Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11191 In re New York City Asbestos Litigation — Index 190276/13

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William E. Robaey, etc., et al.,
Plaintiffs-Respondents,

-against-

Air & Liquid Systems Corporation, etc., et al.,
Defendants,

Federal-Mogul Asbestos Personal Injury Trust, etc.,
Defendant-Appellant.

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The Coalition for Litigation Justice, Inc.,
Amicus Curiae.

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Hawkins Parnell & Young, LLP, New York (Robert B. Gilbreath and Alexander T. Green of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondents.

Crowell & Moring LLP, New York (Brian J. O'Sullivan of counsel), for amicus curiae.

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Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered March 1, 2019, upon a jury verdict, awarding plaintiff, upon remittitur (CPLR 5501[c]) and stipulation, $12 million for past pain and suffering, $4 million for future pain and suffering, $1 million for past loss of consortium, and $250,000 for future loss of consortium against defendant Federal-Mogul Asbestos Personal Injury Trust, as successor to Felt Products Mfg. Co. (Federal-Mogul), unanimously modified, on the facts, to vacate the awards for past pain and suffering and past

loss of consortium, and order a new trial on those damages, unless plaintiff stipulates, within 30 days of entry of this order, to reduce the award for past pain and suffering to $5.5 million and the award for past loss of consortium to $650,000, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

In this asbestos case, Marlena Robaey plaintiff), who died after the trial of this action, testified that, working with her husband and co-plaintiff, she had been regularly exposed to visible dust from scraping and grinding engine gaskets over a period of years, from cleaning the family garage after each gasket change, and from taking her and her husband's dusty clothes into their laundry room to clean. Federal-Mogul's corporate representatives, as well as the various experts called by defendants at trial, testified that the gaskets contained anywhere from 50% to 85% asbestos, and plaintiffs' experts testified that dust from these products, if visible, necessarily exceeded current permissible levels and contained sufficient levels of asbestos to cause plaintiff's peritoneal mesothelioma.

On appeal, Federal-Mogul argues, among other things, that the evidence is legally insufficient to establish that plaintiff was exposed to sufficient levels of asbestos to cause her illness (i.e., specific causation) and that the jury's allocation of fault is and against the weight of the evidence. An expert's opinion on causation in a toxic tort case must set forth "a

plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]). While a plaintiff need not quantify exposure levels precisely, "there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of th[e] agent that are known to cause the kind of harm [claimed]" (*Sean R. v BMW of N. Am., LLC*, 26 NY3d 801, 808-809 [2016]).

Federal-Mogul correctly notes that exposure to asbestos dust is insufficient to establish specific causation, absent evidence that the extent of exposure and the quantity of asbestos in the dust were sufficient to cause the resulting illness (*see Matter of New York City Asbestos Litig.*, 148 AD3d 233, 236 [1st Dept 2017], *affd* 32 NY3d 1116 [2018] ["*Juni*"] [the mere fact that "asbestos, or chrysotile, has been linked to mesothelioma, is not enough for a determination of liability against a particular defendant"]). However, both Federal-Mogul and the dissent overstate the holding in *Juni*, and fail to fully appreciate how the facts in *Juni*, more than any clarification of the law, guided its results. In *Juni*, the plaintiff's experts "testified only in terms of an increased risk and association between asbestos and mesothelioma," and "failed to either quantify the decedent's exposure levels or otherwise provide any scientific expression of

his exposure level with respect to [the defendant's] products" (*id.* at 237).[1] The plaintiff's expert conceded that she did not know how often the decedent had been exposed to the defendant's products.

The *Juni* opinion distinguished three prior decisions in which this Court found sufficient evidence of specific causation, explaining that in each case, experts had testified that the plaintiff or plaintiffs were exposed to dust that "necessarily contain[ed] enough asbestos to cause mesothelioma" (148 AD3d at 238-239, quoting *Lustenring v AC&S, Inc.*, 13 AD3d 69, 70 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005] [plaintiffs worked for long periods in clouds of dust raised by crushing gaskets and packing made of asbestos]; *Matter of New York Asbestos Litig. [Marshall]*, 28 AD3d 255, 256 [1st Dept 2006] [plaintiffs were regularly exposed to dust from working with defendant's gaskets and packing, which were made of asbestos]; *Penn v Amchem Prods.*, 85 AD3d 475, 476 [1st Dept 2011] [expert testified that visible dust created working with asbestos-containing dental liners "must have contained enough asbestos to cause (plaintiff's) mesothelioma"]). In contrast, plaintiff's experts' testimony in *Juni* "*was equivocal at best*, and was insufficient to prove that

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[1] One of the *Juni* experts conceded that more than 99% of the debris from friction brake wear, which allegedly caused the exposure, is not comprised of asbestos, and the other expert acknowledged that most epidemiological studies concluded that mechanics working on friction brakes are not at increased risk of mesothelioma (148 AD3d at 237).

the dust to which Juni was exposed contained *any asbestos*, or enough to cause his mesothelioma" (*Juni*, 148 AD3d at 239 [emphasis added]).

In addition, in *Juni*, there was a failure to connect the decedent's work with exposure, and one of the plaintiff's experts (Dr. Markowitz) conceded that there was no research connecting garage mechanics to higher rates of mesothelioma and, more importantly, that the research on those allegedly exposed to asbestos due to friction work with brakes was weak, showing an association rather than a causal connection, and in only 1 of 22 studies (*id.* at 237). Another important factor in *Juni* was the Dr. Markowitz's concession that asbestos fibers in braking equipment are mixed with certain resins that prevent the asbestos from being respirable, that the heat caused by friction in brakes converted most asbestos to another mineral called forsterite, and that only 1% of the dust blown out from brake drums contain asbestos (*id.* at 237-238). The Court also found that in *Juni*, unlike other cases in which he testified, Dr. Markowitz failed to submit any scientific reports supporting his position (*id.* at 238).. Notably, the Court of Appeals affirmed *Juni* based on the "particular record" (32 NY3d at 1118).

