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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

SANTA ROMAN,

Plaintiff,

-against-

SULLIVAN PARAMEDICINE, INC., HOLLI N. SCHOONMAKER, ARIE NUDEL and DEBORAH L. MASTER,

Defendants.

MEMORANDUM DECISION/ ORDER
Index No. 309025/09

HON. MARK FRIEDLANDER:

Plaintiff in this automobile accident action claims to have suffered serious injury as a result of a three car "rear-end" collision which occurred while she was a passenger in the right front seat of the lead vehicle. The trial was held before the undersigned in October 2013, and, by agreement of the parties, only the issue of liability was presented to the jury.

The vehicle containing plaintiff was an ambulance owned by defendant Sullivan Paramedicine, Inc. and operated by defendant Holli N. Schoonmaker ("HNS"). Because these two defendants are and were united in interest, they will be referred to collectively as HNS. The vehicle behind the ambulance, a Toyota, was owned and operated by defendant Arie Nudel ("Nudel"), and the lattermost vehicle, a Jeep, was owned and operated by defendant Deborah Master ("Master").

Following deliberations, the jury found that all defendants had been negligent and that the negligence of each of them had been a substantial factor in causing the accident. The jury apportioned fault as follows: Fifty percent to Master, thirty percent to HNS and twenty percent to Nudel.

Defendant Nudel now moves this Court for a post-trial order, pursuant to CPLR 4404(a), vacating the jury verdict and granting Nudel judgment notwithstanding the verdict, on the ground that Nudel did not breach

any duty owed to plaintiff, or, in the alternative, ordering a new trial on the ground that the jury verdict was contrary to the weight of the evidence.

In a separate motion, defendant HNS moves this Court for a post-trial order, pursuant to CPLR 4404(a), seeking identical relief for themselves. The Decision which follows will address both motions.

For the reasons set forth below, the Court grants the Nudel motion, sets aside the jury verdict rendered against Nudel and grants Nudel judgment in his favor, on the ground that the verdict as to him is devoid of support, as a matter of law. The motion of HNS, though, is denied, as there is both factual and legal support for the result reached by the jury.

The trial lasted more than ten days, and included eight live witnesses, as well as deposition readings. A great number of facts was adduced, and repeating them at length here would render the instant Decision too unwieldy to absorb. In fact, the moving and opposition papers, which bravely attempt to lay out most of the testimony, each contain approximately forty pages. Rather, the Court will set out below only the barest outline of those facts needed to make the Decision comprehensible, and thereafter will merely add specific facts which must be adopted or refuted to support the results reached.

I. Factual Background.

The accident took place in mid-morning, on July 25, 2009, on an access road, or ramp, to Route 17, in the Catskill region of New York State. The access road is quite long, and curves twice, but the final long section merges into the highway without a yield sign, so that vehicles characteristically accelerate all along the final portion, the better to reach speeds which will permit entering directly into highway traffic.

HNS had picked up plaintiff's mother for transport to a hospital, on a non-emergency basis, and plaintiff accompanied her mother, but sat in the front of the ambulance. In the back, with the patient, was an EMT named Peter Stagl, whose deposition testimony was read to the jury, because he was unavailable at trial. Near the merge point of the ramp and highway, HNS observed a pickup truck stopped and a box of some sort which

might have fallen from the truck. HNS stopped her ambulance behind the truck, and remained there for approximately eight to ten seconds (until the accident occurred), without deploying her siren, hazard lights, or the flashing lights on her roof.

Nudel and his wife were traveling behind the ambulance. At some point, Nudel, realizing that the ambulance was not moving, placed his foot heavily on his brake to come to a stop. According to his testimony, he did come to a stop, but was then hit in the rear by the Jeep driven by Master, with that collision knocking him into the ambulance. Master testified that she saw Nudel hit the ambulance first, but then, she could not stop in time and hit the rear of Nudel's Toyota. Master also stated that, in the course of proceeding down the last stretch of ramp, she briefly looked to her left to check the traffic traveling alongside on Route 17.

At around the time of the accident, the pickup truck in front of the ambulance left the scene, pulling onto Route 17, and leaving the small box behind. The truck has never been identified.

A New York State Trooper arrived at the scene. He testified at trial, repeatedly referring to his report, as it is not clear whether he had an independent recollection of details of the event. His report indicated that each driver gave him a statement, although Nudel denies ever being asked any questions by the trooper. The statements reported by the trooper will be further discussed infra.

Both plaintiff and Nudel retained experts. Although the parties were late in realizing it, there was available to them an event data recorder ("EDR"), colloquially known as a "black box," which was located in Nudel's Toyota and recorded data concerning the accident. Both experts examined the EDR several months before trial, and testified at trial as to their conclusions. The EDR only recorded certain limited amounts of information, but the experts were able to piece together most aspects of the collisions, some of their conclusions requiring the use of computer programs. Significantly, a key item recorded by the EDR, and not requiring computer reconstruction to analyze, was the sequence in which collisions occurred - i.e. whether the back of Nudel's Toyota was hit before or after his front hit the ambulance.

Both experts agreed that, based on EDR readings, the Master Jeep collided with the back of the Nudel Toyota before the Toyota hit the ambulance. The Toyota was thus pushed into the ambulance, and the second collision took place when the front of Nudel's vehicle hit the back of the ambulance. Thereafter, there was a backward "bounce" of the Jeep and the Jeep once again hit the back of the Toyota. Both experts opined that, if the Jeep had not struck the back of Nudel's vehicle, Nudel would have had the time and space to stop before hitting the ambulance.

