Corrected Order - December 22, 2015

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 17, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, J.P., Saxe, **Moskowitz**, Richter, Kapnick, JJ.

14906N Kelly Forman, Index 113059/11
Plaintiff-Appellant,

-against-

Mark Henkin,
Defendant-Respondent.

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Ronemus & Vilensky, New York (Chandra Whalen of counsel), for appellant.

Wade Clark Mulcahy, New York (Brian Gibbons of counsel), for respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered March 19, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion to compel to the extent of directing plaintiff to produce all photographs of plaintiff privately posted on Facebook prior to the accident at issue that she intends to introduce at trial, all photographs of plaintiff privately posted on Facebook after the accident that do not show nudity or romantic encounters, and authorizations for defendant to obtain records from Facebook showing each time

plaintiff posted a private message after the accident and the number of characters or words in those messages, modified, on the law and the facts, to vacate those portions of the order directing plaintiff to produce photographs of herself posted to Facebook after the accident that she does not intend to introduce at trial, and authorizations related to plaintiff's private Facebook messages, and otherwise affirmed, without costs.

In this personal injury action, plaintiff alleges that while riding one of defendant's horses, the stirrup leather attached to the saddle broke, causing her to lose her balance and fall to the ground. Plaintiff claims that defendant was negligent because, inter alia, he failed to properly prepare the horse for riding, and neglected to maintain and inspect the equipment. Plaintiff alleges that the accident resulted in cognitive and physical injuries that have limited her ability to participate in social and recreational activities. At her deposition, plaintiff testified that she maintained and posted to a Facebook account prior to the accident, but deactivated the account at some point after.

Defendant sought an order compelling plaintiff to provide an unlimited authorization to obtain records from her Facebook account, including all photographs, status updates and instant

messages. The motion court granted the motion to the extent of directing plaintiff to produce: (a) all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial; (b) all photographs of herself privately posted on Facebook after the accident that do not show nudity or romantic encounters; and (c) authorizations for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in those messages. Plaintiff now appeals.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." In determining whether the information sought is subject to discovery, "[t]he test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "'It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims'" (*Vyas v Campbell*, 4 AD3d 417, 418 [2d Dept 2004], quoting *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]; *see also GS Plasticos Limitada v Bureau Veritas Consumer Prods. Servs., Inc.*, 112 AD3d 539, 540 [1st Dept 2013]

[sufficient factual predicate required for discovery demands]; *Sexter v Kimmelman, Sexter, Warmflash & Leitner*, 277 AD2d 186 [1st Dept 2000]). Discovery demands are improper if they are based upon "'hypothetical speculations calculated to justify a fishing expedition'" (*Budano v Gurdon*, 97 AD3d 497, 499 [1st Dept 2012], quoting *Manley v New York City Hous. Auth.*, 190 AD2d 600, 601 [1st Dept 1993]).

This Court has consistently applied these settled principles in the context of discovery requests seeking a party's social media information. For example, in *Tapp v New York State Urban Dev. Corp.* (102 AD3d 620 [1st Dept 2013]), we denied the defendants' request for an authorization for the plaintiff's Facebook records, concluding that the mere fact that the plaintiff used Facebook was an insufficient basis to provide the defendant with access to the account. Likewise, in *Pecile v Titan Capital Group, LLC* (113 AD3d 526 [1st Dept 2014]), we concluded that vague and generalized assertions that information in the plaintiff's social media sites might contradict the plaintiff's claims of emotional distress were not a proper basis for disclosure (*see also Abrams v Pecile* (83 AD3d 527 [1st Dept 2011] [rejecting the defendant's demand for access to the plaintiff's social networking sites because there was no showing

that information in those accounts would lead to relevant evidence bearing on the plaintiff's claims]).

Other Departments of the Appellate Division, consistent with well-established case law governing disclosure, have required some threshold showing before allowing access to a party's private social media information (*see e.g. Richards v Hertz Corp.*, 100 AD3d 728, 730-731 [2d Dept 2012] [striking demand for Facebook information of one of the plaintiffs because there was no showing that the disclosure of that material would result in disclosure of relevant evidence or would be reasonably calculated to lead to discovery of information bearing on the claim]; *McCann v Harleysville Ins. Co. of N.Y.*, 78 AD3d 1524, 1525 [4th Dept 2010] [denying authorization for the plaintiff's Facebook information where the defendant failed to establish a factual predicate of relevancy, and characterizing the request as "a fishing expedition . . . based on the mere hope of finding relevant evidence"] [internal quotation marks omitted]). Guided by these principles, we conclude that defendant has failed to establish entitlement to either plaintiff's private Facebook photographs, or information about the times and length of plaintiff's private Facebook messages. The fact that plaintiff had previously used Facebook to post pictures of herself or to

send messages is insufficient to warrant discovery of this information (*see Tapp*, 102 AD3d at 620 [the plaintiff's mere utilization of a Facebook account is not enough]). Likewise, defendant's speculation that the requested information might be relevant to rebut plaintiff's claims of injury or disability is not a proper basis for requiring access to plaintiff's Facebook account (*see id.* at 621 [the defendants' argument that the plaintiff's Facebook postings might reveal daily activities that contradict claims of disability is "nothing more than a request for permission to conduct a fishing expedition"] [internal quotation marks omitted]; *Pecile*, 113 AD3d at 527 [vague and generalized assertions that the information sought might conflict with the plaintiff's claims of emotional distress insufficient]).[1]

However, in accordance with standard pretrial procedures, plaintiff must provide defendant with all photographs of herself posted on Facebook, either before or after the accident, that she intends to use at trial. Plaintiff concedes that she cannot use

[1] The fact that plaintiff deactivated her Facebook account is not a basis to conclude that relevant information is contained therein. In any event, in the motion papers below, defendant's counsel conceded that he conducted a search of plaintiff's public Facebook profile before she deactivated it and found nothing but an old picture of her.

these photographs at trial without having first disclosed them to defendant.

We disagree with the dissent's position that we should reconsider the well-settled body of case law, from both this Court and other Departments, governing the disclosure of social media information. Both parties here agree with the general legal principles set forth in the existing case law and differ only as to the application of those principles to the specific facts of this case. Neither party asks us to revisit our controlling precedent, and the doctrine of stare decisis requires us to adhere to our prior decisions (*see People v Aarons*, 305 AD2d 45, 56 [1st Dept 2003] ["stare decisis stands as a check on a court's temptation to overrule recent precedent. Only compelling circumstances should require us to depart from this doctrine"], *affd* 2 NY3d 547 [2004]). Although we agree with the dissent that social media is constantly evolving, there is no reason to alter the existing legal framework simply because the potential exists that new social network practices may surface. Furthermore, there is no dispute that the features of Facebook at issue here (i.e., the ability to post photographs and send messages) have been around for many years.

Contrary to the dissent's view, this Court's prior decisions

do not stand for the proposition that different discovery rules exist for social media information. The discovery standard we have applied in the social media context is the same as in all other situations — a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims (*see e.g. GS Plasticos Limitada*, 112 AD3d at 540; *Budano*, 97 AD3d at 499; *Sexter*, 277 AD2d at 187; *Manley*, 190 AD2d at 601). This threshold factual predicate, or "reasoned basis" in the words of the dissent, stands as a check against parties conducting "fishing expeditions" based on mere speculation (*see Devore v Pfizer Inc.*, 58 AD3d 138, 144 [1st Dept 2008], *lv denied* 12 NY3d 703 [2009] [parties cannot use discovery "as a fishing expedition when they cannot set forth a reliable factual basis for what amounts to, at best, mere suspicions"]).

Although we agree with the dissent that the discovery standard is the same regardless of whether the information requested is contained in social media accounts or elsewhere, we disagree with the dissent's analysis as to how that standard should work in the personal injury context. According to the dissent, "[i]f a plaintiff claims to be physically unable to engage in activities due to the defendant's alleged negligence,

posted information, including photographs and the various forms of communications (such as status updates and messages) that establish or illustrate the plaintiff's former or current activities or abilities will be discoverable." This view, however, is contrary to our established precedent holding otherwise (*see Pecile v Titan*, 113 AD3d at 526; *Tapp*, 102 AD3d at 620; *Abrams*, 83 AD3d at 527). We are bound by principles of stare decisis to follow this prior precedent, particularly here where no party asks us to revisit it, and we believe that this precedent results in the correct outcome here.

Taken to its logical conclusion, the dissent's position would allow for discovery of all photographs of a personal injury plaintiff after the accident, whether stored on social media, a cell phone or a camera, or located in a photo album or file cabinet. Likewise, it would require production of all communications about the plaintiff's activities that exist not only on social media, but in diaries, letters, text messages and emails. Allowing the unbridled disclosure of such information, based merely on speculation that some relevant information might be found, is the very type of "fishing expedition" that cannot be countenanced. Contrary to the dissent's view, there is no analogy between the defense litigation tool of surveillance video

and the wholesale discovery of private social media information. The surveillance of a personal injury plaintiff in public places is a far cry from trying to uncover a person's private social media postings in the absence of any factual predicate.

The question of whether a court should conduct an in camera review of social media information is not presented on this appeal. The court below did not order an in camera review, nor do the parties on appeal request any such relief. Further, the dissent is mistaken that our prior decisions in this area require a court to conduct an in camera review in all circumstances where a sufficient factual predicate is established. The decision whether to order an in camera review rests in the sound discretion of the trial court, or in this Court's discretion if we choose to exercise it (*see Gottlieb v Northriver Trading Co. LLC*, 106 AD3d 580 [1st Dept 2013]; *Horizon Asset Mgt., Inc. v Duffy*, 82 AD3d 442, 443 [1st Dept 2011]). The cases cited by the dissent in which an in camera review was directed stand simply for the proposition that those courts, in their discretion, believed that such review was appropriate.

Finally, plaintiff's claim that the motion court erred in sua sponte ordering a physical and psychological examination of her is based on a misreading of the court's decision. As

defendant acknowledges, the court did not grant such relief, but merely referenced the previously scheduled examination discussed at oral argument.

All concur except Acosta J.P. and Saxe, J. who dissent in a memorandum by Saxe, J. as follows:

SAXE, J. (dissenting)

This appeal, concerning whether defendant is entitled to disclosure of information that plaintiff posted on the nonpublic portion of her Facebook page before she deactivated her account, prompts me to suggest that we reconsider this Court's recent decisions on the subject (*see e.g. Patterson v Turner Constr. Co.*, 88 AD3d 617 [1st Dept 2011]; *Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 [1st Dept 2013]; *Spearin v Linmar, L.P.*, 129 AD3d 528 [1st Dept 2015]). There are two aspects of these previous rulings that are problematic: first, the showing necessary to obtain discovery of relevant information posted on Facebook or other social networking sites, and second, the procedure requiring that once a threshold showing is made, the trial court must conduct an in camera review of the posted contents in each case to ensure that the defendant's access is limited to relevant information. In view of how recently our initial rulings on the subject were issued, it makes sense to revisit those initial rulings sooner rather than later; in any event, the topic is too new to warrant rigid adherence at this time to our initial rulings under the doctrine of stare decisis.

