, agreeing that any challenge to the prenuptial agreement would be made by August 31, 2012. Plaintiff seeks an extension of time to challenge the agreement. She alleges that the agreement as a whole should be invalidated because she was pressured into signing it just hours before the rehearsal dinner on the night before the wedding. She also claims that defendant husband told

her that he would rip up the agreement after they were married for 10 years. Plaintiff further alleges that her attorneys need to conduct discovery regarding the agreement in order for her to prove the allegations that provisions of the agreement are unconscionable, and that defendant should be directed to pay expert and attorneys fees necessary to conduct such discovery.

While a court has the authority to extend the time limits set forth in a so-ordered stipulation, here the motion court providently exercised its discretion in denying plaintiff's request for an extension of time to challenge the prenuptial agreement, especially since she failed to demonstrate good cause for a further extension (*see* CPLR 2004). Additionally, as discussed below, plaintiff's arguments regarding the validity of the agreement lack merit.

New York has a long-standing "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements" (*Matter of Greiff*, 92 NY2d 341, 344 [1998]). It is axiomatic that a duly executed prenuptial agreement is presumed to be valid and controlling unless and until the party challenging it meets his or her very high burden to set it aside (*see Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001]). However, in many instances, "agreements addressing

matrimonial issues have been subjected to limitations and scrutiny beyond that afforded contracts in general" *(Kessler v Kessler*, 33 AD3d 42, 46 [2d Dept 2006]; *lv dismissed* 8 NY3d 968 [2007]). Although "there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties" (*Brassey v Brassey*, 154 AD2d 293, 295 [1st Dept 1989]), an agreement between prospective spouses may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct (*see Christian v Christian*, 42 NY2d 63, 72 [1977]). Nevertheless, such results remain the exception rather than the rule. The burden of producing evidence of such fraud, duress or overreaching is on the party asserting the invalidity of the agreement (*Matter of Greiff*, 92 NY2d at 344; *Cohen v Cohen*, 93 AD3d 506 [1st Dept 2012]).

Here, the court correctly determined that plaintiff did not meet her burden of establishing grounds to set aside the agreement as a whole. Contrary to her claim that she was pressured into signing the agreement, the record is clear that this agreement was negotiated over approximately four weeks. Plaintiff was represented throughout that time by highly competent and experienced matrimonial counsel. The agreement

went through 6 drafts before a final copy was signed and changes in the terms of the agreement requested by plaintiff's counsel were incorporated into the final document. The agreement expressly disclaims any reliance on representations other than those set forth in the agreement, and extrinsic evidence regarding the parties' intent may not be considered unless a court first finds that the agreement is ambiguous, which in this case it is not (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 577 [2008]).

Plaintiff argues that defendant's admitted failure to transfer to her one of the properties he owns in Michigan pursuant to the terms of the agreement is evidence of fraud. However, the record establishes shows that in the 12 years of the marriage, no demand was made for the transfer of this particular property. In fact, plaintiff apparently raised no objection when this property was sold during the course of the marriage. Defendant contends that the failure to effect a formal transfer of this property was an oversight and has agreed to give plaintiff the proceeds of the sale, plus interest, as part of an equitable distribution settlement. Thus, plaintiff, who never raised this issue prior to the commencement of this action, failed to demonstrate that she was fraudulently induced into

signing the agreement by defendant's promise to transfer that property to her. At best, she may have a cause of action for breach of contract and is entitled to receive the value of the property in equitable distribution, as indicated by the court (*see Ungar v Savett*, 84 AD3d 1460, 1461 [3d Dept 2011]).

Defendant's failure to disclose the entirety of his financial interests is also not a reason to vitiate the contract (*see Strong v Dubin*, 48 AD3d 232, 233 [1st Dept 2008]; *see also Smith v Walsh-Smith*, 66 AD3d 534, 535 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]). Plaintiff was well acquainted with defendant's assets, and she specifically acknowledged in the agreement that the amounts she would receive "are so significantly less than either [defendant's] assets or annual income that the precise amount of [his] assets and income is irrelevant to her decision to enter into this Agreement and the enforceability of this Agreement." Indeed, the parties anticipated at the time of the agreement that defendant's assets would continue to rise significantly. In the face of such an acknowledgment, she cannot claim that the agreement is invalid based on a failure to disclose assets.

With respect to plaintiff's claim that the maintenance provisions are unconscionable, we note that "an agreement

concerning the amount and duration of spousal maintenance must be fair and reasonable at the time it is made, and not unconscionable at the time of entry of final judgment in the divorce action" (*Kessler*, 33 AD3d at 46]). Moreover, courts have the authority to review maintenance agreements to ensure such agreements are not unconscionable at the time of the entry of the judgment of divorce (Domestic Relations Law § 236 [B][3][3]; *see Colello v Colello*, 9 AD3d 855, 860 [4th Dept 2004]). Since the motion court has permitted plaintiff to challenge at trial whether the maintenance provision in the agreement is presently unconscionable in terms of plaintiff's current needs, expenses, and income, this issue may serve as a basis to set aside that provision of the agreement.[1]

The motion court providently exercised its discretion in declining to order defendant to pay, pendente lite, the expenses of the Michigan vacation property, which, defendant contends, he has been paying. The court further properly declined to direct defendant to pay, pendente lite, the expenses of a car and driver since plaintiff has regained the ability to drive. A speedy trial is plaintiff's remedy for these perceived inequities in the

[1]Defendant has not appealed that portion of Supreme Court's order setting the maintenance issue down for trial.

pendente lite award (*see Sumner v Sumner*, 289 AD2d 129, 130 [1st Dept 2001]). Further, the court properly denied plaintiff's motion to renew her request regarding the car and driver, as the purported new facts regarding the parties' daughter would not change the prior determination (*see* CPLR 2221[e][2]). To the extent plaintiff sought leave to reargue her request, the denial of that motion is not appealable (*see Windham v New York City Tr. Auth.*, 115 AD3d 597, 599 [1st Dept 2014]).