The most salient point of disagreement between the experts was that plaintiff's expert blamed Nudel for the accident by opining that he did not begin braking soon enough, and then braked heavily, thus preventing Master from noticing Nudel's braking lights for critical seconds. Given Nudel's long line of sight to the stopped ambulance, according to plaintiff's expert, Nudel should have started to brake earlier. Nudel's expert disagreed with the conclusion that Nudel's timing had any role in causing Master to hit his car. A second relevant point of disagreement was that plaintiff's expert calculated that Nudel had to be traveling at 22-23 miles per hour when he was hit by Master, rather than having come to a stop, as Nudel testified. Nudel's expert testified that Nudel could have been stopped when he was struck, but seemed to concede that this scenario may be less likely than others more in keeping with the speed identified by plaintiff's expert. There was no dispute that Master was traveling at 44 miles per hour when she hit the back of Nudel's vehicle.

The above necessarily includes only an oversimplified version of the very lengthy and involved testimony of both experts, but it is, hopefully, sufficient to illuminate the basis for the ensuing discussion.

II. The Motion by Defendant Nudel.

A. The Attack on Plaintiff's Theory.

Nudel, in his motion, argues that neither the Vehicle and Traffic Law ("VTL") nor case law imposes on drivers the obligation to warn tailgating vehicles behind them of an impending stop, and that, consequently, Nudel violated no duty to Master or to anyone else, when he chose the time to apply his brakes. Plaintiff takes

issue with the description of Master as a tailgater, asserting that the evidence does not support such label. Nudel's reply seems to contend that the fact of Master's collision with the rear of Nudel's vehicle establishes her as a tailgater. In the end, though, this dispute over semantics is irrelevant. Whether or not Master is properly labeled a tailgater, plaintiff has set forth no principle of law which would make Nudel's acts actionable.

Plaintiff argues that Nudel's motion has not adequately dealt with the theory advanced by her expert, and that, despite the disagreement between the experts, the jury could have accepted the theory propounded on behalf of plaintiff. This may be true, but the fact remains, in the Court's view, that, even if the jury accepted all the conclusions of plaintiff's expert, the theory of liability which such expert advanced is not cognizable as a matter of law. In other words, the jury could have accepted every fact and opinion mouthed by such expert, but still had no basis, under the law, for finding liability.

In the Court's view, once the experts agreed that Nudel could have stopped his car in time to avoid a collision with the ambulance, total fault for the event shifted to the Master car which pushed Nudel into the ambulance. This is so whether one believes Nudel, that he came to a complete stop before he was hit from behind, or accepts the expert opinion that he was traveling at half the speed of the car behind him when he was overtaken and hit.

Plaintiff initially hoped to blame Nudel for hitting the ambulance before being struck from behind. This theory was to be propounded without the testimony of experts who examined the EDR. When, at a late date, counsel for Nudel discovered the EDR and retained an expert, who concluded that Nudel was pushed into the ambulance, plaintiff was quite evidently left scrambling for an expert, and for a theory of liability against Nudel. The theory which his expert finally contrived is quite ingenious, but, unfortunately for plaintiff, cannot survive close examination.

No case law has been shown to require that a driver must apply brakes at the earliest possible moment.

when observing an obstruction ahead. So long as the driver can stop in time, such driver's obligation has been satisfied, without reference to how many moments were afforded to the driver behind to observe brake lights. Despite the repeated emphasis by plaintiff's counsel of "stealing" from Master some hundreds of feet of sighting brake lights, the law here recognizes neither a robbery nor even a misappropriation.

It was the obligation of Master to look forward and see what there was to be seen. It is absurd to suggest that she would not or should not have incorporated her view of the large ambulance, in considering the speed she should have been going, merely because the Toyota was between her and the ambulance. Conversely, it is equally absurd to argue that Nudel had some sort of requirement to brake at the first possible moment, when he was traveling a roadway that plaintiff conceded required drivers to accelerate in order to safely enter a highway ahead.

The ambulance in front of Nudel was stopped, but, as indicated above, did not display flashing lights or hazard lights. Under the circumstances, Nudel, or any driver, upon finally apprehending that the large vehicle was actually stopped, in a place at which stopped vehicles are unexpected, would take some period of time to wonder whether the vehicle was about to start moving imminently. After all, the driver of the ambulance might have mistakenly expected to see a yield sign at the entrance to Route 17 (assuming an inexperienced driver) and might be about to proceed upon realizing that there was no need to yield. Thus, any elapsed moments before Nudel applied his brakes are reasonably accounted for. Plaintiff attempts to make a tort out of normal driving behavior, and would realize herself the abject silliness of the claim were she not so literally desperate to implicate this defendant.

(The desperation to make out a claim against Nudel is easily understood once it is realized that Nudel's insurance policy was by far the largest of the three, a fact which of course was unknown to the jurors. Nor could the jury be told that, if they found Nudel even one percent responsible, his policy would be subject to paying the vast majority of the damages. These facts are not germane to the result reached on this motion, but they do

spotlight the presumed motivation of plaintiff and her counsel for straining to recast normal driving behavior as negligence, in a search for a pot of gold. The judicial process should not be used as a lottery. In this regard, it particularly riveted those in the courtroom who were aware of Master's very small insurance policy, to hear plaintiff's counsel, in closing to the jury, vigorously seek to minimize the fault of Master, in an effort to ensure that at least some percentage of fault was going to be attributed to Nudel).