Facts

Plaintiff Kelly Forman alleges that she was injured on June

20, 2011 while visiting defendant Mark Henkin in Westhampton. The two were on what was to be a leisurely horseback ride, when plaintiff fell off of the animal, allegedly due to negligence on the part of Henkin and his employees in failing to correctly tack up the saddle and providing faulty equipment. Plaintiff alleges serious and debilitating injuries, including traumatic brain injury and spinal injuries, causing cognitive deficits, memory loss, inability to concentrate, difficulty in communicating, and social isolation, severely restricting her daily life. Approximately five months later, she commenced this action.

In a written statement plaintiff provided to defendant at her deposition, she described the nature of her claimed physical, mental and psychological injuries. Among the assertions she made was that after the accident, her "social network went from huge to nothing." At her deposition, plaintiff testified that before the accident she had maintained a Facebook page and had posted photographs showing her doing fun things, but that she deactivated her Facebook page some months after the accident (and after the commencement of this action), some time between June and August of 2012. She said that due to her current difficulties with memory, she could not recall the exact nature or extent of her Facebook activity from the time of the accident

until she deactivated the account.

Defendant demanded an authorization to obtain plaintiff's Facebook records, unlimited in time and scope. When the issue was raised by motion, defendant argued that the requested material was necessary for his defense, as it was relevant to the issue of plaintiff's credibility. Plaintiff opposed the motion, arguing that defendant had not shown that the material requested was reasonably calculated to result in the disclosure of relevant evidence, or was material and necessary to the defense of the claims, but that rather, defendant was only speculating that materials posted in her Facebook account after the accident contained such evidence.

The court directed disclosure of any photographs posted after the accident which do not depict nudity or romantic encounters, along with any photographs posted before the accident that plaintiff intends to use at trial, as well as any private Facebook messages plaintiff sent after the accident, redacted so that the only information provided is the amount of characters and the time at which the message was sent. On plaintiff's appeal, the majority concludes that the direction for the disclosure of photographs and information about private messages must be vacated, in the absence of a factual predicate that

contradicts or conflicts with plaintiff's claims. We disagree with that approach to the subject, although it comports with our current case law.

Discussion

A few basic concepts about Facebook must be understood for this discussion (*see generally* http://www.facebook.com/help [accessed July 21, 2015]). Every person who subscribes to Facebook has a "public page" containing information that the subscriber allows to be viewed by the general public, which may include content such as photographs, status updates, or shared links. Each subscriber may choose to make each piece of posted content publicly available, or may limit the posted content so that it can only be viewed by a more limited group, such as the individuals identified by the subscriber as "friends," or a customized list of people. Subscribers can also use Facebook to send messages to other subscribers in a manner similar to text messaging. Those messages will not be visible to anyone not involved in them.

If a subscriber opts to deactivate his or her Facebook page, that person's page is no longer viewable. However, deactivating one's Facebook page does not erase the information that was previously posted there. Instead that information remains

present in Facebook's internal records, so that it can be restored by reactivation of an account, or obtained through a court order.[1]

Over the past few years, as social networking sites have become increasingly ubiquitous, courts across the country have adopted a variety of approaches to discovery of social media accounts (*see generally* Rick E. Kubler and Holly A. Miller, "Recent Developments in Discovery of Social Media Content," ABA Section of Litigation, Insurance Coverage Litigation Committee CLE Seminar, available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_inscle_materials/written_materials/24_1_recent_developements_in_discovery_of_social_media_content.authcheckdam.pdf [accessed Sept. 28, 2015]). It is clear that "discovery of social networking information is a developing body of jurisprudence" (Mallory Allen & Aaron Orheim, *Get Outta My Face[book]: The Discoverability of Social Networking Data and the Passwords Needed to Access Them*, 8 Wash J L Tech & Arts 137, 152

[1] It is also possible for an account to be permanently deleted, an option not relevant to this discussion, but which could, in certain circumstances, lead to a spoliation claim (*see Gatto v United Air Lines, Inc.*, 2013 US Dist LEXIS 41909, 2013 WL 1285285 [D NJ March 25, 2013]

[2012]).

The case law that has emerged in this state in the last few years regarding discovery of information posted on personal social networking sites holds that a defendant will be permitted to seek discovery of the nonpublic information a plaintiff posted on social media, *if, and only if,* the defendant can first unearth some item from the plaintiff's publicly available social media postings that tends to conflict with or contradict the plaintiff's claims. Even if that hurdle is passed, then the trial court must conduct an in camera review of the materials posted by the plaintiff to ensure that the defendant is provided only with relevant materials.

The first New York State appellate case considering a demand for the contents of a plaintiff's Facebook account was issued by the Fourth Department in 2010, affirming the denial of the defendant's motion for such an authorization (*McCann v Harleysville Ins. Co. of New York*, 78 AD3d 1524 [4th Dept 2010]). In rejecting the defendant's assertion that the information was relevant to whether the plaintiff had sustained a serious injury in the accident, the Fourth Department observed that the demand was essentially "a fishing expedition" into the plaintiff's Facebook account in the hope of finding relevant evidence (*id.* at

1525). It is worth noting that the demand in *McCann* was for the entire contents of the plaintiff's Facebook account; the defendant made no effort to tailor the demand to limit it to relevant, discoverable materials contained there.

The Fourth Department elaborated on the point in *Kregg v Maldonado* (98 AD3d 1289 [4th Dept 2012]). In *Kregg*, upon learning that family members of the injured party had established Facebook and MySpace accounts for him and had posted material on his behalf in connection with those accounts, the defendants requested the disclosure of the contents of those and any other social media accounts maintained by or on behalf of the injured party. The Court explained that the request was made without "a factual predicate with respect to the relevancy of the evidence" (*id.* at 1290, quoting *McCann* at 1525; *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]), observing that "there [was] no contention that the information in the social media accounts contradict[ed] plaintiff's claims for the diminution of the injured party's enjoyment of life" (*Kregg* at 1290). The prerequisite of a "factual predicate" contradicting the plaintiff's claims, imposed in *McCann* and *Kregg*, has been incorporated into the decisions that followed on discovery of material posted on social media.

In *Tapp v New York State Urban Dev. Corp.* (102 AD3d 620 [1st Dept 2013], *supra*), this Court concluded that merely having a Facebook account does not establish a factual predicate for discovery of private material posted to a Facebook page. *Tapp* used the *Kregg* concept of requiring a "factual predicate" before allowing a defendant to obtain discovery of information the plaintiff posted on social media: "defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account — that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims'" (*id.* quoting *Patterson v Turner Constr. Co.*, 88 AD3d 617, 618 [1st Dept 2011], *supra*, *Kregg*, 98 AD3d at 1290). Indeed, in *Tapp*, this Court explicitly rejected the defendant's rationale that "plaintiff's Facebook postings 'may reveal daily activities that contradict or conflict with' plaintiff's claim of disability," asserting that the argument amounted to a "fishing expedition" (*id.* at 621, citing *McCann* at 1525).

Even where some factual predicate for the disclosure of information posted on social media is established, this Court has required that an in camera review be performed so that the defendant is not made privy to non-relevant content. This

procedure was imposed in *Patterson v Turner Constr.* and the recent case of *Spearin v Linmar, L.P.* (129 AD3d 528 [1st Dept 2015], *supra*). In *Patterson*, where the defendant requested an authorization for all of the plaintiff's Facebook records after the incident, the motion court conducted an in camera review and determined that at least some of the information contained there would "result in the disclosure of relevant evidence" or was "reasonably calculated to lead to the discovery of information bearing on the claims," and consequently ordered the plaintiff to provide the requested authorization. This Court remanded the matter back to the motion court for a more specific determination, explaining that "it is possible that not all Facebook communications are related to the events that gave rise to plaintiff's cause of action" (88 AD2d at 618).

In *Spearin*, the plaintiff's public profile picture from his Facebook account, uploaded after his accident, depicted the plaintiff sitting in front of a piano, which tended to contradict his testimony that, as a result of the claimed accident he could longer play the piano (*id.* at 528). Even so, this Court modified an order that required the plaintiff to provide an authorization for access to his Facebook account; we required, instead, an in camera review of the plaintiff's post-accident Facebook postings

for identification of information relevant to the plaintiff's alleged injuries (*id.*). The Second Department ruled similarly in *Richards v Hertz Corp.*, (100 AD3d 728, 730 [2nd Dept 2012]), where the plaintiff claimed she could no longer ski, yet after the accident a picture was uploaded depicting her on skis. This factual predicate was held to entitle the defendant *not* to an authorization for all of the material posted to Facebook by the plaintiff, but to an in camera review of those items and a determination of which ones were relevant to the claims (*id.*).

The procedure created by these cases, by which a defendant may obtain discovery of nonpublic information posted on a social media source in a plaintiff's control only if that defendant has first found an item tending to contradict the plaintiff's claims, at which time the trial court must conduct an in camera review of all the items contained in that social media source, imposes a substantial — and unnecessary — burden on trial courts. As one Suffolk County justice has observed, "[I]n camera inspection in disclosure matters is the exception rather than the rule, and there is no basis to believe that plaintiff's counsel cannot honestly and accurately perform the review function" (*Melissa "G" v North Babylon Union Free Sch. Dist.*, 48 Misc 3d 389, 393 [Sup Ct, Suffolk County 2015]).

Moreover, as the numbers of people who maintain social networking site accounts increase over time, there will be a commensurate increase in the burden on the trial courts handling personal injury litigation to conduct in camera reviews of litigants' social media postings. Our trial courts are already overburdened; we should think twice about unnecessarily adding to their workload.

Moreover, the extra burden is clearly unnecessary since the procedure we are currently employing stands in marked contrast to the standard discovery procedure in civil litigation generally.

All discovery issues in this state are controlled by CPLR 3101(a), which provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The term "material and necessary" has long been interpreted liberally in New York, "to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial" (*Allen v Cromwell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [1st Dept 2006]). As the Court of Appeals has more recently put it, "New York has long favored open and far-reaching pretrial discovery" (*DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184, 193 [1992], *cert denied sub nom Poole v*

Consolidated Rail Corp., 510 US 816 [1993]).

It is true that the law does not allow "fishing expeditions," that is, the use of a disclosure demand based solely on "hypothetical speculations" (*Manley v New York City Hous. Auth.*, 190 AD2d 600, 601 [1st Dept 1993] [internal quotation marks omitted]), "merely to see what beneficial things might be inadvertently discovered from the other side" (*see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3101, C3101:8). However, that does not mean that there is a preliminary requirement that the party seeking discovery must be able to prove that the other side has in its possession an item or items answering to the description in the discovery demand. Rather, the "material and necessary" standard only requires a reasoned basis for asserting that the requested category of items "bear[s] on the controversy" (*see id.*), or a showing that it is likely to produce relevant evidence (Anne M. Payne and Arlene Zalayet, Modern New York Discovery [2d ed 2004] 2015 Supp § 22.55.60 at 245).