Here, the experts did not merely testify as to only an increased risk. Dr. Schwartz testified that the visible dust from the gaskets at issue, which were conceded by defendants' expert to contain between 50% and 85% asbestos, 80% being

"standard," necessarily contained several thousand times the "safe" amount of asbestos, and thus was causative of plaintiff's disease.[2] The dust was not created by the use of the product, as in *Juni*, but by the physical breaking down of the product itself. Under such circumstances, studies specific to mechanics scraping gaskets were not necessary, as the research on workers exposed to such dust was sufficient. In sum, the evidence here was akin to that proffered in *Lustenring* (133d 69), *Marshall* (28 AD3d 255), and *Penn (85 AD3d 474)*, rather than that in *Juni*.

To be sure, in other cases upheld by this Court, the expert's testimony was more specific, opining as to specific amounts of asbestos in the air to which the plaintiffs were exposed (*see e.g. Matter of New York City Asbestos Litig. [Murphy-Claggett]*, 173 AD3d 529 [1st Dept 2019] [plaintiff's industrial hygienist testified as to the amounts expected to have been in the air, 10 to 100 million fibers per cubic meter, relying on comparisons to airborne measurements in case studies of insulation workers who used similar products at similar exposure levels and developed mesothelioma, and plaintiff's medical expert testified that exposures at such levels over the course of 10 years of work would have caused, and did cause decedent's mesothelioma]; *Ford v A.O. Smith Water Prods.*, 173 AD3d 602 [1st Dept 2019] [plaintiff's experts opined, given that

[2]Felt Products' corporate representative testified that its head and manifold gaskets (used by plaintiff's husband) contained approximately 50% asbestos.

the average concentration of airborne asbestos resulting from tearing out insulation is 8.9 fibers/cc, that plaintiff was exposed to amounts well above OSHA's 0.1 fibers/cc threshold]). However, nowhere in those decisions did this Court hold that such an expression of specific exposure levels was required to uphold the verdicts. To the contrary, other post-*Juni* decisions have upheld verdicts based upon the same type of evidence as was submitted here (*see e.g. Nemeth v Brenntag N. Am.*, ___ AD3d ___, 2020 Slip Op 02261 [1st Dept 2020] [expert's opinion was based upon plaintiff's testimony that she used the specific talcum powder for 11 years, the dusty nature of talcum powder, proof presented at trial that the specific talcum powder was contaminated with asbestos, and a geologist's releasibility analysis of the powder and conclusion that it released asbestos fibers several orders of magnitude higher than a person would be exposed to by breathing ambient air]*; Matter of New York City Asbestos Litig. [Sweberg]*, 143 AD3d 483, 484 [1st Dept 2016] [expert opined that plaintiff's exposure during four years of working where boilers containing materials of 15% asbestos were demolished, leaving clouds of dust in the air, was substantial, and that the dust necessarily contained enough asbestos to cause mesothelioma], *lv dismissed* 28 NY3d 1165 [2017]; *Matter of New York City Asbestos Litig. [Hackshaw]*, 143 AD3d 485, 486 [1st Dept 2016] [visible dust caused by demolition of asbestos insulation and valves to which plaintiff was exposed necessarily contained

enough asbestos to cause mesothelioma], *affd* 29 NY3d 1068 [2017]). The evidence adduced in *Sweberg* and *Hackshaw* is the same as the evidence adduced here, i.e., that the visible dust plaintiff was exposed to was necessarily in excess of 1% and sufficient to cause her disease. Accordingly, the jury's verdict is based on legally sufficient evidence and is not against the weight of the evidence (*see Sweberg*, 143 AD3d at 483; *Hackshaw,* 143 AD3d at 485; *see also Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]).

The jury rationally found that plaintiff had not been exposed to asbestos manufactured, used, or sold by a number of settling and nonparty tortfeasors. Notably, it assessed liability against only those alleged tortfeasors the asbestos content of whose product was shown by evidence introduced by corporate representatives or defendants' own experts. It was the burden of Federal-Mogul to prove that the dust produced by those settling and non-party tortfeasors' products contained sufficient amounts of asbestos to cause plaintiff's disease, and it was within the jury's province to find that it did not meet that burden (*see Murphy-Clagett*, 173 AD3d at 529-530). The trial court properly ruled that certain expert witnesses could not bolster their testimony through other studies and treatises (*see generally Rosario v New York City Health & Hosps. Corp.*, 87 AD2d 211, 214-215 [1st Dept 1982]; *Cohn v Haddad*, 244 AD2d 519, 520 [2d Dept 1997]).

We find that the damages awards for plaintiff's past pain and suffering and her husband's past loss of consortium deviate materially from what would be reasonable compensation (CPLR 5501[c]; *see Matter of New York City Asbestos Litig.*, 121 AD3d 230 [1st Dept 2014], *affd* 27 NY2d 1172 [2016]; *Lustenring v AC&S, Inc.*, 13 AD3d 69 [1st Dept 2004], *supra*). We thus remand for a new trial on those damages unless plaintiff stipulates to reduce the awards as indicated.

All concur except Friedman, J. who dissent in a memorandum as follows

FRIEDMAN, J. (dissenting)

I respectfully dissent. For substantially the same reasons as those set forth in my recent dissent in *Nemeth v Brenntag N. Am.* (__ AD3d ___, 2020 NY Slip Op 02261, *11-21 [1st Dept 2020]), I would reverse and grant the posttrial motion by defendant Federal-Mogul Asbestos Personal Injury Trust, as successor to Felt Products Manufacturing Company (Fel-Pro), for judgment notwithstanding the verdict pursuant to CPLR 4404(a). In brief, plaintiffs' experts failed to offer — and admitted that they had not offered — a quantitative, scientific expression of the decedent's estimated exposure to asbestos from Fel-Pro's products (automotive gaskets), as required by Court of Appeals precedent that, as of today, remains binding on this Court (*see Sean R. v BMW of N. Am., LLC*, 26 NY3d 801 [2016]; *Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762 [2014]; *Parker v Mobil Oil Corp.*, 7 NY3d 434 [2006]; *see also Matter of New York City Asbestos Litig. [Juni]*, 148 AD3d 233 [1st Dept 2017], *affd* 32 NY3d 1116 [2018]). For example, one of plaintiffs' expert witnesses, Dr. David Schwartz, answered "No" when asked whether he had "attempted to do anything on a time-[weighted] average basis or a fiber CC year [fibers per cubic centimeter per year] cumulative dose for [the decedent] in her work solely with Fel-Pro gaskets." Dr. Schwartz also conceded that he was "not able to determine" the decedent's asbestos exposure from Fel-Pro products "relative" to her total

asbestos exposure from all sources.[3]