Plaintiff seeks to mitigate the effect of his expert's testimony that there was a 98% probability that Nudel could have stopped in time to avoid hitting the ambulance, by emphasizing the comment of one of the experts that a man of Nudel's age (82) might have had a problem keeping enough pressure on the brake to come to a complete stop in the time and space allotted to Nudel. However, this comment by the expert is utterly speculative. Nudel repeatedly denied that he was pressing the brake very hard. (He stated "heavy" but not "heavy, heavy"). Further, assuming we discount Nudel's statement that he actually brought his vehicle to a stop, it cannot be denied that Nudel was deprived of the chance to prove that he was up to the task of stopping, by the inconvenient fact that Master crashed into him before he reached that point. All in all, without evidence to Nudel's health and background, speculation as to the effect of Nudel's age on this one (hypothetical) act is so speculative as to be without probative value.

Plaintiff argues that, if Nudel had begun to brake earlier and were further distanced from the ambulance, even the impact to his Toyota of Master's vehicle would not have pushed him into the ambulance. This is an example of a truism which is not relevant to the issues before the Court. If Nudel had been a half mile behind the ambulance, the impact from Master similarly would have had no consequence for the ambulance. Nudel, however, did not choose how far ahead of him the ambulance would be traveling, and, when it stopped, he had to do what he could to avoid hitting it. According to expert testimony, he was on track to doing that when he was hit from the rear.

B. Case Law on Plaintiff's Theory.

Many of the cases cited by Nudel emphasize the responsibility of the rear vehicle in any rear end collision, and the fact that the purported abrupt stopping of the front vehicle is not an excuse. This is well established, but, as plaintiff correctly points out, the point of most of this one-sided precedent is to implicate Master, not necessarily to absolve Nudel. In a hypothetical action brought by Nudel against Master, Master could not evade responsibility by claiming that Nudel stopped short. However, in an action by a third party for injuries sustained, as is the case here, the precedent is less one-sided as to the fault of a short stopping car. Plaintiff makes a point of this distinction, but plaintiff's argument is blunted by the fact that, according to the experts, Nudel did not actually stop short. He was slowing down when he was hit, and he was doing so in response to an obstacle which he could not control.

More significantly, plaintiff confuses the events of this accident with the rules governing stopping without proper signaling. Plaintiff, at trial, sought an instruction to the jury with regard to VTL Section 1163(c), as such section affected both Nudel and HNS. The Court granted it with regard to HNS, but not with regard to Nudel. The section prohibits a stop or a sudden decrease in speed without the display of a proper signal. (Emphasis added). As to HNS, there was evidence that her "lengthy" stop should have been made more visible by the deployment of hazard lights. However, as to Nudel, there was no claim of defective brake lights, or any other failure to signal that he was braking. It is patently clear that section 1163 deals with signaling. A driver signaling as he brakes has complied with the section, and Nudel's compliance was effected when his brake lights went on.

Thus, when plaintiff argues that it is accepted law to impose a duty on a driver not to suddenly decrease speed without signaling, she is invoking a duty irrelevant to Nudel, because no evidence exists to suggest that he was not signaling. Similarly, the jury instruction mentioned by plaintiff, which was read at trial, also refers only to a sudden stop without first giving a signal.

One of the prime cases cited by plaintiff for the proposition that a sudden stop alone subjects a driver to liability is Lipp v. Saks, 129 A.D.2d 681. That case, however, involves far more than a stop of the type attempted by Nudel here. In Lipp, the defendant driver lost control of his vehicle, and his "sudden" stop was brought about when he crashed into the vehicle ahead. Furthermore, he then left his vehicle protruding into the next lane, so that a following vehicle, containing the plaintiff, could not safely pass.

In general, the more recent trend of the law has been to emphasize the responsibility of the rear driver who hits a stopped or stopping vehicle, to the extent of entirely exonerating the front driver absent circumstances far more egregious than those which could possibly be said to apply to Nudel. Cases in which a plaintiff accused of short stopping was not held to be comparatively negligent, or in which a defendant similarly accused is found without liability, are legion.

In Gutierrez v. Trillium, 111 A.D.2d 669, 671, the court stated that vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance." In that case, the plaintiff, whose lead car stopped short, was found not to be subject to a claim of comparative negligence. In our case, the presence of the ambulance should have alerted Master to the "prevailing conditions." See also Clarke v. Phillips, 112 A.D.3d 872; Cabrera v. Rodriguez, 72 A.D.3d 553; Mendiolaza v. Novinski, 268 A.D.2d 462; and Mitchell v. Gonzalez, 269 A.D.2d 250, all cited by Nudel.

Plaintiff objects to Nudel's use of "sudden stop" precedent, criticizing the citation to Cabrera, supra, and complaining that the instant case is not a sudden stop case. This begs the question of why plaintiff herself invokes sudden stop cases, such as Lipp, cited supra, and Niemec v. Jones, 237 A.D.2d 267. More importantly, the sudden stop precedent is helpful to Nudel, because his actions are more defensible than those of drivers who come to a sudden stop. Nudel, according to the experts at trial, was still decelerating when he was hit. If a

driver who stops abruptly is free of liability, then, a fortiori, a driver who has not yet completed such act is even more so.

Plaintiff criticizes Nudel's invoking of DiPonzio v. Riordan, 89 N.Y.2d 578, stating that the Court of Appeals in that case merely refused to recognize the existence of a duty not previously known in the law, that of a gas station owner to monitor each customer in order to ensure that the customer's car was turned off before the gas pump was activated. Here, by contrast, according to plaintiff, the duty to avoid abrupt stops is well recognized, as is the duty not to suddenly decrease speed without proper signal. The problem with plaintiff's self-serving formulation is that Nudel in this instance neither failed to give a signal, nor stopped short.