Of course, the statute creates exceptions for privileged matter, attorney's work product, and materials prepared in anticipation of litigation (*see* CPLR 3101[b], [c], [d][2]); but, beyond such statutory protections, "if nothing unusual can be

shown to invoke the court's protective order powers under CPLR 3103(a), as with a showing that the disclosure devices are being used for harassment or delay, the party is entitled to the disclosure" (Connors, Practice Commentaries, at C3101:8). Finally, a demand may not be overbroad; it must seek only materials relevant to the issues raised in the litigation, and if it fails to distinguish between relevant and irrelevant items, a protective order pursuant to CPLR 3103(a) may be issued.

In accordance with the foregoing, generally, in a personal injury action, a defendant may serve on a plaintiff a notice to produce tangible documents or other items in the plaintiff's possession or control, describing the type of content that is relevant to the claimed event and injuries. Assuming that the demand is sufficiently tailored to the issues, and unless a claim of privilege is made, normally the plaintiff must then search through those items to locate any items that meet the demand, and provide those items. There is not usually a need for the trial court to sift through the contents of the plaintiff's filing cabinets to determine which documents are relevant to the issues raised in the litigation.

One federal magistrate judge provided a cogent analysis of why the rule our courts have adopted regarding discovery from

social media accounts should be changed, and a traditional approach used instead:

> "Some courts have held that the private section of a Facebook account is only discoverable if the party seeking the information can make a threshold evidentiary showing that the plaintiff's public Facebook profile contains information that undermines the plaintiff's claims. This approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. *On the other hand, a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section*. The Federal Rules of Civil Procedure do not require a party to prove the existence of relevant material before requesting it. Furthermore, this approach improperly shields from discovery the information of Facebook users who do not share any information publicly. For all of the foregoing reasons, the Court will conduct a traditional relevance analysis" [emphasis added].

(*Giacchetto v Patchogue-Medford Union Free Sch. Dist.*, 293 FRD 112, 114 n 1 [ED NY 2013] [internal citations omitted]).

There is no reason why the traditional discovery process cannot be used equally well where a defendant wants disclosure of information in digital form and under the plaintiff's control,

posted on a social networking site. The demand, like any valid discovery demand, would have to be limited to reasonably defined categories of items that are relevant to the issues raised. Upon receipt of an appropriately tailored demand, a plaintiff's obligation would be no different than if the demand concerned hard copies of documents in filing cabinets. A search would be conducted through those documents for responsive relevant documents, and, barring legitimate privilege issues, such responsive relevant documents would be turned over; and if they could not be accessed, an authorization for them would be provided.

There is no particular difficulty in applying our traditional approach to discovery requests for information posted on social networking sites. If a plaintiff claims to be physically unable to engage in activities due to the defendant's alleged negligence, posted information, including photographs and the various forms of communications (such as status updates and messages) that establish or illustrate the plaintiff's former or current activities or abilities will be discoverable. If a plaintiff's claims are for emotional or psychological injury, it may be more difficult to frame a discovery demand, but it can certainly be done without resorting to a blanket demand for

everything posted to the account (*see e.g. Giacchetto*, 293 FRD at 112; *Equal Empl. Opportunity Commn. v Simply Storage Mgt., LLC*, 270 FRD 430 [SD Ind 2010]).

Using the approach I suggest would also obviate the need for the awkward and questionable procedure adopted by the motion court in this matter with regard to posted messages; the order on appeal allowed defendant access to only the number of characters per message and the time each was sent on plaintiff's Facebook page, but not the content. If the traditional approach to discovery were applied to posted messages, they could be treated exactly as any other letter, notice or document.

Of course, categorizing posted material as "private" does not constitute a legitimate basis for protecting it from discovery. There can be no reasonable expectation of privacy in communications that have reached their intended recipients (*see United States v Lifshitz*, 369 F3d 173, 190 [2d Cir 2004]; *see generally Romano v Steelcase Inc.*, 30 Misc 3d 426, 432-434 [Sup Ct Suffolk County 2010]). As long as the item is relevant and responsive to an appropriate discovery demand, it is discoverable. To the extent disclosure of contents of a social media account could reveal embarrassing information, "that is the inevitable result of alleging these sorts of injuries" (*Equal*

Empl. Opportunity Commn. v Simply Storage, 270 FRD at 437).

Nor should it matter that the account was "deactivated," since apparently a deactivated account may easily be "reactivated," thereby giving the subscriber access to the previously posted material (*see generally* http://www.facebook.com/help [accessed July 21, 2015]). An authorization for the site itself to provide posted content would be necessary only if previously posted materials became inaccessible to the subscriber.

The majority suggests that the doctrine of stare decisis precludes us from altering our previous rulings. However, in my view this so-called "well-settled body of case law" is not so long-established that it is deserving of immutable stare decisis treatment. "[T]he relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned" *(Montejo v Louisiana*, 556 US 778, 792-793 [2009]). Not only are the precedents under consideration here only a few years old, but they concern social networking practices that are still in the process of developing. Under these circumstances, the relationship of social media and the law ought to be flexible, open to discussion and re-examination,

rather than bound by our initial views regarding the optimal procedure to be used.

In addition to relying on stare decisis, the majority concludes that there is no need to "alter the existing legal framework." Little is said about how the existing decisions have unfairly created a rule of judicial protectionism for the digital messages and images created by social networking site users, in contrast to how discovery of tangible documents is treated under the CPLR.

In this context -- the area where litigation and social media converge -- it is important to keep in mind that in recent years social media profiles have become virtual windows into subscribers' lives. The breadth of information posted by many people on a daily basis creates ongoing portrayals of those individuals' lives that are sometimes so detailed that they can rival the defense litigation tool referred to as a "day in the life" surveillance video. And, just as "day in the life" videos are a staple of tort practice (*see* Ken Strutin, *The Use of Social Media in Sentencing Advocacy; Technology Today*, NYLJ, Sept. 28, 2010 at 5, col 1), the contents of a self-made portrait of a plaintiff's day-to-day life may contain information appropriate for discovery in personal injury litigation.

Facebook and other similar social networking sites are so popular that it will soon be uncommon to find a personal injury plaintiff who does not maintain such an on-line presence. We should keep that in mind when unnecessarily creating new discovery procedures for them, especially when those procedures are unduly burdensome on our trial courts.

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

ENTERED: DECEMBER 17, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15288 Marie Dennehy, et al., Index 800349/11
Plaintiffs-Respondents,

-against-

Alan B. Copperman, M.D., et al.,
Defendants-Appellants.

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Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for Alan B. Copperman, M.D., appellant.

Mauro Lilling Naparty LLP, Woodbury (Katherine Herr Solomon of counsel), for Reproductive Medicine Associates of New York, LLP and Reproductive Medicine Associates-International, LLP, appellants.

Duffy & Duffy, PLLC, Uniondale (Edward G. Bithorn of counsel), for respondents.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered January 14, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motions to strike the request for punitive damages and to dismiss the causes of action for medical malpractice, lack of informed consent, breach of contract, and negligence, modified, on the law, to grant the motions to the extent of dismissing the causes of action for breach of contract and negligence, for the reasons set forth in

B.F. v Reproductive Medicine Assoc. of New York, LLP (_AD3d_ [2015][Appeal No. 15289], decided simultaneously herewith), and otherwise affirmed, without costs.

All concur except Manzanet-Daniels, J. who concurs in part and dissents in part in a memorandum as follows:

MANZANET-DANIELS, J. (concurring in part and dissenting in part)

I concur in part and dissent in part for the reasons set forth in my opinion in *B.F. v Reproductive Medicine Assoc. of New York, LLP* (_AD3d_ [2015][Appeal No.15289], decided simultaneously herewith).

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

ENTERED: DECEMBER 17, 2015

CLERK

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

15845 Sallie E. Herman, Index 301234/09
Plaintiff-Appellant,

-against-

Gerald J. Moore, et al.,
Defendants-Respondents.

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Pirrotti & Glatt Law Firm PLLC, Scarsdale (Anthony Pirrotti, Jr. Of counsel), for appellant.

Morris Duffy Alonso & Faley, New York (Arjay G. Yao and Kenneth E. Pitcoff of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about July 9, 2014, upon a jury verdict in defendants' favor, unanimously reversed, on the law, without costs, and the matter remanded for a new trial.

Plaintiff claims that she sustained a permanent, consequential limitation of her neck and back as a result of a motor vehicle accident. The accident occurred while she was on her way to go apple picking with other members of her Jehovah's Witness congregation. Four years before the motor vehicle accident, plaintiff had injured her back when a bookcase fell on her. She saw an orthopedist one time in connection with the earlier injury, and treated with a physical therapist for one month.

Plaintiff claims that there were numerous errors made by the court during the trial, and that the court demonstrated a decided bias against her. Two of the statements and rulings to which plaintiff objects arose out of plaintiff's religious affiliation. Before the trial commenced, defendants moved to preclude plaintiff from highlighting that she was a Jehovah's Witness. The court granted the motion, and directed plaintiff to testify only that she was with "friends" when the accident occurred. The court did, however, make clear that plaintiff could testify that, because of her injuries, she was unable to participate in door-to-door proselytizing.

After the jury retired, one of the jurors who had originally been an alternate but was now on the deliberating panel, alerted the court that he had discerned from plaintiff's testimony that she was a Jehovah's Witness, and that he was a Jehovah's Witness as well. He testified under questioning from the court and from counsel for plaintiff and defendants that he might be "a little more likely" to believe plaintiff because of the knowledge he had about her religion. Based on that statement, the court granted defendants' counsel's request to disqualify the juror. In questioning the juror, the court referred to plaintiff's religious affiliation.

Plaintiff also takes issue with the court's decision to give a missing witness charge. The charge was related to her testimony that, in connection with the earlier accident, she saw a Dr. Rose, an orthopedist who referred her to physical therapy. Plaintiff did not call Dr. Rose as a witness, nor did she introduce into evidence any of the medical records generated by him or the physical therapy provider. It is unclear from the record when defendants requested the missing witness charge related to Dr. Rose.

Plaintiff requested a similar charge with respect to Dr. Rene Elkin, a neurologist who defendants called as their expert witness. Dr. Elkin testified that she generated a report concluding that plaintiff's neck and back injuries were degenerative in nature and were not causally related to the accident. Prior to trial, plaintiff had served a subpoena on Dr. Elkin requesting that she bring all of the records that she relied on in preparing the report, including notes she made in connection with her physical examination of plaintiff. However, Dr. Elkin testified at trial that she no longer had the notes. Plaintiff requested that the court issue a missing documents charge with respect to Dr. Elkin's notes. The court denied the request to charge, stating that Dr. Elkin had testified that the

notes were subsumed in her report.

While we are disturbed by some of the court's actions in conducting the trial, we find that, on the whole, it did not demonstrate a level of bias warranting reversal (*see Pickering v Lehrer, McGovern, Bovis, Inc.*, 25 AD3d 677, 679 [2d Dept 2006]). However, as discussed below, there are other errors which do require a new trial.

The party seeking a missing witness charge has the burden of promptly notifying the court when the need for such a charge arises (*see Spoto v S.D.R. Constr.*, 226 AD2d 202, 204 [1st Dept 1996]). The purpose of imposing such a burden is, in part, to permit the parties "to tailor their trial strategy to avoid substantial possibilities of surprise" (*People v Gonzalez*, 68 NY2d 424, 428 [1986] [internal quotation marks and citation omitted]). Once the party requesting the charge meets its initial burden, the party opposing the request can defeat it by demonstrating that, among other things, the witness was not available, was outside of its control, or the issue about which the witness would have been called to testify is immaterial (*id.*).

