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2019-2020

EVIDENCE UPDATE

August 21, 2020

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EVIDENCE UPDATE
2019-2020

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SPEAKER BIOGRAPHY

PROF. MICHAEL J. HUTTER is a Professor of Law at Albany Law School, where he has been a member of the faculty since 1976. He is also Special Counsel to the Albany law firm of Powers & Santola, LLP. Professor Hutter is the Past President of the Albany County Bar Association. Professor Hutter is an honors graduate of Brown University, receiving scholarships during his four years of matriculation, and Boston College Law School. In law school he was the Editor-In-Chief of Boston College's law review (*Annual Survey*), and was elected to the Order of the Coif. After graduation, Professor Hutter served as law clerk to Judge Matthew J. Jasen, an Associate Judge of the New York Court of Appeals. From 1979-1984, he was the Executive Director of the New York State Law Revision Commission. He also served as a Commissioner on the New York State Law Revision Commission. Professor Hutter was the Chair of the NYS Capital Defender Office from 2005-2008. In 1999, he was selected as one of seven nominees to the Court of Appeals by the State Commission on Judicial Nomination. Professor Hutter's teaching areas include Evidence, New York Practice, Conflict of Laws, Trial Practice, and Unfair Competition. He authors a bi-monthly "Evidence" column for the *New York Law Journal*, wherein he comments on and discusses recently decided court decisions raising evidence issues. In his practice, Professor Hutter specializes in appellate practice. He has argued over 350 appeals in all of New York's appellate courts, state and federal, and many of the cases in which he represented the prevailing party are landmark decisions.

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I. PROCEDURAL CONCERNS

A. Court Control Over Trial

1. Generally

Walid M. v. City of New York
176 A.D.3d 619 (1st Dep't 2019)

In this assault and excessive force action involving P, a teenager diagnosed with autism, Court held trial court did not improvidently exercise its discretion in precluding Ds from introducing testimony from P's treating doctors at facility where incident occurred and P was residing. Ds failed to disclose any of these witnesses until four days before trial, after having previously affirmatively represented to the court that they did not intend to call any witnesses. The court and Ps relied on this representation in estimating the length of trial and selecting a jury. In view of the trial court's broad authority to control its courtroom, it was not unreasonable for the court to decline to add these witnesses and prolong the trial when a jury had already been chosen (twice) based on certain representations about its length.

People v. Ramsey
174 A.D.3d 651 (2d Dep't 2019)

In this robbery prosecution, Court reversed conviction on the basis that the trial court's conduct denied D a fair trial. Court noted the trial court engaged in extensive questioning of witnesses, usurped the roles of the attorneys, elicited and assisted in developing facts damaging to the defense on direct examination of the People's witnesses, bolstered the witnesses' credibility, interrupted cross-examination, and generally created the impression that it was an advocate on behalf of the People. **COMMENT:** Although the issue was not preserved as a matter of law because defense counsel made no objections, the Court reversed in the interest of justice.

People v. Mitchell
__ A.D.3d __ (2d Dep't 6/24/20)

Court reversed Ds conviction for robbery, finding the trial court improperly "made" a record. Here, after the two complainants, in response to questions by the prosecutor, were unable to positively identify D as the perpetrator of the robbery, trial court improperly assumed the appearance or the function of an advocate by questioning the complainants until it elicited a positive in-court identification of D from each of them. Under these circumstances, the court's decision to elicit such testimony was an improper exercise of discretion and deprive D of a fair trial.

Grimaldi v. Sangi
177 A.D.3d 1208 (3d Dep't 2019)

In this action to recover on a promissory note, Court rejected P's argument that the trial court deprived him of a fair trial by its curtailing of his direct examination and rebuttal. Court noted the "trial court has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony,

expedite the proceedings and to admonish counsel and witnesses when necessary." Here, the court allowed P to testify extensively during his direct, to extensively cross-examine D and to express his additional arguments as well as introduce evidence during rebuttal; as such, "the commentary and colloquies cited by P when viewed in their proper context reveal nothing more than an evenhanded attempt towards focusing the proceedings on the relevant issues and clarifying facts material to the case in order to expedite the trial."

People v. Allen
183 A.D.3d 1284 (4th Dep't 2020)

In this manslaughter prosecution, D argued that the trial court abused its discretion by allowing uniformed police officers to be present in the courtroom during summations, thereby depriving her of a fair trial. Court rejected the argument. It noted: "A trial judge has the general obligation to preserve order and decorum in the courtroom and the nature of our review is to determine whether an unacceptable risk is presented of impermissible factors coming into play. Inasmuch as the record is devoid of any facts establishing where the uniformed officers were located or how many of them were seated together, there is no basis for us to conclude that their presence in the courtroom presented such a risk." **COMMENT:** Justice Bannister dissented. She wrote: "I agree with D that the court erred in permitting several members of the Livingston County Sheriff's Office - approximately "a dozen members," according to defense counsel, most of them in uniform - to sit in the courtroom during summations. The court erred when it did not intervene in any way despite defense counsel's request that those officers be asked to leave."

People v. Sampson
__ A.D.3d __ (4th Dep't 6/12/20)

In this DWI prosecution, Court rejected D's contention that the trial court improperly aided the prosecution during an evidentiary hearing by asking additional questions of the testifying State Trooper. The court did not take on either the function or appearance of an advocate and instead merely sought to clarify the Trooper's testimony and to facilitate the progress of the hearing and to elicit relevant and important facts.

2. Presentation of Proof

Greenman v. 2451 Broadway Mkt.
181 A.D.3d 514 (1st Dep't 2020)

In this slip and fall action, Court held trial court erred in permitting defense counsel to argue that the actual cause of plaintiff's fall was the effect of the Valium he had been given earlier that day in connection with a medical visit, since no evidence had been offered as to the dose plaintiff was given, the length of time the Valium would have remained in his system after his medical procedure, or the effect the Valium would have had on his ability to ambulate at the time of his accident. **COMMENT**: The decision does not state how this matter arose at trial.

Nieves v. Clove Lakes Health Care
179 A.D.3d 939 (2d Dep't 2020)

In this wrongful death action, Court reversed judgment for P and remanded the action for a new trial in the interest of justice based on P's counsel's improper and inflammatory comments in summation. As to those comments, Court noted as follows: "P's counsel improperly appealed to the passion of the jurors by characterizing D as a "corporation" that has "two lawyers," a "tech person," "general counsel," and "video people." Counsel also improperly accused D of willfully depriving P of evidence that would have been harmful to D's case, accused D's witnesses of having "changed" their testimony after their depositions or pretrial affirmations, which were not in evidence, "because they saw that they couldn't win," and improperly argued that D failed to call certain witnesses, who were not under D's control.

People v. Hymes
174 A.D.3d 1295 (4th Dep't 2019)

In this child abuse prosecution, D argued that the trial court should have given the appropriate *Molineux* limiting instruction when the victim testified regarding an uncharged crime (D abused her five years earlier). Trial court said it would give the requested instruction, but never did. As D did not object to the failure, D could not complain about the failure on appeal. **COMMENT:** Justices Curran and Smith dissented, arguing that the issue should be reviewed, and the conviction reversed, by the Court exercising its "interests of justice" review power.

3. Adjournments/Recess

Matter of Bursch v. Purchase College
33 N.Y.3d 1014 (2019)

P, a student at D, was accused of multiple disciplinary violations including sexual assault of another student. P requested a three-hour adjournment of his scheduled administrative hearing so that his attorney could attend the proceeding. Ds denied this request. Court held: "Under the particular circumstances of this case, we find Ds abused their discretion as a matter of law by failing to grant the requested adjournment."

Freeman v. Shtogaj
174 A.D.3d 448 (1st Dep't 2019)

In this medical malpractice action, Court held Ds were entitled to a new trial of damages because trial court erred in denying their request for a continuance to permit their expert orthopedist to testify about his examination of D. The orthopedist's testimony was likely to be material. Although Ds were able to elicit testimony from their expert radiologist to rebut D's expert's testimony at trial, the orthopedist had a different specialty, would have testified based on a physical examination of D rather than an examination of her MRI films, and would have testified that no future treatment was necessary - an opinion that the radiologist did not offer and that is directly relevant to damages. The need for a continuance did not result from a failure to exercise due diligence on Ds' part. The orthopedist became unavailable because of a death in his family -

a circumstance that Ds had no way of predicting or avoiding. Moreover, the resulting brief delay would not have affected the orthopedist's ability to testify at trial if not for the constricted timeline due to the court's vacation schedule. Court also held the trial court properly denied Ds' request for a continuance to permit their expert radiologist to testify about her interpretation of co-P's MRI films, because the need for a continuance resulted from Ds' failure to exercise due diligence. Ds admittedly knew before the trial began that the radiologist would not be available until after the court left for vacation, yet failed to timely raise this issue.

Abe v. New York Univ.
180 A.D.3d 420 (1st Dep't 2020)

In this discrimination in employment action, Court declined to consider P's unpreserved argument about the trial court's interruption of his counsel's closing argument to excuse the jury during one juror's sudden indisposition, from which she recovered after a recess of a few minutes. However, it did state: "Were we to consider the argument, we would find that the trial court providently exercised its broad discretion to control and manage ... court proceedings, which of course may include delays occasioned by a juror's illness or other unavailability.

Yuliano v. Yuliano
175 A.D.3d 1354, 105 N.Y.S.3d 913 (2d Dep't 2019)

In this divorce action, Court held Supreme Court providently exercised its discretion in denying P's request for an adjournment of the trial on August 22, 2012 in order to permit her to obtain new counsel. In support, it noted P had been responsible for numerous delays in this action and P's history of discharging counsel.

Matter of Cassini
182 A.D.3d 1 (2d Dep't 2020)

In this complex and protracted probate proceeding, wherein the Surrogate's Court granted the motions of petitioner former executor's attorneys for leave to withdraw, Court held in a comprehensive opinion by P.J Scheinkman the Surrogate's Court denial of petitioner's pro se motion for a 60-day adjournment of a scheduled trial date to obtain new counsel was an improvident exercise of discretion. Court noted that while the Surrogate's Court effectively gave petitioner notice to appoint another attorney at a conference held six weeks prior to trial, the court's strict adherence to the scheduled trial date failed to give her a reasonable opportunity to obtain the representation. Further, although she had a prospective attorney at that pretrial conference, given the lengthy history of the matter, it was not unreasonable for an incoming attorney to seek additional time within which to properly prepare for a complex financial trial, not to mention review 28 boxes of files, particularly where the adverse parties were represented by counsel who, like petitioner's former counsel, had been involved in the litigation for years and were well-versed in the voluminous materials. In the absence of any indication on this record that petitioner's motion for an adjournment was made solely for the purpose of delay, the Surrogate's Court should not have rejected the request out of hand.

4. Missing Witness

People v. Smith
33 N.Y.3d 454 (2019)

In this attempted murder prosecution, Court held that the party against whom the charge is sought has the burden to show that the testimony of the uncalled witness would be cumulative. **COMMENT:** Prior to *Smith*, all four departments held the party seeking the charge had to show the testimony would be non-cumulative. Thus, the party seeking the charge must show initially only: (1) the witness has personal knowledge about a material issue; (2) the witness would be expected to testify favorably for the party who failed to call him or her; and (3) such party failed to call the witness. The burden then shifts to show the charge should not be given for some appropriate reason, such as the witness's testimony would be cumulative. For further discussion, *see*, Hutter, "*People v. Smith*," NYLJ, Aug. 1, 2019, p. 3, col. 3.

B. Spoliation

Pegasus Aviation v. Varig Logistica
26 N.Y.3d 543 (2015)

Court held: "A party that seeks sanctions for spoliation of [electronic] evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." And "Where the evidence is determined to have been intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense. Majority held spoliation occurred as a result of negligence but Judge Stein in dissent concluded it was the result of gross negligence. Court then remitted for a determination as to the relevance issue. **COMMENT:** (1) Court adopted rule from pre-December 2015 Second Circuit precedent, including *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 [SD N.Y. 2003]). (*See, generally* Schlosser, "New York Should Catch the Federal ESI Wave Before It's Too Late," NYLJ, 12/23/15, p. 3, col. 3); and that precedent was rejected by amendment to FRCP 37(e), effective December 1, 2015. *(See Id.)*. (2) Court does not fully discuss what triggered the duty to preserve. For a thoughtful discussion of a non-party's duty to preserve, *see* Gleason, "Implementation of Litigation Holds for Non-Parties," NYLJ, Jan 20, 2017, p. 3, col.3. (3) Although Court does not so hold, lower courts have applied *Pegasus* to non-electronic evidence spoliation.

Brandsway Hospitality v. Delshah Capital
173 A.D.3d 457 (1st Dep't 2019)

In this breach of contract action, Court held Supreme Court did not abuse its discretion by referring issues of alleged spoliation of electronic evidence to information technology expert

rather than granting D's motion to dismiss the action as sanction for spoliation, even though it was undisputed that email messages relevant to the action were deleted. Parties to action presented sharply conflicting accounts of when and by whom emails were deleted, and trial court properly sought more information on the timing of deletions and potential recovery of admissible evidence before making a ruling on Ds' motion.

Temiz v. The TJX Companies
178 A.D.3d 620 (1st Dep't 2019)

In this slip and fall action, trial court, as a sanction for the loss of a surveillance tape, directed that the jury be instructed that "if the footage was preserved and produced, it would have shown that a slippery substance was on the floor long enough for the D to be aware of the condition and therefore the D had constructive notice of the slippery condition at the time P fell." Court held charge is not appropriate, because it requires, rather than permits, the jury to draw an adverse inference, and is tantamount to a grant to P of S/J as to liability. Accordingly, a new, permissive adverse inference charge is required. **COMMENT:** Court cited as appropriate PJI 1:77.1.

Dunn v. New Lounge 4324
180 A.D.3d 510 (1st Dep't 2020)

In this P/I action Court held Supreme Court properly granted P's cross motion for sanctions for spoliation and found that an adverse inference charge at trial is appropriate. P established that D was on notice that its surveillance footage, which captured what happened inside of its club and a portion of the area immediately outside of its club, might be needed for future litigation. After receiving such notice, D did not take steps to ensure that the video footage was preserved.

China Dev. Indus. Bank v. Morgan Stanley
183 A.D.3d 504 (1st Dep't 2020)

In this commercial action, Court denied Ds motion for spoliation sanctions based on destruction of emails, audio recordings and files. It determined that there was no basis to conclude that P had an obligation to preserve the documents which involved transactions between the parties. The documents were destroyed in 2007 and a litigation held was not imposed until 2010. Court held the evidence did not show that P "reasonably anticipated" litigating against Ds at that time, but shows rather that a credible probability of litigation against Ds arose only significantly later. Thus, there was at the time of the destruction no duty to preserve the documents.

Delmur, Inc. v. School Constr. Auth.
174 A.D.3d 784 (2d Dep't 2019)

In this property damage action, P's truck which was allegedly struck by D's truck, was stored at a yard. To cover the storage costs when they were not paid, owner of yard seized the truck and sold it. Court upheld striking of complaint as sanction for the spoliation. It noted P was obligated to preserve the truck at the time it was seized, and D's ability to prove their defense was fatally compromised.