Rather, plaintiff is positing a previously unknown duty of drivers to begin a process of braking at the earliest possible point in time, so that a car following can have the maximum window to respond. In effect, a driver under this duty would have the responsibility of constantly checking the rear view mirror to ascertain whether following cars were inappropriately gaining on him or her, because such awareness would trigger more urgent need for prompt braking. Plaintiff can point to no case law whatsoever endorsing this precise duty, rendering it as novel as the rejected duty of a gas station owner in Di Ponzio. Furthermore, the imposition of such duty would endanger the driver by diverting attention too often from the road ahead.

C. Other Considerations Regarding Plaintiff's Theory.

Both experts made it clear that Master, at the time of hitting Nudel, was traveling at 44 miles per hour, twice as fast as Nudel. Contrary to plaintiff's protestations on the subject, Master did claim that her distance from Nudel, before she began braking, was "more than a car length." While Master could not be specific in terms of feet or yards, she offered no estimate larger than that just quoted. The experts themselves confirmed that proper safe practice required a distance of one car length for each ten miles per hour of speed. Thus, Master would have had to be traveling between four and five car lengths behind Nudel in order to be driving safely. Master herself estimated her speed at 20-25 miles per hour, but, even at that speed, her distance should

have been more than two car lengths. Someone who estimates that her distance was "more than a car length" was clearly very far from the standard articulated by the experts and was therefore the immediate cause of the accident.

Plaintiff argues that Master really had to be farther behind Nudel than she herself estimated, because, if she had been closer, she would not have had sufficient reaction time to brake at all. This bootstrap argument must fail, because there is no absolute proof that Master's foot was not already on the brake (perhaps because of seeing the ambulance) when, after looking toward the traffic on the highway and turning back to look at the ramp ahead, she suddenly realized how close she was to Nudel. However, in this and other instances herein, the Court will presume all facts adduced to be those most favorable to plaintiff. In the end, it does not matter to the result herein what the precise distance between Master and Nudel was, only that Master in fact struck Nudel.

Two other aspects of plaintiff's opposition bear mention. Plaintiff objects to cases cited by Nudel which hold that drivers need not anticipate disobedience of a stop sign by others. Thus, if a driver with a right of way at an intersection failed to appreciate that another motorist was speeding through a stop sign and coming toward him, such driver would not face being held comparatively negligent, because he had no obligation to presume that the stop sign would be ignored. Plaintiff states that stop sign cases are distinguishable from cases involving quick stops, or quick decelerations. Yet, in view of plaintiff's failure to uncover cases involving quick decelerations (or, more accurately, "stealing" cars to the rear of additional seconds of seeing one's brake lights), analogies must be made to similar instances in which the aggression of other motorists need not be anticipated. Here, Nudel was no more required to assume the failures of Master to maintain a safe distance than he would be to assume the violation of stop signs by anyone else.

Second, plaintiff maintains that cases involving a sudden need to stop cannot apply to Nudel, because nothing sudden confronted Nudel. This is not quite as clear as plaintiff insists. Nudel was quite familiar with the road, as he had a house in the area. He knew well that vehicles were not supposed to be stopped at the

merge point and that he had an obligation to get up to highway speed in order to merge. Thus, if he were to ignore his need to speed up, he had to apprehend with some confidence that the vehicles ahead were not in fact about to move forward. When the unusual situation confronting him did finally crystallize, it cannot be said that he wasn't faced with a "sudden" choice.

In this respect, it is ironic that plaintiff seeks to prove the lack of tailgating by Master by invoking the formula that Master's car, traveling at 40 miles per hour, was advancing approximately 60 feet per second (leaving her little reaction time). If that be the case, then Nudel, who plaintiff says was driving at 30 miles per hour, was advancing at 45 feet per second. Thus, when plaintiff (to use the phrasing from summation) accuses Nudel of depriving Master of 250 feet of "sight distance" (i.e. brake light display), she is claiming that Nudel took just over five seconds too long to react to the strange sight ahead of him. Plaintiff agrees that normal reaction time (to a car sharply breaking ahead) is 1.5 seconds. Is it then a breach of some duty to add about three seconds for exercising judgment as to what the vehicles at the other end of the ramp were about to do?

Nudel moved to dismiss at the close of plaintiff's case, and moved again for a directed verdict at the close of the evidence. The basis for those motions was similar to the conclusions set forth above. Nudel thus preserved his right to elicit dismissal. The Court, in response to the motions, referred briefly to some of the observations set forth supra, but concluded that the jury should be given the case so that, if, on appellate review, it was decided that the claim against Nudel could stand, a complete record of trial would be available. (It was regarded as a virtual certainty that appellate review would be sought, no matter who prevailed at the trial level, by reason of the very large insurance policy at risk).

In the end, though, even viewing the evidence adduced at trial in the manner most favorable to plaintiff, as plaintiff rightly demands, it cannot be said that plaintiff, through her expert or otherwise, has demonstrated, or even identified, a breach by Nudel of any duty of care imposed upon him either by the VTL or by case law.

For all of the above reasons, the theory proffered by plaintiff at trial regarding Nudel's liability cannot stand, and the claim against Nudel must be dismissed.

D. The Purported Alternate Basis for Liability.

Plaintiff has insisted, however, that, even if her theory of liability fails muster, her verdict against Nudel can still remain intact, because the jury could have found that Nudel's vehicle struck the ambulance before Master's Jeep hit Nudel's Toyota, and, in that case, Nudel would bear liability for the collision and the injury to plaintiff. In maintaining this position, plaintiff is seeking to salvage a verdict against Nudel, based on a version of the facts which runs counter to the findings of her own expert, the findings of the only other expert retained in the case, and the assertions of fact made by plaintiff's counsel to the jury both in his opening statement and in his summation.