It should be borne in mind that the decedent's relevant alleged exposure to asbestos from Fel-Pro products was restricted to helping her husband remove gaskets from his cars "once or twice . . . in a month" over a period of 12 years.[4] It should also be remembered that only about half of the gaskets involved were Fel-Pro products, that not all of the Fel-Pro gaskets contained asbestos, and that any asbestos that the gaskets did contain was of the less hazardous chrysotile variety. I further note that, in this Court's above-cited *Juni* decision, which was affirmed by the Court of Appeals, we held, contrary to the majority's apparent position in this case, that specific causation in an asbestos case cannot be proven merely by testimony that the injured person was exposed to "visible dust" from asbestos-containing products (*see* 148 AD3d at 239). *Juni* also rejected, as inconsistent with the Court of Appeals' decision in *Parker*, the theory, propounded by plaintiffs herein, that specific causation in an asbestos case may be established on

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[3]According to plaintiffs' own evidence, during the relevant time period, the decedent was exposed each workday to asbestos from her husband's work clothes, which were so dusty from his work with insulation products (which were not Fel-Pro products) that the garments appeared to be covered with snow.

[4]In contrast, the occupational exposure limit for asbestos is based on "an eight (8)-hour time-weighted average" (29 CFR 1910.1001[c][1]), and claims based on occupational asbestos exposure typically involve exposure for eight hours per day, five days per week, during the relevant period of the injured person's employment.

the basis of a "cumulative exposure" theory, without quantifying, in some fashion, the level of asbestos exposure from a particular defendant's product (*see id.*).

As stated in my dissent in *Nemeth*, the majority's departure from the Court of Appeals' requirement of a scientific expression of the level of exposure to a toxin from a particular defendant's product cannot be justified by reliance on decisions of this Court (whenever they were decided) that appear to allow a plaintiff to prevail upon a lesser standard of proof. Even if the majority correctly anticipates that the Court of Appeals will overrule its existing precedents in this area, this Court remains bound by those precedents until the Court of Appeals actually does overrule them. Accordingly, it seems to me that I need not discuss the various decisions of this Court cited by the majority in support of its result. I note, however, that *Juni* cannot be successfully distinguished on the ground that the record in that case did not contain any scientific literature concerning the asbestos risk from the particular product at issue. The same lack is apparent here. In this case, plaintiffs' relevant expert, Dr. Steven Markowitz, admitted that he was unaware of "any epidemiological study that shows whether peritoneal mesothelioma is or is not linked to work with automotive

gaskets."

In view of the foregoing, I need not reach the remaining issues raised by Fel-Pro.

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

ENTERED: AUGUST 6, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10997N Medical Building Associates, Inc., Index 105724/11
Plaintiff-Appellant,

-against-

Abner Properties Company,
Defendant-Respondent.

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Law Offices of James C. Mantia, P.C., New York (James C. Mantia of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Jeffrey Levine of counsel), for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered April 16, 2019, which, to the extent appealed from as limited by the briefs, granted defendant owner's motion to vacate a *Yellowstone* injunction previously issued to plaintiff tenant, granted defendant a money judgment in the amount of $212,806.78 in unpaid use and occupancy, plus attorney's fees to be calculated later, and denied plaintiff's cross motion for an order requiring defendant to consent to the filing of plaintiff's alteration plans and building applications with the Department of Buildings (DOB), pursuant to a 2013 so-ordered stipulation between the parties, unanimously reversed, on the law and the facts, with costs, to reinstate the *Yellowstone* injunction, vacate the money judgment in favor of defendant owner and deny the application for attorney's fees, and direct owner to cooperate with tenant's filing of its current "as built plans" with Department of Buildings.

The court's 2016 order finding that triable issues of fact precluded all the relief requested, including the vacatur of the *Yellowstone* injunction and the entry of a money judgment for unpaid use and occupancy and additional rent, necessarily encompassed a finding that the record evidence, including the evidence concerning tenant's alleged failure to pay outstanding use and occupancy and additional rent, did not support the vacatur of the injunction and entry of a money judgment, which, in all material respects, is identical to the relief sought in owner's instant motion. As there were no extraordinary circumstances permitting the court to ignore the prior order and no new evidence was proffered that differs from the type of evidence presented on the prior motion, there was no basis for the court to depart from the prior ruling that issues of fact exist concerning tenant's alleged failure to pay use and occupancy so as to warrant the denial of the motion to vacate the *Yellowstone* injunction based on tenant's alleged failure to pay the full use and occupancy owed, as well as the request for entry of a money judgment for use and occupancy and additional rent (*see Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]). Based on that ruling, the grant of attorney's fees to owner should also be vacated and denied.

Under the circumstances, including the unending dispute between the parties with respect to whether tenant's plans are in compliance with the terms of the "punch list" and the pertinent

building codes and law, and tenant’s waiver of the right to self-certification, which leaves the Department of Buildings as the ultimate arbiter of whether the “as built” plans and the prior build-out conform with the building code,” tenant's cross motion for an order directing owner to comply with the parties' 2013 so-ordered stipulation is granted to the extent of directing owner to execute any and all required building applications or other building documents that tenant must provide to DOB or the

Landmarks Preservation Commission in order for tenant to file its current "as built" plans with DOB.

The Decision and Order of this Court entered herein on February 11, 2020 is hereby recalled and vacated (*see* M-1677 decided simultaneously herewith).

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

ENTERED: AUGUST 6, 2020

CLERK

Renwick, J.P, Oing, Singh, Moulton, JJ.