Labuda v. Labuda
175 A.D.3d 39 (3d Dep't 2019)

In this P/I action arising out of allegations that D, while operating an ATV on P's property without permission, struck P twice with the ATV. Shortly after the incident, D requested P by letter to preserve all evidence involved in the alleged accident, including P's cell phone and any video taken on the date of the incident. A year later P informed D that he no longer had the phone, trading it in for a new one some 7 months after the incident. D moved for spoliation sanctions. While Court did not condone P's failure to preserve the phone and his failure to provide D with access to alleged preserved information that the phone contained, Court was concerned about the possible prejudice to D as a result of the failure to preserve the phone. It noted P had averred that the information contained in the phone had been preserved and continued to exist in different forms, specifically police investigators had examined the phone and had extracted and downloaded all relevant photos and videos; the AG's office had created a folder in cloud storage that contained pertinent electronic files, and he provided a hyperlink that allegedly provided access to these files; and when he replaced his phone, technicians for his carrier extracted "all of the data" and uploaded it to his new phone, as well as to cloud storage that P is able to access. D still complained because without the phone he could not access its metadata and determine whether there were additional photos that had been deleted. Court remanded the matter to the trial court for its determination whether D was prejudiced in his defense without the phone and its metadata, considering all of the photographs that were apparently available.

Matter of Thomas
179 A.D.3d 98 (4th Dep't 2019)

In this Surrogate's Court proceeding seeking determination of stock ownership, Court held adverse inference was not warranted because of respondent's failure to produce certain corporate records. It so ruled because petitioner failed to show respondent negligently lost or intentionally destroyed the corporate book.

Martinez v. Nelson
64 Misc.3d 225 (Sup. Ct. Bronx Co. 2019) (Higgitt, J.)

In this MV accident case, D sought spoliation sanctions because P failed to submit to an IME before having surgery with respect to her cervical spine, which she alleged was injured in the accident. The surgery was not dictated by an emergency situation. Court held Ds established that P had an obligation to preserve the condition of her cervical spine at the time of its alteration by virtue of a preservation letter that was served on P approximate one-month prior to her unannounced surgery. Ds also demonstrated that, at the least, P was guilty of ordinary negligence in having the surgery. Court noted it was possible that she may have altered the condition of her cervical spine intentionally, willfully or in gross negligence, which would trigger a rebuttable presumption that the evidence was relevant to the defense of the action, but her state of mind could be ascertained only after relevant discovery proceedings.

C. Objections

People v. Britt
34 N.Y.3d 607 (2019)

In this prosecution for knowing possession of counterfeit bills, D challenged on appeal the admission of a Secret Service agent's expert testimony regarding counterfeiters. Court held the argument was not preserved as D's trial objections were insufficient. Court noted that as defense counsel issued only "one-word" objections without any elaboration, the objections were mere "general objections" which are insufficient to preserve the issue as a matter of law. Court also noted that while defense counsel in the discussion of the jury charge contended that the agent had not been qualified as an expert witness and added that this was "part of the reason why" he had objected to the agent's testimony about separation of counterfeit from genuine currency in a different pocket, D counsel's remarks targeted portions of the jury instruction and did not function to specify the basis of the earlier general objection at a time when the trial court could still "effectively change" its prior ruling allowing the testimony (CPL 470.05[2])."

People v. Urena
183 A.D.3d 534 (1st Dep't 2020)

In this murder prosecution, Court observed: To the extent that D objected to leading questions by the prosecutor, and to allegedly improper evidence of D's gang activity, we find nothing that was so egregious or prejudicial as to warrant reversal. By failing to object, by making generalized objections or objections that did not articulate the grounds asserted on appeal, or by failing to request further relief after the court took curative actions, D failed to preserve his remaining claims of prosecutorial error, and we declined to review them in the interest of justice.

D. Appealability of *In Limine* Rulings

Knafo v. Mt. Sinai Hosp.
__ A.D.3d __ (1st Dep't 6/18/20)

In this medical malpractice action, P appealed Supreme Court's order precluding P's experts' testimony to the extent of precluding evidence that P's hyponatremia, which was subsequently correct, caused permanent fasciculations. Court held order was appealable, stating: "We reject D doctor's argument that the appeal should be dismissed pursuant to the rule that an evidentiary ruling made before trial is reviewable only in connection with the appeal from the judgment rendered after trial. An exception to that rule exists where the evidence in question is so central to the proponent's case that its exclusion is the functional equivalent of … summary judgment." Here, without the proposed evidence purporting to establish a causal link between D's alleged departure from accepted practice and P's permanent condition, her malpractice claim is certain to fail. Thus, the order is appealable because it limits the scope of issues to be tried.

C.H. v. Dolkart
174 A.D.3d 1098 (3d Dep't 2019)

In this med mal action, D moved to preclude the opinions of P's expert witnesses as inadmissible under *Frye*. Trial court denied motion. Court dismissed Ds' appeal. Noting that "an order which merely determines the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission." Here, the trial court's decision merely permits P to offer various testimony of his expert witnesses and does not limit the scope of issues to be tried. Thus, an appeal does not lie. **COMMENT:** But doesn't the denial of D's motion affect a substantial right which under another line of authority permits an appeal? *See* Hutter, "Appealability of Evidentiary Rulings Made Before Trial on Motions *in Limine*," Leaveworthy (NYSBA - Committee on Courts of Appellate Jurisdiction), Vol. V, No. 3 (Fall/Winter 2016, p. 3).

Matter of Rochester Genesee Regional Transp. Auth. v. Stensrud
173 A.D.3d 1699 (4th Dep't 2019)

In this condemnation proceeding, Supreme Court granted petitioner's *in limine* motion to strike part of respondents' appraisal report and preclude respondents' expert from testifying. Court held order was appealable as it "limited the scope of the issues at trial" by precluding the introduction of evidence regarding respondents' primary method of property valuation.

II. BURDEN OF PROOF

A. *Res Ipsa Loquitur*

Jeanty v. New York City Housing Auth.
176 A.D.3d 502 (1st Dep't 2019)

P alleged that she was injured after the armature of a door, through which she was trying to pass in order to exit D's premises, fell and struck her in the head. Although the first and third elements may be satisfied in P's favor, a factual issue exists with regard to the second element as to whether D had exclusive control over the instrumentality which caused her accident even though D did not have sole physical access to the door**. COMMENT:** The location and nature of an armature suggest third-parties would not have access to it?

Chambers v. Tilden Towers Housing Co.
177 A.D.3d 413 (1st Dep't 2019)

In this P/I action for injuries sustained when an elevator suddenly dropped five floors, Court held P failed to raise a triable issue of fact. It noted P's reliance on the doctrine of *res ipsa loquitur* to impute notice to owner D was misplaced as exclusive control of the instrumentality bringing about the injury, which is necessary for the doctrine to apply, is absent where, as here, an owner has ceded all responsibility for maintenance and repair to its elevator service contractor.

Sklarova v. Coopersmith
180 A.D.3d 510 (1st Dep't 2020)

In this medical malpractice action, Court held P sufficiently established that the doctrine applies to her cause of action as the parties' experts disagreed as to whether P's injury ordinarily occurs in the absence of negligence, raising an issue of fact on that point.

Galue v. Independence 270 Madison LLC
__ A.D.3d __ (1st Dep't 6/18/20)

In reversing a verdict from D in this P/I action, Court held trial court erred in refusing the charge *res ipsa*. It specifically noted in so ruling that the doctrine "does not require sole physical access to the instrumentality causing the injury." P was injured when a towel dispenser/trash receptable fell out of a bathroom wall in D's building.

Zhigue v. Lexington Landmark Prop.
183 A.D.3d 854 (2d Dep't 2020)

In this negligence action, the trial court awarded S/J to P. P alleged that he sustained injuries when a portion of a decorative plaster ceiling above the area where P was working fell, causing a scaffold under which P was standing to collapse, crushing him. Court held *res ipsa* was not applicable as P failed to establish the second element. It noted P did not demonstrate that the plaster ceiling is "structural" and, therefore, the obligation of D to maintain pursuant to the terms of the lease it entered into.

Cantey v. City of New York
__ A.D.3d __ (2d Dep't 6/10/20)

In this P/I action, P sought to recover damages for his injuries sustained when, while running new electrical wiring, an overhead light fixture on premises owned by the City fell on him. Supreme Court granted P partial summary judgment on liability, invoking *res ipsa*. Court reversed. It noted that the assistant plant chief at the property where P was working testified at a deposition that the light fixture which fell on P was approximately 40 years old; the plant's employees checked the plant's light fixtures only if there was a problem, such as a light bulb which had to be replaced; worker did not know of any other light fixture having fallen from the ceiling; and after the accident, plant employees checked all of the other light fixtures in the area where P was working and found that they all were stable and in good repair. The light fixture involved in the accident was attached to a piece of pipe which appeared to have bent. On these facts, the inference that the City was negligent is not inescapable, and the presence of contractors at the site indicated that the City did not have exclusive control over the area.

Greater Binghamton Dev. LLC v. Stellar 83 Court, LLC
173 A.D.3d 1512 (3d Dep't 2019)

P's building sustained substantial damage as a result of a fire to an adjacent building owned by one of the Ds and which was at the time undergoing substantial renovation by D contractors. P's

theory of liability was based on *res ipsa*. Court held *res ipsa* could not be invoked because P was unable to show that Ds' negligence was more likely than other causes to have been the cause of the fire, and that P could not prove the Ds were in exclusive control of the instrumentality that cause the fire as the instrumentality that caused the fire was unknown and P submitted no expert proof to the contrary. **COMMENT:** All physical evidence was destroyed in the fire.

Zapata v. Yugo J&V, LLC
183 A.D.3d 956 (3d Dep't 2020)

Ps were injured when the second-floor deck of D's apartment building collapsed, causing them to fall 15' to concrete floor. Court held trial court properly charged *res ipsa*, noting: "Neither Ps nor D proffered any explanation as to why the deck collapsed; however, there is no requirement that the specific cause of an accident be established to invoke the doctrine. As relevant here, common experience informs us that a deck being put to its regular and intended use does not ordinarily collapse in the absence of negligence and, given that no credible evidence was set forth demonstrating that Ps were contributorily negligent in causing the collapse, we find that the first and third prongs of the doctrine were readily established. With respect to the second prong, exclusive control, Ps were not required to "eliminate every alternative explanation for the [deck collapse], but only to demonstrate that the likelihood of causes other than [D's] negligence is so reduced that the greater probability lies at [D's] door, rendering it more likely than not that the injury was caused by [D's] negligence."

B. Circumstantial Evidence

Washington v. New York City Transit Auth.
174 A.D.3d 667 (2d Dep't 2019)

In this slip and fall action, Court held trial court properly denied giving the PJI circumstantial evidence charge because P testified about what caused her to fall. The charge is only appropriate where there is some direct proof.

C. Judicial Notice

O.K. v. Y.M. & YW.H.A. of Williamsburg, Inc.
175 A.D.3d 540 (2d Dept 2019)

On a motion to change venue to Nassau County, D argued that venue was not proper in Kings County as none of the parties resided int hat county. Ds claimed their principal place of business was in Nassau County. However, Ds failed to submit their certificate of incorporation. Contrary to their contention, the computer printout they submitted in support of their motion from the website of the NYS Department of State, Division of Corporations was inadmissible, since it was not certified or authenticated and it was not supported by factual foundation sufficient to demonstrate its admissibility as a business record. Thus, Ds failed to support their claim for venue change. **COMMENT:** Couldn't judicial notice of the certificate of incorporation be taken from the website?

Orser v. Wholesale Fuel Dist.
173 A.D.3d 1519 (3d Dep't 2019)

In this breach of employment contract action, Court held trial court "was under no obligation to take judicial notice of prior factual findings and credibility determinations made by a different court in collateral, unrelated litigation involving P and his boss did not abuse its discretion by denying D's application to admit same."

D. ***Noseworthy***

Visone v. Third & Twenty-Eight LLC
__ A.D.3d __ (1st Dep't 6/25/20)

In this P/I action, court held P was not entitled to *a Noseworthy* inference because he failed to offer expert medical evidence establishing, by clear and convincing evidence, that his lack of memory of his accident is causally related to his accident. Thus, P's inability to identify the cause of his fall is fatal to this action, as it is at least as likely, if not more so under the circumstances of this case, that his accident was caused by his own voluntary intoxication following a day of participating in "SantaCon" than as a result of Ds' negligence in maintaining its premises.

E. Presumption

1. Mailing

Williams v. New York Property Ins. Underwriting Assoc.
183 A.D.3d 410 (1st Dep't 2020)

In this coverage dispute action, Court affirmed S/J dismissing the complaint. It noted P's bare denial of receipt of the cancellation notice, standing alone, did not overcome the presumption of proper mailing, particularly in light of an email forwarded to D soon after the notice of cancellation was sent, which indicated that the cancellation notice had been received by P's producer.

2. Rear-End

Quiros v. Hawkins
180 A.D.3d 500 (1st Dep't 2020)

Court granted P's S/J motion on liability in this rear-end collision case. Court rejected D's contention of a non-negligent explanation, the brakes failed. It rejected the claim as D failed to make the two-pronged showing that the accident was caused by an unanticipated problem with his car's brakes and that they exercised reasonable care to keep brakes in good working order.

Edwards v. Aponte
181 A.D.3d 484 (1st Dep't 2020)

In this rear-end collision action, Court held D's argument that P "unexpectedly" stopped short was insufficient to establish a non-negligent explanation "especially in light of fact that D conceded that traffic conditions were heavy."

Meadas v. Diaz
182 A.D.3d 419 (1st Dep't 2019)

In this MV accident case, Court held that in opposition to P's prima facie showing that D's vehicle rear-ended her vehicle, which raised a presumption of negligence, D presented evidence of a non-negligent explanation for the collision, namely, the unanticipated failure of the vehicle's brakes, despite their reasonable maintenance of the vehicle.

Morgan v. Flippen
173 A.D.3d 735 (2d Dep't 2019)

In this MV accident case involving rear-end collision, Court held D's contention that he applied his brakes but was unable to stop because his vehicle skidded on a wet metal grating on the roadway was insufficient to rebut the inference of negligence arising from the rear-end collision because he failed to demonstrate that his skid on known road conditions was unavoidable.

Perez v. Persad
183 A.D.3d 771 (2d Dep't 2020)

In this MV rear-end collision action, trial court granted P S/J on liability. It noted Ds submitted an affidavit from D in opposition to P's motion. D asserted that after both his vehicle and P's vehicle had stopped for a red light, P's vehicle began to move forward when the light turned green and then abruptly stopped, causing his vehicle, which had begun to move forward, to come into contact with the rear of P's vehicle. In essence, this explanation amounts to nothing more than a claim that P's vehicle came to a sudden stop which, without more, failed to raise a triable issue of fact as to D's negligence.

Guerin v. Robbins
182 A.D.3d 951 (3d Dep't 2020)

In this MV accident case, while D1 was driving on a highway, an SUV suddenly merged and stopped in front of him. D1 hit the brakes and did not strike the SUV, but his vehicle was rear-ended by a vehicle driven by D2. P, who was a front passenger in the vehicle driven by D1, commenced this negligence action for alleged personal injuries sustained as a consequence of this motor vehicle accident. Court granted Ds' S/J motion. In so holding, Court stated: "Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. [W]here the lead driver is forced to brake and stop suddenly without striking the vehicle in front due to that vehicle coming to a sudden stop, there is no basis for imposing liability on that driver. D1 testified at his deposition that he was driving in the right

lane on a highway and that he saw the SUV move from the left lane to the middle lane. He testified that, as the SUV was in the middle lane, he looked to his right to see if he "had an out to go" because there was a vehicle to the left of him. The SUV suddenly "jumped in front" of D1 without flashing a turning signal, hit the brakes and came to a complete stop. D1 braked and avoided hitting the SUV. Shortly thereafter, however, D2 struck D1's vehicle in the rear. In view of the foregoing, D1 satisfied his moving burden by establishing that he was not negligent." Court then held P in response did not raise a triable issue of fact as to D's negligence. **COMMENT:** Justice Lynch dissented, arguing that in the absence of any explanation as to why the SUV stopped in the first instance, a question of fact was raised as to whether the negligence of all three drivers constituted a proximate cause of the accident.