E. The Effect of Judicial Admissions.

Movant argues that plaintiff's opening statement (as well as his summation) precludes this effort, as the statement(s) constituted a "judicial admission," ("JA"), which binds plaintiff. However, the case law cited by movant demonstrates very clearly that, in these circumstances, the assertions made by plaintiff's counsel constitute merely an informal JA, which provide added evidence as to the matters conceded, but do not constitute a formal JA, which would unalterably bind the party making the admission.

Echevarria v. Cromwell, 232 A.D.2d 347, cited by movant, would seem to indicate that a statement made in the opening argument can thereafter bind a party, but notes that such is the case only when the statement is not thereafter refuted by other evidence. Here, as plaintiff would argue, there is other evidence, mostly in the form of Master's testimony at trial that she saw Nudel hit the ambulance before she struck Nudel. That evidence, however problematic, in view of all the other evidence in the case, seems to remove the instant situation from the purview of Echevarria. By contrast, other decisions cited by movant make very clear that

what may be conceded in an opening statement, or in any informal JA, is merely added evidence against the admitting party. Tullett v. BGC, 111 A.D.3d 480; Wheeler v. Citizen's Telecom, 18 A.D.3d 1002.

GJF v. Sirrius, 89 A.D.3d 622, 624, cited in movant's papers, provides an excellent review of the instances in which a JA may be regarded as formal and binding on the one hand, or informal and merely evidentiary on the other. The descriptions listed make it even clearer that, in this case, the statements of counsel constituted at most an informal JA.

This is not to suggest that the case law cited by plaintiff is any more persuasive. Jones v. Davis, 307 A.D.2d 494, relates to an opening statement in which a plaintiff's counsel specifically blamed one defendant, but the jury verdict found another defendant liable. The court there found no bar to affirming the liability of the unmentioned defendant, stating that plaintiff's counsel, in the opening, had not conceded a fact that was in contention, but had merely proceeded on only one theory of liability, when alternate theories could be available and adopted by the jury. Here, in a significant contrast to Jones, plaintiff's opening did in fact concede a fact, probably the most important single fact in contention – which collision occurred first.

Edmiston v. Tony Rome, 224 A.D.2d 941, cited by plaintiff, is not illustrative here, as that case merely stated that, where one of plaintiff's two experts conceded a fact which would have deprived plaintiff of proof of causation, plaintiff and the jury could still rely on the testimony of the second expert, who concluded differently. That decision does not control here, where plaintiff's one expert disagreed with the fact on which plaintiff now purports to rely, and where all the experts were in agreement with each other. Finally, Jensen v. Casale, 22 A.D.2d 994, is not only mis-cited by plaintiff, but recites facts utterly different from those claimed in plaintiff's opposition, and is, in any event, inapposite.

Despite the above infirmities in plaintiff's choice of precedent, the entire body of case law available on the subject makes it abundantly clear that what occurred in the instant trial, in the form of factual assertions on

opening and in summation, constituted at most informal JA's, which, while not precluding plaintiff's reliance on such conflicting facts as may have been adduced, constitute evidence in opposition to such facts.

F. The Viability of an Alternate Theory.

The aforesaid conclusion, however, does not avail plaintiff, in that the evidence adduced by the experts so overwhelms any evidence against it as to render reliance on the latter ineffectual for the purpose of upholding the result reached by the jury with respect to Nudel. The test for determining whether to set aside a jury award, as a matter of law, is whether it can be said that by no rational process could the jury have based its finding on the evidence presented. An early exposition of this rule may be found in Blum v. Fresh Grown, 292 N.Y. 241, in which the history of the concept is described at some length. Thereafter, Annunziata v. Colasanti, 126 A.D.2d 75 shows that it can be utilized by plaintiffs as well as defendants.

The experts who testified in this case both stated clearly that the scientific evidence derived from the EDR must trump witness testimony, as such testimony is inherently subjective. This is all the more so when the testimony is based on events which occurred unexpectedly, suddenly and violently, and were over within several seconds. It is critical to note that the evidence as to the order of the collisions is not derived from an opinion based on the practical experience of the experts, in which case another expert, with different experiences, might reasonably have a conflicting opinion. Rather, the order of collisions is derived from a reading of rather straight forward data on the EDR. The experts were merely persons who understood how to read the "language" on the EDR. An example of the more subjective type of expert opinion might be the conclusion, again voiced by both experts, that the ambulance's lack of flashing lights could have contributed to the accident. The reading of the EDR is in a different category.

Neither plaintiff nor any other party has demonstrated that the EDR, as a mechanism, is not totally reliable, or that use of the EDR is not well accepted science, not only in automobile collision case, but also in airline disaster cases, where the stakes are often very much higher.

In contrast to the unanimous agreement of the experts, and their very cogent explanations of their conclusions, there is primarily the self-serving testimony of Master, trying to extricate herself from responsibility. Indeed, her counsel had the same opportunity to hire experts as did the other parties, and could have sought to elicit a expert opinion which would exonerate his client. He did not do so, leaving the jury no rational alternative but to believe the science.

G. Supposed Evidence Supporting an Alternate Theory.

To be sure, plaintiff points to other supposed evidence that the Master vehicle may have been the last to collide. However, what plaintiff cites can hardly be called probative. Plaintiff claims that the version of the accident described by the three inhabitants of the ambulance conflicts with the experts' account. But that is not the case.