Here, the record does not reflect when defendants asked for a missing witness charge for Dr. Rose. This presents the

possibility that they did not do so until after plaintiff presented her case. Had that been so, plaintiff would have lost any opportunity to account for Dr. Rose's absence, argue that plaintiff did not have the requisite control over him, or attempt to procure his appearance. Accordingly, since there is no indication that defendants met their burden, we find that the missing witness charge was improperly given.

In any event, the court's stated basis for the missing witness charge was unreasonable. The court explained to the jury that it could infer, because plaintiff did not call Dr. Rose, that he would have testified that the current pain plaintiff was experiencing was related to the accident from 2003, when a bookcase fell on her, and not to the motor vehicle accident. However, the court's surmise that the previous injury had not fully resolved was speculative. Indeed, plaintiff testified that she received only one month of treatment for that injury, and never made any statement even suggesting that the injuries allegedly caused by defendants were actually the sequelae of an earlier trauma. Accordingly, there would have been no purpose for Dr. Rose to testify. The inference the court invited the jury to make simply had no basis in fact, and, by giving the missing witness charge, the court prejudiced the plaintiff.

The lack of justification for the missing witness charge is made even more evident by the court's refusal to charge the jury that the accident aggravated an earlier injury. In other words, had the court truly believed that a basis existed to believe that plaintiff still suffered from injuries suffered in the bookcase accident, it would have been inconsistent not to charge the jury that it could find that the vehiclar accident aggravated those injuries.

Finally, while Dr. Elkin did not, as plaintiff suggests, testify that she "destroyed" her notes, she did concede that she did not comply with the subpoena, which required her to bring with her to court the notes that she used in generating her report on behalf of defendants. The failure to produce those notes affected plaintiff's ability to cross-examine defendants' expert and was fundamentally unfair to plaintiff. At the least, it would have been appropriate for the court to issue an adverse inference charge (*see Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402, 403 [1st Dept 2009]). That Dr. Elkin testified that the notes were subsumed in the report is of no moment. Plaintiff was entitled to independently investigate that claim without having to rely on Dr. Elkin's own assurances that the notes were themselves of no probative value. Defendant argues that, before

plaintiff requested the missing documents charge, but after the jury had been impaneled, the court offered plaintiff the option of marking the case off the calendar so she could enforce the subpoena. However, because the parties had already selected a jury, this was not a legitimate remedy.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16428 The People of the State of New York, Ind. 1364N/13
Respondent,

-against-

Russell King,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

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Judgment, Supreme Court, New York County (Melissa Jackson, J.), rendered December 17, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree, and sentencing him to an aggregate term of 3½ years, with 5 years' postrelease supervision, unanimously affirmed.

Regardless of whether defendant made a valid waiver of his right to appeal, we perceive no basis for reducing defendant's period of postrelease supervision.

Defendant's challenge to the requirement that he register under the Gun Offender Registration Act (Administrative Code of City of NY § 10-601 *et seq.*) is unreviewable on this appeal

because it is not part of his sentence (*see People v Smith*, 15 NY3d 669 [2010]; *People v Rosa*, 85 AD3d 587 [2011], *lv denied* 17 NY3d 861 [2011]). The fact that defendant's sentence and commitment sheet makes a reference to this registration requirement does not incorporate it into the court's sentence.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16429 In re Jill Guttman, Index 103514/12
Petitioner-Appellant,

-against-

City of New York, et al.,
Respondents-Respondents.

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Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

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

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered December 11, 2013, denying the petition seeking to, among other things, annul respondents' determination, dated May 7, 2012, which gave petitioner, a probationary teacher, an unsatisfactory rating for the 2010-2011 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' determination is supported by the record, and petitioner failed to show that it was arbitrary and capricious or made in bad faith (*see Matter of Richards v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 117 AD3d 605, 606 [1st Dept 2014]). The record shows that the unsatisfactory rating was based on numerous observations by the school principal and that

petitioner's performance failed to improve even though she was provided with support from a literacy coach, a math coach, and other teachers (*see id.*). The audiotapes of meetings between the principal and petitioner do not demonstrate antiunion bias by the principal.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16430-
16430A In re Alexis Alexandra G.,
also known as Alexis G.,
also known as Alexis H.,
and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Brandy H., also known as
Brandy N.H.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Michelle R. Duprey of counsel), attorney for the child Alexis H.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), attorney for the child Janiyah H.

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Order of disposition, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about October 20, 2014, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the child Janiyah H., and committed the custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's

Services for the purpose of adoption, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about October 20, 2014, pertaining to the child Alexis G., unanimously dismissed, without costs, as academic.

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7], [3][g]). The record shows that the agency exerted diligent efforts to encourage and strengthen respondent's relationship with Janiyah by referring respondent to parenting skills training and a drug treatment program and by scheduling regular supervised visitation (*see Matter of Jonathan M.*, 19 AD3d 197 [1st Dept 2005], *lv denied* 5 NY3d 798 [2005]). Respondent completed a few of the services to which she was referred. However, despite the agency's diligent efforts, during the statutorily relevant period, she failed to address meaningfully the problems leading to Janiyah's placement, in particular, her addiction to prescription painkillers, and thus failed to plan for Janiyah's future (*see Matter of Violeta P.*, 45 AD3d 352 [1st Dept 2007]). Respondent also failed to visit the child regularly. The agency was not a guarantor of respondent's success in overcoming her predicament (*see Matter of Sheila G.*, 61 NY2d 368, 385 [1984]).

A preponderance of the evidence at the dispositional hearing

supports the finding that Janiyah's best interests would be served by terminating respondent's parental rights (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]) so as to facilitate the child's adoption by her foster mother, with whom she has lived since the age of two and who meets all her needs (*see Matter of Jesus Michael P. [Sonia R.]*, 122 AD3d 520 [1st Dept 2014]; *Matter of Juan A. [Nhaima D.R.]*, 72 AD3d 542, 543 [1st Dept 2010]). Respondent's request for a suspended judgment is unpreserved and, in any event, unwarranted (*see Matter of Andrea E. [Valerie E.]*, 72 AD3d 1617 [4th Dept 2010], *lv denied* 15 NY3d 703 [2010]; *Matter of Juan A.*, 72 AD3d at 543).

The appeal from the order pertaining to the child Alexis is academic, since she has reached the age of 18 (*see Matter of Winston Lloyd D.*, 7 AD3d 706, 707 [2d Dept 2004]).

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16431 The People of the State of New York, Ind. 6832/97
Respondent,

-against-

Tony Richardson,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

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Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered February 5, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were

adequately taken into account by the guidelines and outweighed by the seriousness of the underlying sex crime, as well as defendant's criminal and prison disciplinary history.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16432 Jennifer Tejeda, Index 303750/09
Plaintiff-Respondent,

-against-

Mohammad S. Aifa,
Defendant,

Danella Construction of
NY, Inc., et al.,
Defendants-Respondents,

Evelyna Lake, et al.,
Defendants-Appellants.

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Marjorie E. Bornes, Brooklyn, for appellants.

Law Offices of Alan A. Tarzy, New York (Alan A. Tarzy of counsel), for Jennifer Tejeda, respondent.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (M. Grace Sacro of counsel), for Danella Construction of NY, Inc. and Thomas W. Dickerson, respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered April 23, 2013, which, to the extent appealed from, denied defendants Evelyna Lake and Dito Limo Corp.'s motions for summary judgment dismissing the complaint and cross claims as against them on the issue of liability and for summary judgment on the issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, insofar as it denied the motion based on liability, and that

motion granted, and the appeal therefrom otherwise dismissed, without costs, as academic. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that she suffered serious injuries when she was a passenger in a livery cab driven by defendant Aifa that was the front-most vehicle in a rear-end accident involving four vehicles. Defendant Lake, who was driving the third car in the accident, testified that Aifa's cab stopped suddenly to pick up a passenger, that the second cab then braked, and that she braked and came to a stop about a foot behind the second cab. Lake's cab was then hit in the rear by the truck behind her, which was driven by defendant Dickerson, causing her vehicle to travel forward and strike the second cab. Dickerson testified that the accident occurred because cabs in front of him stopped suddenly to pick up passengers, that he was just a half-car length behind Lake's cab when he first saw it, and that he hit the rear of Lake's cab after it had stopped.

Lake provided a "non-negligent explanation for the collision" between her car and the cab stopped in front of her, thereby rebutting the presumption that she was negligent (*see Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept 2001]). She submitted the testimony that she had come to a full stop

before being hit by Dickerson's truck, which caused her car to move forward into the cab stopped in front of her (*see Williams v Hamilton*, 116 AD3d 421 [1st Dept 2014]). Dickerson's testimony that Lake stopped short is insufficient by itself to raise an issue of fact as to her negligence; he provided no explanation as to why he did not maintain a safe distance between his vehicle and Lake's vehicle in front of him (*see Corrigan v Porter*, 101 AD3d 471, 472 [1st Dept 2012]). Thus, Lake and defendant Dito, the owner of the cab Lake was driving, demonstrated their lack of fault in connection with both the impact with the second vehicle and the rear impact by Dickerson's vehicle, and are entitled to summary dismissal of the complaint and cross claims against them.

In light of the foregoing, we do not reach defendants' arguments as to plaintiff's ability to demonstrate that she suffered a serious injury causally related to the accident.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16433 Devi Kristo, Index 112185/11
Plaintiff-Appellant,

-against-

Board of Education of the City
of New York, et al.,
Defendants-Respondents,

Kafka Construction, LLC,
Defendant.

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Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Cozen O'Connor, New York (Michael Morris of counsel), for respondents.

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Order, Supreme Court, New York County (Louis B. York, J.), entered July 7, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment as to liability on his Labor Law §§ 240(1) and 241(6) claims, and granted defendants-respondents' (defendants) cross motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, unanimously reversed, on the law, without costs, plaintiff's motion granted, and defendants' cross motion denied.

Plaintiff is entitled to summary judgment on the issue of liability on his Labor Law § 240(1) claim, since his deposition

testimony establishes that a proximate cause of his injury was the unsecured scaffold planks, which shifted when he stepped on the platform because three of the required planks were missing (*see Ciardiello v Benenson Capital Co.*, 273 AD2d 147 [1st Dept 2000]). Thus, contrary to defendants' contention, plaintiff was not the sole proximate cause of his accident (*see Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008]). Further, defendants' recalcitrant worker defense, predicated on plaintiff's alleged entry into an area of the scaffold that had been cordoned off, is unavailing, as there is no evidence that plaintiff had been instructed on the day of the accident not to enter or use the cordoned-off area (*see Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003], *lv dismissed* 1 NY3d 622 [2004]).