Altman v. Shaw
__ A.D.3d __ (3d Dep't 6/18/20)

In this rear-end MV collision case, P alleged that the accident occurred when the front of Gibson's vehicle struck and rear-ended D's vehicle that had suddenly stopped in front of Gibson, resulting in D's vehicle then striking the rear of her vehicle In her deposition, P testified that she was "creeping along" in stop and go traffic and had come to a full and complete stop. D moved to hold Gibson solely liable for P's alleged injuries. Court held given the traffic conditions at the time of the accident and Shaw's duty to maintain a safe distance between his car and P's care in anticipating of sudden stops, Shaw has not established a nonnegligent explanation that would overcome the presumption of lability for the subject rear-end collision.

Niedawiecki v. Yeates
175 A.D.3d 903 (4th Dep't 2019)

In this rear-end collision accident case where lead vehicle (P) suddenly stopped, a non-negligent explanation for the collision was provided in D's EBT transcript submitted by P on his cross-motion for S/J. That explanation was P stopped suddenly in front of his vehicle after a non-party vehicle suddenly pulled in front of P's vehicle.

Animah v. Agyei
63 Misc.3d 783 (Sup. Ct. Bronx Co. 2019) (Higgitt, J.)

In this MV accident case in which P, a passenger in a vehicle rear-ended by D's car, Supreme Court granted P's S/J motion on liability, after engaging in a thorough review of First Department case law. It concluded: "Synthesizing the First Department case law reflecting the general rule that a sudden stop, standing alone, does not constitute a nonnegligent explanation for an accident with that Court's decision in *Baez-Pena*, the undersigned concludes that an assertion that the driver of a rear-ended vehicle made a sudden stop on a local public roadway within the City of New York, standing alone, is insufficient to raise a triable issue of fact as to whether the driver of the rear-ending vehicle has a nonnegligent explanation." **COMMENT:** In *Baez-Pena v. MM Truck*, 151 A.D.3d 473, 56 N.Y.S.3d 307 (2017), the First Department had stated: "[A] rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a *prima facie* case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident. The . . . defendants argue

that [the] plaintiff's contention that a sudden, unforeseeable stop by a lead vehicle can provide such a non-negligent explanation is contrary to this Court's consistent holding that an allegation that the lead vehicle suddenly stopped is insufficient to rebut the presumption of negligence on the part of the rear-ending vehicle. However, this is simply not accurate. This is not to say that there are not many cases in which this Court has held that a sudden stop is insufficient; there are. However, the Pena defendants do not cite any cases from this Court, nor are we aware of any, where a sudden stop by a vehicle on a highway, with normal traffic conditions, resulted in summary judgment in favor of that vehicle."

3. Vehicle & Traffic Law §388(1)

Couchman v. Nunez
180 A.D.3d 645 (2d Dep't 2020)

In this MV accident case, Court stated that where a P seeks to hold a vehicle owner liable for the alleged failure to maintain a rented vehicle, the owner is not afforded protection under the Graves Act if it fails to demonstrate on its S/J motion that it did not negligently maintain its vehicle.

Heins v. Vanbourgonalien
180 A.D.3d 1019 (2d Dep't 2020)

In this action, D gave consent to A to drive D's car. A was injured in an accident involving D's care and other Ds. A sought to hold D liable under V&T §388. Court rejected A's attempt; as driver of the car, "rather than an "innocent third person," to recover from the owner. Court concluded that to allow such a claim would expand the scope of §388 beyond its purpose of providing recovery for injured third-persons.

Gonzalez v. Zaki's Auto Sales
183 A.D.3d 623 (2d Dep't 2020)

In this MV accident case, on 11/5/14, P alleged that Marcial was driver of vehicle at time of action and D was the owner. D moved for S/J, alleging it was a dealer of used cars and had sold care to Marcial and issued a temporary registration pursuant to V&T §420-a five days before the accident. Court granted S/J to D noting that D complied with all of the statutory requirements before issuing the temporary registration, and that Marcial had obtained insurance on the vehicle before being issued the temporary registration and taking the vehicle into his possession on 10/31/14. Further, D's evidence established that D was diligent in its efforts to comply with the statutory requirements concerning the permanent registration, and that its failure to do so within the statutory five days was because of an error in the title that required correction, and not any negligence by D in its statutory obligations.

Williams v. J. Luke Constr. Co.
172 A.D.3d 1509 (3d Dep't 2019)

Plaintiff was struck by a struck owned by defendant company which was driven by a company employee. The employee was permitted to drive the truck to and from his home. He was intoxicated at the time of the accident. The company had work rules which prohibited employees from operating company vehicles when intoxicated. The company moved for summary judgment on the ground he did not have permission to drive the truck at the time of the accident because he was intoxicated. Court noted V&T §388 imputes to the owner of a motor vehicle the negligence of one who operates it with the owner's permission . . . [and] creates a presumption that the vehicle is being operated with the owner's consent, but the presumption may be rebutted by substantial evidence showing that the operation was without permission." Court then observed:" An owner may place limitations on a driver's permission to use a vehicle, such as granting consent to drive only to a particular area or for a specific purpose, and use outside the scope of permission negates the owner's liability under the statute. Thus, an owner may avoid liability under the statute if the driver exceeded the time, place and purpose of the use permitted by the owner. These type restrictions are, of course, to be distinguished from limiting instructions which relate to the manner of operation, such as the speeding or careless pilotage of the car. In this latter situation the owner is still held accountable. However, even where the owner may escape liability, it is unquestionable that, unless the evidence adduced has no merit whatsoever, the question of consent and authority is for the jury. In their motion, defendants argued that permission for Price to drive the company vehicle was restricted by company policies prohibiting possession or use of drugs or alcohol on company business or property, limiting use of company vehicles to business purposes and prohibiting an employee from reporting to work under the influence of alcohol. They submitted written copies of such policies. They also submitted testimony indicating that company policy prohibited driving a company vehicle while intoxicated, but no such written policy appears in the record. Although an unambiguous and unequivocal agreement restricting authorization to use a vehicle negates an owner's liability for an accident occurring subsequent to a breach of the restriction more often than not, a question of fact arises as to whether the presumption has been rebutted. The policies in the record do not qualify as an unambiguous agreement restricting permissive use of company vehicles by J. Luke employees. In any event, the requirement to drive sober relates more closely to the manner of operation, or how to drive, rather than a restriction on who may operate the vehicle and when and where they may do so. As defendants did not establish, as a matter of law, that Price was driving without permission at the time of the accident, they were not entitled to summary judgment." **COMMENT**: Judge Mulvey's opinion contains a thoughtful review of the basic rules devised by the courts in interpreting the section.

III. RELEVANCE

A. Generally

People v. Johnson
183 A.D.3d 401 (1st Dep't 2020)
In this forgery prosecution, Court held D's flight from a plainclothes officer, whom D may have recognized, was too equivocal to prove that he knew the tickets inside the envelope were forged. Court noted there are other reasonable explanations for D's flight, such as his potential awareness that it is unlawful to sell tickets, even if genuine, in the vicinity of the Garden.

People v. Walters
183 A.D.3d 496 (1st Dep't 2020)

In this drug prosecution, Court held trial court providently exercised its discretion when it ruled that questions by defense counsel, during cross-examination of a detective who participated in the execution of the warrant that led to D's arrest, opened the door to the detective's testimony that there was evidence that drugs were being sold out of the apartment, and that a person fitting D's description was one of the two targets. It noted the carefully limited ruling properly responded to questioning that "might otherwise mislead the fact finder", and the court provided suitable jury instructions.

People v. Crupi
172 A.D.3d 898 (2d Dep't 2019)

In this murder prosecution charging D with killing his wife, Court held the trial court did not err in admitting (1) evidence of D's 2011 internet search history, concerning methods of killing and crime scene clean up. This evidence was relevant to demonstrate D's intent to commit murder, and his development of a plan or scheme to do so, and its probative value outweighed any potential undue prejudice to D; and (2) evidence that D patronized prostitutes during his marriage and subsequent to the murder of his wife. The evidence was relevant to establish the victim's state of mind regarding the parties' marriage, to provide the jury with background information regarding D's relationship with the victim and to show that there was marital strife, and to complete the narrative of D's post-murder behavior.

People v. Signor
173 A.D.3d 1264 (3d Dep't 2019)

In this assault prosecution trial, Court held the trial court did not abuse its discretion in permitting the People to elicit testimony that D provided a false name to the officer who arrested him. Court also held D's cross-examination of the officer opened the door to a more probing inquiry on that point. **COMMENT:** Consciousness of guilt is basis for relevancy.

Queen v. Kogut
173 A.D.3d 1796 (4th Dep't 2019)

In this MV accident action, Court held trial court erred in permitting D to testify that she was not issued a traffic ticket after the accident as "it is well established the evidence of non-prosecution is inadmissible in a civil action."

McCulloch v. New York Cent. Mut. Ins. Co.
175 A.D.3d 912 (4th Dept. 2019)

P sued D carrier for SUM benefits. At trial she was precluded from calling as witnesses any claims representatives employed by D. Apparently, P wanted them to testify to D's internal investigation of her claim and as well its evaluation of her claim. Court held no error was present. In support, Court noted such testimony was irrelevant to whether P sustained a serious injury and whether any such injury was causally related to the accident as they had no personal knowledge of the facts of the accident and were not qualified to testify regarding P's injuries. Court added that a representative of the carrier was not needed to explain the relationship of the parties. **COMMENT:** Ruling prevents a SUM carrier from being forced to explain at trial its evaluation of the claim.

People v. Cotton
__ A.D.3d __ (4th Dep't 6/12/20)

In this burglary prosecution, Court rejected D's contention that the court erred in permitting the People to introduce, as evidence of D's consciousness of guilt, evidence that, after the incident, the victim discovered the some of her electronic devices had been damaged. Evidence that D may have damaged them to prevent her from preserving a record of D's conduct is probative of his consciousness of guilt inasmuch as it is akin to evidence of tampering or witness intimidation, and the probative value of that evidence is not outweighed by its potential for prejudice.

B. Habit

Goldson v. Mann
173 A.D.3d 410 (1st Dep't 2019)

In this medical malpractice action, Court held D failed to establish on his S/J motion that he did not depart form good and accepted medical practice in examining P during an IME, or that any such departure was not a proximate cause of P's injury to her left shoulder. Court noted D's expert affirmation, which relied on D's testimony regarding his custom and practice of examining patients during his IMEs, was insufficient. D's testimony did not establish a deliberate and repetitive practice sufficient to show evidence of his behavior during P's examination, as he testified that his examination varied depending on the examinee.

Williams v. New York City Hous. Auth.
183 A.D.3d 523 (1st Dep't 2020)

In this slip and fall action, Court held, *inter alia*, that D met its burden of showing it had no notice, actual or constructive, of the condition by proof as to the protocol for cleaning and inspecting the premises; coupled with the monthly inspection reports, log books of complaints, and the affidavits confirming a lack of records of complaints. It focused on testimony by the caretaker, that he followed that protocol as a matter of habit. It then noted that a D landlord in a premises liability action may meet its *prima facie* burden on a S/J motion by establishing that it had a regular inspection and maintenance routine that it adhered to at the time the accident occurred.

Martin v. Timmins
178 A.D.3d 107 (2d Dep't 2019)

In this medical malpractice action alleging that D physician failed to properly suture a mesh patch to P's abdominal wall during a hernia repair, Court held in a thoughtful opinion written by Justice Maltese that Supreme Court erred in admitting D's testimony as to his general method for suturing mesh patches as evidence of his custom and practice. Judge Maltese noted that the evidence did not demonstrate that D's suturing of the mesh patch represented a deliberate and repetitive practice by a person in complete control of the circumstances, which was required to invoke the habit evidence rule. In this connection D's procedure for suturing mesh patches during hernia repairs lacked unvarying uniformity and was likely to vary from time to time depending upon the surrounding circumstances. Moreover, he did not show that he expected to prove a sufficient number of instances of the conduct in question. Although D testified that he had performed hundreds of hernia repairs using mesh patches, he could not remember how many times he had used the Kugel Composix mesh patch involved in the subject operation before he performed P's surgery, and the suturing procedure for that mesh patch used on P differed from the suturing procedure for other types of mesh patches.

Carro v. Colonial Woods
178 A.D.3d 893 (2d Dep't 2019)

D in this slip and fall action moved for S/J, contending it had no actual or constructive knowledge of the dangerous condition. To show lack of constructive knowledge, D relied on the deposition testimony of its president who testified about D's general inspection practices. Court held testimony was insufficient, indicating it lacked any specificity about the area where P fell.

Ortega v. Ting
172 A.D.3d 1217 (2d Dep't 2019)

In this MV accident case, arising out of P being struck while on his bicycle by a car driven by D, P had no memory of the event. He testified that, while he did not recall the accident, he did recall leaving work and getting on his bicycle with the intent of taking the route he usually took home, which route he detailed, explaining that he took the same route every day, except for when

he took the bus. While that route would have had the P traveling with traffic at the time of the accident, the defendant testified, *inter alia*, that the P was traveling against traffic. The jury returned a verdict in favor of the P on the issue of liability. Court affirmed. It noted the jury could have "credited P's testimony as to his habit or routine practice, as to which P submitted sufficient evidence to allow the inference of its persistence at the time of this accident.
COMMENT: Supreme Court gave the PJI "Habit" charge 1:71.

Heubish v. Baez
178 A.D.3d 778 (2d Dep't 2019)

In this medical malpractice action, court held D's habit testimony as to how he performs knee replacement surgeries, including that the methodology for measuring and dissecting 10 millimeters of the patient's patella did not vary from patient to patient, that the manner in which he performed knee replacement surgeries was done in a deliberate, identical, and repetitive manner on every patient, and that he was in complete control of the circumstances concerning the measuring and dissection of the patient's patella, was properly admitted by Supreme Court. The evidence supported a finding that surgical techniques represented a deliberate and repetitive practice by a person in complete control of the circumstances.

C. Prior Accidents

Daniels v. New York City Trans. Auth.
35 N.Y.3d 938 (2020) *revg*., 171 A.D.3d 601 (1st Dep't 2019)

In this subway accident case in which P's leg slipped into a gap between the train doors and the platform, the Court held the trail court erred in admitting evidence of prior accidents at New York City subway stations involving the gap between the train car and platform in the absence of a showing that the relevant conditions of those accidents were substantially the same as P's accident.

D. Character Witness

People v. Durrant
173 A.D.3d 890 (2d Dep't 2019)

In this sex abuse prosecution, D called as a character witness a coworker from his prior employment, who testified that he was not aware that D had a bad reputation for sexually abusive or sexually inappropriate conduct in their "working community." When defense counsel asked the witness if he was aware of anyone ever saying "anything bad with respect to D begins sexually inappropriate or sexually abusive toward other people in the workplace," the People objected. The objection was sustained. The People moved to strike the witness's testimony. The People's motion was granted on the ground that the witness was not aware of D's reputation, and testimony that a witness never heard anyone say anything negative is not sufficient character evidence. Court held negative evidence of reputation - *i.e*., that the witness never heard anyone say anything negative about D - can constitute relevant character evidence. However, relevant character evidence must be of reputation generally in the community where the crime occurred.

Although that community is more broadly defined in modern times, reputation in the workplace for lack of sexual impropriety was in no way relevant to whether he sexually abused a child in secret and outside of the workplace. Thus, the character evidence was properly stricken, since that evidence was irrelevant.