The court also providently exercised its discretion in awarding plaintiff $300,000 in interim counsel fees for trial preparation on child-related issues on condition that she present documentation of legal work within 30 days after trial (*see* Domestic Relations Law § 237). However, given the unique procedural posture of this case and the great disparity between the parties' finances both at the time of the execution of the prenuptial agreement and at the time of the commencement of this action , plaintiff's request for counsel fees beyond those incurred for child-related issues is an issue appropriate to leave for trial (*see Kessler*, 33 AD3d at 47-48). As Supreme Court has ruled that plaintiff is entitled to a hearing on her challenge to the maintenance provisions of the prenuptial agreement, and, as noted, that ruling is not challenged on

appeal, an award of counsel fees *may* be necessary despite the fee waiver, "as justice requires" (Domestic Relations Law § 237[a]) in order to ensure a level playing field to litigate her claim.[2] Accordingly, we direct that the question of the validity of the counsel fee provision for non-child-related issues in the parties' agreement should be considered at trial.

All concur except Andrias and Saxe, JJ. who concur in a separate memorandum by Saxe, J. as follows:

[2]We do not share the concern of our concurring colleague that our decision will encourage baseless fee applications which may unnecessarily be referred to trial. Our decision does nothing to alter or expand well settled precedent regarding enforcement of valid prenuptial agreements. Our trial court has the expertise and experience to reject such fee applications.

SAXE, J. (concurring)

We are confronted on this matrimonial appeal with a conflict between the supremacy of two important but divergent facets of public policy: "the strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements" with prenuptial agreements (*Bloomfield v Bloomfield*, 97 NY2d 188 [2006]), and the competing policy -- enunciated in Domestic Relations Law § 237(a) -- in favor of ensuring that nonmonied spouses have the ability to litigate legitimate issues (*see Silverman v Silverman*, 304 AD2d 41, 48 [1st Dept 2003]).

The parties entered into a prenuptial agreement that included a waiver of counsel fees. The wife sought to challenge the validity of the prenuptial agreement, and moved for various relief. I agree with the majority's affirmance of the denial of plaintiff's requests (1) for an extension of time to challenge the parties' prenuptial agreement, (2) for an order directing defendant to pay, pendente lite, the expenses for the Michigan house or for a car and driver once plaintiff regained the ability to drive, and (3) to renew her earlier request regarding the car and driver, based on purported new facts regarding the parties' daughter. I also agree with the majority that it was a provident

exercise of discretion for the motion court to award plaintiff $300,000 in interim counsel fees for trial preparation on issues of child support and custody, on condition that she present documentation of the legal work within 30 days after trial.

However, one aspect of the majority's opinion seems to me to require a more elaborate explanation that what is provided, although I agree with the result. That aspect of the ruling modifies the order on appeal insofar as Supreme Court denied counsel fees for any issues other than child-related matters, in view of plaintiff's waiver of counsel fees contained in the prenuptial agreement. Our order, despite that fee waiver, directs Supreme Court to determine at trial whether the fee waiver may be set aside, with the following explanation:

> "[P]laintiff's request for counsel fees beyond those incurred for child-related issues is an issue appropriate to leave for trial (*see Kessler*, 33 AD3d at 47-48). As Supreme Court has ruled that plaintiff is entitled to a hearing on her challenge to the maintenance provisions of the prenuptial agreement, and, as noted, that ruling is not challenged on appeal, an award of counsel fees *may* be necessary despite the fee waiver, 'as justice requires' (Domestic Relations Law § 237[a]) in order to ensure a level playing field to litigate her claim."

I agree with the majority that under the unique procedural posture of this matter, it is appropriate to leave for trial the question of whether plaintiff may be entitled to an award of

counsel fees for the litigation of the non-child-related issue of maintenance. However, I believe that given the strong possibility that this ruling may be misunderstood or misapplied, substantially more examination and discussion of our holding is required. I therefore write separately to discuss the limited circumstances where it is appropriate to consider awarding counsel fees despite such a fee waiver.

Initially, it is important to strongly emphasize that under most circumstances, courts should enforce counsel fee waivers contained in prenuptial agreements. The law sets the bar very high for a party seeking to void provisions of a prenuptial agreement (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 577 [2008]; *Barocas v Barocas*, 94 AD3d 551, 551-552 [2012]). As a general rule, "[d]uly executed prenuptial agreements are accorded the same presumption of legality as any other contract" (*Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001]). And, most importantly for the present purposes, prenuptial agreements most often involve substantial disparities of wealth between the parties; nevertheless, such disparities by themselves do not create grounds to set aside marital agreements (*see Smith v Walsh-Smith*, 66 AD3d 534, 535 [1st Dept 2009]; *Strong v Dubin*, 48 AD3d 232, 233 [1st Dept 2008]).