The descriptions from those in the ambulance, who felt, but, for the most part, did not see, the events, revolve around an initial collision which involved the ambulance, and a subsequent one which was heard but not really felt. Plaintiff now would interpret this to signify that the first collision they describe was one between Nudel and the ambulance, while the second was between Master and Nudel. However, plaintiff conveniently overlooks the experts' clear conclusion from the EDR that the Master vehicle struck the Nudel vehicle twice, as described supra, once before the Nudel vehicle his the ambulance, and once after. Under these circumstances, the first collision felt by the ambulance inhabitants could well have been the one caused by the Nudel vehicle being pushed into the ambulance by the Master Jeep, while the second could have been the "bounce" of the Jeep once again hitting the Nudel vehicle, but not transferring much of that energy all the way to the ambulance.

In the above scenario, the ambulance occupants would not have appreciated at all that the Nudel vehicle was struck even before it hit the ambulance, and it is entirely appropriate that they should have failed to sense that first impact. It occurred further back, did not shake the ambulance at all, and, because it did not involve hitting a stationary object, may have generated less noise to persons further away. The occupants of the

ambulance, preoccupied with their own predicament, may have been sufficiently distracted so as to be unaware of outside noise until they were rather rudely shaken by the hit to their rear. In the absence of an EDR, and expert testimony about its information, one could not be certain how best to connect the testimony of the ambulance occupants to the order of collisions. However, with two experts describing the same order of collisions, the testimony from inside the ambulance offers no basis whatsoever for discounting the scientific findings.

In the same way, plaintiff seeks to persuade the Court that Nudel offered a different version of the order of collisions at his deposition. This, however, is misleading. Nudel's deposition transcript, which was read at trial (Tr. pp. 381-390), contains a full explanation of the order of events and such explanation is consistent with the testimony offered by Nudel at trial. Significantly, Nudel insisted on this version at his December 2010 deposition, more than two years before the EDR was examined, when he was unaware that there would be any scientific backing for his account. Thus, it was not merely an idea put into his head by a later discovery of evidence.

To offset the above testimony, plaintiff points to a single phrase in the deposition, also read at trial (Tr. p. 367), which is described without context. At the start of his description of the accident, Nudel mentions the stopped ambulance, and then states "I hit behind it." As soon as counsel at the deposition interrupted to ask for a read back of that sentence, Nudel, realizing he had been misunderstood, sought to clarify and went on to give the full account described above. It must be emphasized that Nudel spoke English with a pronounced foreign accent, and often used locutions which would not have been uttered by anyone speaking English as a native language. Under the circumstances, the phrase could as easily have been understood as "I was hit behind it," or simply as shorthand for the fact that there was an accident behind it (the ambulance). Without context, one cannot be certain as to why that single phrase does not include mention of <u>what</u> he hit. In short, the phrase "I hit behind it," in the absence of his full explanation immediately following, is deprived of probative value.

Plaintiff's assertion that Nudel admitted hitting the ambulance first but "later recanted" could only persuade someone who has not read the deposition at all.

Finally, plaintiff points to the statement ostensibly given by Nudel to the state trooper at the scene, in which Nudel purportedly said that he didn't realize the ambulance was stopped, and he couldn't stop in time, and he hit the back of it. Nudel strongly denied giving any statement at all to the trooper (except to protest when he was handed some document by the trooper, "but she pushed me"). A dissection of what the trooper reported as Nudel's statement reflects three separate comments, each of which could well have been consistent with the version of the accident now presented both by the experts and by Nudel. None of the three suggests causation of any of them by any other.

As explained supra, Nudel may well have needed several seconds to determine whether to apply his brakes, because he knew (as all parties agree) that he was supposed to bring his car up to highway speed, and he was trying to determine whether the ambulance ahead was about to move on, as it should have done under most circumstances. Thus, the statement that "he didn't realize the ambulance was stopped" may certainly indicate his quandary as to how long it would remain in place. The statement that he couldn't stop in time was certainly true as of the moment his car was struck by Master's Jeep. The same is true for the third statement as to hitting the back of the ambulance. There is no part of the language he reportedly used which is contrary to his later testimony. The only aspect which supports any differing version is the absence of the account as to how Master struck him.

Having listened to the way Nudel used the English language at trial, the Court cannot discount that the trooper may have failed to follow everything Nudel stated. In fact, this may account for what Nudel admits to stressing when the trooper handed him some paper at the end of the event. More significantly, though, what Nudel may or may not have failed to include in the immediate aftermath of the event cannot be given such weight as to counter scientific testimony agreed to by experts from both sides.

H. The Testimony of the State Trooper.

Parenthetically, there is something highly questionable about the trooper's entire report concerning the aftermath of the accident. HNS testified quite clearly that she moved her ambulance to the side of the ramp immediately following the collision, so as to remove any danger of more accidents. She then surmised that Nudel was too upset to move his vehicle, and she moved his Toyota as well, all before the trooper arrived. There was absolutely no reason for HNS to contrive this detailed testimony. Yet, according to the trooper, when he arrived on the scene, the vehicles were all in the same locations as at the time of the accident, presumably therefore assisting in his reconstruction.

Next, according to the trooper's account, HNS told him that, before the collision, EMT Stagl had left the ambulance to remove the item of debris from the road. HNS testified to no such event, and neither did Stagl. Neither Nudel nor Master reported seeing anyone from the ambulance, or anyone at all, standing or walking on the road before the accident, even though both Nudel and Master had seen the ambulance and Nudel had seen the debris. When the ambulance left the scene, it went around the debris, which was thus still in place. All accounts of the ambulance stop have it in place no more than 8-10 seconds before the impact, which, as a matter of logic, leaves insufficient time for Stagl to be told of the problem, decide to leave his patient, disembark from the rear of the ambulance, walk to the debris, move it, walk back to the ambulance and resume his seat, before being struck. No matter how fast Stagl walked or ran, what is described is not a ten second event. Interestingly, Nudel described seeing Stagl sitting in the ambulance when his Toyota hit the ambulance. Accepting the trooper's account would practically guarantee an interpretation that Nudel would have had to see Stagl rushing into the ambulance just before the accident.