IV. WITNESSES

A. Generally

Onilude v. City of New York
178 A.D.3d 499 (1st Dep't 2019)

In this action for false arrest, Court held the trial court improvidently exercised its discretion in precluding testimony from the witness who identified P to the police as an individual she had seen fleeing the scene of a crime. Court noted Ds satisfied their discovery obligation by providing the witness's last known address and telephone number during discovery, more than four years before trial, and thus, there could have been no surprise or prejudice warranting the preclusion. While the witness subsequently moved, she declined to disclose her new address to any parties to the suit, a factor Ds could not control. As Ds did not know her new address, they had no obligation under CPLR 3101(h). Court also held Ds should not have been sanctioned for the fact that the witness did not wish to discuss the case with P's counsel when counsel called her. P's counsel did not attempt to contact the witness until two months before trial and did not attempt to obtain a nonparty deposition of the witness during discovery. **COMMENT:** The trial court also was found to have abused its discretion in ordering a hearing at which D's trial attorney would be subject to questioning by P's trial attorney, and precluding the witness's testimony when defense counsel declined to participate in such a hearing.

Monza v. 1141 Elder Towers
180 A.D.3d 547 (1st Dep't 2020)

In this slip and fall action, Court held trial court improvidently exercised its discretion in precluding the testimony of D's building superintendent at the time of the accident, on the ground that it was prejudicial to D. D could not have been prejudiced or surprised by P's disclosure of the witness on the eve of trial, since he was D's employee at the time of the accident.

Caso v. Miranda Sambursky
180 A.D.3d 611 (1st Dep't 2020)

In this legal malpractice action based upon allegations that of D's negligence in preparing a witness for a deposition. Court granted S/J. The witness was the sole eyewitness to the underlying MV accident who had given statements to the investigating detective officer, who wrote them in his reports, and which statements inculpated the driver in the accident. At the witness's deposition he denied making many of those statements, and at trial provided

conflicting and inconsistent testimony. The jury returned a verdict for D. Court held P's contention that had the witness been better prepared, the jury would have found for him was pure speculation.

Greenberg v. Grace Plaza
174 A.D.3d 510 (2d Dep't 2019)

In this wrongful death action, P, an attorney, the decedent's son and one of two distributes of the estate, was the attorney for the estate. When P listed himself as one of 3 witnesses to the malpractice in issue, Ds moved to dismiss the complaint on the ground the advocate-witness barred P from serving as attorney for the estate. Supreme Court granted the motion. Court reversed. It noted initially that the rule generally does not control where the attorney is also a litigant and where disqualification of the attorney would work substantial hardship on the client. Here, where P averred his attempt to retain different counsel was unsuccessful, his disqualification would work substantial hardship on the estate and its' distributes. Thus, disqualification was not warranted.

Argila v. Edelman
174 A.D.3d 521 (2d Dep't 2019)

In this custody matter, the child's mother argued that Family Court improperly restricted her examination of the father as part of her direct case by refusing to permit her to use leading questions. While an adverse party who is called as a witness may be viewed as a hostile witness and direct examination may assume the nature of cross-examination by the use of leading questions, whether to permit such questions over objection is a matter which rests in the sound discretion of the trial court. Here, the mother already had the opportunity to cross-examine the father using leading questions when he testified as part of his own direct case. In any event, the father was "not reluctant or evasive in answering questions." Thus, no error was present.
COMMENT: Court cited in support *Matter of Giaquinto, infra*.

Matter of Giaquinto
164 A.D.3d 1527 (3d Dep't 2018), *affd*. 32 N.Y.3d 1180 (2019)

In this contested probate matter, Court held Surrogate Court did not err in precluding will contestant from questioning executor, whom she called on her direct case, using leading questions. Court held no error was present as executor was not reluctant or evasive in answering questions. **COMMENT:** There is no right to question an adverse party on direct using leading questions.

Rosen v. Mosby
180 A.D.3d 1253 (3d Dep't 2020)

In this real property related action, Court held trial court properly permitted a witness to testify in connection with P's claim, as nothing in CPLR article 31 requires a party to generate a witness

list prior to trial and P made no demand for discovery with regard to the identity of witnesses following the filing of his amended complaint with respect to said claim.

People v. Geddis
173 A.D.3d 1724 (4th Dep't 2019)

In this assault prosecution where trial court allowed the victim to testify while accompanied by a therapy dog, Court held the trial court "abused its discretion in allowing the victim, an adult, to testify while accompanied by a therapy dog." **COMMENT**: Court did not set forth any basis for its conclusion. Arguably, the basis was the mere fact the victim was an adult. Proper?

B. Opinion

People v. Watkins
180 A.D.3d 1222 (3d Dep't 2020)

In this prosecution, Court held as to the convictions related to a traffic stop, contrary to D's assertion, the police officer's testimony regarding his training and experience in visually estimating speed established a proper basis for his opinion that D was traveling approximately 35 milers per hour over the speed limit.

Brooks v. Blanchard
174 A.D.3d 1362 (4th Dep't 2019)

In this MV accident case, Court held trial court erred in excluding the testimony of P that D exhibited indicia of intoxication during their interaction immediately after the accident and that, in his opinion, she was intoxicated. Although D's failure to remain at the scene meant that P was the only witness who had an opportunity to observe D and interact with her after the accident, the trial court prohibited P from testifying about his observations of D on the ground that he was not an "expert" in signs of intoxication. Court noted that contrary to the court's ruling, it is well settled that a lay witness may testify regarding his or her observation that another individual exhibited signs of intoxication, and also regarding his or her opinion that another individual was intoxicated. **COMMENT:** Court added that although " [t]rial courts are accorded wide discretion in making evidentiary rulings [and], absent an abuse of discretion, those rulings should not be disturbed on appeal, we conclude that the ruling at issue here was an abuse of discretion."

C. Competency

People v. Bush
__ A.D.3d __ (3d Dep't 6/25/20)

D was convicted of endangering the welfare of an incompetent person and assault of that person. V was a resident at a residential facility where D worked. At the trial V testified. D argued that

V was incompetent due to a mental defect and, therefore, County Court erred in permitting him to testify. Court held the trail court's extensive questioning of V and the responses thereto demonstrate that V knew the difference between telling the truth and a lie, the significance of an oath, and the consequences if he lied under oath. In the absence of any evidence that V failed to understand the nature of the oath, the court did not abuse its discretion in allowing V to testify. Court noted that at trial the People made a hearsay objection and D argued impeachment was involved. On appeal, D attempted to argue that the testimony was hearsay, an argument D had not preserved.

People v. Carrasco
65 Misc.3d 5 (App. T. 2d Dep't 2019)

In this assault prosecution arising from an incident of domestic violence, Court held the eight-year-old daughter of the complainant, who was D's ex-girlfriend, was erroneously permitted to testify under oath because the court did not establish that the child understood the nature of an oath. Here, the court's inquiry failed to elicit whether complainant's daughter appreciated the fact that a witness who testifies falsely may be punished. The error was harmless, however, as the record demonstrated she properly could have been permitted to testify as an unsworn witness and because her testimony was sufficiently corroborated by other evidence. **COMMENT:** CPL 60.20(7) controlled.

D. Dead Man's Statute

Grechko v. Maimonides Med. Ctr.
175 A.D.3d 1261 (2d Dep't 2019)

In this medical malpractice action brought by decedent's executor, decedent had been sent by his primary care physician Dr. A, to treat at a hospital where he saw Dr. B. decedent had been discharged 3 days earlier from D. Decedent died at the hospital. Court held the deposition transcripts of Dr. A and Dr. B were erroneously admitted at trail against P as Dead Man's Statute barred their admissibility. It wrote: "Both Dr. A and Dr. B were Ds at the time they gave deposition testimony, making them interested parties under the statute. Moreover, they both testified to transactions or communications with the decedent and sought to offer that testimony against the decedent's estate." Court also held P did not waive the protections of the Statute as executor does not waive rights by taking opponent's deposition; and that deposition could not be admitted under the Statute just because it would be admissible under a hearsay exception.

25-35 Bridge St. LLC v. Excel Automotive, Inc.
63 Misc.3d 269 (Sup. Ct. Kings Co. 2019) (Levine, J.)

This action arose from a disputed option to purchase contained in a commenced lease which D admittedly failed to exercise in a timely manner. P sought a declaration that the option was unenforceable on the ground it was stricken, or alternatively, that D failed to exercise it in a

timely manner. Action was commenced by V who was the initial landlord but who died while the action was pending, and P was substituted as plaintiff. V prior to his death submitted affidavits averring that the original terms of the lease he entered into with D redacted the option, and he submitted that lease. Court in a thoughtful opinion made two prongs involving the Dead Man's Statute. First, the court held the statute did not bar limited testimony from D's principal authenticating D's proffered version of the lease entered into between D and V, which contained an option. He testified that D's version of the lease was the complete copy of the one that he and V had signed at a pizzeria, and he identified his own signature, as well as the signatures of V and the real estate broker who closed the deal. The Statute, however, precluded him from testifying about any conversations he had with V concerning the contents or meaning of the lease. The Court also held that the real estate broker who closed the deal was not an interested witness under the Statute. Thus, he was permitted to authenticate D's proffered version of the lease with the purchase option intact and to testify about conversations he had with V preexisting the signing of the lase and about his interactions with D's principal after the signing. The broker's only interest in the transaction is his potential right to collect a commission against V's estate, contingent upon D's purchase of the premises, an issue which was not before and would not be decided by the trial court. Any potential lawsuit between the broker and the estate would not be dependent upon the broker's testimony here since the court precluded him from testifying about any communications he had with V over the meaning of the lease and/or D's attempt to exercise the option.

V. IMPEACHMENT

A. Generally

People v. Johnson
175 A.D.3d 1130 (1st Dep't 2019)

In this attempted murder prosecution, Court held trial court properly permitted cross-examination about D's ability to cooperate with his attorneys. It noted the cross was directly relevant to refute a claim about D's alleged delusions that was at the core of his insanity defense. D did not demonstrate that the only way he could rebut his cross was by completely waiving attorney-client privilege, or that there were any privileged matters that would actually tend to have such rebuttal effect.

D'Amato v. WDF Dev., LLC
183 A.D.3d 695 (2d Dep't 2020)

In this P/I action in which P alleged he was injured when he slipt and fell while inspecting a tunnel at premises owned by D. At the trial Dudin testified during Ds' case that, in July 2010, he was employed as a resident engineer by Hazen and Sawyer, the construction manager hired by D to oversee the construction project. Dudin testified, in relevant part, that, after the accident, he inspected the area where the injured P fell and that the pipe he observed in the area was not part of the work performed by Ds. He testified that the pipe was used by another contractor on the project, John Piccone. At the close of evidence, Supreme Court submitted to the jury the

following question: "Did the [injured plaintiff] trip over [the defendants'] pipe on July 28th, 2010?" The jury answered the question in the negative. P moved to set aside the jury verdict on the ground that Ds had misled the jury into believing that Dudin was an independent, impartial witness when, in actuality, he was an interested witness employed by Ds, which motion was denied. Court reversed and granted the motion. It stated: "The record reveals that Ds affirmatively represented to the jury that Dudin was a disinterested, objective witness, notwithstanding that he was employed by Ds at the time of trial. During summation, Ds' counsel stated that Dudin was "with the construction manager," and that he was "not on [Ds'] payroll," but rather was a representative of the DEP. Additionally, Ds' counsel stated that, "you heard from Mr. Dudin, who is with the DEP now, this is not [Ds'] stuff" in the tunnel. Counsel specifically referred to Dudin as "an objective witness" who "has no dealings with [Ds]," and stated that he was "there to help the [injured] P." Under the circumstances, we find that the jury should have had the opportunity to consider Dudin's status as an employee of Ds in assessing his credibility and in determining whether this relationship biased or influenced the witness's testimony. **COMMENT:** Court commented that PJI 1:92 charge would have been warranted.

Lisa I. v. Manikas
183 A.D.3d 1096 (3d Dep't. 2020)

P's 15-year old daughter was sexually assaulted when attending a sleep-over at the home of a friend, owned by the Ds, the friend's parents, by an adult relative of Ds. At the deposition of the friend Ds' attorney extensively questioned the friend about the child's prior sexual history and drug use. In anticipation that Ds would conduct an examination of the child in the same manner, P moved for a protective order, pursuant to CPLR 3103(a), to preclude defendants from questioning the child during the deposition about her sexual history and drug use. P argued that any questions of this nature would be for the purposes of intimidation and harassment. Plaintiff further argued that the Rape Shield Law, codified in CPL 60.42, afforded the child the same protections as a victim in a criminal case, and any testimony as to her sexual history and alleged pregnancies would be irrelevant and immaterial to this civil litigation. Ds opposed the motion arguing that this line of questioning would be relevant to credibility and as to whether the child had a motive to fabricate the allegations for reasons of a purported pregnancy. Ds assured Supreme Court that it was not their intent to harass or embarrass the child. Supreme Court partially granted P' motion by precluding Ds from examining the child regarding her prior sexual history, but permitted Ds to examine her regarding her purported drug use. In reaching this conclusion, the court determined that the Rape Shield Law applies to civil cases. In a thoughtful opinion by Justice Reynolds-Fitzgerald, the Court held that Supreme Court did not err in partially granting the motion for a protective order. However, in arriving at this conclusion, it deemed unnecessary to reach the question as to whether CPL 60.42 applies to civil cases, as Supreme Court had the responsibility and authority pursuant to CPLR 3103(a) to issue a protective order to protect a party from harassment, irrespective of the application of the criminal statute. Given that P demonstrated how the child would be subject to undue embarrassment and harassment by being questioned about her sexual history, and that her sexual history is irrelevant and immaterial to the elements of the causes of action and any defenses to the action, Court concluded that Supreme Court did not abuse its discretion in granting a protective order precluding questions as to the child's sexual history.

People v. Williams
65 Misc.3d 1153 (Sup. Ct. NY Co. 2019) (Kiesel, J.)

In this assault prosecution, trial court precluded defense counsel from cross-examining prosecution witness, an undocumented immigrant, on the subject of his immigration status. Court cited sound public policies exist to bar questions of immigration status as an avenue of cross-examination for both parties: if defendants knew they could be subject to questions about their immigration status, it might keep them from exercising their constitutional right to testify on their own behalf, and if witnesses knew they could face the same questions, they might be discouraged from reporting crime to law enforcement, thus endangering their own safety and hindering the prosecution in its ability to keep the population safe. Defense counsel would only be permitted to inquire of the witness about transgressions that went directly to credibility, for example, if there was evidence that he knowingly made a false statement to obtain government benefits or assumed a false identity while in the country.

B. Convictions

People v. Walters
172 A.D.3d 916 (2d Dep't 2019)

In tis burglary prosecution, the trial court at a pre-trial hearing ruled that the prosecution could ask D whether he had two felony convictions, but could not elicit the underlying facts. When D at trial testified, the trial court permitted the prosecution to inquire into the facts of his conviction. Court held prejudicial error was present. It noted the policy underlying *Sandoval* is that the accused has the right to make an informed choice concerning whether he or she should take the witness stand and D here was denied that right when, after making what he believed to be an informed judgment and taking the witness stand, the trial court implicitly changed the ruling upon which he relied by allowing the prosecutor to continue her course or prejudicial questioning despite objections from defense counsel. Court also noted that D did not open the door to questioning about the underlying facts of the conviction as he did not deny the fact that he was convicted.

People v. Green
173 A.D.3d 765 (2d Dep't 2019)

In this drug prosecution, Court held the trial court did not err in permitting the prosecution to inquire about D's 2004 felony conviction of criminal possession of a controlled substance in the third degree if D testified. In its view, the conviction was probative of D's credibility because it "bore on his willingness to place his own interests above those of society."

People v. Cole
177 A.D.3d 1096 (3d Dep't 2019)

In this vehicular assault and DWAI prosecution, People sought to impeach D with eight prior convictions during the period from 1987 to 1991, including a 1991 burglary conviction for which defendant was incarcerated until 1995 and released from parole in 1998. D had no convictions

since that time up to the present event which occurred in 2017. In fashioning a compromise, County Court determined that the People could inquire of defendant whether he had been convicted of one felony level offense in 1991, without further detail. In explaining its ruling, the court noted that "D spent a substantial portion of the time after the 1991 conviction in a state prison facility." Court held that since D had been released from prison for 23 years, with an unblemished record leading up to this even, County Court abused its discretion in allowing inquiry into the 1991 conviction, which was simply too remote. The error, however, was harmless.