11382 In re 980 Westchester Avenue, LLC, Index 26641/19E
Petitioner-Appellant,

-against-

Mercy Ewoodzie, et al.,
Defendants-Respondents.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Donald A. Miles, J.), entered on or about October 2, 2019,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 18, 2020,

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

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

ENTERED: AUGUST 6, 2020

CLERK

Renwick, J.P., Kapnick, Oing, Moulton, JJ.

11389-
11389A Index 653038/14

A&F Hamilton Heights Cluster, Inc., etc., et al.,
Plaintiffs,

James Fendt, etc.,
Plaintiff-Appellant,

-against-

Urban Green Management, Inc., et al.,
Defendants.

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[A Third-Party Action]

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WHGA Hamilton Heights Cluster, Inc., et al.,
Intervenors-Plaintiffs-Respondents,

-against-

Hamilton Heights Cluster Associates, L.P., et al.,
Intervenors-Defendants,

A&F HHC Equities, LLC,
Intervenor-Defendant-Appellant.

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Safeguard Realty Management, Inc., et al.,
Nonparty Respondents.

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Meyer, Suozzi, English & Klein, P.C., Garden City (Michael J. Antongiovanni of counsel), for appellants.

Offit Kurman P.A., New York (Daniel I. Goldberg of counsel), for respondents.

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Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 7, 2018, and May 9, 2019, which granted intervenor plaintiffs' motion for summary judgment declaring that the 1999 limited partnership agreement is the sole valid and enforceable agreement governing the partnership and that the

unsigned 2004 agreement never went into effect, and granted defendants' motion for summary judgment dismissing "any and all remaining derivative claims," unanimously affirmed, with costs.

This action involves a dispute over management and ownership of a limited partnership. The principal issue presented by this appeal is whether a limited partnership agreement signed in 1999 (the 1999 agreement) is the governing agreement, or whether an unsigned 2004 amendment to the 1999 limited partnership agreement (the unsigned amendment) is valid and therefore governs the parties' respective rights. Supreme Court found that the 1999 agreement was the operative agreement and that the unsigned amendment was a nullity. Based on that finding it granted summary judgment to movants. We now affirm.

The relevant transactions are convoluted and involve numerous similarly-named entities.

In 1998 West Harlem Group Assistance, Inc. (WHGA), the owner of six residential properties in Harlem, first partnered with James Fendt and Eric Anderson to renovate the properties. The properties, which needed substantial renovation, contained affordable housing units and qualified for funding and assistance from the U.S. Department of Housing and Urban Development (HUD) and New York City's Department of Housing Preservation and Development (HPD).

WHGA, and Fendt and Anderson, created the limited partnership Hamilton Heights Cluster Associates, L.P. (the

limited partnership). WHGA formed WHGA Heights Cluster, Inc. (GP-1) to act as the general partner of the limited partnership. For their part, Fendt and Anderson formed a special purpose entity, A&F Hamilton Heights Cluster, Inc. (A&F HHC) to be the limited partner. Fendt and Anderson each owned 50% of A&F HHC. Initially, GP-1 owned 1% of the equity of the partnership and A&F HHC owned 99%. The impetus for this division was that the parties did not expect the partnership to generate any profits for some time, and this division allowed A&F HHC to capture the losses for tax purposes. WHGA, a non-profit, could not take the losses.

The parties entered into the 1999 agreement on October 1 of that year. Pursuant to the 1999 agreement GP-1's equity interest was increased to 67%. A&F HHC was made a general partner and its equity interest was set at 32%. The remaining 1% ownership interest in the limited partnership was assigned to a new limited partner associated with Anderson and Fendt called A&F Equities, LLC (original LP).

In 2001 the limited partnership refinanced with loans from European American Bank (EAB) and with a combination of funding from various governmental agencies.

In 2004 the limited partnership again refinanced with the approval of HPD, replacing its EAB loan with a $2.75 million loan from the New York Community Bank. At the same time, Anderson and Fendt’s relationship began to sour and the two began to partially

divide their business interests.

Fendt and other parties aligned with him (the Fendt faction, non-movants below) assert that there was a change in the limited partnership's membership, and percentage membership interests, that attended the 2004 refinancing. Parties aligned with WHGA, including Anderson (the WHGA/Anderson faction, movants below)[1], dispute this assertion. The Fendt faction asserts that as part of the closing the parties agreed to an amendment of the 1999 agreement, embodied in the unsigned amendment. Several iterations of the amendment, none signed, have surfaced. The Fendt faction relies on the iteration dated December 22, 2004.

According to the unsigned amendment various entities were substituted for the partners set forth in the 1999 agreement. A new entity, West Harlem Hamilton Heights Cluster, Inc. (New GP-1, a WHGA-controlled entity) was named a general partner of the limited partnership. GP-1 was no longer listed as general partner. A&F HHC continued as a general partner. A&F HHC Equities, LLC (New LP) was listed as the limited partner.

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[1]The use of the term "WHGA/Anderson faction" is used as shorthand to help clarify where the parties stand on the issues raised in this appeal. WHGA and Anderson assert different versions of some of the facts that underlie this hydra-headed litigation, but these differences do not affect the legal issues in this appeal. Anderson and his company Urban Green Management, Inc., have not submitted a brief. Therefore the usual terms "appellant" and "respondent" do not accurately summarize the status of the parties affected by this appeal. Accordingly, the WHGA/Anderson faction is also referred to herein as "movants" and the Fendt faction is sometimes referred to as "non-movants," which reflects their status in Supreme Court.

Original LP, the limited partner of the 1999 agreement, was no longer listed as limited partner. Under the unsigned amendment, New GP-1 was assigned a .051% interest, A&F HHC a .049% interest, and New LP a 99.9% interest. However, the unsigned amendment provides that capital proceeds are to be distributed 50% to new LP, and 25% each to the general partners. The Fendt faction avers that this arrangement was for tax purposes, and to acknowledge the greater investment in the properties by entities controlled by Fendt and Anderson.