The unsworn accident report relied upon by defendants to show an inconsistency in plaintiff's account of the accident is insufficient to raise an issue of fact (*see Perez v Brux Cab Corp.*, 251 AD2d 157, 159 [1st Dept 1998]). The report is inadmissible hearsay (*id.*), and defendants provide no excuse for their failure to tender the report in admissible form (*Allstate Ins. Co. v Keil*, 268 AD2d 545, 545-546 [2d Dept 2000]). The inconsistent statement in plaintiff's hospital record as to how

the accident occurred is also insufficient to raise a triable issue of fact, because it is not germane to plaintiff's diagnosis and treatment (*see Sermos v Gruppuso*, 95 AD3d 985, 986-987 [2d Dept 2012]).

Given the foregoing determination, we need not address plaintiff's remaining claims (*Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 617 [1st Dept 2014]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]). In any event, the court erred in denying plaintiff summary judgment on his Labor Law § 241(6) claim predicated on defendants' violation of 12 NYCRR 23-5.1(e)(1), which requires scaffold planks to be "laid tight" (*Susko v 337 Greenwich LLC*, 103 AD3d 434, 436 [1st Dept 2013]). In addition, the court erred in granting defendants summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, since issues of fact exist regarding whether defendants created or had constructive notice of the scaffold's defective condition (*see Hernandez v Argo Corp.*, 95 AD3d 782, 783 [1st Dept 2012]), and whether they exercised supervisory control over the erection and placement of

the scaffold (*see Alomia v New York City Tr. Auth.*, 292 AD2d 403, 405 [2d Dept 2002]).

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16435-
16436 In re Rebecca M. T.,
Petitioner-Respondent,

-against-

Trina J. M., et al.,
Respondents-Appellants,

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Julian A. Hertz, Somers, for Trina M., appellant.

Tennille M. Tatum-Evans, New York, for Byron Luis M., Jr., appellant.

Anne Reiniger, New York, for respondent.

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Orders, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about September 3, 2014, which, upon a fact-finding determination that respondent Byron Luis M. had committed the family offenses of reckless endangerment, menacing in the second degree, criminal mischief, and disorderly conduct, and that respondent Trina J.M. had committed the family offense of disorderly conduct, granted a two-year order of protection against respondents, unanimously modified, on the law, to vacate the finding of criminal mischief, and otherwise affirmed, without costs.

A fair preponderance of the evidence in the record supports the Referee's findings, except to the extent the Referee found

that Byron had committed the family offense of criminal mischief (*see* Family Ct Act §§ 812[1]; 832). The evidence fails to support the finding of criminal mischief, because nothing in the record establishes that Byron intentionally broke any property, nor does it establish the value of any broken property (*see* Penal Law §§ 145.00, 145.05, 145.10, 145.12; *see also Matter of Joshua VV.*, 68 AD3d 1172, 1173 [3d Dept 2009]).

Although the Referee failed to state whether Byron's actions constituted first or second degree reckless endangerment, we find that a fair preponderance of the evidence supports a finding that he committed conduct constituting reckless endangerment in the second degree. The Referee credited petitioner's testimony that, during a July 2013 incident involving an altercation between Byron and petitioner's husband, Byron repeatedly swung a butcher knife while standing less than three feet away from petitioner, disregarding the substantial risk that petitioner could be seriously injured (*see* Penal Law § 120.20; *Matter of Tatiana N.*, 73 AD3d 186, 191-192 [1st Dept 2010]).

The evidence supports the finding that Byron and Trina, his girlfriend, each committed the family offense of disorderly conduct during the July 2013 altercation. The record shows that respondents were screaming and/or cursing during the altercation,

and that the incident ended with the apartment in disarray and petitioner running from the apartment partially naked. Further, the Referee credited petitioner's testimony that after Byron dropped the knife, Trina passed a frying pan to him, thereby enabling Byron to hit petitioner's husband in the head with it. This evidence supports a finding that respondents acted with reckless disregard of causing public inconvenience, annoyance or alarm (*see* Penal Law § 240.20; *see also Matter of Sarah W. v David W.*, 100 AD3d 463, 463 [1st Dept 2012]; *Matter of Cassie v Cassie*, 109 AD3d 337, 342-343 [2d Dept 2013]). There is no basis to disturb the Referee's credibility determinations (*Matter of Everett C. v Oneida P.*, 61 AD3d 489, 489 [1st Dept 2009]).

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16437 In re Anderson Kill, P.C., Index 156153/14
Petitioner-Appellant,

-against-

Anderson Kill, P.C. etc.,
Respondent,

Stelios Coutsodontis,
Intervenor-Respondent.

_____

Anderson Kill P.C., New York (Jeffrey E. Glen of counsel), for appellant.

Poles Tublin Stratakis & Gonzalez, LLP, New York (Scott R. Johnston of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered February 11, 2015, denying the petition for a turnover order that would enable petitioner to enforce a judgment against its former client Sea Trade Maritime Corporation for unpaid legal fees, and dismissing the proceeding, unanimously affirmed, without costs.

"A special proceeding for turnover is the procedural device provided by [CPLR] article 52 for enforcement of a judgment against an asset of the judgment debtor in the possession or custody of a third person; such a third person is known as a garnishee" (*JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d

293, 301 [1st Dept 2007]).

Here, pursuant to the subject escrow agreement, which petitioner drafted and was a party as escrow agent, the parties agreed that the disputed corporate assets were to be disbursed either (1) pursuant to jointly signed written instructions, or (2) upon a final nonappealable judicial determination of the intervenor's ownership interest in the corporation and entitlement to any portion of the escrow funds, neither of which has occurred. Thus, even if CPLR 5225(b) allowed for the release of the escrow funds, pursuant to CPLR 5240, which provides a court with substantial authority to order equitable relief, the turnover petition was properly denied. The parties drafted an escrow agreement intended to secure the sale proceeds for the benefit of the parties, and petitioner should not be permitted to circumvent that agreement.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16438 The People of the State of New York, Ind. 2234/12
Respondent,

-against-

William Johnson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at hearing; Michael J. Obus, J. at plea and sentencing), rendered December 6, 2012, convicting defendant of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing court, which had the advantage of seeing and hearing the arresting officer testify, credited his account of the incident, and we find no basis for disturbing that determination (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The events

described by the officer were not so inherently implausible as to warrant a different conclusion.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16439 Shawn Mims, etc., et al., Index 652653/11
Plaintiffs-Respondents,

-against-

Capitol Records, LLC, etc.,
Defendant-Appellant.

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Pryor Cashman LLP, New York (Donald S. Zakarin of counsel), for appellant.

Reitler Kailas & Rosenblatt LLC, New York (Brian D. Caplan of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 9, 2015, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing "[c]laims 7 and 16" in plaintiffs' complaint, unanimously modified, on the law, to grant the motion with respect to claim 7, and otherwise affirmed, without costs.

Defendant is entitled to summary judgment dismissing so much of plaintiffs' breach of contract cause of action relating to defendant's retention of digital download revenues (plaintiffs' claim 7). Defendant established, as a matter of law, that the Assignment Agreement's 21% "Domestic Distribution/Services fee" at issue, which redefined the applicable costs and fees that defendant was entitled to retain, did not exclude revenues

defendant received from digital downloads, as did the prior agreement between plaintiffs and defendant's assignor.

The court correctly denied summary judgment dismissing so much of the breach of contract cause of action relating to defendant's retention of revenues paid to it by SoundExchange (plaintiffs' claim 16), since issues of fact exist as to the amount of revenues paid by SoundExchange to defendant and the amount that plaintiffs are entitled to.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16440 The People of the State of New York, Ind. 4000/10
Respondent,

-against-

Henry Brown,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered November 1, 2011, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him to a determinate term of 6 years, unanimously affirmed.

Defendant's unpreserved challenges to the validity of his plea do not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review them in the interest of justice. As an alternative holding, we find that the plea was knowing, intelligent and voluntary. There was nothing before the plea court to warrant an inquiry into whether defendant's mental condition impaired his ability to understand the plea proceedings, or into whether he affirmatively waived an insanity

defense (*see People v Diallo*, 88 AD3d 511 [1st Dept 2011], *lv denied* 18 NY3d 888 [2012]). Unlike the situation in *People v Mox* (20 NY3d 936 [2012]), there was nothing in the plea allocution that triggered a duty to inquire into an potential psychiatric defense.

Although we do not find that defendant made a valid waiver of his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16441-
16441A-
16441B Star Meth Corp.,
Plaintiff-Appellant,

-against-

Stuart Steiner, et al.,
Defendants-Respondents.

Index 605647/00

Joseph P. Dineen, Garden City, for appellant.

Aronwald & Pykett, White Plains (William I. Aronwald of counsel), for respondents.

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered August 26, 2014, after a jury trial, in favor of defendants, and bringing up for review an order, same court and Justice, entered July 30, 2014, which denied plaintiff's posttrial motion for judgment notwithstanding the verdict or a new trial, unanimously affirmed, without costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment, and appeal from order, same court and Justice, entered July 11, 2011, which, to the extent appealed from, granted defendant Steiner's motion for summary judgment insofar as he sought to preclude plaintiff from seeking damages incurred prior to plaintiff's date of incorporation,

unanimously dismissed, without costs, as academic.

The jury's findings that in 1993 Steiner disclosed defendants' fraudulent payroll scheme to Peter Schorr, a son and nephew of plaintiff's owners, and that Peter ratified the scheme, was based on legally sufficient evidence and was not against the weight of the evidence (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]; *Lolik Big V Supermarkets*, 86 NY2d 744, 746 [1995]). Accordingly, the motion court correctly concluded that, based on the "open repudiation" rule, the six-year statute of limitations began to run in 1993 and thus plaintiff's action was time-barred (*see Westchester Religious Inst. v Kamerman*, 262 AD2d 131 [1st Dept 1999]; *212 Inv. Corp. v Kaplan*, 44 AD3d 332, 334 [1st Dept 2007]). The jury clearly resolved issues of credibility in defendants' favor, and its determinations are entitled to deference (*see Haiyan Lu v Spinelli*, 44 AD3d 546 [1st Dept 2007], *lv denied* 10 NY3d 716 [2008], *rearg denied* 11 NY3d 769 [2008]).

The trial court correctly declined to issue an adverse inference charge based upon Steiner's invocation of the Fifth Amendment in a deposition in an unrelated action in which he was a nonparty (*see Access Capital v DeCicco*, 302 AD2d 48, 52 [1st Dept 2002]).

Plaintiff failed to preserve its argument that Peter lacked authority to bind plaintiff, as plaintiff did not raise the issue at trial, request that the jury be charged on the issue, or request that the claim be listed on the special verdict sheet (*see Brown v Dragoon*, 11 AD3d 834, 835 [3d Dept 2004], *lv denied* 4 NY3d 710 [2005]).

Plaintiff's remaining arguments are either moot, given the foregoing, or unavailing.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16443 The People of the State of New York, Ind. 4198/12
Respondent,

-against-

David Mitchell,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber 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 (Bonnie Wittner, J.), rendered on or about October 16, 2013.