Of course, prenuptial agreements may be set aside in their entirety on grounds of "fraud, duress, or other inequitable conduct" (*Cioffi-Petrakis v Petrakis*, 103 AD3d 766, 767 [2d Dept 2013]). Nevertheless, such results remain the exception rather than the rule. As one Nassau County Supreme Court Justice has aptly observed, a prenuptial agreement is likely to be upheld as long as

> "each spouse retains a lawyer of his or her own choosing, is provided with a proposed agreement with sufficient time to give due consideration to the serious consequences of the proposed terms, is given fair and adequate disclosure, and is presented with an agreement that does not scream inequity or will leave one party practically destitute"

(*C.S. v L.S.*, NYLJ 1202610051412 [Sup Ct, Nassau Co July 10, 2013]; *see* Alton L. Abramowitz, *Live by the Prenup, Die by the Prenup!*, NYLJ, Aug. 29, 2013 at 3, col 1).

When a prenuptial agreement is not set aside in its entirety based on fraud or unconscionability, specific provisions of it may still be stricken. This is because Domestic Relations Law §236B(3) dictates that extra scrutiny be given to maintenance and child support provisions of marital agreements, defined as agreements "made before or during the marriage" (Domestic Relations Law §236B[3]). While the statute directs that property distribution provisions are "valid and enforceable" as long as

they are "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (*id.*), it specifies that maintenance provisions are valid and enforceable "provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment." In addition, such provisions are subject to General Obligations Law § 5-311, which prohibits marital agreements that relieve either spouse of the support obligation to the extent that the other is likely to become a public charge (*id.*). With regard to child support provisions, the statute directs that they shall remain subject to the protections of Domestic Relations Law § 242 (*id.*)[1]. So, only in those respects does the law dictate that prenuptial agreements waiving or limiting claims by one spouse against the other must receive a greater degree of scrutiny than

[1] Notably, I am not addressing here the potential need for awards of counsel fees, despite fee waivers, needed to litigate child-related disputes. Indeed, in the present case, the parties' prenuptial agreement properly allows for court awards of fees for child-related issues, albeit providing for their award at the conclusion of the litigation, without consideration of whether the non-monied spouse will have the ability to assume that cost. The present discussion is limited to awards of counsel fees for non-child-related legal work where the client waived such counsel fees in a prenuptial agreement.

ordinary contracts when considering whether they must be enforced.

It is important to note that the heightened standard that the Domestic Relations Law creates for review of maintenance and child support provisions of marital agreements has no counterpart for counsel fee waivers contained in such agreements. There is simply no statutory basis for setting aside a presumptively valid counsel fee waiver on any grounds other than the usual grounds for setting aside a contract provision, such as unconscionability based on overreaching or inequitable conduct in the execution of the agreement (*see Barocas v Barocas*, 94 AD3d at 552). Accordingly, when a valid prenuptial agreement includes a waiver of counsel fees, ordinarily there is no viable basis for an award of such fees under § 237.

Nevertheless, there may be circumstances when a triable issue emerges despite the existence of a prenuptial agreement, and the possible need for litigation of that triable issue creates with it a possibility -- *not* a certainty -- that the agreement's fee waiver may be found unenforceable to that extent.

The case of *Kessler v Kessler* (33 AD3d 42 [2d Dept 2006], *lv dismissed* 8 NY3d 968 [2007]) helps illustrate this concept. There, although the remainder of the prenuptial agreement was

upheld, the Second Department affirmed an order holding a prenuptial agreement's fee waiver to be "unconscionable and unenforceable in light of the strong public policy embodied in Domestic Relations 237(a)." The Court acknowledged the inherent conflict between the "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements," and the policy embodied in Domestic Relations Law § 237, "in favor of assuring that matrimonial matters are determined by parties operating on a level playing field" (*Kessler*, 33 AD3d at 45). Being careful to recognize that "not every agreement waiving the right to seek an award of an attorney's fee should be set aside" (*id.* at 47), the Second Department concluded that "[i]f . . . enforcement of the [fee waiver] would preclude the nonmonied spouse from carrying on or defending a matrimonial action as justice requires, the provision may be held unenforceable" (*id.* at 48). In setting aside the fee waiver, the Court of Appeals pointed to the wife's suggestion that even if the prenuptial agreement was upheld, there were triable issues concerning what property was covered by the agreement and what was acquired after the agreement. Therefore, a legitimate need for some litigation was presented, creating a valid basis for an award of counsel fees despite the valid

prenuptial agreement.

Here, the issue that needs to be tried, which *may* make an award of counsel fees necessary despite the fee waiver, in order to ensure a level playing field, is not an issue that the prenuptial agreement failed to cover, as was the case in *Kessler*. Rather, the motion court ruled that the wife is entitled to a hearing on her challenge to the maintenance provisions of the prenuptial agreement, *and that ruling is not challenged on appeal*. Consequently, although nothing in the record before this Court justifies the need for such a hearing, we must accept, based on the unchallenged ruling, that plaintiff has made the requisite showing establishing the existence of a potentially meritorious challenge to the maintenance provision of the prenuptial agreement, which could, in turn, give her a legitimate basis to challenge her fee waiver.