The unsigned amendment thus embodies major changes to the limited partnership: a new ownership structure, the substitution of a new general partner and a new limited partner, and changes in allocations of capital, and income and loss. The new division of capital proceeds contained in the unsigned amendment represents a significant reduction of the proceeds that WHGA (through the general partner controlled by it), and A&F HHC (the other general partner) were due under the 1999 agreement.

The WHGA/Anderson faction asserts that the parties never agreed to the unsigned amendment and points out that in nearly six years of litigation no one has produced an executed version. Fendt points to various facts that give rise to an inference that the parties behaved as if they had agreed to the unsigned amendment. Before Supreme Court, he cited these facts in opposing the WHGA/Anderson faction's motion for summary judgment, arguing that they create triable issues of fact. For example,

Donald Notice, an officer of WHGA, signed a partnership resolution and related documents that reflected the above changes to the limited partnership's membership. Additionally, a copy marked "Draft" of the unsigned amendment was found by HPD in its closing binder pertaining to the 2004 refinancing and was produced in discovery. The 1999 agreement was also in the binder. The loan documents list the purported new general and limited partners contained in the 2004 amendment, without mentioning their percentage interests in the limited partnership. The Fendt faction also points to the fact that Anderson, as the tax matters partner, signed off on the limited partnership's tax returns and K-1s, and that in 2004-13 these documents reflect the percentage ownership of the unsigned amendment (albeit with a decimal error and a misnaming of one of the partners).

Notice's and Anderson's responses to these facts are to claim that these documents reflect mistakes made by various professionals who participated in drafting the documents. They also blame their own inattention. However, their foundational defense is that they never agreed, in writing, to an amendment of the 1999 agreement.

The parties' disputes led to litigation in 2014 when Fendt sought to remove the properties' building manager, Urban Green Management, Inc. (Urban Green), owned by Anderson, with another managing agent. Fendt sued derivatively on behalf of the limited partnership, alleging that Anderson and Urban Green had diverted

partnership funds.

Fendt relied on the unsigned amendment in bringing this derivative action, which put its validity at issue. The WHGA-controlled entities, GP-1 and New GP-1, moved to intervene and to dismiss the action on the basis that neither Fendt nor New LP had authority to sue on behalf of the limited partnership. Anderson and Urban Green also moved to dismiss and for the appointment of a receiver. In a decision dated July 5, 2015, Supreme Court granted the motion to dismiss in substantial part, finding that plaintiffs had not established their authority to sue. The court noted that the unsigned amendment was not executed, and that Fendt had made contradictory claims regarding Original LP and New LP's authority to cause the limited partnership to bring the action. The Court granted plaintiffs leave to file an amended complaint with A&F HHC as plaintiff. It also granted the WHGA entities' motion to intervene and file a complaint.

GP-1 and New GP-1 thereupon filed an intervenor complaint seeking, inter alia, a declaratory judgment that the unsigned amendment was invalid and that the only enforceable agreement governing the limited partnership was the 1999 agreement. Fendt purportedly caused A&F HHC and New LP to file an answer and assert counterclaims, inter alia, seeking a declaration that the unsigned amendment governed the Limited Partnership. Discovery ensued. On another front, in 2015 Anderson brought a dissolution proceeding under BCL § 1104-a, which led to Anderson buying out

Fendt's interest in A&F HHC.

The issue of what agreement controls again came to a head in the summary judgment motions brought by WHGA and Anderson that are the subject of this appeal. As noted above, Supreme Court ruled for the WHGA/Anderson faction, and found that the 1999 agreement was the operative agreement. The court found that prior decisions of Justices in this action, and in related actions, established the necessity of a signed amendment as "law of the case" and no signed version had surfaced during discovery. Supreme Court also held, inter alia, that Fendt could not bring a double derivative claim on behalf of the limited partnership because A&F HHC is a minority partner under the 1999 agreement. Finally, the court held that New LP could not bring suit, because there was no proof of a written assignment of Original LP's interest to New LP.

DISCUSSION

In its well-reasoned opinion, Supreme Court correctly held that Fendt had no power to bring a double derivative claim on behalf of the limited partnership via A&F HHC, as A&F HHC was only a minority owner of the limited partnership (*see Pessin v Chris-Craft Indus.*, 181 AD2d 66, 72 [1st Dept 1992]).[2] It also correctly found that Fendt had failed to show that he could

[2]Movants also correctly pointed out below that Fendt had lost his standing in 2015 to bring a derivative claim on behalf of A&F HHC when Anderson bought out Fendt's share in that entity.

exercise powers on behalf of New LP that are contained in the unsigned amendment, as the non-movants failed to proffer a signed copy of that document.

The principal, and dispositive, question presented on appeal is whether the unsigned amendment is effective, and therefore served to amend the 1999 agreement. That question turns on whether a signed amendment is necessary, or, as appellants argue, whether the unsigned amendment may become operative through the parties' conduct. We must determine if a signed writing was required under the Revised Limited Partnership Act. Surprisingly, this presents an issue of first impression.

The Revised Limited Partnership Act (RLPA) is in many respects a "default statute" that allows limited partnerships to chart their own course of governance, but imposes rules if the partnership does not explicitly opt out of specific provisions. Many substantive provisions in the act are qualified by the phrase "except as may be provided otherwise in the partnership agreement." That phrase appears in RLPA § 121-110(c), which concerns, among other matters, the distributions and allocations of tax losses to partners. That section reads in full:

"The partnership agreement of a limited partnership may be amended from time to time as provided therein; provided, however, that, except as may be provided otherwise in the partnership agreement, without the *written consent of each partner adversely affected* thereby, no amendment of the partnership agreement shall be made which (i) increases the obligations of any limited partner to make contributions, (ii) alters the allocation for tax purposes of any items of income, gain, loss, deduction or credit, (iii) alters the manner of computing the distributions of any partner, (iv) alters, except as provided in subdivision (a) of

section 121-302 of this article, the voting or other rights of any limited partner, (v) allows the obligation of a partner to make a contribution to be compromised by consent of fewer than all partners or (vi) alters the procedures for amendment of the partnership agreement."