People v. Delbrey
179 A.D.3d 1292 (3d Dep't 2020)

In this burglary prosecution, the trial court permitted the People to cross-examine D about five prior felony convictions between 1999 and 2006, but not about the nature of the crimes or the underlying facts. The ruling was made as a compromise between the People's assertion that each of the convictions bore on D's credibility and D's objections that there were too many crimes in total and they were too remote in time. The trial court adopted D's suggestion that the People should not be permitted to inquire about the nature or specifics of the underlying crimes, but rejected his argument that the People should not be permitted to specify the number of prior convictions. D now argues that he was prevented from testifying on his own behalf by the cumulative prejudicial effect of the large number of convictions and their remoteness in time. Court held this contention is unpreserved, as D made no objection to the court's compromise ruling before the end of the Sandoval hearing, and in any event the ruling was not an abuse of discretion.

C. Prior Bad Acts

People v. Smith
27 N.Y.3d 652 (2016)

In this decision resolving 3 appeals, Court set forth basic considerations for determining whether a criminal D may examine arresting police officers about their misconduct in making other arrests that give rise to civil actions against the officers. They are: (1) presence of good faith basis for the examination; (2) misconduct is relevant to officer's credibility in that it shows an untruthful bent or self-interest, as well as it is an act that is "criminal, vicious, or immoral;" (3) absence of unfair prejudice to the parties and jury confusion. In the separate appeals, Court held trial court properly disallowed questions about whether the charges from the arrest were dismissed and that a lawsuit was settled for a large amount; disallowed question whether officer was "sued" but should have allowed inquiry about the underlying acts of misconduct; and should have allowed inquiry as to whether officer had been involved in making a specified false arrest.
COMMENT: Decision is applicable to all "bad acts" impeachment efforts in both civil and criminal cases. For a further discussion of decision, *see*, Hutter, "People v. Smith and Bad Acts Impeachment," NYLJ, Dec. 1, 2016, p.3, col. 3.

People v. Rouse
34 N.Y.3d 269 (2019)

In this murder prosecution, Court held: (1) the trial court abused its discretion in limiting, on cross-examination, exploration of testifying police officer's prior bad acts to his participation in ticket-fixing scheme in unrelated federal criminal proceeding, and in not permitting inquiry with respect to officer's deceit of federal prosecutor. Court noted defense counsel had good faith basis for inquiry, since officer's suppression testimony acknowledged that he had not been immediately forthright with federal prosecutor until confronted with irrefutable proof making it impossible for him to maintain his prior inconsistent statements. Court also noted there was no suggestion that defense counsel's inquiry into officer's deceit would have obscured main issues or confused jury. (2) the trial court abused its discretion in precluding cross-examination of both officers with respect to prior judicial determinations that addressed the credibility of their prior testimony in judicial proceedings. In two unrelated federal criminal proceedings, the trial court had found officers' testimony incredible in manner which suggested that officers may have falsely testified in order to obtain desired result. Such determinations were probative of officers' credibility in instant prosecution, since defense strategy was convincing jury that officers incorrectly identified him as shooter, and only countervailing prejudice articulated by court was concern that jury may view prior determinations of credibility as binding.

People v. Gamble
179 A.D.3d 580 (1st Dep't 2020)

In this murder prosecution, Court held trial court providently exercised its discretion in precluding D from cross-examining a witness about an arrest that had resulted in a dismissal, because trial counsel had insufficient information to demonstrate that the charges were not dismissed on the merits, and thus failed to demonstrate a good faith basis for the inquiry.

People v. Burgess
178 A.D.3d 609 (1st Dep't 2019)

In this prosecution for criminal possession of a forged instrument, Court held both the hearing and trial courts erred in denying D's request to cross-examine a police officer regarding allegations of misconduct in a civil lawsuit in which it was claimed, among other things, that this particular officer arrested P without suspicion of criminality and lodged false charges against him. It noted the civil complaint contained specific allegations of falsification by this officer that bore on his credibility at both the hearing and trial. At each proceeding, this officer was the only witness for the People. "We find that the error was not harmless."

People v. Connor
__ A.D.3d __ (1st Dep't 6/4/20)

In this larceny prosecution, Court held trial court erred in denying D's request to cross-examine a police Sergeant regarding allegations of misconduct in a civil suit in which it was claimed this police Sergeant and a detective arrested P without suspicion of criminality and lodged false charges against him. The civil complaint contained allegations of falsification specific to this officer (and another officer) which bore on his credibility at the trial.

D. Contradiction

Rudle v. Shifrin
182 A.D.3d 617 (2d Dep't 2020)

In this medical malpractice action, Court held trial court committed reversible error in permitting P to introduce extrinsic documentary evidence concerning collateral matters solely for the purpose of impeaching D's credibility. **COMMENT:** Court did not state the nature of the documentary evidence admitted.

E. Prior Inconsistent Statement

People v. Butts
__ A.D.3d __ (2d Dep't 6/10/20)

In tis murder prosecution, one of the shooting victims (Lindsay) claimed that he could not identify the shooters. However, 11 days later, Lindsay admitted to the police that he recognized three of the intruders as being D and his two co-Ds, and that he had not come forward with this information earlier because doing so would cause problems for his family and he feared for their safety. The trial court precluded D from calling Boyd on the grounds that the defense failed to lay a proper foundation for impeachment with Boyd's testimony, that Boyd had been present in the courtroom during Lindsay's testimony, and that the testimony would be hearsay. The Court, however, noted that defense counsel had failed to lay a proper foundation because he was not aware of the proffered testimony while Lindsay testified; it was only subsequent to Lindsay having completed his testimony that Boyd contacted counsel claiming that Lindsay had told him repeatedly, both immediately after the incident and in the ensuing months before trial, that he had not seen the intruders' faces because they wore masks. Moreover, the prosecutor initially volunteered to recall Lindsay to enable the defense to lay the foundation. In addition, the proffered testimony was in "substantial contradiction" to Lindsay's testimony that he recognized the defendant even though he had a scarf covering his face, because at some point during the incident the defendant's face became uncovered. Therefore, the proffered testimony was sufficiently inconsistent to be relevant to the issue of Lindsay's credibility. The Court further noted that testimony as to whether Lindsay told Boyd that he did not see the intruders' faces went directly to the heart of the most contested aspect of this case—whether the defendant was one of

the intruders. As such, the precluded evidence was not only relevant to Lindsay's credibility, it was also "relevant to the very issues that the [trier of fact] must decide." Tus, the Court concluded a reversal was required as the precluded evidence resulted in D being deprived of a fair trial.

People v. Bush
__ A.D.3d __ (3d Dep't 6/25/20)

D was convicted of endangering the welfare of an incompetent person, and assault. D contended that County Court erred when it sustained the People's hearsay objection precluding a witness from testifying that a former employee told the witness at a meeting that D was not involve din the assault on the victim. Court noted that D was required to lay a proper foundation by questioning the former employee about any inconsistencies between his trial testimony and the prior statement that he made to this witness and then giving him an opportunity to explain any inconsistencies. D failed to do so. **COMMENT:** Court recognized that the People's hearsay objection was really one for improper impeachment.

F. Character Witness for Untruthfulness

People v. Youngs
175 A.D.3d 1604 (3d Dep't 2019)

In this sex abuse prosecution involving a child, trial court denied D's request to call a witness who would testify to the victim's reputation for untruthfulness. the court noted the two-step analysis for such character evidence: (1) the reliability of the evidence (a question of law); and (2) the credibility of the evidence (a question of fact). Here, "D proffered a proposed witness who was prepared to testify that she had known the victim since birth, that they were members of the same large extended family and that many members of the extended family knew the victim. Further, the proposed witness was prepared to testify that she was aware of the victim's bad reputation for truthfulness among the extended family. … County Court erred when it determined that the proposed testimony failed to establish a proper foundation for admission of testimony regarding the victim's bad reputation for truthfulness; in fact, the offer of proof contained each element required by *People v. Fernandez,* 17 NY3d 70, 926 NYS3d 390 [2011])."

People v. Bailey
179 A.D.3d 1518 (3d Dep't 2020)

In this sex prosecution, Court held trial court properly barred defense counsel from questioning victim's mother about the victims' past specific instances. **COMMENT:** Court noted D was free to call qualified witnesses to testify to the victim's general reputation in the community for being untruthful, but failed to do so.

G. Deposition of Non-Party Witness

Grechko v. Maimonides Med. Ctr.
175 A.D.3d 1261, 109 N.Y.S.3d 418 (2d Dep't 2019)

In this medical malpractice action, Court held the deposition transcript of a physician, who was a party D at the time of the deposit could not be sued for impeachment purposes at trial under CPLR 3117(a). It wrote: "The declaration of the decedent did not fall within the declaration against interest exception to the hearsay rule because Ds failed to establish that the subject statement was against the decedent's interest." **COMMENT:** See discussion in IV, D.

VI. HEARSAY

A. Hearsay?

People v. Dorvil
175 A.D.3d 903 (2d Dep't 2019)

In this robbery prosecution, Court held trial court "should have granted D's request for a limiting instruction as to the proper use of statements made by Espinal to D during a controlled phone call. As the statements were admitted for the non-hearsay purpose of providing context to D's statements, the jury should have been instructed not to consider the statements for their truth."

People v. Herrera-Machicea
181 A.D.3d 901 (2d Dep't 2020)

In this sex prosecution, Court held trial court did not err in admitting the complainant's testimony regarding her conversation with D about reporting the abuse, since that testimony was offered as proof of the complainant's state of mind rather than for its truth. **COMMENT:** Court also noted that D's portion of the conversation was admissible as an admission.

People v. Churaman
__ A.D.3d __ (2d Dep't 6/24/20)

In this murder prosecution, Court held trial court did not err when it allowed into evidence portions of his videotaped statement to law enforcement officials that contained statement that non-testifying witnesses had implicated him in the crime. The statements were not received for their truth, but to explain D's reaction to hearing them; and the trial court properly instructed the jury that it was not to consider any of the statements as evidence against D.

People v. Thomas
174 A.D.3d 1430 (4th Dep't 2019)

In this criminal prosecution, Court held trial court properly determined that the testimony from the police officer that D's brother said to D, "the police are here to talk to you," was not inadmissible hearsay inasmuch as it was not offered for the truth of its content. Rather, the

statement was "offered as the basis of an inference for another relevant fact," *i.e.*, that D was aware of the police officer's presence.

B. Admissions

1. Generally

U-Trend New York Investment v. U.S. Suite LLC
179 A.D.3d 532 (1st Dep't 2020)

In this commercial litigation, Court referenced allegations in P's complaint in rejecting P's arguments. It noted: "Facts admitted in a party's pleading constitute found judicial admissions, and are conclusive of the facts admitted in the action in which they are made."

Handelsman v. Llewellyn
180 A.D.3d 580 (1st Dep't 2020)

In this automobile action, P moved for S/J on liability. They relied on D's plea of guilty to reckless driving, a misdemeanor, to support their argument that he is collaterally estopped from contesting liability. Court held D's plea, without more, merely constitutes "some evidence of negligence." Further, contrary to P's argument, the plea itself, is not dispositive of D's liability because the allocution minutes indicate that he pleaded guilty to reckless driving with no further factual elaboration of the circumstances.

MIC General Ins. Corp. v. Campbell
181 A.D.3d 428 (1st Dep't 2020)

In this insurance coverage action, Court held D was not covered by the policy as he admitted to P's investigator that he did not reside at the premises.

People v. Melo
182 A.D.3d 431 (1st Dep't 2020)

In this assault prosecution, Court held trial court providently exercised its discretion in admitting social media posts by D, including, among other things, a music video reenacting part of the crime, as this evidence contained D's admissions to elements of the charged crimes.

Rosales v. Riveria
176 A.D.3d 753 (2d Dep't 2019)

In this MV accident, the Espinal Ds moved for S/J on the ground they could not be held liable in light of a formal judicial admission by P that the Espinals were not a proximate cause of P's injuries. The Espinals argued that P had, in effect, admitted that the Espinals were free from fault when his attorney argued, in an affirmation submitted in support of a prior motion, that "Rivera and . . . Beltre were negligent as a matter of law for their failure to bring their vehicles to a timely halt and that such negligence was the sole proximate cause of the complained of

collision." Court held S/J was proper as P made an informed judicial admission that the Espinals were not at fault in the happening of the accident. It noted: "Admissions by counsel, as by any other agent, are admissible against a party provided that the statements had been made by the attorney while acting in his authorized capacity;" and that an informal judicial admission is evidence of the fact or facts admitted. In opposition, P did not raise any issue of fact as to whether the Espinals' conduct proximately caused his injuries.

Re/Max of New York v. Weber
177 A.D.3d 910 (2d Dep't 2019)

In this declaratory judgment action seeking a ruling as to whether D was a shareholder of P, Court held D's prior admissions made in other actions that he was not a shareholder of P did not constitute formal judicial admissions entitling P to S/J. It noted formal admissions are facts admitted by a party's pleadings, and are conclusive of the facts admitted in the action in which they are made. The admissions relied upon here were not made in this action.

People v. Yanez
180 A.D.3d 816 (2d Dep't 2020)

In this murder prosecution, Court held trial court did not err in permitting a witness to testify that in the hours before the victim was killed, D fought with the victim and threatened him. It stated: "[T]he hearsay rule does not exclude the admission of out-of-court statements demonstrating the state of mind of the declarant when that state of mind is an issue in the case. Moreover, when a particular act of the declarant is at issue, the declarant's statement of a future intent to perform that act is admissible as proof of the declarant's intent on that issue and as inferential proof that the declarant carried out [or attempted to carry out] his intent." **COMMENT:** D's statement was plainly admissible as his admission.

2. Adoptive

People v. Vining
28 N.Y.3d 686 (2017)

In a prosecution arising out of a series of domestic violence incidents, Court held the trial court did not err in admitting into evidence the recording of a telephone call between defendant and his ex-girlfriend, which was initiated by the D when incarcerated and knowing that the call was being monitored as an adoptive admission. Appling the rule that another person's statement made to a party can be adopted by the party, and thus admissible as a party admission, by the D's silence, Court viewed D's non-responsive and evasive answers to the ex-girlfriend's repeated accusations that he broke her ribs, could be viewed as silence, and thus potentially adoptable. Court then further held that the trial court properly concluded that the content of the conversation, itself, demonstrated that defendant both heard and understood what the ex-girlfriend was saying, but chose to give evasive and manipulative responses, and that view was supported by the context of the call, where defendant voluntarily contacted his accuser in violation of an order of protection in an attempt to influence her to drop the charges against him. Once the People satisfied those threshold evidentiary requirements for admissibility, the call was

properly placed before the jurors, who were fully equipped to assess its significance and dynamics**. COMMENT**: For further discussion, *se*e Hutter, "People v. Vining and Adoptive Admissions, NYLJ, April 6, 2017, p. 3, col. 3.