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 17, 2015

CLERK

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

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16444 The People of the State of New York, Ind. 2150/12
Respondent,

-against-

Mark Williams,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Jonathan Garelick of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 (Renee White, J.), rendered on or about October 19, 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 17, 2015

CLERK

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

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16445 Sylvia Kordower-Zetlin, Index 652282/13
Plaintiff-Respondent,

-against-

The Home Depot U.S.A., Inc., et al.,
Defendants,

Contractor Resource Center Corp., et al.,
Defendants-Appellants.

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Ofeck & Heinze, LLP, New York (Mark F. Heinze of counsel), for appellants.

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 15, 2014, which denied defendants Contractor Resource Center Corp. (CRC) and Ezra Esha's motion to dismiss the complaint as against them pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against said defendants.

Plaintiff entered into a contract with defendant the Home Depot U.S.A., Inc., whereby the latter would act as general contractor to renovate her residence. Home Depot hired CRC, Esha, and other defendants not relevant to this appeal as

subcontractors. Plaintiff alleges that the work was substandard, shoddy, unworkmanlike, defective, and negligently performed. She also alleges that defendants caused damage to her property, including a mahogany staircase, railings, wood-paneled hallways, artwork, and family heirloom furniture, and that an employee or independent contractor of defendants stole jewelry and artwork from her. In addition to suing Home Depot for breach of contract, plaintiff sued CRC and Esha (among others) for negligence/gross negligence and unjust enrichment.

"[C]laims based on negligent or grossly negligent performance of a contract are not cognizable" (*Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478 [1st Dept 2010]). This principle applies even when the plaintiff's agreement is with the general contractor, not the subcontractors (*see Felice v American A.W.S. Corp.*, 46 AD3d 505 [2d Dept 2007]).

Plaintiff's reliance on her allegation that CRC and Esha's work was so negligently done that New York City agencies found violations of City Codes is misplaced. *New York Univ. v Continental Ins. Co.* (87 NY2d 308 [1995]) rejected the argument "that statutory provisions necessarily or generally impose tort duties independent of contractual obligations" (*id.* at 317).

Contrary to plaintiff's contention that CRC and Esha had an

extracontractual duty to work safely, "tort liability for breach of contract will not be imposed merely because there is some safety-related aspect to the unfulfilled contractual obligation" (*Church v Callanan Indus.*, 99 NY2d 104, 112 [2002]).

Relying on *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]), plaintiff contends that in entering into a subcontract with Home Depot, CRC and Esha assumed a duty of care to her. However, *Espinal* did not involve the duplication or classification of tort and contract claims. Plaintiff's purported negligence/gross negligence claim is really a contract claim (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 552 [1992] ["In disentangling tort and contract claims, (courts) have ... considered the nature of the injury, the manner in which the injury occurred and the resulting harm"]).

The unjust enrichment claim must be dismissed because the subject matter of the claim is governed by plaintiff's contract with Home Depot (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). This is so even though the quasi-contract claim is asserted against the subcontractors, who were not signatories to that contract (*see e.g. Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313 [1st Dept 1995]; *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989],

lv dismissed in part, denied in part 74 NY2d 874 [1989]). There is no indication in the record that Home Depot disputes the existence of the contract or its application to the instant dispute.

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

ENTERED: DECEMBER 17, 2015

CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16446 The People of the State of New York, Ind. 1196/04
Respondent,

-against-

Jamel Purnell,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lori Ann Farrington 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, Bronx County (Alvin Yearwood, J.), rendered on or about September 2, 2014,

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 17, 2015

CLERK

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

Mazzarelli, J.P., Acosta, Moskowitz, Richter, JJ.

16447N Ndiaga Diagne, Index 307983/10
Plaintiff-Appellant,

-against-

J.T.S. Trucking, Inc., et al.,
Defendants-Respondents.

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Sheryl R. Menkes, New York, for appellant.

Perry, Van Etten, Rozanski & Primavera, LLP, New York (Jeffrey K. Van Etten and Kristen Turiano of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 18, 2015, which denied plaintiff's post-note of issue motion to permit a second inspection of defendants' tractor-trailer involved in the subject 2010 accident, unanimously reversed, on the facts and as a matter of discretion, without costs, and the motion to reinspect defendants' tractor trailer granted.

While plaintiff has made a minimal showing, we find that the resignation of plaintiff's expert accident reconstructionist following the filing of the note of issue, due to the breakdown in the relationship between plaintiff's counsel and the expert, and having nothing to do with the case, is a sufficient demonstration of an unusual or unanticipated circumstance, within

the meaning of 22 NYCRR § 202.21(d). As to the showing of substantial prejudice which would arise in the absence of this requested discovery (*see generally Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]), we reject the court's and defendants' assertion that plaintiff's new expert could simply rely on the prior expert's factual findings, as there is no evidence in the record of what those factual findings might be, or whether they are of the type on which the new expert could form an opinion. In any event, there would need to be evidence demonstrating the reliability of the prior findings (*see Wagman v Bradshaw*, 292 AD2d 84, 85 [2d Dept 2002], citing *Hambsch v New York City Tr. Auth.*, 63 NY2d 723 [1984]), and it is not at all clear that this could be done without the testimony of the prior expert, who will apparently not testify.

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

ENTERED: DECEMBER 17, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15289 B.F., et al., Index 800405/11
Plaintiffs-Respondents,

-against-

Reproductive Medicine Associates
of New York, LLP, et al.,
Defendants-Appellants.

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Mauro Lilling Naparty LLP, Woodbury (Caryn L. Lilling of counsel), for Reproductive Medicine Associates of New York, LLP, appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for Alan B. Copperman, M.D., appellant.

Lieff Cabraser Heimann & Bernstein, LLP, New York (Wendy R. Fleishman of counsel), for respondents.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered January 7, 2014, modified, on the law, to grant the motions to the extent of dismissing the first, third, fourth, fifth and sixth causes of action, and otherwise affirmed, without costs.

Opinion by Friedman, J.P. All concur except Manzanet-Daniels, J. who concurs in part and dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
David B. Saxe
Sallie Manzanet-Daniels
Paul G. Feinman
Judith J. Gische, JJ.

15289
Ind. 800405/11

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B.F., et al.,
Plaintiffs-Respondents,

-against-

Reproductive Medicine Associates
of New York, LLP, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Joan B. Lobis, J.), entered January 7, 2014, which, to the extent appealed from as limited by the briefs, denied their motions to dismiss the first six causes of action of the complaint and to strike the demand for punitive damages.

Mauro Lilling Naparty LLP, Woodbury (Caryn L. Lilling and Katherine Herr Solomon of counsel), for Reproductive Medicine Associates of New York, LLP, appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for Alan B. Copperman, M.D., appellant.

Lieff Cabraser Heimann & Bernstein, LLP, New York (Wendy R. Fleishman, Daniel R. Leathers and Jeremy J. Troxel of counsel), for respondents.

FRIEDMAN, J.P.

This is a medical malpractice action for "wrongful birth" (*see Foote v Albany Med. Ctr. Hosp.*, 16 NY3d 211, 214 [2011]; *Becker v Schwartz*, 46 NY2d 401, 412-413 [1978]), in which it is alleged that defendants' failure to perform adequate genetic screening of an egg donor for an in vitro fertilization resulted in the conception and birth of plaintiffs' impaired child. The primary question raised on this appeal is whether plaintiffs' wrongful birth cause of action accrued upon the termination of defendants' treatment of the plaintiff mother, less than two months after the implantation of the embryo, or upon the birth of the infant several months later. We hold that the wrongful birth claim accrued upon the birth of the infant and, therefore, was not barred by the applicable statute of limitations (CPLR 214-a) when this action was commenced within 2½ years after the birth. Accordingly, we affirm the order appealed from insofar as it denied defendants' motion to dismiss the cause of action for medical malpractice.[1]

Plaintiffs, who had been unable to achieve pregnancy naturally, first consulted with defendant Alan Copperman, M.D., at defendant Reproductive Medicine Associates of New York, LLP (RMA), in February 2008, and subsequently placed themselves on

[1]Other issues raised by this appeal are addressed at the conclusion of this writing.

RMA's waiting list for an egg donor. Plaintiffs were told that RMA screened donor candidates for genetic diseases and other conditions, but the particular conditions for which candidates were tested were not discussed with them. Plaintiffs were told, however, that some risk of birth defects would remain notwithstanding the screening.

In October 2008, plaintiffs were matched with a donor, whom they accepted. In December 2008, plaintiffs signed a consent form to go forward with the in vitro fertilization procedure. The consent form contains, among other provisions, a representation that plaintiffs "understand that the risk of major birth defects following the use of donor oocytes (eggs) appears to be the same as in the general population."

On January 21, 2009, two embryos, each produced by fertilizing a donated ovum with the plaintiff father's sperm, were implanted in the plaintiff mother. Shortly thereafter, it was confirmed that the plaintiff mother was pregnant with twins. The plaintiff mother had her last appointment at RMA on March 10, 2009, and thereafter treated with an obstetrician unaffiliated with defendants for the remainder of the pregnancy. On September 25, 2009, the plaintiff mother gave birth to twin boys.

In February 2010, after Dr. Copperman received information that plaintiffs' donor might have a genetic mutation, RMA tested

the donor for a chromosomal abnormality known as "Fragile X," which can produce intellectual disability and other deficits, particularly in males. The donor, who had not been tested for Fragile X before donating her eggs to plaintiffs, was shown to be a Fragile X carrier. The following May, Dr. Copperman called the plaintiff mother and told her that her egg donor was a Fragile X carrier. Plaintiffs then had their sons tested and found that one of the boys (M.F.) had the full Fragile X mutation.

In December 2011, plaintiffs commenced this action against RMA and Dr. Copperman, asserting 12 causes of action. RMA and Dr. Copperman moved separately to dismiss the complaint pursuant to CPLR 3211(a)(5) and 3211(a)(7). Supreme Court granted the motions to the extent of dismissing the seventh through twelfth causes of action (from which plaintiffs have not appealed), but otherwise denied the motions, leaving pending plaintiffs' first six causes of action, which are denominated, in order, "fraudulent concealment," "medical negligence," "negligence," "common law fraud," "negligent misrepresentation" and "breach of contract." The court also denied defendants' motions insofar as they sought to strike the complaint's prayer for punitive damages. Defendants have appealed.

Initially, defendants ask us to dismiss "any claims which may be construed to be asserted on behalf of M.F.," plaintiffs'

impaired child. Defendants are correct that any cause of action brought against them on behalf of M.F. would amount to a "wrongful life" claim not cognizable under New York law (*see Becker*, 46 NY2d at 408-412), since the harm alleged by the complaint is M.F.'s conception and birth. Under *Becker*, parents may not bring a claim on behalf of an impaired child on the theory that the child himself or herself (as opposed to the parents) would have been better off had the child never come into being. However, while M.F. is named as an infant plaintiff in the caption of the action, the only two causes of action that the complaint asserts on his behalf — the seventh, for "breach of contract — third-party beneficiary," and the tenth, for "breach of express and implied warranties — third-party beneficiary" — were dismissed by Supreme Court as legally insufficient pursuant to CPLR 3211(a)(7) and, as previously noted, plaintiffs have not taken an appeal from Supreme Court's order. Accordingly, M.F.'s lack of any cognizable claim against defendants provides no occasion for disturbing the order appealed from, which properly dismissed all claims asserted on M.F.'s behalf.