RLPA § 121-110(c) (emphasis supplied).

The unsigned amendment purports to alter the allocation of distributions and tax losses to the partners. The 1999 agreement contains no provision that would allow for such changes without a writing memorializing the consent of the adversely affected partners. Therefore, the default requirement of an executed writing applies, as provided in RPLA § 121-110(c). It is undisputed that no party has located, much less authenticated, an executed version of the unsigned amendment. As it has not been signed by any adversely affected partner, the unsigned amendment is of no effect.

Non-movants argue that parties can modify a contract by their conduct. That is true of course as a general matter (*see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 11 [1st Dept 2009]). However, the contract in this case is one that is subject to a detailed statutory scheme, and therefore the "modification by conduct" argument requires greater scrutiny. The Fendt faction cites only one case that involved modification of a partnership agreement by conduct (*see Estate of Kingston v Kingston Farms Partnership*, 130 AD3d 1464, 1465-66 [4th Dept 2015]). However, that case did not involve a provision, such as RLPA § 121-110(c), that requires changes to specified aspects of

the limited partnership to be consented to in writing, unless the parties' agreement provides otherwise.[3]

Non-movants argue that the equitable exceptions to the statute of frauds provide support for their argument that an executed writing is unnecessary under the facts of this case. General Obligations Law § 15-301(1) states that any agreement that recites that it cannot be amended orally can only be amended in a writing signed by the party to be charged. The Fendt faction correctly points out that the equitable claims and defenses of waiver, estoppel and partial performance are still available to prove or enforce an oral modification of a contract within the statute of frauds (*see 310 S. Broadway Corp. v Barrier Gas Serv., Inc.*, 224 AD2d 409 [2nd Dept 1996]; *Matter of Latham Four Partnership v SSI Med. Servs.*, 182 AD2d 880 [3rd Dept 1992]; *Wilkenfeld v Rowen*, 262 AD2d 28 [1st Dept 1999]). However, non-movants cite no case that has applied similar equitable claims and defenses in cases involving limited partnership agreements covered by the RLPA.

Given the detailed statutory scheme governing limited partnership agreements embodied in the RLPA, we find the non-movants' argument by analogy unpersuasive. By design, the RLPA

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[3]In *Kingston*, the "modification" concerned the partners' annual meeting to value the partnership. The agreement called for that meeting to be in March. However, the parties never met in March, and instead met habitually in December. The court held that a December valuation meeting was binding because the partners had modified the agreement by their conduct.

sets forth a clear separation between general and limited partners. This separation is more defined than the division between managers and members in limited liability corporations. With few exceptions, the RLPA provides that a general partner has the liabilities of a partner in a non-limited partnership. In exchange for a more passive position, the limited partners are generally sheltered from personal liability to third parties who transact business with the limited partnership (*see generally*, Bruce A. Rich, Practice Commentaries, McKinney's Cons. Laws of NY, Book 38, Revised Limited Partnership Act, at 317, 334-336). The RLPA's default requirements of partner consent to substantive changes to a limited partnership agreement helps protect the passive limited partners from actions taken by general partners that might adversely affect the limited partners' interests. That default protection would be undermined if we were to engraft on to the RLPA the equitable exceptions applicable to the Statute of Frauds. Accordingly, we decline to do so.

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

ENTERED: AUGUST 6, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11448 In re Annette M.-L., Dkt V-21326/16
Petitioner-Appellant,

-against-

William L.,
Respondent-Respondent.

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Karen D. Steinberg, New York, for appellant.

Davis Polk and Wardwell LLP, New York (Daniel S. Magy of counsel), and The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorneys for the child.

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Order, Family Court, Bronx County (Aija M. Tingling, J.), entered on or about May 11, 2017, which denied with prejudice the mother's petition to modify a prior order of custody, unanimously reversed, on the law, without costs, the petition reinstated, and the request for modification of the custody and parenting time provisions of the parties' divorce judgment is granted, and the Family Court is directed to enter, within 14 days of the mother's presentation to the Clerk of the Family Court of a copy of this order, an order granting the mother's modification petition and awarding her sole legal and physical custody of the child, without prejudice to further proceedings commenced by either party with regard to respondent father's communication and visitation with the child.

The parties resolved the custody of their child by their divorce agreement, which was the basis for their 2010 Florida divorce decree. Under the divorce decree, petitioner mother had

primary physical custody and the father had visitation on alternating weekends. In or about 2013, the child and mother relocated to New York. The father agreed, provided that the child would spend each summer with him, with the father paying for her transportation to Florida and the mother paying for the return trip.

The father did not arrange for the child to visit him in either the summer of 2014 or 2015, although he saw her for a few days in New York in the latter summer. In summer 2016, the mother drove the child to Florida, with the understanding that the father would return the child to New York in time to start school. However, the father enrolled the child in school in Florida, without the mother's knowledge or consent, and told the mother that he would not send the child back to New York. The father then filed a petition in Florida to modify the custody provisions of the parties' divorce decree.

In August 2016, petitioner served and filed petitions in Bronx Family Court seeking immediate return of the child and modification of the custody order, so as to give her sole legal and physical custody of the child and to give the father visitation with the child on alternate school breaks and summers.

On October 26, 2016, the Florida and New York courts held a joint telephonic hearing, to decide which court had jurisdiction (*see* Domestic Relations Law §§ 75-i, 75-j). After both parties testified, the Florida judge found that the father had acquiesced

in the child's move to New York in 2013. Accordingly, he declined jurisdiction and dismissed the father's petition. (Domestic Relations Law § 76).

On November 10, 2016, the Bronx Family Court issued an order directing the return of the child, and she was returned to her mother in New York on or about November 11, 2016. On the same day, the Family Court issued a temporary visitation order permitting the father to have the child spend Christmas with him in Florida, and scheduling the next court date for February 6, 2017. The father did not make arrangements to have his daughter visit him for Christmas.