C. Prior Inconsistent Statement

Kaufman v. Quickway
14 N.Y.3d 907 (2010), *affd. on other grounds* 64 A.D.3d 978 (3d Dep't 2009)

In this Dram Shop Act action, convenience store clerk stated in supporting deposition prepared by police officer and purportedly signed by her "under penalty of perjury" that she sold a 12-pack of beer to Mr. Beers (driver who caused fatal accident) and that at the time she detected beer on his breath and that she had a difficult time understanding him. However, at a subsequent deposition clerk averred that Beers showed no signs of intoxication and denied making the statements contained in the supporting deposition. Third Department held the supporting deposition statements were not admissible for its truth as a prior inconsistent written statement under the hearsay exception recognized in *Lefendre v. Hartford Acc.* (21 N.Y.2d 518, 289 N.Y.S.2d 183 [1968]) and *Nucci v. Proper* (95 N.Y.2d 597, 721 N.Y.S.2d 593 [2001]) since she has seriously disputed their utterance and content, expressly asserting that her words were "incorrectly reported." In so holding, the Court noted there were more factors here supporting the reliability of the statements than in *Nucci*. The Court of Appeals disagreed. In its view: "The supporting deposition prepared by the Trooper and signed by the witness under penalty of perjury contained numerous *indicia* of reliability justifying its admissibility under *Letendre.* And, as in *Letendre*, the store clerk was available for cross-examination." Nonetheless, the Court affirmed the dismissal of the action on the ground that there was no "practical connection between the allegedly illegal sale of the alcohol and the accident. **NOTE:** *See* Diamond, "New York Needs A Residual Exception To The Hearsay Rule," NYLJ, 12/24/09, p.4; *see generally*, Hutter, "The *Letendre* Exception," NYLJ, 8/4/11, p. 3, col. 1. **COMMENT:** Still no reported case citing to *Quickway*.

D. Excited Utterance / Present Sense Impression

People v. Almonte
33 N.Y.3d 1083 (2019)

In a 5-2 decision, majority held any error in admitting 911 call between the victim and the 911 operator under excited utterance exception to the hearsay rule was harmless. Dissenters were of the view that the call was not admissible as an excited utterance, but one held the error was harmless and the other prejudicial error. Both addressed the argument raised for the first time in the Court of Appeals that the exception should be abolished as its underlying rationale is questionable, e.g., the state of excitement precludes fabrication. While the issue could not be addressed as it was not preserved, the dissenters stated that the validity of the exception should be questioned by counsel the next time an issue is presented regarding the admissibility of a statement under the exception. Both expressed the view that the excited utterance exception should be abolished as its underlying rationale was questionable. **COMMENT**: For further discussion of the dissenters' expressed view, *see* Hutter, Exited Utterance ands the Quest for Reliability, NYLJ, Feb. 6, 2020 (criticizing the dissenters' view).

People v. Jaber
172 A.D.3d 1227 (2d Dep't 2019)

In this assault prosecution, Court held trial court properly admitted the complainant's 911 calls as excited utterances. It noted the determination of admissibility of a statement as an excited utterance is entrusted in the first instance to the trial court, which "must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth." Here, the evidence demonstrated that the 911 calls qualified as excited utterances. First, the nature of the attack on the complainant was the type of startling event that would cause "physical shock or trauma." Further, the 911 calls were made only approximately five minutes after the event, and in those intervening minutes, the complainant ran across the street from the scene of the incident to his apartment to bandage his wound. Under these circumstances, this short interval of time did not "detract[ ] from [the] spontaneity" of the statements. Furthermore, the complainant "sounded worked up and agitated" during the 911 calls, thus demonstrating that "the statements were uttered when emotional excitement continue[d] to dominate." **COMMENT:** Note the foundation laid by the prosecutor for admissibility.

People v. Thelismond
180 A.D.3d 1076 (3d Dep't 2020)

In this murder prosecution Court held the admission of an anonymous 911 call was reversible error. It was not admissible as an excited utterance as the People did not present sufficient facts from which it could be inferred that the anonymous caller personally observed the incident. The anonymous caller merely stated to the 911 operator that "[s]omebody just got shot on East 19th and Albemarle" and that it "was a guy with crutches. He started to shoot." Nothing in these brief, conclusory statements, which were made at least five minutes after the shooting occurred, suggested that the caller was reporting something that he saw, as opposed to something he was told. Moreover, although there was testimony that the call was made from a payphone located in the vicinity of the shooting, the People did not demonstrate that the payphone was situated outdoors or in a place where the actual site of the shooting would be visible. Court also held the declarations of the 911 caller were not admissible under the "present sense impression" exception to the hearsay rule as the People failed to demonstrate that the anonymous caller was describing events that he actually perceived.

People v. Thomas
174 A.D.3d 1430 (4th Dep't 2019)

In this criminal prosecution, Court held trial court properly determined that the police officer's testimony that D's brother said that "D came at us with a knife" was admissible under the present sense impression exception. That statement was made by D's brother "immediately after the event" it describes, and it had the requisite "corroboration to bolster . . . assurances of its reliability."

People v. Sampson
__ A.D.3d __ (4th Dep' 6/12/20)

In this DWI prosecution, D argued that the trial court erred in determining that the testimony of a State Trooper regarding statements made by other occupants of the vehicle was admissible in evidence under the present sense impression and excited utterance exceptions. When the Trooper first approached the window of the vehicle, about 20 seconds after pulling it over, he observed D attempting to settle himself between two occupants of the vehicle who were sitting in the back seat, and he heard the other occupants spontaneously state, among other things, that D was the driver of the vehicle. The court properly admitted in evidence the spontaneous statements of the other occupants of the vehicle as excited utterances and present sense impressions inasmuch as the statements described an unfolding situation and were verified by the Trooper's own observations.

People v. Allen
63 Misc.3d 969 (Sup. Ct. Queens Co. 2019) (Zayas, J.)

In this unlawful possession of a weapon prosecution, People moved to introduce at trial testimony concerning an uncharged robbery that D allegedly committed minutes before police arrested him and found a pistol in his truck. The testimony was not from the robbery victim but from a police officer with whom the victim spoke after D had been arrested. The argument was the victim's statement was admissible as an excited utterance. Court held the testimony was inadmissible under the Confrontation Clause. It was of the view that the statement was testimonial as, viewed objectively, the purpose of the statement was to provide the police with information about a past event with the understanding that it would be likely used in a criminal prosecution.

E. Business Record

1. Foundation Requirements

Freeman v. Shtogaj
174 A.D.3d 448 (1st Dep't 2019)

In this medical malpractice action, Court held the trial court properly admitted into evidence the medical records of Ps' treating physician, notwithstanding that these records contained reports from other doctors, based on the treating physician's testimony that they were created in the ordinary course of business for the purposes of diagnosis and treatment. **COMMENT:** Note that the admitted records included reports from other doctors. Basis for their admissibility?

Global Energy Eff Holdings v. M&T Bank
180 A.D.3d 624 (1st Dep't 2020)

Court held insurance investigator's report on his second interview with decedent's wife was not admissible as a business record because it was not prepared pursuant to the investigator's standard procedure.

Viera v. Khasdan
__ A.D.3d __ (1st Dep't 7/6/20)

In this dental malpractice action, Court held Supreme Court erred in denying Ds' motions for S/J on the ground that they relied on uncertified dental records. Here, P did not challenge the accuracy or veracity of the uncertified dental records; to the contrary, she relied on them in opposing Ds' motions and appended certified dental records to her opposition papers.

Wu v. City of New York
183 A.D.3d 411 (2d Dep't 2020)

In this excessive force action, Court held trial court properly rejected plaintiff's attempt to authenticate her medical records through the testimony of someone who merely became the records' physical custodian after the sale of the surgical center at which they were created.

Bank of New York Mellon v. Gordon
171 A.D.3d 197 (2d Dep't 2019)

In a comprehensive decision opinion by Justice Miller, Court provided guidance for the admissibility of records establishing mortgagor's default. P bank in order to prevail on its S/J motion for foreclosure on the mortgage executed by D was required to establish that it had standing by proof it is the holder or assignee of the underlying note and that D was in default. P sought to establish standing through an affidavit of an employee of its attorneys wherein she averred she was the manager of a group of employees that were "responsible for receiving original loan documents from the firm's clients and documenting the receipt of those original loan documents; that when a client forwards a filed containing original loan documents her staff makes a computer entry … confirming their receipt; these entries were made at or about the time of the receipt of the original loan documents; the records of such events were created and maintained in the ordinary course of the firm's business to store these records as computer entries." Court held the affidavit was sufficient noting that the manager had knowledge of the practices of her law firm and her averments established compliance with the elements necessary to establish the exception. However, the Court found lacking the affidavit from an employee of the lenders' loan service submitted in support of showing D's default. The affidavit stated that from the records she reviewed, D had defaulted on the loan. The affidavit was insufficient as it did not indicate that the affiant was familiar with the original lender's record-keeping practices and procedures. **COMMENT:** The exception's foundation must be established by a person with knowledge of the practices and procedures of the business making the record. Court also noted that such person did not have to be an employee of the entity making the record.

Deutsche Bank v. Elshiekh
179 A.D.3d 1017 (2d Dep't 2020)

In this foreclosure action, Court held affidavits submitted by P were insufficient to establish S/J. It stated: "Both affiants based their assertions upon their review of unspecified business records without attaching or otherwise incorporating any such business records to their affidavits. Thus, their averments constitute inadmissible hearsay, lacking probative value. Evidence as to the

content of business records is admissible only where the records themselves are introduced; without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay. It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted. A witness's description of a document not admitted into evidence is hearsay. The assertions by the affiants as to the contents of records were inadmissible without the submission of the records themselves. While a witness may always testify as to matters within his or her personal knowledge through personal observation, neither affiant claimed to have any such personal knowledge."

American Home Mortgage v. Carnegie
181 A.D.3d 632 (2d Dep't 2020)

In this mortgage foreclosure action, Court held the affidavit of an employee of P's current loan sub-servicer was insufficient to lay the foundation to support the admissibility of the records relied upon by the affiant for her assertion that the note was transferred to P's custodian prior to the commencement of the action and remained in the possession of P's custodian at the time of commencement. The Court further held the affiant's assertions as to the contents of the records were inadmissible without the submission of the records themselves. **COMMENT:** Absent was the requisite knowledge of the recordkeeping practices of the entity.

People v. Stover
174 A.D.3d 1150, 105 N.Y.S.3d 194 (3d Dep't 2019)

Int his assault prosecution, Court held an x-ray report of victim's right eye was properly admitted under the exception as it was produced by medical imaging company, in its regular course of business as part of its medical care of inmates, at the correctional facility and its request, and certification accompanying the record was executed by the correctional facility's designated custodian of medical records under CPLR §§2306(a), 4518(c).

2. Information Recorded (*Johnson v. Lutz*)

Walid M. v. City of New York
176 A.D.3d 619 (1st Dep't 2019)

In this assault and excessive force action involving, P, a teenager diagnosed with autism, Court held the trial court also did not improvidently exercise its discretion in allowing only a limited subset of P's records from facility in which P was residing to be admitted into evidence. Court noted it was clear that these records required at least some redaction, including to eliminate double hearsay and propensity evidence. Since D's refused to propose any redactions, after having been given ample opportunities to do so, the trial court was justified in adopting Ps' proposed redactions instead. Ds cannot now complain that the records should have been redacted less heavily.

Global Energy Eff. Holdings v. M&T Bank
180 A.D.3d 624 (1st Dep't 2020)

In this action, Court held trial court properly excluded as double hearsay a written report including a statement by the decedent's wife. The statement is not admissible as a business record, because the decedent's wife was under no duty to make the statement. Nor is the statement admissible as an excited utterance, because, among other things, it was not made contemporaneously with, or immediately following a startling event.

Hasan v. City of New York
183 A.D.3d 572 (2d Dep't 2020)

In this MV rear-end collision accident case, Court granted P's S/J motion on liability. It relied upon, *inter alia*, a submitted certified copy of a police accident report which contained D's admission that the took his eyes off the road for a second and struck the rear of P's vehicle.

People v. Sabirov
__ A.D.3d __ (2d Dep't 6/17/20)

In this sex abuse prosecution, D sought to introduce as a business record a Desk Appearance Ticket Investigation form (DAT form) which contains information from the arresting officer at the time of the arrest. The DAT form contained the arresting officer's notation, "intox," and a box checked by the arresting officer indicating "under the influence of drugs/marihuana to the degree that he may endanger himself or others." The arresting officer testified that he had completed the form in his own handwriting. The trial court should have allowed the D to introduce the DAT form as an admissible business record of the Police Department. The DAT form should not have been excluded at trial, and it is evidence that, notwithstanding the arresting officer's testimony that D did not stumble, slur his speech, or vomit at the time of the arrest, the officer assessed that the D was intoxicated.

People v. Sabirov
__ A.D.3d __ (2d Dep't 6/17/20)

In this sex abuse prosecution, D sought to introduce an Early Case Assessment Bureau sheet (ECAB sheet) apparently created by the Police Department or the District Attorney's office, as well as the testimony of the individual who created it to establish the foundation for its admission as a business record. The ECAB sheet supported D's request for an intoxication charge and also provided a basis for impeachment of the arresting officer's testimony as to his perceptions of D's condition at the time of the arrest. The ECAB sheet contains the statement that D "appeared to be intoxicated, and did not appear to understand why [he] was being arrested." This document, which includes statements from the arresting officer, is potentially admissible as a business record of either the Police Department or the District Attorney's office. Upon objection by the People to its admission, the trial court should have granted the defendant's request to elicit the

testimony of the individual who created the document in order to lay an evidentiary foundation by establishing that "each participant in the chain producing the record, from the initial declarant to the final entrant, was acting within the course of regular business conduct." D should also have had the opportunity to try to establish that any statements in the ECAB sheet attributed to the arresting officer might themselves qualify as exceptions to the hearsay rule. Had D been permitted to explore the circumstances under which the ECAB sheet was created, D may have established that the statements contained in the ECAB sheet were admissible for the truth of those statements.

Kawalsingh v. Champion
67 Misc.3d 378 (Sup. Ct. Queens Co. 2020) (Caloras, J.)

In this MV accident case in which P's car was rear-ended by D's car, court denied P's motion for partial S/J on liability. It relied upon, *inter alia*, a police accident report, recording P's statement "I applied the brakes to slow down," a statement which was inconsistent with other accounts of the accident made by P. Court noted that "although the police report ordinarily might not be admissible under the business exception rule, it may be admissible where, as here, it contained admissions and declarations against interest. Consequently, P's statement in the police report is admissible." **COMMENT:** Why "ordinarily" admissible? Police accident reports are admitted subject to *Johnson v. Lutz*.

F. Past Recollection Recorded

People v. Tapia
33 N.Y.3d 257 (2019)

In an assault prosecution Court held Supreme Court did not abuse its discretion in admitting as a past recollection recorded the grand jury testimony of one of the arresting officers who testified at trial, but could not recall the circumstances leading to D's arrest. Here, at trial the officer stated that he had previously testified truthfully and accurately at the grand jury to an event he had observed when that event was still fresh in his mind, and that reading the official minutes of the prior testimony did not refresh his present recollection. Although the officer, based on his lack of independent recollection, could not swear that the transcription of his testimony was accurate, the court stenographer's certification of the grand jury testimony, together with the officer's statement that he had testified truthfully and accurately, satisfied the requirement that the transcript of the official minutes was a correct representation of the prior testimony. A trivial typographical error in the transcript of the officer's testimony did not create an improper foundation, particularly where D fully explored the discrepancy on cross-examination.
COMMENT: Court noted that when a statement is admitted under the exception, it is received as a "supplement" to the witness's trial testimony. For further discussion, *see* Shechtman, "Evidence Admissibility in *People v. Tapia*," NYLJ, April 18, 2019, p. 3, col. 3.

People v. Folk
173 A.D.3d 403 (1st Dep't 2019)

In this assault prosecution, the trial court admitted the grand jury testimony of a witness indicating that D fired an errant shot that struck a bystander as D fled an altercation. Court noted the People's concession that the testimony was not admissible under the exception because the witness did not testify at trial that the testimony "correctly represented his knowledge and recollection when made."

Global Energy Eff. Holdings v. M&T Bank
180 A.D.3d 624 (1st Dep't 2020)

Court held the insurance investigator's report on his second interview with decedent's wife, which, in a break with his custom, the investigator did not ask the decedent's wife to sign, is not admissible as a past recollection recorded because it lacks the requisite trustworthiness.
COMMENT: See also discussion in Business Records.