It bears emphasis that awarding counsel fees despite a fee waiver, or even finding a triable issue regarding whether counsel fees should be awarded despite a fee waiver, is not normally warranted where the parties entered into a valid prenuptial agreement -- and a disparity between the parties' finances does not, in itself, change that fact. Rather, the presented circumstances must be such as would actually preclude the

nonmonied spouse from carrying on or defending a viable claim requiring litigation, so that justice could require an award of counsel fees to the non-monied spouse as contemplated by Domestic Relations Law § 237(a), notwithstanding that spouse's fee waiver. The need to conduct a fact-finding inquiry into whether justice requires an award of counsel fees despite a fee waiver will only emerge where the party challenging the waiver has made a prima facie showing that there is a meritorious, or at least potentially meritorious, challenge to terms of the prenuptial agreement, prompting the need for litigation.

The majority's decision referring for trial the issue of the fee waiver's validity, without sufficient discussion, could encourage future baseless applications for awards of counsel fees despite fairly-negotiated, valid prenuptial agreements containing fee waivers. I am concerned about more than just the possibility of baseless awards of counsel fees in such situations; I also anticipate that fee applications which ought to be rejected outright may unnecessarily be referred for trial regarding the issue of the enforceability of the fee waiver. This would in turn result in the accrual of unnecessary fees, which additional costs will then be included in settlement demands, any time a court perceives an issue of fact regarding the enforceability of

provisions of a facially valid prenuptial agreement.

To be clear, awarding counsel fees or trying the issue of whether such fees should be awarded despite a fee waiver, should be considered only in the narrowest of circumstances, when (1) litigation of an issue is required although it is covered by the parties' prenuptial agreement, and (2) justice requires an award of fees to allow the nonmonied spouse to litigate that issue (Domestic Relations Law 237[a]).

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13787 The People of the State of New York, Ind. 43872C/10
Respondent,

-against-

Sean Ward,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered September 26, 2011, convicting defendant, after a nonjury trial, of attempted patronizing of a prostitute in the third degree, and sentencing him to a term of 10 days, unanimously affirmed.

After reviewing the record and independently assessing all of the proof, we find that the verdict was not against the weight

of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The finder of fact found that the officer's account was more credible than defendant's.

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13788 NRT New York, LLC, doing business as Corcoran Group,
Plaintiff,

Charles Rutenberg LLC,
Plaintiff-Respondent,

-against-

Christopher Morin, et al.,
Defendants-Appellants. Index 152678/13

_____

Greenberg Freeman LLP, New York (Sanford H. Greenberg of counsel), for appellants.

Capuder Fazio Giacoia LLP, New York (Alfred M. Fazio of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 14, 2014, which, to the extent appealed from, denied defendants' motion to dismiss plaintiff broker Charles Rutenberg LLC's claims, unanimously affirmed, with costs.

The motion court correctly found that the plain terms of the parties' brokerage agreement, when construed in the context of the whole of the agreement (*see Beal v Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007]), unambiguously provided that the five-month expiration period therein applied only to the broker's exclusive right to rent defendants' apartment, and not to the additional circumstances anticipated by the agreement where the renter,

timely procured by the broker, ultimately purchased the apartment near the end of the initial two-year lease term. The agreement's fifth paragraph, which provided that the broker would receive a six percent commission if the renter it procured ultimately purchased the apartment, did not contain a time limitation regarding that right. Defendants' interpretation that the five-month time limitation set forth in paragraph two of the exclusive agency agreement applied to all provisions of the agreement is commercially unreasonable, and undermined by the various additional rights afforded under the agreement (*see generally Sterling Resources Intl., LLC v Leerink Swann, LLC*, 92 AD3d 538 [1st Dept 2012]). If accepted, it would effectively render the fifth paragraph meaningless (*see Beal Sav. Bank*, 8 NY3d at 324-325). Nor does the extension clause in paragraph 8 apply to this case. Since defendants did not meet their burden to show that the contract language was clear, unambiguous and supportive only of the interpretation they espoused (*see Sterling Resources Intl.*, 92 AD3d 538; *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 499 [1st Dept 2011]), they failed to establish

that the five-month limitation refutes, as a matter of law, the broker's claimed right to the commission (*see generally Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Mill Fin., LLC v Gillet*, 122 AD3d 98 [1st Dept 2014]).

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Gische, JJ.

13789 In re Sanitation Officers Association, etc., et al., Petitioners-Respondents, Index 151155/13

-against-

The City of New York, etc., et al., Respondents-Appellants

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Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for appellants.

Taubman Kimelman & Soroka, LLP, New York (Antonette M. Milcetic of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Geoffrey D. Wright, J.), entered June 4, 2013, which, inter alia, granted the petition seeking to vacate an arbitration award, dated November 6, 2012, denying petitioners' grievance, and remanded the matter for consideration of an appropriate remedy, unanimously reversed, on the law, without costs, the petition denied, and the award confirmed.