While an impaired child may not recover damages "dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence" (*Becker*, 46 NY2d at 412), the child's parents may seek to recover their past and future

"extraordinary financial obligations relating to the care" of that child during his or her minority (*Foote*, 16 NY3d at 215). To recover such damages on a wrongful birth cause of action, "the parents must establish that malpractice by a defendant physician deprived them of the opportunity to terminate the pregnancy within the legally permissible time period, or [as alleged here] that the child would not have been conceived but for the defendant's malpractice" (*Mayzel v Moretti*, 105 AD3d 816, 817 [2d Dept 2013]). In this case, the second cause of action asserted in plaintiffs' complaint, denominated "medical negligence," states a wrongful birth cause of action, based principally on allegations (1) that defendants' failure to test the egg donor for Fragile X was a deviation from the applicable medical standard of care and (2) that defendants failed to obtain plaintiffs' informed consent to the procedure inasmuch as they did not disclose to plaintiffs that the egg donor had not been tested for Fragile X. The question is whether this claim is barred by the statute of limitations.

CPLR 214-a provides in pertinent part:

> "An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure[.]"

As noted, the embryos arising from the donated eggs were

implanted in the plaintiff mother on January 21, 2009; the last date on which defendants treated the plaintiff mother was March 10, 2009; and plaintiff's impaired son was born on September 25, 2009. This action, however, was not commenced until December 2011. Thus, if plaintiffs' wrongful birth claim accrued upon the birth of their son, it has been timely asserted; if the claim accrued upon defendants' last treatment of the plaintiff mother, it is untimely.

The Court of Appeals has not addressed the question of when a wrongful birth cause of action accrues. In *LaBello v Albany Med. Ctr. Hosp.* (85 NY2d 701 [1995]), however, the Court of Appeals held that "an infant plaintiff's medical malpractice cause of action, premised on alleged injurious acts or omissions occurring prior to birth, accrues on the earliest date the injured infant plaintiff could juridically assert the claim and sue for relief, that is, the date of being born alive" (*id.* at 703). While plaintiffs rely heavily on *LaBello*, defendants correctly point out that *LaBello*, which hinged on the principle that "an infant plaintiff has no right of action unless born alive" (*id.* at 704), does not control the present question concerning the time of accrual of a cause of action belonging to two adults, each of whom was fully capable of bringing suit at

all relevant times.[2]

In arguing that plaintiffs' wrongful birth cause of action accrued at the time of the alleged malpractice, or at the time of the conclusion of the course of treatment that included the alleged malpractice, defendants rely on a different Court of Appeals decision, *Jorge v New York City Health & Hosps. Corp.* (79 NY2d 905 [1992]). In *Jorge*, the plaintiff alleged that, but for a false negative reading of a sickle cell anemia test of the father of her unborn child, she would have terminated her pregnancy, which, when carried to term, resulted in the birth of a child afflicted with sickle cell anemia. In reversing this

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[2]In spite of the fact that the question of when a wrongful birth claim accrues is not addressed in *LaBello*, the Second Department has cited that case in support of a holding that a wrongful birth cause of action "accrued at the time of birth, rather than at the time of the earlier alleged malpractice" (*Ciceron v Jamaica Hosp.*, 264 AD2d 497, 498 [2d Dept 1999]). In *Pahlad v Brustman* (33 AD3d 518, 519 [1st Dept 2006], *affd* 8 NY3d 901 [2007]), this Court cited *Ciceron* in support of its statement that a cause of action for wrongful birth (the decision's use of the term "wrongful life" appears to be a misnomer) accrues at the time of the infant's birth. The statement in *Pahlad*, however, is dictum, since the action (which the majority held to be time-barred) was commenced more than three years after the child was born (*see id.* at 518-519). In a more recent decision, we affirmed Supreme Court's determination that Colorado law applied to a wrongful birth action on the ground that "the last events necessary to make defendants liable, namely the birth and treatment of the subject child, occurred in Colorado" (*Fonda v Wapner*, 103 AD3d 510, 511 [1st Dept 2013]), but our *Fonda* decision does not provide further analysis of why the child's birth was "necessary to make defendants liable."

Court and dismissing the *Jorge* complaint as time-barred on the ground that the plaintiff's subsequent obstetric treatment did not toll the statute of limitations under the continuous treatment doctrine (*id.* at 906), the Court of Appeals implicitly took the position that the wrongful birth claim accrued before the child was born. However, so far as can be discerned from the opinions issued in *Jorge* by the Court of Appeals and by this Court, the plaintiff in that case did not argue that her claim accrued only upon the birth of the child, without regard to the applicability of the continuous treatment doctrine.

We hold that a cause of action for wrongful birth accrues upon the birth of the impaired child, which renders the medical malpractice claim in this case timely. In a decision holding that parents could not recover the ordinary costs of raising a healthy, normal child born as the result of the failure of a surgical contraceptive procedure, the Court of Appeals made the following observation: "Liability for negligent conduct exists only when it proximately causes legal harm to a fully protected interest of another" (*O'Toole v Greenberg*, 64 NY2d 427, 431 [1985]; *see also id.* at 432 [to have a viable cause of action, plaintiffs "must show not only *injuria*, namely, the breach of the defendant's obligation, but also *damnum* to themselves in the sense of damage recognized by law" [internal quotation marks

omitted]). In the case of a claim for wrongful birth, "the parents' legally cognizable injury is the increased financial obligation" of raising an impaired child (*Foote*, 16 NY3d at 215 [internal quotation marks omitted]), as previously discussed. Whether this legally cognizable injury will befall potential parents as the result of the gestation of an impaired fetus cannot be known until the pregnancy ends. Only if there is a live birth will the injury be suffered. Thus, until there is a live birth, the existence of a cognizable legal injury that will support a wrongful birth cause of action cannot even be alleged.[3] Without legally cognizable damages, there is no legal right to relief, and "the Statute of Limitations cannot run until there is a legal right to relief" (*LaBello*, 85 NY2d at 704 [internal quotation marks and brackets omitted]). Accordingly, the statute of limitations begins to run on a wrongful birth claim upon the live birth of an impaired child, whose care and support will occasion the pecuniary damages the parents may seek to recover.

Although, for the reasons discussed above, Supreme Court correctly denied the motion to dismiss plaintiffs' second cause of action, for medical malpractice, we modify to grant the motion

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[3]Even if knowledge of the impairment of the fetus would not have prompted the parents to choose to terminate the pregnancy, the natural course of any pregnancy is a matter of substantial uncertainty.

to dismiss their causes of action for ordinary negligence, breach of contract, fraud and negligent misrepresentation, which are all essentially redundant of the medical malpractice claim. Each of the non-malpractice claims is based upon the same alleged conduct as the medical malpractice claim (defendants' screening and choice of an egg donor for an in vitro fertilization and advice to plaintiffs concerning the risks of the procedure); each non-malpractice claim will depend upon the same expert evidence as the malpractice claim; and each non-malpractice claim seeks recovery for the same injury as the malpractice claim (the additional expense of raising a child affected by Fragile X Syndrome).

We turn first to the negligence claim. In a very recent decision holding that a laboratory's misreading of a tissue sample constituted medical malpractice rather than ordinary negligence, this Court observed: "It is settled that a negligent act or omission 'that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice'" (*Annunziata v Quest Diagnostics Inc.*, 127 AD3d 630, 631 [1st Dept 2015], quoting *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). Here, defendants' screening of plaintiffs' egg donor, even if it could plausibly be viewed as not constituting medical treatment itself,

indisputably bears a substantial relationship to the rendition of medical treatment by a licensed physician and therefore, under our precedents, constitutes medical malpractice.[4] Moreover, while a medical facility's conduct may be actionable as ordinary negligence "where the alleged negligent act may be readily determined by the trier of the facts based on common knowledge" (*Coursen v New York Hosp.-Cornell Med. Ctr.*, 114 AD2d 254, 256 [1st Dept 1986]), this is not the case here, given that plaintiffs, to prove their claim, must proffer expert testimony concerning the standard of care for the screening of egg donors.[5]

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[4]We are not persuaded by the partial dissent's attempt to distinguish *Annunziata* on the ground that the wrongful conduct there was the misreading a tissue sample, while here the challenged conduct is the failure to order a particular test in the first place. Deciding which medical test to order, no less than reading the test results, requires medical knowledge and judgment.

[5]The cases cited by our partially dissenting colleague do not support her view that defendants' allegedly inadequate screening of plaintiffs' egg donor is cognizable as ordinary negligence. In *Weiner v Lenox Hill Hosp.* (88 NY2d 784 [1996]), the defendant hospital's alleged "fail[ure] to properly safeguard its blood supply from HIV contamination" (*id.* at 786) was held to constitute ordinary negligence because it was not part of "the rendition of medical treatment to a particular patient" (*id.* at 788 [internal quotation marks omitted]). Similarly distinguishable is *Rodriguez v Saal* (43 AD3d 272 [1st Dept 2007]), in which a claim against the New York Organ Donor Network (NYODN) for inadequately testing and screening organs for transplant was held to constitute ordinary negligence because "NYODN did not provide any type of medical treatment directly to [the] decedent" (*id.* at 274). The claim against the hospital for "improper or inadequate hiring practices and administrative

The cause of action for breach of contract must also be dismissed as legally redundant of the malpractice claims because plaintiffs do not allege that defendants, "within the context of . . . [the] treatment, . . . expressed a specific promise to accomplish some definite result" (*Leighton v Lowenberg*, 103 AD3d 530, 531 [1st Dept 2013]; *see also Scalisi v New York Univ. Med. Ctr.*, 24 AD3d 145, 147 [1st Dept 2005] [same]). Indeed, the consent to the in vitro fertilization that plaintiffs signed, while it contains no guarantee that any resulting child would be free of birth defects, does include a representation by plaintiffs that they "underst[ood] that the risk of major birth defects following the use of donor oocytes (eggs) appears to be the same as in the general population." In essence, the breach-of-contract claim is based on nothing more than the allegation that defendants promised to carry out the treatment in accord with the prevailing medical standard of care. If plaintiffs'

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procedures" in *Bleiler v Bodnar* (65 NY2d at 72), which conduct was held to constitute ordinary negligence, put in question the hospital's administrative competence, not the professional competence of its medical personnel. Finally, completely irrelevant to the issues raised on this appeal is *Landon v Kroll Lab. Specialists, Inc.* (91 AD3d 79 [2d Dept 2011], *affd* 22 NY3d 1 [2013]), which involved a claim against a forensic drug testing laboratory for producing a false positive result. The *Landon* plaintiff had been required to submit to drug testing as a condition of his probation, and neither side contended that the drug test performed by the laboratory bore any relationship to a course of medical treatment.

claim were cognizable as a breach of contract claim, then every medical malpractice claim arising from a voluntary physician-patient relationship could be pleaded in the alternative as a breach of contract.