At the February 6, 2017 conference, when the father did not appear, the trial judge telephoned him. The court advised him that he would have to appear in person at a trial in New York in order to contest the mother's application for custody, and the father said that was "fine." After some discussion, the parties, including the father, agreed that trial would start at 2:30 p.m. on May 9, 2017. The court further advised the father that if he did not appear on that date, she would proceed with the trial. She admonished him that, "If anything happens before that date you have to notify the Court."

On May 9, 2017, when the father failed to appear, the court held an inquest in his absence. The court took testimony from the mother and received in evidence the child's medical and school records.

The court found the mother's testimony to be credible. Specifically, she found that the father did not arrange for the child to visit him in the summer of 2014 and saw her only briefly in New York in the summer of 2015. The court further found that the mother took the child to visit the father in the summer of 2016, and the father did not return her at the end of the summer and registered her for school in Florida. She also found that the only time the father saw the child from November 2016 until trial began in May 2017 was a brief visit in New York in January 2017. The court also found that the mother has been solely responsible for the child's medical and educational needs. She also found that the father had not been involved in the child's education or medical care, and has rarely called her.[1] Nevertheless, the court dismissed her modification petition with prejudice, finding that she had failed to demonstrate changed circumstances requiring modification of the custody provisions of the parties' divorce decree. We disagree.

We find that the facts, as found by the trial court, demonstrate three changes in circumstances any one of which would provide a basis for modifying the custody order: 1) the relocation of the mother and the child from Florida to New York, with the father's acquiescence, which rendered the father's

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[1]The court made these findings without drawing any inference against the father for his failure to testify, which it certainly could have done (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]).

visitation schedule impractical, if not impossible (*see Matter of Dench-Layton v Dench-Layton*, 123 AD3d 1350, 1351 [3d Dept 2014]; *see also Matter of Leon T. v Marie J.*, 132 AD3d 602 [1st Dept 2015]; *Matter of Robertson v Robertson*, 40 AD3d 1219, 1220 [3d Dept 2007]); 2) the father's decreased involvement in the child's life; and 3) the deterioration in the parents' relationship, as illustrated by the father's failure to return the child at the end of the 2016 summer.

Moreover, we find that the record is sufficient to determine and grant the mother's modification petition on the merits, as she has requested.[2] The factual findings made by the trial judge demonstrate that it is in the child's best interests to grant the mother's request for modification of the custody provisions of the parties' divorce decree to award her sole legal and physical custody of the child (*Eschbach v Eschbach*, 56 NY2d 167 [1982]). The record demonstrates that the child is doing well in her mother's care. Her medical records entered into evidence indicate that she is healthy and well-cared for. The child's educational records entered into evidence show that the child has improved in school since moving back to New York from Florida in November 2016.

In addition, the fact that the mother has had consistent employment in New York as a surgical technician at the same oral

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[2]The father did not oppose this relief, as he did not file an answer objecting to the mother's modification petition, failed to appear for trial and did not file a brief in this court.

surgery practice since 2014 indicates greater stability and economic improvement in the child's life.

However, it is not possible, at this time, to establish a visitation plan that is in the child's best interests, given the father's failure to testify and present evidence at trial. Accordingly, the granting of the mother's modification petition shall be without prejudice to further proceedings commenced by either party to establish an appropriate visitation schedule. The mother does not appear to dispute the Family Court's observation that neither the mother nor her daughter have any connection to Bronx County. Nevertheless, the court erred when it referred all future or subsequent filings in the proceeding to Westchester County because its determination on venue constituted an improper advisory opinion (Family Court Act § 171; *Robertson*, 40 AD3d at 1221; *see also Coleman v Daines*, 19 NY3d 1087, 1090 [2012]). In any event, we note that the Family Court expressly accepted jurisdiction over the matter after a hearing on the issue, and that "[i]mproper venue is not a jurisdictional defect requiring dismissal of the action" (*Lowenbraun v McKeon*, 98 AD3d 655, 656 [2d Dept 2012][internal quotation marks omitted]).

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

ENTERED: AUGUST 6, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11830 The People of the State of New York, Ind. 1103/16
Respondent,

-against-

James Gibson,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Stephen Chu of counsel), and Covington & Burling, LLP, New York (Sarah Mac Dougall of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Nathan Brandon Shi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered February 1, 2017, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fourth degrees, and sentencing him, as a second felony drug offender, to concurrent terms of three years, unanimously affirmed.

The court properly denied defendant's suppression motion. Testimony elicited at the hearing was that while stopped at a red light heading north at 149th Street and Convent Avenue, the officers observed defendant standing approximately 10-15 feet away on the southeast corner *of Convent Avenue and 149th Street*, talking on his cell phone and holding in his right hand, a small white object, a few centimeters of which were visible. A second individual standing on the northeast corner, likewise talking on his cell phone and holding paper money was also observed by the officers.

The testimony was that although it was nighttime and dark, the corner was "well lit" from street and building lights and the officers had an unobstructed view. At some point defendant waved at the second individual, who began to approach the defendant. At this point the officers pulled the vehicle into the crosswalk kitty-corner to the southeast corner of 149th Street and Convent Avenue, in front of defendant. All three officers exited with their badges displayed but their weapons holstered. After the officers exited the vehicle, the second individual changed direction and started walking away. Meanwhile, defendant turned, dropped the object which was in his hand, and walked toward the officers. The object which defendant dropped was recovered by one of the officers and found to be a napkin containing 5 ziploc bags of crack cocaine.

The hearing court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The credible evidence established that the circumstances were sufficient to raise a reasonable suspicion that a drug transaction was about to occur and the police officers' actions in getting out of their unmarked vehicle and displaying their shields rose only to a level one approach to request information requiring an objective credible reason not necessarily indicative of criminality (*see People v Leung*, 68 NY2d 734, 736 [1986]; *People v Grunwald*, 29 AD3d 33, 38-40 [1st Dept 2006], *lv denied* 6 NY3d 848 [2006]). It is undisputed that

the circumstances were sufficient to justify this level of intervention. As noted by the hearing court, the officers never actually stopped the defendant because defendant dropped the drugs, thereby voluntarily abandoning them. At the point when defendant discarded the drugs, the officers had thus not "surrounded" defendant, as he claims, nor directed him to do anything. Defendant's abandonment of the drugs was not precipitated by illegal police action.