In this proceeding brought pursuant to CPLR article 75, petitioner Sanitation Officers Association, Local 444, SEIU, AFL-CIO (the Union), the exclusive bargaining representative of all supervisors and level-I superintendents employed by respondent Department of Sanitation of the City of New York

(DOS), filed a grievance under the parties' collective bargaining agreement (CBA) alleging that DOS improperly assigned supervisors in violation of the CBA. Respondents asserted as an affirmative defense that, for economic reasons, they exercised management rights reserved under the CBA by laying off 200 out of 330 supervisors, and reassigning the remaining supervisors to additional district sections. The arbitrator found that petitioners established a prima facie violation of the CBA but denied the grievance on the ground that DOS raised a valid defense since it retained its management prerogative to restructure the workforce and the CBA expressly reserved its right to alter the ratio of supervisors to collection equipment.

Contrary to petitioner's argument, the arbitrator did not exceed his power in considering and crediting DOS's defense (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]). The arbitrator's consideration of the defense was necessary to resolve the dispute submitted to him and his decision was not irrational nor did it exceed a specifically enumerated limitation on his power (*id.*). Additionally, as noted by the arbitrator, his denial of the grievance does not impair the union's right to bargain over the practical impact that the workforce reduction

and reassignments have placed on the remaining employees (see NYC Admin Code §12-307). Thus, the decision does not violate the strong public policy favoring collective bargaining (see NYC Admin Code §12-302). Accordingly, there is no basis to overturn the arbitrator's interpretation of the issues and the scope of his authority, which must be accorded substantial deference (see *Frankel v Sardis*, 76 AD3d 136, 140 [1st Dept 2010]).

We have considered petitioners' remaining arguments, and find them unavailing.

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13790 The People of the State of New York, Ind. 3605/12
Respondent,

-against-

Ariel Marte,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Adrienne M. Gantt of counsel) for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about November 28, 2012,

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: DECEMBER 16, 2014

CLERK

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

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13791 Arthur Herlihy, et al., Index 190149/11
Plaintiffs-Respondents,

-against-

A.F. Supply Corporation,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Sherry Klein Heitler, J.), entered on or about December 13, 2013,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated November 20, 2014,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13793 The People of the State of New York, Ind. 504/09
Respondent,

-against-

Julio Perez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc I. Eida of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered March 21, 2011, as amended April 13, 2011, convicting defendant, after a jury trial, of assault in the first degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 10 and 5 years, respectively, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

Defendant's claim that his counsel was ineffective for failing to request a justification charge is unreviewable on direct appeal, since it involves matters of strategy not reflected in the record (*see People v Kin Wong*, 81 AD3d 421 [1st Dept 2011], *lv denied* 16 NY3d 896 [2011]), and defendant has not

made a CPLR 440.10 motion. As an alternative holding, insofar as the record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defense counsel "was not ineffective for failing to raise a justification defense that would have been weak, at best, and which might have undermined a stronger defense" (*People v Rhodes*, 281 AD2d 225, 226 [1st Dept 2001], *lv denied* 96 NY2d 906 [2001]). Counsel reasonably pursued a strategy of arguing that the People's eyewitnesses lacked credibility, and that their testimony was scarcely corroborated by any physical evidence.

Defendant's argument that the court should have given a justification charge is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the court properly refrained from charging justification, because it was unsupported by any reasonable view of the evidence. Furthermore, regardless of whether such a charge was supported by a reasonable view of the evidence, a sua sponte justification charge would have interfered with defendant's strategy (*see People v Kin Wong*, 81 AD3d at 421; *People v Johnson*, 75 AD3d 426 [1st Dept 2010]).

However, defendant is entitled to be resentenced with an express determination as to whether to grant or deny youthful offender treatment (*see People v Rudolph*, 21 NY3d 497 [2013]). We reject the People's argument that the court satisfied its obligation pursuant to CPL 720.20(1) by imposing a sentence incompatible with such treatment after defense counsel had requested it, because the court was still required to "make an explicit determination on the record" (*People v Smith*, 113 AD3d 453, 454 [1st Dept 2014]).

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13794 In re Donovan Jermaine R., also known as Donovan R., also known as Donovan B.,

A Dependent Child Under Eighteen Years of Age, etc.,

Jamie R.,
Respondent-Appellant,

SCO Family of Services,
Petitioner-Respondent.

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Carol L. Kahn, New York, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Jess Rao of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about October 21, 2013, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about August 16, 2013, which found that respondent father was unable to care for his child presently and for the foreseeable future due to mental illness, unanimously affirmed, without costs.

Clear and convincing evidence established that respondent is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for his child

and that the child would be in danger of becoming a neglected child should he ever be placed in respondent's care (Social Services Law § 384-b[4] and [6]). Respondent has faced an almost life-long battle with mental illness, as documented in his medical records and as testified to by the expert psychologist. He has spent the last several years in a psychiatric facility, his illness at times manifests in anger and the evidence established that he has no insight into his psychiatric problems and inability to care for a child (*see Matter of Claudina Paradise Damaris B.*, 227 AD2d 135 [1st Dept 1996]; *cf. Matter of Arielle Y.*, 61 AD3d 1061 [3rd Dept 2009]). Contrary to respondent's contention, it was unnecessary for the expert to have witnessed interaction between him and the child, whom respondent had not seen since his birth.

The expert's reliance on appellant's extensive medical records and clinical interview were a sufficient basis for the opinions proffered. Even if it were possible that someday respondent

would be capable of providing adequate care for a child, such possibility does not warrant transferring the child to his care (*see Matter of David Joseph G.*, 169 AD2d 439 [1st Dept 1991]).