Rosen v. Mosby
180 A.D.3d 1253 (3d Dep't 2020)

In this real property related action, Court held trial court did not err in precluding P's handwritten memorandum with regard to his interactions with D as P testified that he readily recalled the details of his conversation with her.

G. Hospital and Medical Records

People v. Ortega
15 N.Y.3d 610 (2010)

In this consolidated appeal, Court restated familiar law that hospital records fall within the business records exception to the hearsay rule when they reflect acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects of the particular patient's hospitalization; however, where details of how a particular injury occurred are not useful for purposes of medical diagnosis or treatment, they are not considered to have been recorded in the regular course of the hospital's business. In *Benston*, it then held that records' identification of victim's assailant as "an old boyfriend" and description of case as involving "domestic violence" and reference to "safety plan" for victim were relevant to diagnosis and treatment of victim, and thus admissible in an assault prosecution as domestic violence was part of attending physician's diagnosis, domestic assault differed materially from other types of assault in its effect on victim and in resulting treatment, and developing safety plan for victim, including referral to shelter or dispensing information about domestic violence and necessary social services, was important part of victim's treatment. In companion case *Ortega*, Court held statement in record that victim was "forced to" smoke white, powdery substance, was relevant to victim's diagnosis and treatment, and thus admissible to in criminal possession of stolen property prosecution, since victim, under such scenario, would not have been in control over either the amount or the nature of the substance he ingested, and treatment of a patient who is the victim of coercion may differ from a patient who has

intentionally taken drugs. **NOTE:** *See* discussion of *Ortega* in Hutter, "Admissibility of Patient's Statement In Medical Record - Redux," NYLJ, 2/3/11, p. 3, col. 1.

People v. Cosme
173 A.D.3d 445 (1st Dep't 2019)

In this robbery prosecution, Court held trial court providently exercised its discretion in admitting limited portions of a non-testifying victim's medical records in which he reported that he had been struck with a handgun, and there was no violation of the hearsay rule or the Confrontation Clause. The particular type of object that caused the victim's injuries was relevant to diagnosis and treatment and there was no *Crawford* violation, because the records were not prepared in anticipation of litigation.

Grechko v. Maimonides Med. Ctr.
175 A.D.3d 1261 (2d Dep't 2019)

In this medical malpractice action, it was alleged that decedent left D after treatment at its ER against medical advice. ("AMA"). However, in decedent's medical records there was an entry that according to his physician decedent had signed an AMA form. Trial court ruled the entry was not admissible. Initially, Court held that while the entry was germane to decedent's medical treatment, Ds had failed to offer foundational testimony for it under CPLR 4518(a) or certification under CPLR 4518(c), and thus entry was not admissible under business records exception. Court further held the entry was not admissible as an admission of decedent because the source of the entry was not decedent but the physician. **COMMENT**: (1) In its opinion, Court noted that an entry in a medical record which is inconsistent with the patient's position in the litigation is admissible even if the entry was not germane to treatment, provided patient was the source. This conclusion is contrary to the leading Court of Appeals case, *Williams v. Alexander* (309 N.Y. 283 [1955]). For discussion, see Hutter, "Admissibility of Patient's Statement in Medical Record," NYLJ, 12/2/10, p. 3, col. 3. (2) Certification alone should not provide basis for admissibility of entry.

H. Statements of Physical Condition and Cause Thereof

People v. Duhs
16 N.Y.3d 405 (2011)

In this child abuse prosecution arising out of D's alleged conduct in placing a three-year-old's feet and lower legs into a tub filled with scalding hot water, Court held testimony of pediatrician who treated the infant for his burns that child told her D "wouldn't let me out" in response to pediatrician's question as to how he was injured was admissible as mechanism of treatment was germane to pediatrician's treatment of child. Of note, the physician testified such information was germane to her treatment. **COMMENT:** (1) Court has certainly overruled in part *Davidson v. Cornell* (132 N.Y. 228 [1892]) which, as prior cases and commentary have stated, holds to the contrary, although Court does not state it is doing so and cites *Davidson* for support of its ruling. As a result of *Ortega,* and *Duhs,* New York's medical statement hearsay exception now provides that statements made to a physician relating to present and past pain and physical condition, and

the cause thereof are admissible if germane to the person's diagnosis and treatment, bringing New York in line with the modern evidence rule. For further discussion of the implications of these decisions, *see, Hutter, "*Medical Statement Exception," NYLJ, 6/02/11, p.3; (2) The Second Circuit reversed the grant of habeas corpus to D, finding that the Court of Appeals' ruling was not contrary to or an unreasonable interpretation of established Supreme Court law. *See, Duhs v. Capra,* 639 Fed. Appx. (2d Cir. 2016), *revg*. 83 F.Supp.3d 435 (ED N.Y. 2015).

I. Prior Consistent Statement

Dees v. MTA New York City Transit
178 A.D.3d 633 (1st Dep't 2019)

In this negligence action, based on evidence that the rear tire of D's bus ran over decedent's right foot when the bus mounted the sidewalk as it was pulling into a bus stop, Court held decedent's statement to his attorney, in correcting an inaccuracy in the notice of claim, that he was in the middle of the block and the subsequent amended notice of claim file by his attorney were admissible as prior consistent statements.

J. Prior Testimony

People v. Tapia
33 N.Y.3d 257 (2019)

In this assault prosecution, Court held that in the absence of D's right of confrontation, CPL 670.10 does not allow the People's use of grand jury testimony for the reason that there was no cross-examination in the grand jury proceeding.

VII. EXPERT TESTIMONY

A. Appropriate Subject Matter: Necessity/Helpfulness

People v. Boone
30 N.Y.3d 521 (2017)

Court held that in a case in which a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect. Accordingly, in a robbery prosecution in which defendant, a black man, was identified in lineups by the victims, who were both white men, the trial court erred in denying defendant's request that the jury be instructed on cross-racial identification. The likelihood of misidentification is higher when an identification is cross-racial, as people generally have significantly greater difficulty accurately identifying members of other races than members of their own race. Expert testimony on the cross-race effect is not a precondition of a jury charge on the subject. A juror may have a tentative belief, based on his or her ordinary experiences, that cross-racial identifications are often inaccurate, but most jurors will have no knowledge of the research demonstrating the cross-race effect. Expert testimony explaining the studies to the jury is therefore admissible, because it would help to clarify an issue calling for professional or technical knowledge

possessed by the expert and beyond the ken of the typical juror, but does not render a charge regarding the cross-race effect superfluous. Moreover, a cross-racial identification charge should not be predicated on whether defense counsel cross-examined the People's witnesses about their identification, since some mistaken eyewitnesses, at least by the time they testify at trial, exude supreme confidence in their identifications.

Daniels v. New York City Trans. Auth.
35 N.Y.3d 938 (2020)*, revg.*, 171 A.D.3d 601 (1st Dep't 2019)

In this subway accident case in which P's leg slipped into a gap between the train doors and the platform, Court held the trial court properly admitted P's expert testimony regarding nonmandatory gap standards promulgated by the American Public Transit Association and the Public Transportation Safety Board.

People v. Johnson
175 A.D.3d 1130 (1st Dep't 2019)

In this attempted murder prosecution Court held trial court properly permitted the People's expert to testify that persons asserting insanity defenses may exaggerate their mental illnesses in order to avoid prison. Court noted the trial court's jury instructions were sufficient to prevent either the expert testimony at issue, or a summation remark from misleading the jury about the consequences of an insanity acquittal.

People v. Hernandez
181 A.D.3d 530 (1st Dep't 2020)

In this murder prosecution, Court held trial court did not abuse its discretion in precluding expert testimony on the effect on memory of a lengthy period of time (33 years) because the expert's proposed testimony was within the jurors' ordinary experience and knowledge.

People v. Lesane
__ A.D.3d __ (1st Dep't 7/6/20)

In this drug prosecution, Court properly exercised its discretion when it admitted expert testimony concerning circumstances that indicate an intent to sell drugs as opposed to possession for personal use. The testimony was within the scope permitted under Court of Appeals precedent and it did not invade the province of the jury.

People v. Enoksen
175 A.D.3d 624 (2d Dep't 2019)

In this prosecution of an attorney for grand larceny, Court held trial court acted within its discretion in permitting the People to call an expert witness to testify about the purpose of an escrow account and how it differs from other types of accounts, which, here, was helpful in clarifying issues beyond the ken of the typical juror.

People v. Shoshi
177 A.D.3d 779 (2d Dep't 2019)

In this criminal contempt prosecution, Court held trial court did not err in permitting an expert in the field of domestic violence to testify on the subject of domestic violence generally. Court noted the expert's testimony was relevant to explain the behavior patterns of victims of domestic violence that might appear unusual or that jurors might not be expected to understand, and she did not testify as to the particular facts of the case or offer an opinion as to whether the conduct at issue constituted domestic violence.

People v. Churaman
__ A.D.3d __ (2d Dep't 6/24/20)

Court reversed D's murder conviction. The basis for the reversal was the trial court's ruling denying D's application to permit testimony from his expert witness on the issue of false confessions. Court noted that it had previously determined that "it cannot be said that psychological studies bearing on the reliability of a confession are, as a general matter, within the ken of the typical juror.'" Court noted further: "With regard to expert testimony on the phenomenon of false confessions, in order to be admissible, the expert's proffer must be relevant to the [particular] D and interrogation before the court.'" Here, the report of D's expert was sufficiently detailed so that it was relevant to this particular D, including discussing characteristics that heightened his vulnerability to manipulation, and the interrogation conducted by the detectives, such as the techniques that were utilized and the improper participation of D's mother during the interview.

People v. Pascuzzi
173 A.D.3d 1367 (3d Dep't 2019)

In this vehicular manslaughter prosecution, D argued the trial court erred in granting the People's motion *in limine* to preclude D's expert psychiatrist from testifying about the effects of intoxication and trauma on short-term memory formation. Court wrote: "It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefitted by the specialized knowledge of an expert witness. Here, the court found that the expert's testimony would be an improper means of buttressing D's position that he did not remember the accident. This view is supported by the record, as the testimony that D was confused and only partially responsive after the accident permitted the jury to infer that his cognitive abilities could have been affected. Further, the proposed testimony was within the average juror's understanding, not beyond the range of ordinary knowledge or intelligence and does not require professional or scientific knowledge. Thus, the court did not abuse its discretion in precluding the testimony."

People v. Pascuzzi
173 A.D.3d 1367 (3d Dep't 2019)

In this vehicular manslaughter prosecution, Court held the People's accident reconstruction

expert could "offer his professional opinion on the ultimate issue of whether D was driving at the time of the crash" as it "would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror."

People v. Ivanchenko
175 A.D.3d 1428 (3d Dep't 2019)

In this cruelty to animals prosecution, Court held trial court did not err in allowing expert to testify regarding nonaccidental nature of puppy's injuries as the cause of puppy's injuries required scientific and medical knowledge beyond the ken of typical juror.

Zapata v. Yugo J&V, LLC
183 A.D.3d 956 (3d Dep't 2020)

In this P/I action where Ps were injured when they fell 15' to the ground when the deck they were standing on collapsed, Court held trial court did not err in not requiring expert testimony to prove Ps' damages. Court noted: "Generally speaking, expert testimony is appropriate when it serves to clarify an issue that is beyond the ken of the lay juror and calls for professional or technical knowledge. Here, there is no question that the injuries that Ps' sustained were a direct result of the fall precipitated by the deck collapse. Moreover, Ps' testimony regarding the nature and permanency of their injuries, coupled with the medical records introduced into evidence, were not beyond the competence of Ps or the ordinary experience and knowledge of a lay jury so as to require expert testimony to render an appropriate damages award.

O'Keefe v. Wohl
__ A.D.3d __ (3d Dep't 6/25/20)

In this MV accident case, P sued the Town of Northumberland, alleging the Town's negligent construction and maintenance of the roadway was a contributing cause of the accident. Court denied the Town's S/J motion. It noted that P countered Town's expert proof that the roadway was safe with evidence that additional devices, such as a stop sign and painted stop bar, as well as pavement markings indicating the proper turning radius, were required for the subject intersection by applicable design standards; and Ps' expert opined that the absence of such markings and devices was a substantial contributing factor to this collision.

B. Qualifications

Baptiste v. RLP-East
182 A.D.3d 444 (1st Dep't 2020)

In this MV accident case, Court held trial court erred in permitting P to call an accident reconstructionist to testify that his injuries were caused by the construction accident, and not the bus accident, since the witness was not a biomechanical engineer nor was there any evidence that he had relevant medical training. Nevertheless, this error did not require reversal, as P proffered medical experts who testified that P's injuries were caused by the construction accident. Although Ds' experts opined that the injuries were not traumatic, but were degenerative in

nature, one of Ds' medical experts conceded that P's injuries could have been caused by the type of trauma described by a witness to the construction accident.

Galue v. Independence 270 Madison LLC
__ A.D.3d __ (1st Dep't 6/18/20)

P was injured when a towel dispenser/trash receptacle unit installed by D1 in premises owned by D2 fell out of a bathroom wall. Court reversed verdict for Ds, noting, *inter alia*, that to the extent that the unit allegedly fell out of the wall 8 months after installation by D1, the court erred by failing to allow P to fully question the credentials of D1 and his qualifications as an expert.

M.C. v. Huntington Hosp.
175 A.D.3d 903 (2d Dep't 2019)

In this medical malpractice action, P alleged D doctor, a urologist, failed to diagnose his testicular condition when treated at the ER. Court held P's expert, who was board certified in pediatric emergency medicine, but was not a urologist, was qualified to give an expert opinion regarding P's treatment in the ER as he laid the requisite foundation for his asserted familiarity with emergency medicine and the treatment of young adolescent males for various conditions, including testicular torsion, P's condition. While the expert was licensed to practice in CT, rather than in NY, an expert need not be from the exact same locality as where the occurrence took place. Court held it is sufficient if the expert attests to familiarity with either the stance of care in the locality or to a minimum standard applicable locally, statewide, or nationally. His affirmation sufficiently identified, and assessed Ds' conduct against, a relevant standard of care.

Samer v. Desai
179 A.D.3d 860 (2d Dep't 2020)

In this medical malpractice action, Court granted S/J to certain of the Ds. The basis of its ruling was that it disagreed with Supreme Court's determination that the affirmation of P's expert was sufficient to raise a triable issue of fact. It held: "While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. Thus, where a physician provides an opinion beyond his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered. Here, P's expert, who specialized in general and vascular surgery, did not indicate that he or she had any special training or expertise in orthopedics or family medicine, and failed to set forth how he or she was, or became, familiar with the applicable standards of care in these specialized areas of practice.

Kiernan v. Arevalo-Valencia
__ A.D.3d __ (2d Dep't 6/17/20)

In this medical malpractice action, P alleged that D, an internist, failed to diagnose her condition, temporal arteritis, which caused her blindness. On D's S/J motion, Court held P's expert affirmation was not lacking in probative value because Ps' expert was board certified in general

surgery rather than internal medicine. Court noted a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field; however, the expert must be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. Here, Ps' expert's affirmation sufficiently established that Ps' expert was possessed of the requisite skill, training, education, knowledge and experience from which it can be assumed that the opinion rendered was reliable. In particular, the expert demonstrated that he was qualified to render an opinion regarding the symptomology of temporal arteritis, which he characterized as a relatively common disease of the arteries, and as to whether a proper examination and investigation of P's symptoms was conducted in accordance with accepted medical practices.