Contrary to defendant's claim, the hearing court did not treat this as a level three stop. It found that although the circumstances were sufficient to justify such a stop, the officers "never really got to that point." Thus, the People's inaccurate characterization of the encounter was not considered by the hearing court and in any event, was not binding on the court (*see e.g. People v Wells*, 16 AD3d 174 [1st Dept 2005], *lv denied* 5 NY3d 796 [2005]).

"By failing to object, making general objections or failing to request any further relief after the court sustained an objection, defendant failed to preserve his present challenges to the prosecutor's summation" (*People v Miles*, 157 AD3d 641, 641 [1st Dept 2018], *lv denied* 31 NY3d 1015 [2018]). "The word 'objection' alone [is] insufficient to preserve [an] issue" for review as a question of law (*People v Tevaha*, 84 NY2d 879, 881 [1994]). We decline to review these unpreserved challenges in the interest of justice. As an alternative holding, we conclude

that the prosecutor's remarks were appropriate responses to defense counsel's attacks on the police officers' credibility (*see e.g. People v Marte*, 69 AD3d 405, 406 [1st Dept 2010], *lv denied* 14 NY3d 842 [2010]; *People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). In any event, any

error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: AUGUST 6, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Sallie Manzanet-Daniels
Barbara R. Kapnick
Anil C. Singh
Lizbeth González, JJ.

11769
Index 101378/19

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In re Kenneth Sonders,
Petitioner-Appellant,

-against-

New York State Department of Motor Vehicles
Traffic Violations Bureau,
Respondent-Respondent.
_____x

Petitioner appeals from the judgment (denominated an order) of the Supreme Court, New York County (Carol R. Edmead, J.), entered September 30, 2019, denying the petition to stay the enforcement of a one-year revocation of petitioner's license by respondent, and dismissing the proceeding brought pursuant to CPLR article 78.

Law Office of Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Letitia James, Attorney General, New York (David Lawrence, III and Steven C. Wu of counsel), for respondent.

MANZANET-DANIELS, J.

We hold that the revocation of petitioner's driver's license by respondent DMV, based on a 24-year-old default conviction was, under the circumstances, arbitrary and capricious.

Petitioner was issued four summonses in October of 1994 for driving violations including driving without insurance. When entering the violations into the DMV database, a DMV employee entered petitioner's surname as "Sanders," rather than "Sonders," which DMV acknowledges was a "possible data-entry error." Petitioner claims to the best of his knowledge and memory never to have been issued the summonses in question. A default judgment was entered against petitioner as a result of his failure to contest the tickets. The conviction for driving without insurance carried a mandatory penalty of a one-year license revocation (*see* Vehicle and Traffic Law § 318[3][a]-[b]).

On or about August 6, 2019, petitioner renewed his New York State driver's license in person at the DMV. At that time, he obtained a copy of his driving record abstract, which indicated that his license status was "valid."

Thereafter, petitioner received suspension notices, dated August 7, 2019, stating that his license had been suspended on February 3, 1995; and a revocation order dated August 7, 2019 stating that owing to the February 3, 1995 conviction his license

would be revoked for one year in accordance with section 318 of the Vehicle and Traffic Law. Petitioner claims that this is the first notice he received of the summonses.

Petitioner paid the outstanding fines and in September 2019 commenced an article 78 proceeding challenging the license revocation. Supreme Court denied the petition and dismissed the proceeding. This appeal followed.

Our review is limited to whether DMV's determination was arbitrary and capricious, irrational, affected by an error of law or an abuse of discretion (CPLR 7803[3]). An action may be said to be arbitrary if it lacks basis in reason and is taken without regard to the facts (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

The possession of a license to drive is a vested property right. As noted by the Court of Appeals in *Matter of Wignall v Fletcher* (303 NY 435, 441 [1952]), "A license to operate an automobile is of tremendous value to the individual and may not be taken away except by due process."

No such due process was afforded to petitioner, who never received notice of the conviction and was led to believe for over 20 years that his license was in order. Petitioner is "caught in a situation almost worthy of Kafka" as the actions of respondent

"produce[] a truly irrational result": DMV is punishing petitioner for its own, admitted errors in never apprising him of the conviction and thereafter affirming that he possessed a valid license (*see Hall v New York State Dept. of Motor Vehs.*, 192 Misc 2d 300, 300-301 [2002]).

Similar actions by DMV were found to be arbitrary and capricious in a case involving a six-year delay. In *Matter of Resto v State of N.Y. Dept of Motor Vehs.* (135 AD3d 772 [2d Dept 2016]), the village justice court did not communicate to DMV that it had ordered revocation of the petitioner's license until six years after the fact, at which time his application to renew his license was denied, although his previous license renewals had been granted. The Second Department held that under the circumstances of the case, including the justice court's six-year delay in reporting to DMV that it had ordered the revocation of the petitioner's driver's license to respondent, the revocation of the license was arbitrary and capricious (*id.*).

Imposition of the required penalty 24 years after the fact, which DMV admits was attributable to a potential data-entry error, while continuing to renew petitioner's license without apprising him of any problem, is the quintessence of an arbitrary and capricious action.

Accordingly, the judgment (denominated an order) of the

Supreme Court, New York County (Carol R. Edmead, J.), entered September 30, 2019, denying the petition to stay the enforcement of a one-year revocation of petitioner's license by respondent, and dismissing the proceeding brought pursuant to CPLR article 78, should be reversed, without costs, the petition granted and the determination annulled, and the matter remitted to respondent for further proceedings in accordance with this opinion.

All concur.

Judgment (denominated an order), Supreme Court, New York County (Carol R. Edmead, J.), entered September 30, 2019, reversed, without costs, the petition granted and the determination annulled, and the matter remitted to respondent for further proceedings in accordance with this opinion.

Opinion by Manzanet-Daniels, J. All concur.

Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

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

ENTERED: AUGUST 6, 2020

CLERK