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13795 The People of the State of New York, Ind. 2372/12
Respondent,

-against-

Shakeinne Jones,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Karen M. Kalikow of counsel) for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about December 5, 2012,

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: DECEMBER 16, 2014

CLERK

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

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13796- Ind. 3433/08
13797 The People of the State of New York,
Respondent,

-against-

Francisco Melo-Cordero,
Defendant-Appellant.
- - - - -
Immigrant Defense Project,
Amicus Curiae.

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Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

Immigrant Defense Project, New York (Dawn M. Seibert for counsel), for amicus curiae.

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Order, Supreme Court, Bronx County (John W. Carter, J.), entered on or about December 6, 2013, which denied defendant's CPL 440.10 motion to vacate his judgment of conviction, unanimously affirmed.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *see also Strickland v Washington*, 466 US 668 [1984]), and the court properly exercised its discretion in denying defendant's CPL

440.10 motion without holding a hearing (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]; *People v Satterfield*, 66 NY2d 796, 799-800 [1985]). Contrary to defendant's contentions on appeal, the court did not evaluate his ineffective assistance claim under an incorrect legal standard. The denial of the motion was not exclusively based on the nonretroactivity of *Padilla v Kentucky* (559 US 356 [2010]). Rather, the court addressed defendant's distinct claim that his former counsel gave him inaccurate advice about the immigration consequences of his plea, a claim that does not depend on *Padilla*, and the court evaluated this claim under the proper standards (*see People v McDonald*, 1 NY3d 109, 114-115 [2003]).

The record supports the court's finding that defendant failed to show that his counsel's performance "fell below an objective standard of reasonableness" (*McDonald*, 1 NY3d at 113). Defendant's submissions did not provide adequate support for his allegation that counsel inaccurately advised him as to the consequences of his guilty plea. In particular, defendant did not provide an affirmation or other information from his counsel, and defendant's own affidavit described his counsel's advice in terms of what supposedly "could" happen regarding deportation if defendant accepted the People's plea offer. We conclude that

defendant's submissions did not establish that counsel provided immigration advice that was actually erroneous (*see People v Simpson*, 120 AD3d 412 [1st Dept 2014]).

Defendant also failed to satisfy the requirement of prejudice. In light of the strength of the People's case, the length of the possible sentence that he faced and the near certain deportation consequences that would have resulted from his conviction after trial, the court properly determined that defendant had not established the necessity of a hearing on his CPL 440.10 motion based solely on the otherwise unsupported assertion made in his affidavit that but for his attorney's allegedly incorrect advice, he would not have pleaded guilty and would have proceeded to trial (*see* CPL 440.30[4][d]; *see also People v Hernandez*, 22 NY3d 972, 975-976 [2013]).

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: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13798 Jennifer Brown, Index 303682/13
Plaintiff-Appellant-Respondent,

-against-

Michael Brown,
Defendant-Respondent-Appellant.

_____

Laurence P. Greenberg, New York, for appellant-respondent.

Cadwalader, Wickersham & Taft LLP, New York (William Schwartz of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered September 5, 2013, which, to the extent appealed from as limited by the briefs, directed defendant husband to pay plaintiff wife monthly temporary taxable maintenance in the amount of $37,000, unanimously affirmed, without costs.

The motion court properly applied the formula set forth in Domestic Relations Law § 236(B)(5-a)(c)(2)(a) in calculating the award of temporary spousal maintenance to plaintiff wife. Specifically, the court listed all 19 of the enumerated factors, explained how the factors support an upward deviation from the $13,100 a month in guideline support, and found that $37,000 per month was not "unjust or inappropriate" under the circumstances (*Lennox v Weberman*, 109 AD3d 703 [1st Dept 2013]).

The court also properly imputed an annual income to the husband of $900,000 when it computed the maintenance award (*see Lennox*, 109 AD3d at 703-04; *see also Hickland v Hickland*, 39 NY2d 1, 4-6 [1976], *cert denied* 429 US 941 [1976]). The court took into account the effect of loss adjustments on the parties' tax returns, the family's monthly expenses, and the fact that the husband can manipulate his income as evidenced by the disparity between his W-2 income and the parties' monthly expenses.

In any event, the amount awarded is a proper accommodation between the reasonable needs of plaintiff and the financial ability of defendant, while taking into consideration the pre-separation standard of living (*see Marfilius v Marfilius*, 239 AD2d 299, 300 [1999]).

The court providently exercised its discretion in making the award of temporary maintenance taxable to the wife (*see Lasry v Lasry*, 180 AD2d 488, 489 [1st Dept 1992]; *Siskind v Siskind*, 89 AD3d 832, 833 [2nd Dept 2011]).

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13800 The People of the State of New York, Ind. 4066/10
Respondent,

-against-

Eric Peels,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Lisa A. Packard of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered June 4, 2012, convicting defendant, after a jury trial, of assault in the second and third degrees and criminal mischief, and sentencing him, as a second violent felony offender, to an aggregate term of six years, unanimously affirmed.

The verdict 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 overwhelmingly disproved defendant's justification defense as to the second-degree assault, because his aggressive behavior at the time of the assault was completely incompatible with the legal

requirements for a claim of self-defense. With regard to the third-degree assault conviction involving another victim, the evidence supported the inference of substantial pain, thereby establishing the physical injury element (*see People v Chiddick*, 8 NY3d 445, 447-448 [2007]).