The above strongly suggests that the trooper's testimony is, at the least, sufficiently problematic so as to render it a negligible counterweight to the testimony of both experts. Notably, the trooper conveniently attributed statements to all of the three participants which could be seen as constituting admissions against

interest. Whether he actually elicited those statements, or placed them in his report based on assumptions of culpable conduct by each, is difficult to say, especially in view of plaintiff's own testimony that she had to approach the trooper in his car in order to talk to him, Nudel's denial that the trooper questioned him, and the problems described above with regard to the trooper's version of events.

For all of the above reasons, the opinions of the experts stand unopposed by any evidence on which a jury could reasonably rely to discount such conclusions. Plaintiff, nevertheless, insists that the jury could have done so and that their verdict should be upheld on that counter-intuitive basis. But there is a problem with that insistence, as well.

I. The Jury's Apportionment of Fault.

It cannot be clearer that the jury did not, in fact, adopt the version propounded at summations only by Master's counsel. The jury found Master fifty percent responsible for the accident and Nudel twenty percent responsible for the accident, with the remainder of the responsibility going to HNS. The percentages are telling, in themselves. If the jury had truly believed that Nudel struck the ambulance first, and that the later hit by Master was the one described by the ambulance occupants as so light that they heard a noise but felt no impact, how could those same jurors find Master to be more than twice as responsible for the accident as was Nudel? In what version of reality would a verdict like that make any sense whatsoever?

It would be astonishing enough, if the jurors believed Master, that they found her anywhere near as culpable as Nudel. To find her equally culpable would be utterly without reason. To find her more liable would be even more irrational. However, to find her, not only more liable, but <u>more than twice</u> as liable as Nudel, when she arrived at the collision as a veritable afterthought, is beyond all understanding. There can be no denying that no rational jury in the world could have arrived at the percentages contained in the verdict, if they believed, as plaintiff would now have it, that Master's account was the accurate one, and that the scientific evidence agreed on by two dueling experts, had no validity.

It is also noteworthy that plaintiff's counsel, now insisting on the possibility of the jury's acceptance of Master's account, was given the clear opportunity to test that thesis before the jury deliberated. In a charge conference that was initially held off the record, the Court suggested to all parties that a question be placed on the verdict sheet as to which collision had occurred first. All counsel were present when this was discussed, and it was plaintiff's counsel who objected most vigorously. The Court had hoped to avoid any confusion as to the basis for the jury's eventual verdict. Plaintiff's counsel, it would seem, was hoping to use just such possible confusion in the event his own legal theory of liability was later struck down.

In the end, the Court did not include the question, because it was difficult to insert it in a sufficiently neutral manner, both as to phrasing and as to the order of the questions (if more than one would be required) so as to avoid suggesting a preferred answer to the jury. That difficulty caused the concern that the question, which was different from those usually posed to jurors, might not be wise unless all parties consented and assisted in formulating the language. Thus, in the end, if plaintiff wishes to base her defense of the verdict on an utterly improbable reading of the jury's mind, she has only herself to blame for preventing any proof at this point that the jury held such unlikely view.

Courts have held in the past that, where evidence is inherently improbable, and there is a moral certainty that it does not reflect the truth, the court is not required to give it credence, and a jury's dependence on it may be rejected. Very similar fact situations may be difficult to find, because the instant case revolves around a complex series of facts, but movant has cited certain decisions that cannot be said to be inapposite. In Collins v. Boulevard Gardens, 253 A.D.2d 722, the court rejected a jury verdict regarding a plaintiff's injury, primarily, it would seem, because plaintiff claimed to be using a cane for a long time, but the cane was before the court and appeared to be brand new. Here, the testimony of Master can be rejected because the EDR is before the Court, as translated by two experts, and it displays a reality directly opposed to that claimed by Master. See also Loughlin v. City of New York, 186 A.D.2d 176.

In his reply, movant cites Estate of Clines, 226 A.D.2d 269, wherein the testimony of an expert was said to completely overwhelm the "subjective" testimony of a decedent's relatives as to the decedent's competence. Thus, in that non-jury trial, the appellate division found a basis to overturn the trial court's fact-finding as to the validity of a purported inter vivos gift. The relevance of the precedent relates to the contrast between dispassionate expert testimony on the one hand, and the self-serving account of a party on the other, or even the purported admission of a party speaking under the strain of events, both of which are, by contrast "subjective," and either less reliable or totally unreliable, depending on circumstances.

The only conclusion that can be reached based on the above is that it can be stated as a moral certainty, first, that any evidence as to Nudel's vehicle having struck the ambulance before Master struck Nudel's vehicle does not reflect reality and may be entirely discounted, and, second, that – not only should the jury have discounted Master's version of the accident based on the factors discussed above – it is clear that the jury did not in fact accept Master's account and did not base its verdict on such account.

By reason of the foregoing, Nudel's motion is granted in all respects, the jury verdict attributing liability to him is vacated, and all claims and cross-claims against him are dismissed.