Finally, plaintiffs assert a "fraudulent concealment" cause of action based on defendants' alleged failure to disclose that the egg donor had not been screened for Fragile X Syndrome, that the donor was a Fragile X carrier, and that the in vitro fertilization procedure involved a risk that the egg donor would be a Fragile X carrier. In addition, plaintiffs assert a fraud cause of action based on defendants' representation that the institutional defendant had "a rigorous donor screening program" and that all of its donors had "a good genetic history." A negligent misrepresentation claim is predicated on the same alleged facts. These allegations simply recapitulate the medical malpractice allegations and do not make out independent fraud or negligent misrepresentation claims, since the injury for which recovery is sought is identical to the injury alleged in support of the medical malpractice claim (*see Roswick v Mount Sinai Med. Ctr.*, 22 AD3d 409, 410 [1st Dept 2005]; *Atton v Bier*, 12 AD3d 240, 241 [1st Dept 2004]). The partial dissent's theory that the causes of action for misrepresentation and breach of contract are cognizable because they seek damages other than the damages

sought by the medical malpractice cause of action is not reflected in the complaint or in plaintiffs' appellate brief.[6]

Finally, plaintiffs have adequately pleaded a basis for an award of punitive damages in this case, given their allegations that Fragile X is a common cause of mental retardation for which donor candidates could easily have been tested, and given that defendants' failure to screen for Fragile X potentially affected many patients other than plaintiffs (*see Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 203-204 [1990]).

Accordingly, the order of the Supreme Court, New York County (Joan B. Lobis, J.), entered January 7, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motions to dismiss the first six causes of action of the

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[6]The fraudulent concealment claim is not saved by the allegation that defendants did not immediately inform plaintiffs of the donor's carrier status upon learning of it, since the record establishes (and plaintiffs do not dispute) that defendants did not become aware that the donor was a Fragile X carrier until after the child's birth. At that point, plaintiffs could no longer avoid the harm for which they seek to recover. Given that we are rejecting defendants' argument that the malpractice claims are time-barred, defendants' delay in informing plaintiffs of the donor's carrier status has no effect on the timeliness of this action. We note, however, that the Court of Appeals has long held that "concealment by a physician or failure to disclose his own malpractice does not give rise to a cause of action in fraud or deceit separate and different from the customary malpractice action, thereby entitling the plaintiff to bring his action within the longer period limited for such claims" (*Simcuski v Saeli*, 44 NY2d 442, 452 [1978]).

complaint and to strike the demand for punitive damages, should be modified, on the law, to grant the motions to the extent of dismissing the first, third, fourth, fifth and sixth causes of action, and otherwise affirmed, without costs.

All concur except Manzanet-Daniels, J who concurs in part and dissents in part in an Opinion.

MANZANET-DANIELS, J. (concurring in part and dissenting in part)

I concur in the majority's reasoning that the parents' claims accrued upon the birth of their son with Fragile X syndrome, and thus are timely. I also concur that plaintiff parents have adequately pleaded a basis for punitive damages. However, I dissent insofar as I believe that it cannot be determined on this motion to dismiss whether additional causes of action alleged are duplicative of or subsumed within the cause of action alleging medical malpractice (*see Newell v Ellis Hosp.*, 117 AD3d 1139 [3d Dept 2014]). "[T]he distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and no rigid analytical line separates the two" (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787 [1996] [internal quotation marks omitted]).

This case arises from defendants' alleged failure to screen an egg donor for Fragile X syndrome before implantation of the donor's fertilized egg into the plaintiff mother. Plaintiffs allege that they would have used a different egg donor if they had known that their donor was a Fragile X carrier.

The mother was treated by defendants through March or April of 2009, and had twin boys born on September 25, 2009. After learning that one of the children had Fragile X syndrome, plaintiffs commenced this action against RMA and Dr. Copperman on

December 6, 2011, within 2½ years after the child's birth.

Plaintiffs B.F. and Steven F. – husband and wife – began treating at RMA for in vitro fertilization services in February 2008. Plaintiffs claim to have repeatedly asked Dr. Copperman if defendants were testing the egg donors for birth defects, as Mr. F. worked with special needs children and was particularly concerned about the issue.

Defendants represented to plaintiffs that donors go through a "rigorous screening process" that includes genetic testing, and Dr. Copperman assured them that "to the extent possible," every possible effort was made to "screen donors for genetic mutations that would cause conditions of mental retardation." During a donor workshop, RMA employees made further representations that all donors in the program were subjected to rigorous medical examination and genetic testing to ensure that they were healthy. Plaintiffs claim that in reliance on these representations they chose to proceed with a shared donor cycle at the cost of $21,830, which included "genetic consultation and screening" of the donor.

Plaintiffs were offered an egg donor in November 2008, and were told that the donor had cleared the screening process. A nurse from RMA told plaintiffs that the donor had donated several times before, which had resulted in a number of successful

pregnancies and healthy babies. The next month the donor's eggs were retrieved, fertilized, and implanted into Mrs. F. Mrs. F.'s pregnancy was confirmed in the beginning of January 2009. The pregnancy continued without incident, and she gave birth to twin boys on September 25, 2009.

Initially plaintiffs did not have any concerns about the health of their sons. On May 10, 2010, however, Dr. Copperman called the plaintiff mother and informed her that their egg donor was a Fragile X carrier. After consulting with a geneticist and having their sons tested, plaintiffs learned that their son M.F. had a full Fragile X mutation.

Fragile X mutation is an inherited cause of mental impairment. Plaintiffs allege that it is "by far the most common type of known inherited mental retardation in male children," and that a simple blood test costing $100-$200 has been readily available since 1992 to test for this condition. As the disease is only passed through the female's X chromosome, M.F.'s Fragile X mutation must have been inherited from the egg donor and not from his father.

According to the complaint, those affected with a Fragile X mutation range from having "learning disabilities to severe mental retardation and autism." There are other behavioral, intellectual and social characteristics to those afflicted with

Fragile X, including speech, language, and motor delay, tactile defensiveness and sensory overload, and abnormal physical features. Infant M.F.'s full Fragile X mutation requires "intensive physical, occupational, speech and behavioral therapies for several hours a day, five times per week." According to plaintiffs, he will require special education services for the rest of his life, and will most likely never live independently. Plaintiffs allege that they would have insisted on using an egg from a different donor had they known that their donor was a carrier of Fragile X.

Plaintiffs commenced this action in December 2011. The complaint alleges 12 causes of action against defendants, 6 of which are relevant on appeal. The first cause of action, for fraudulent concealment, alleges that defendants withheld information from plaintiffs that would have revealed that their egg donor had not been screened for Fragile X syndrome, and that the donor was in fact a Fragile X carrier. When defendants became aware that the egg donor was a Fragile X carrier, plaintiffs contend that they suppressed and concealed this information until finally disclosing the information to them in May 2010.

The second cause of action, for medical malpractice, alleges that defendants carelessly and negligently failed to test the egg

donor for Fragile X, and departed from proper standards of care by failing to report to plaintiffs that they either "could not or would not properly screen egg donors for the leading cause of inherited severe mental retardation." Similarly, in the third cause of action, for negligence, plaintiffs allege that defendants failed to promulgate rules and procedures for testing, and failed to warn plaintiffs that testing was not conducted regularly on the egg donors in their program.

In the fourth cause of action, for common-law fraud, plaintiffs allege that defendants misrepresented their testing protocols in their written materials, and falsely represented facts regarding screening procedures. In the fifth cause of action, for negligent misrepresentation, plaintiffs allege that defendants, acting with a special relationship, induced plaintiffs, through brochures and other written materials that carelessly misrepresented that they had a "rigorous donor screening program" with all donors having a good genetic history, to avail themselves of defendants' services. In the sixth cause of action, for breach of contract, plaintiffs allege that the parties entered into a contract for a suitable donor in exchange for good and valuable consideration, and that defendants breached

that contract by failing to screen the egg donor for Fragile X.[1]

The claims for negligence, breach of contract, fraudulent concealment, common-law fraud and negligent misrepresentation are sufficiently pleaded and are not duplicative of the medical malpractice claim. The negligence claim involves defendants' alleged failure to adopt proper procedures to provide screening and testing of an egg donor for Fragile X. The claim arguably implicates a duty different from that implicated in the medical malpractice claim. Claims contesting the adequacy of blood testing and screening procedures sound in negligence, not malpractice (*see Weiner v Lenox Hill Hosp.*, 88 NY2d at 788 [provider's failure to properly safeguard its blood supply from HIV contamination sounded in negligence, not malpractice, and was subject to three-year statute of limitations]; *Bleiler v Bodnar*, 65 NY2d 65, 66 [1985] [failure to promulgate appropriate rules and procedures "sounds in negligence, and is subject to the three-year limitations period . . . rather than the shorter medical malpractice limitations period"]). Claims contesting the

[1] The complaint alleged six other causes of action, for breach of contract on behalf of a third-party beneficiary (the child), breach of the express and implied warranties of merchantability on behalf of the parents and on behalf of the child, strict products liability for failure to warn, and negligent infliction of emotional distress. These have all been dismissed from the case and are not relevant on appeal.

adequacy of an organ procurer's testing and screening procedures have similarly been found to sound in negligence (*see Rodriguez v Saal*, 43 AD3d 272 [1st Dept 2007] [failure to properly screen donated kidney resulting in the transplant of a diseased kidney with extensive tumor infiltration sounded in negligence]; *see also Landon v Kroll Lab. Specialists, Inc.*, 91 AD3d 79 [2d Dept 2011] [negligence action against drug testing laboratory for negligently conducting drug screen and reporting erroneous positive result], *affd* 22 NY3d 1 [2013]).

The complaint alleges that defendants failed to employ a simple and readily available blood test to screen for Fragile X, which they claim to be "by far the most common type of known inherited mental retardation in male children." The failure to order a simple blood test – as opposed to, perhaps, the faulty performance of the test itself – is within "the ken of the average juror" and does not involve "medical competence or judgment" (*Weiner*, 88 NY2d at 788-789). *Annunziata v Quest Diagnostics Inc.* (127 AD3d 630 [1st Dept 2015]), cited by the majority, involved the misreading of a Pap smear tissue sample, and not the failure to order or perform the test in the first instance as is the case here.

Defendants' argument that the non-negligence claims were duplicative of other claims is not persuasive, as they capture

distinct allegations resulting in separate damages. The allegations unrelated to the medical malpractice cause of action include those related to material misrepresentations made by defendants in their brochure and sales materials to induce plaintiffs to purchase their goods and services in the first instance. The damages sustained on account of defendants' breach of contract (the cost of the in vitro fertilization) are different from the damages sounding in wrongful life (the extraordinary cost of raising a disabled child), which are separate and apart from those sounding in fraud (which, as the court found, may include punitive damages). At this stage, on a CPLR 3211 motion to dismiss, plaintiffs have adequately detailed in their complaint and brief how distinct "actions worked to produce a separate and distinct harm," the majority's assertions to the contrary notwithstanding. The representation in the consent to in vitro fertilization that plaintiffs "underst[ood] that the risk of major birth defects following the use of donor

oocytes (eggs) appears to be the same as in the general population," in no way negates defendants' promise, as alleged in the complaint, to test all donors for all possible known causes of mental disturbances or mental retardation.

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

ENTERED: DECEMBER 17, 2015

CLERK