The court properly exercised its discretion in admitting evidence that immediately after the incident, defendant was taken to a hospital under arrest and in an extremely agitated state, where he was "combative, argumentative and threatening staff" by kicking, spitting and flailing his limbs, and that he had to be restrained and sedated. There was a sufficiently close nexus to warrant an inference that defendant's mental state and behavior at the hospital reflected those conditions during the incident. Accordingly, this evidence tended to corroborate the testimony of the People's witnesses and refute defendant's defense of justification, and the People did not exceed the court's ruling.

Since one of the charges submitted to the jury was a hate crime based on the victim's sexual orientation (*see* Penal Law § 485.05[1]), the court also properly exercised its discretion in admitting a portion of a recorded telephone conversation in which defendant expressed a desire to harm witnesses against him and used an epithet relating to sexual orientation.

In any event, we find that any error regarding the evidence of defendant's behavior at the hospital or the recorded call was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13801 Stroud Productions and Enterprises, Inc., et al., Plaintiffs-Appellants, Index 601798/05

-against-

BMG Music, Defendant,

Steven Ames Brown, Defendant-Respondent.

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C. Robinson & Associates, LLC, New York (W. Charles Robinson of counsel), for appellants.

Baker & Hostetler LLP, New York (Oren J. Warshavsky of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered October 13, 2011, which, to the extent appealed from, granted defendant Steven Ames Brown's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, with costs.

Plaintiffs' claims for conversion and tortious interference with contract against Brown relating to unpaid producer royalties allegedly due to plaintiffs since 1992 were properly dismissed as time-barred. Plaintiffs may not argue that Brown should be equitably estopped from raising the statute of limitations defense since the issue was not raised before the motion court

(*see Recovery Consultants v Shih-Hsieh, 141* AD2d 272, 276 [1988]). In any event, the argument fails because plaintiffs rely on the same acts that form the basis of their underlying claims. It is "fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit" (*see Zumpano v Quinn*, 6 NY3d 666, 674 [2006]).

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Gische, JJ.

13802 Mary McCrae, etc., Index 402947/05
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant,

New York City Health and
Hospitals Corporation, et al.,
Defendants.

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Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Debra S. Reiser, New York, for respondent.

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Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered on or about January 16, 2014, which, to the extent appealed from, denied defendant Transit Authority's (defendant) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff commenced this action to recover damages for negligence after a fifty-pound sandbag struck and killed Sha-Keia McCrae, who was standing on the public sidewalk below the Rockaway Avenue train station of the Number 3 subway line. Plaintiff alleged that the Transit Authority, acting in a proprietary capacity as owner and operator of the station, failed

properly to secure the sandbag box, and thereby failed to maintain the subject premises in a reasonably safe condition. Defendant moved for summary judgment, arguing that the alleged negligent act of failing to secure the sandbag involved a governmental function that provided it immunity given the absence of a special relationship with the decedent.

Even if the failure to secure the sandbag can be characterized as a "security deficiency," as this deficiency does not serve as part of defendant's general security plan to protect the public pursuant to its police powers, does not implicate the allocation of police resources, and does not require the expenditure of substantial sums on capital improvements, we find that the alleged negligent act was so overwhelmingly proprietary in nature as to place the source of defendant's asserted liability well toward the proprietary function terminus of the continuum described in *Miller v State of New York* (62 NY2d 506, 511-512 [1984])(*see Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 455 [2011], *cert denied* __ US __, 133 S Ct 133 [2012]; *Granata v City of White Plains*, 120 AD3d 1187 [2d Dept 2014]).

Further, the Supreme Court correctly determined that triable

issues of fact exist as to the foreseeability of the apparent assault upon the decedent, thus precluding the award of summary judgment to defendant.

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13803 The People of the State of New York, Ind. 4109/11
Respondent,

-against-

Robert Claiborne,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about December 14, 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: DECEMBER 16, 2014

CLERK

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

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13804 Nicholas Restituyo, Index 307768/10
Plaintiff-Appellant,

-against-

East 174th Street Inc., et al.,
Defendants-Respondents.

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Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for East 174th Street Inc., respondent.

Hardin, Kundla, McKeon & Poletto, P.A., New York (Stephen J. Donahue of counsel), for Associated Food Stores Inc. and Teo Food Corp., respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about July 25, 2013, which, insofar as appealed from as limited by the briefs, granted the motions of defendants East 174th Street Inc. (owner), and Associated Food Stores Inc. (Associated) and Teo Food Corp. (Teo) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff, an employee of defendant Teo Food Corp, was injured when he was caused to fall by a hole in a metal platform in an area in the back of the premises that was used to receive deliveries. The court properly found that the owner of the

premises and Associated, which subleased the premises to Teo, were out-of-possession landlords, and that the hole that caused plaintiff's fall was not a significant structural defect, and the repair was not extraordinary in scope or expense (see *Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107 [1st Dept 2003]; *Quinones v 27 Third City King Rest.*, 198 AD2d 23 [1st Dept 1993]; *see also Garrow v Smith*, 198 AD2d 622, 623-624 [3d Dept 1993]). Moreover, the statutory sections allegedly violated by the owner and Associated, which were cited by plaintiff in the complaint and bill of particulars, were not specific statutory safety provisions (see *e.g. Centeno v 575 E. 137th St. Real Estate, Inc.*, 111 AD3d 531 [1st Dept 2013]; *Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497 [1st Dept 2011], *lv denied* 16 NY3d 713 [2011]).