III. The Motion of Defendants Sullivan and Schoonmaker.

HNS also moves to set aside the verdict against her and her employer, apparently seeking a new trial, although nominally asking for outright dismissal. Given all the circumstances herein, HNS is entitled to neither. As indicated in the above discussion of Nudel's actions, an important factor governing the reactions of those traveling behind HNS was their perception of what HNS was about to do, and not only their realization that HNS was stopped at that moment. The Toyota had to achieve reasonable speed by the end of the ramp, but the ambulance and the pickup truck were in the way. If both were about to resume travel, then it would have been counter-productive to safe practice for Nudel to come to a stop on the final section of the ramp.

Therein lies the fault of HNS. If, during those 8-10 seconds that she remained at a complete stop, she had deployed her flashers (and, even more, her roof lights) she could have sent a signal to traffic behind her that what they were seeing was no momentary stop, but a delay to which their needed response would include braking. HNS argues, in its reply, that it should have no liability because both Nudel and Master admitted seeing the ambulance from a distance, and there is no proof that they would have seen it more clearly if lights and flashers had been deployed. This, however, utterly ignores the fact that both experts testified to the contrary at trial. The testimony of the experts constitutes significant proof on which the jury was entitled to rely. While, as discussed supra, the experts' translation of the EDR data was more conclusive than their opinion as to the impact of lights and flashers, which is a more subjective use of expertise, it remains a sufficient basis for the jury's result, especially because no expert opinion was adduced to refute it. HNS, had she so desired, could have retained an expert to opine on her actions and the impact thereof, but she did not.

HNS also seeks to avoid liability on the mere ground that she was stopped when hit from behind, and cites a plethora of cases laying blame for such event on the cars behind the stopped vehicle. It need not be belabored that the vast majority of those cases deals almost entirely with affirming the liability of the rearmost vehicle, and not with excluding the liability of the stopped vehicle for injuries to a passenger in the front car. Liability can attach to the front vehicle under circumstances like those prevailing here.

Movant also argues that HNS was confronted with an emergency situation, and responded to such crisis properly. As is fully developed in plaintiff's opposition papers, all of the "emergency" cases cited in movant's memorandum of law deal with situations far more dire than the one facing HNS and are therefore distinguishable. In any event, to be fair to HNS, the Court instructed the jury regarding the diminished responsibility of a driver faced with an emergency, and, as the instruction states, regarding the jury's power to evaluate whether HNS did or did not face an emergency. The jury quite evidently felt the situation facing HNS

was not an emergency and there is certainly no basis for setting aside that conclusion as against the weight of the evidence or contrary to law.

HNS criticizes plaintiff for claiming that the ambulance both stopped abruptly, and was stopped too long, as the two claims are contradict each other. However, it seems clear that plaintiff's claim is based only on the latter, with the mention of the initially abrupt stop thrown in more to paint a picture of HNS as generally negligent than to assert that such abrupt stop in itself was a cause of the accident.

HNS contends that she could not have gone around the truck in front of her, or over the box in the road. Both contentions are insufficient for a set aside of the jury's verdict. There was no testimony that the roadway and shoulder were too narrow to accommodate the ambulance passing the pickup truck, only that HNS considered it too dangerous to drive her ambulance on the shoulder. It did not aid HNS' case that HNS seemed to testify at the same time that she was stopped completely because she could not get around the truck, and that she was simultaneously maneuvering to get around that very truck.

However, as to the road, the jury was given, courtesy of plaintiff's professional technical illustrator, exquisitely detailed photographs and sketches of each section of the long ramp and the entrance to the roadway, and could have drawn their own conclusions as to the possibility of passing the pickup truck. Additionally, the box was repeatedly described, by various witnesses, as having dimensions so modest that it would seem frivolous to argue that the ambulance could not find a way to pass it. The box, whatever it may have been, appears from the evidence to have been totally dissimilar to the large rock which disabled the vehicle (or caused it to lose control) in Stevenson v. Recore, 221 A.D.2d 834, cited by movant.

The issues and facts discussed supra have already been visited by the appellate division, as a summary judgment motion by HNS was previously granted by the Hon. Kenneth Thompson in the Bronx Supreme Court, and that ruling was reversed on appeal in Roman v. Sullivan, 101 A.D.3d 443. The appellate division cited the fact that HNS may have been distracted by looking at her cell phone or blackberry, as plaintiff, who was seated

to her right, contended, and that the ambulance may have had room to maneuver around whatever was in front of it. It may be inferred that HNS' attention to her phone may just as easily be a contributing factor to the length of her stop at the merge point, or to her failure to deploy flashers, as to her abrupt stop behind the truck.

The evidence as to HNS' use of her phone was repeated by plaintiff to the jury, and the jury had evidence on which to decide whether the ambulance could have passed the truck. Thus, the very evidence cited by the appellate court as establishing issues of fact, was placed before the jury. If the jury found that such evidence established HNS' negligence, it cannot be argued now that the jury's conclusions must be set aside, because such argument would run contrary to the appellate court's past ruling sending these issues to the finder of fact. Thus, when movant points out that the appellate ruling did not decide these issues in plaintiff's favor, such observation is beside the point. It was, rather, the jury which decided these items in plaintiff's favor, at the explicit direction of the higher court that it weigh those issues.

The Court will not deal with the relevance of Tutrani v. County of Suffolk, 10 N.Y.3d 906, and whether it has or has not been rejected by subsequent decisions of the court of appeals, because, although Tutrani was repeatedly invoked at trial, no party to this motion now claims that it is controlling here, and the Court notes that it deals with liability in an accident wherein a car abruptly switched lanes, a factor completely absent here.

For all of the reasons set forth hereinabove, the motion of HNS is denied in all respects. As set forth supra, the motion of defendant Nudel is granted.

This constitutes the Decision and Order of the Court.

Dated: 3/5/14

MARK FRIEDLANDER, J.S.C.