Plaintiff's remaining contentions are unavailing.

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13805 Marcio Magdalena, Index 153047/13
Plaintiff-Respondent,

-against-

Eduardo Lins, et al.,
Defendants-Appellants.

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Stroock & Stroock & Lavan LLP, New York (Michael A. Fernández of counsel), for appellants.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 28, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint for lack of personal jurisdiction and on forum non conveniens grounds, unanimously reversed, on the law, with costs, and the motion granted on the ground of lack of personal jurisdiction. The Clerk is directed to enter judgment accordingly.

The court erroneously concluded that the parties had consented to jurisdiction in New York based on a forum selection clause. It appears that the court conflated the oral fee sharing agreement between the parties (the Fee Sharing Agreement), which is the subject of the instant lawsuit and which contains no consent or forum selection provision, with a separate written fee

sharing agreement between defendant Glendun Point S.A. and an entity that is not a party to this lawsuit (the Non-Circumvention Agreement), which contains the forum selection provision the court cited. Since plaintiff is neither a party to the Non-Circumvention Agreement, which pre-dates the Fee Sharing Agreement at issue, nor an intended third party beneficiary of that agreement, he cannot enforce its forum selection clause against defendants (*see ComJet Aviation Mgt. v Aviation Invs. Holdings*, 303 AD2d 272 [1st Dept 2003]; *see also PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp.*, 25 AD3d 470 [1st Dept 2006]).

There is no other basis for jurisdiction over either defendant. Among other things, there is no basis for general jurisdiction pursuant to CPLR 301, since Glendun is not incorporated in New York and does not have its principal place of business in New York (*see Daimler AG v Bauman*, __ US __, 134 S Ct 746, 760 [2014]). Similarly, no jurisdiction lies pursuant to CPLR 301 over Glendun's founder, defendant Eduardo Lins. While Lins, a Brazilian national, owns an apartment in New York, he is not domiciled there. His daughters regulary reside there. Lins resides and is domiciled in Uruguay; New York is not his domicile (*id.*).

Plaintiff cites insufficient facts to demonstrate any other basis for general jurisdiction over either defendant.

Nor is there any basis for long-arm jurisdiction (CPLR 302 [a][1]). The record shows that the parties negotiated and executed the Fee Sharing Agreement while they were out of the country, and it is not alleged that the agreement was performed or breached in New York. Thus, no part of the transaction at issue occurred in New York (*see Copp v Ramirez*, 62 AD3d 23, 28-29 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]; *Finesurgic Inc. v Davis*, 148 AD2d 414 [2d Dept 1989], *lv dismissed in part, denied in part* 74 NY2d 781 [1989]; *see also Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]).

As there is no jurisdiction over defendants, we do not reach the forum non conveniens issue (*see Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG.*, 23 AD3d 269 [1st Dept 2005]).

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13806 The People of the State of New York, Ind. 4692N/12
Respondent,

-against-

OBA Perdue,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered on or about November 27, 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 [1st Dept 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: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13807 Jennifer Cangro, Index 100492/13
Plaintiff-Appellant,

-against-

Park South Towers Associates, et al.,
Defendants-Respondents.

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Jennifer Cangro, appellant pro se.

Gartner & Bloom, PC, New York (Arthur P. Xanthos of counsel), for Park South Towers Associates, respondent.

Rose & Rose, New York (Dean Dreiblatt of counsel), for Rose & Rose, respondent.

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Appeal from order, Supreme Court, New York County (Donna M. Mills, J.), entered September 12, 2013, which denied plaintiff's motion to reargue, unanimously dismissed, with costs, as taken from a nonappealable paper.

The appeal is dismissed because "[n]o appeal lies from the

denial of a motion for reargument" (*D'Andrea v Hutchins*, 69 AD3d 541, 542 [1st Dept 2010]; *Reid v Presbyterian Hosp. in City of N.Y.*, 254 AD2d 139, 140 [1st Dept 1998], *lv dismissed* 93 NY2d 904 [1999]).

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

ENTERED: DECEMBER 16, 2014

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Feinman, Gische, JJ.

13808 The People of the State of New York, Ind. 4682/11
Respondent,

-against-

Mark Grassi,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and Kaye Scholer LLP, New York (Jennifer L. Taiwo of counsel), for appellant.

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

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Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about January 4, 2013, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed defendant 20 points under the risk factor relating to relationship with the victim. Defendant and the victim were strangers, notwithstanding their brief Internet exchanges, and to the extent there was any relationship, defendant established it for the purpose of victimization (*see People v Tejada*, 51 AD3d 472 [1st Dept 2008]).

Regardless of whether the court properly assessed points

under the relationship with victim factor, the record supports the court's alternative finding that an upward departure was warranted. Even without the points disputed on appeal, defendant's point score is 105, which is nearly enough for a level three adjudication. The risk assessment instrument did not adequately account for the significant risk of recidivism indicated by defendant's failure to control his behavior notwithstanding his sentence of probation and level one adjudication following his previous sex crime conviction, as well as his pattern of behavior toward underage girls.

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

ENTERED: DECEMBER 16, 2014

CLERK