People v. Pascuzzi
173 A.D.3d 1367 (3d Dep't 2019)

This vehicular manslaughter prosecution arose out of an initial collision of a VW with the rear of a Honda, causing the VW to then strike the rear of a tractor-trailer. Three people were in the VW, D and two friends. The friends died as a result of the accident and D was indicted, charged with being the operator of the VW. D denied he was the driver, claiming he was in the back seat. The Police accident reconstructionist opined that one victim was in the rear passenger seat and the other in the front passenger seat, with D the driver. D argued the expert did not have the necessary qualifications in physics, biomechanical engineering and occupancy kinematics to render an expert opinion as to the positions of the occupants of the VW. Court held: "If the claim had been properly before us, we would not have found that the expert lacked qualifications, as he testified that his collision reconstruction training included over 1,700 hours of training in subjects that included applied physics, biomechanics and occupant kinematics and, further, the he had 18 years of experience in accident reconstruction and had participated in 541 reconstructions." **COMMENT:** Presiding Justice Garry, writing for the Court, set forth in detail the expert's foundation for his opinion. If you have a case involving the use of an accident reconstructionist, this decision is a must read due to the thoroughness of Justice Garry's opinion.

Holownia v. Caruso
183 1085 (3d Dep't 2020)

In this MV accident case, Court held the trial court properly permitted the trooper who responded to the scene of the accident to testify as to her personal observations, investigation and opinion as to whether the tractor trailer contributed to the subject accident. The trooper testified that she investigated hundreds of motor vehicle accidents in her career and that, after arriving at the subject accident scene, she conducted an investigation, interviewed available witnesses and, based thereon, provided a description of the accident scene, including her observations as to the points of impact on the various vehicles involved therein. The trooper's testimony, therefore, "was within the ordinary expertise of a police officer who routinely responds to motor vehicle accidents". Furthermore, When the trooper was questioned as to "the cause of the accident," Supreme Court appropriately sustained plaintiffs' objection. Upon further questioning, the court permitted the trooper to offer her limited opinion as to the contribution of Page's tractor trailer to the accident based upon her investigation of the scene, observation of the damaged vehicles and interviews with witnesses, with her concluding that the tractor trailer did not have "any

influence" on the accident. Given that the trooper's conclusion derived from her own factual observations that did not require any particular expertise, we find no abuse of discretion in Supreme Court's admission of the trooper's testimony.

C. Bases

1. Generally

Salinas v. World Houseware
34 N.Y.3d 1093 (2019)

P alleged she sustained burn injuries when a potholder, sold by D, which she was using caught fire. D move for S/J, and P submitted expert opinions in opposition. The experts relied upon assumption that the subject potholder caught fire after contacting the heating element of P's oven, a fact P specifically denied several times during her deposition. P was not equivocal at her deposition, nor did she seek to correct her testimony at any time thereafter. Court held 4-3: "Although P's deposition testimony partially contradicted the factual conclusions reached by her expert witnesses, the expert opinions were based upon other record evidence and were neither speculative nor conclusory. Insofar as P raised genuine issues of fact on the element of causation, S/J should not have been granted on that ground." **COMMENT:** ?

Estreich v. Jewish Home Lifecare
178 A.D.3d 543 (1st Dep't 2020)

At issue in this P/I action was whether decedent experienced some level of cognitive awareness during her admission to Ds' facilities. Court held P raised a triable issue of fact by her expert's opinion that decedent "had a sufficient level of awareness to enable her to feel pain, as evidenced by the fact that she made facial expressions, smiled, ... grimaced, moaned, blinked, responded to simple questions, responded to verbal and tactile stimuli, and retracted to pain, all of which were indicators of some level of awareness and conscious pain." The facts were noted in decedent's medical records.

Silber v. Sullivan Properties, LP
182 A.D.3d 512 (1st Dep't 2020)

In this slip and fall action, Court held that P in opposition to D's SJ Motion failed to raise a triable issue of fact as his expert's expert opinion was conclusory and speculative, since he did not take measurements of the coefficient of friction of the stairwell or conduct any other tests to show that the combination of the rainwater and marble surface was a hazardous condition .

Zabawa v. Sky Mgt. Corp.
183 A.D.3d 430 (1st Dep't 2020)

In this P/I action, Court held Ds' expert affidavit of their professional engineer stating that the building's steam heating system conformed to the requirements of the Building and Energy Codes of the City of New York failed to satisfy Ds' initial burden as the expert never inspected

the building's heating system, the records of that system or the accident location.

Ippolito v. Con. Edison
177 A.D.3d 715 (2d Dep't 2019)

In this clip and fall action, Court granted D's CPLR 4401 motion for judgment as a matter of law on the ground P failed to establish a *prima facie* case of negligence as the testimony of her expert on liability was based on unsupported assumptions and was speculative. It noted, as an example that the expert testified to having no knowledge of when the sidewalk was constructed, when the manhole had been installed, or the weight and inside dimensions of the manhole structure. Yet, he opined that D was responsible for the settling of the sidewalk flag and manhole due to improper backfilling, simply because the manhole belonged to D at the time of P's fall.

Kingsley Arms, Inc. v. Kirchoff
173 A.D.3d 1506 (3d Dep't 2019)

In this construction contract action trial to the court, P presented expert testimony from its expert, Reeves, regarding the cause of the pipe failure in issue. The trial court did not credit this testimony, and Court held no abuse of discretion in doing so was present. In this connection, Court noted that Reeves' opinion that the pipes were over pressurized due to excessive surface water did not account for the first phase of the project that was previously described. Further, although Reeves opined that the design was based on flawed assumptions, he conceded that he did not do any calculations to support his conclusion that the specified pipe was insufficient based on what he believed to be the correct soil composition and volume of water runoff. Further, Reeves placed great emphasis on the evidence of "geysers" downstream from the project site during excessive rainstorms, but there was no evidence of similar incidents following the second repair. Thus, there was a basis for discrediting the opinion.

Darrow v. Hetronic Deutschland GMBH
181 A.D.3d 1037 (3d Dep't 2020)

In this products liability action based upon an improperly designed remote control device used to operate a boom crane, Court affirmed S/J to Ds. It noted that P's expert's affidavit was insufficient to raise a triable issue of fact as the expert opinion was not supported by his own inspection and testing of the device but upon deposition testimony of witnesses to explain the functions of the remote; offered no proposed alternative designs; and did not point to any industry standards or data to support his conclusion that the absence of a "dead man's" switch rendered the remote unsafe.

Page v. Niagara Falls Memorial Med. Ctr.
174 A.D.3d 1318 (4th Dep't 2019)

In this medical malpractice action, Court held P's submissions were insufficient to raise a triable issue of fact whether any such deviation was a proximate cause of P's alleged injuries. Here, Ps' expert did not adequately address D's *prima facie* showing that there was no evidence of a brain injury resulting from the adverse respiratory event. In particular, Ps' expert failed to address or

explain the results of the CT scan performed shortly after the adverse respiratory event that showed "no evidence of acute brain injury," and he did not address the results of an MRI taken a few days after P's discharge from the ICU that was "[u]nremarkable" and "fail[ed] to demonstrate an acute ischemic event." Instead, Ps' expert asserted that "it is likely that [P] underwent brain damage . due to lack of oxygen to her brain" during the period between the discovery of her respiratory distress and the administration of the emergency opioid-reversing medication, and then assumed the existence of such an injury in opining that an immediate administration of such medication would have "lessen[ed] the injury to [P's] brain." This was held to be conclusory and speculative.

Stradtman v. Cavaretta
179 A.D.3d 1468 (4th Dep't 2020)

In this medical malpractice action, Court held P's expert's opinion was appropriately based on decedent's medical records. Court noted: "Those records included a CT scan of decedent revealing pneumatosis, which, according to Caruana's testimony, suggested that decedent's bowel was dying. The records also included the autopsy report, confirming that the cause of decedent's death was the passing of gastrointestinal contents through the wall of the dying bowel. Based on that information, the expert opined: once a CT reveals pneumatosis, standards of care require that a surgeon visually inspects all of the portions of the bowel in the operating room. This is because bowel ischemia may or may not be reversible, and in case ischemia cannot be reversed, a bowel resection is necessary to save a patient's life." **COMMENT:** Note the factual basis of the opinion and the explanation tying together the opinion from the facts. No "ipse dixit" was present.

Dziwulski v. Tollini-Reichert
181 A.D.3d 1165 (4th Dep't 2020)

In this medical malpractice action, Court granted D's S/J motion. Court held the affidavit of P's medical expert failed to raise a triable issue of fact in opposition inasmuch as the affidavit itself lacked a proper foundation for consideration. Court noted P's expert failed to state whether he or she reviewed the BOP, the deposition testimony, or the affidavit of D's medical expert.

Golimowski v. Town of Cheektowaga
__ A.D.3d __ (4th Dep't 6/12/20)

In this MV accident case the trial court, ruling just before jury selection on P's previously filed motion *in limine* precluded, *inter alia*, expert testimony referencing to or relying upon P's pre-accident alcohol use. Court upheld ruling. It noted that in the absence of foundational testimony describing P's actions at the time of the accident, which occurred approximately eight hours after she consumed her last alcoholic beverage, or drawing a connection between P's alcohol use and her alleged comparative fault, any evidence regarding her pre-accident use of alcohol was of no probative value and highly prejudicial.

2. Professional Reliability

Freeman v. Shtogaj
174 A.D.3d 448 (1st Dep't 2019)

In this medical malpractice action, the P's treating physician records, which included reports from other physicians, were properly admitted. Court held those records were properly relied upon by P's treating physician in offering his opinions. It noted the underlying MRI films were properly admitted, and the other MD's reports did not form the "principal basis" for the expert's opinions.

Walid M. v. City of New York
176 A.D.3d 619 (1st Dep't 2019)

In this assault and excessive force action involving a teenager diagnosed with autism, Court held P's expert testimony was not insufficient to support an award for emotional distress and psychological injury. It noted the expert's reliance on statements made by his subject (P) in two interviews was proper, as such evidence is clearly generally accepted as reliable in the profession. Although the expert's reliance on statements by P's sister was improper, as there was no showing that such statements are generally accepted as reliable and she was not called as a witness at trial, this is not a basis to disregard his entire opinion, but only any portions based solely on such statements. Because the expert's key conclusions were based primarily on appropriate evidence, and are supported by other evidence in the record, they were appropriately considered.

Global Energy Eff. Holdings v. M&T Bank
180 A.D.3d 624 (1st Dep't 2020)

Court held trial court properly rejected the opinion of D's expert as unreliable, because D failed to show that the hearsay evidence that formed the basis of the opinion was the type of material commonly relied on in the medical profession. **COMMENT:** Court did not state the nature of the hearsay evidence.

Matter of Fredericka v. Jolanda S.
176 A.D.3d 1624 (4th Dep't 2019)

In this proceeding to terminate parental rights, Court held *Matter of State of New York v. Floyd Y.* (22 N.Y.3d 95, 979 N.Y.S.2d 240 [2013]) applies in a narrow context: the admission of hearsay evidence serving as the basis of an expert's opinion at civil commitment hearings held pursuant to article 10 of the Mental Hygiene Law. In cases such as respondent's, however, courts apply the professional reliability exception to the foundation requirements for expert testimony without addressing *Floyd Y.* (*see e.g. Matter of Angell SS [Caroline SS]*, 129 A.D.3d 1119, 1120, 10 N.Y.S.3d 697 [3d Dep't 2015]; *Matter of Kaitlyn X [Arthur X]*, 122 A.D.3d 1170, 1171, 997 N.Y.S.2d 777 [3d Dep't 2014]). To the extent that *Floyd Y.* requires additional due process scrutiny in the civil commitment context, its analysis should not be applied to the instant Family Court proceedings."

Latini v. Barwell
181 A.D.3d 1305 (4th Dep't 2020)

In this MV action, P challenged D's expert's opinion submitted in support of D's S/J motion as incompetent because the expert relied upon unsworn medical reports and records. Court held the expert could rely on those documents as his opinion was sworn. **COMMENT:** Court applies "professional reliability" expert opinion basis rule

D. Methodology

1. Need

Romano v. Stanley
90 N.Y.2d 444 (1997)

In this Dram Shop Act action, plaintiff's expert opined that decedent driver must have been visibly intoxicated at D's bar where she was served four hours before her death, because an opinion reached based upon her blood alcohol level of .33% at the time of death and the normalcy of her liver. Court held opinion inadmissible as the expert gave no testimony as to how he reached that opinion from the two relied upon facts. It was, accordingly, "speculative". **COMMENT:** Reminder that mere *ipse dixit* of expert is insufficient.

2. *Frye*: Reliability

People v. Williams
__ N.Y.3d __ (3/31/20)

In this manslaughter prosecution, court held that the trial court erred in admitting expert testimony relating to low copy number (LCN) testing and forensic statistical tool (FST) testing without first holding a *Frye* hearing. It noted that the trial court relied on a prior Supreme Court ruling which held that such evidence was admissible under *Frye*, a ruling based upon acceptance in many other countries, and OCME's own internal support. Court held there was indeed "marked conflict with respect to the reliability of LCN DNA within the relevant scientific community at the time the LCN issue was litigated in this case." The fact that LCN evidence is used in foreign countries was deemed of "no consequence inasmuch as there is no indication that the threshold for admissibility in those bodies contains the same exacting standards to be applied in courts of this state." According to the Court, the conflict among the experts was simply too sharp to ignore. **COMMENT:** Court suggested that a *Frye* hearing may be called for even with respect to standard forensic tests when there is present disagreement in the scientific community.

Knafo v. Mt. Sinai Hosp.
__ A.D.3d __ (1st Dep't 6/18/20)

In this medical malpractice action, P's experts proposed to testify that P's hyponatremia, which was subsequently corrected, caused permanent fasciculations. Supreme Court rejected the testimony based on *Frye*. Court affirmed, noting: "To satisfy the *Frye* standard, expert

testimony must be based upon a scientific principle or procedure which has been "sufficiently established to have gained general acceptance." A party fails to carry this burden if it does not present supporting material such as clinical data and peer reviewed medical literature. Here, the material presented by P's proposed experts discussed the presence of involuntary fasciculations in patients who experienced hyponatremia, but who also demonstrated indicia of brain damage.

Cabera v. Port Authority of NY
__ A.D.3d __ (1st Dep't 7/16/20)

Court set aside jury verdict for P. Among other trial holdings requiring reversal, Court held the trial court erred in precluding Ds' accident reconstructionist from testifying. It noted the trial court's *in limine* inquiry of the expert concerning scientific studies was not relevant, as the subject of the testimony, accident reconstruction and perception reaction time are not novel scientific theories, such as to require a *Frye* hearing; the proposed expert testimony was based on evidence in the record concerning the accident, and was not entirely speculative; and Ds' notice of expert exchange was not insufficient such as to warrant his in toto preclusion. The remedy for any alleged failures in specificity could have been handled by limiting his testimony to the subject matters listed in the exchange.

People v. Degracia
173 A.D.3d 1199 (2d Dep't 2019)

In this criminal prosecution, D argued trial court erred in denying his motion to conduct a *Frye* hearing to determine the admissibility of the results of DNA testing derived from the use of the Forensic Statistical Tool ("FST"). Court held given the acceptance of FST by other trial courts in New York, denial of motion was proper.

Guerra v. Ditta
__ A.D.3d __ (2d Dep't 7/8/20)

In this MV accident case, S/J on liability was granted to P. Prior to the trial on damages, P moved to preclude D's proffered biomechanical expert from testifying or in the alternative for a Frye hearing. Trial court denied the motion. The jury then found that P did not sustain a serious injury. Court held that there was no need to hold a Frye hearing as it had previously ruled that biomechanical engineering is a scientific theory accepted in the field. However, it hen held that there was an insufficient foundation for the expert's opinion. Specifically, D failed to show that the expert's opinion related to existing data and were the result of properly applied accepted methodology.

Altman v. Shaw
184 A.D.3d 995 (3d Dep't 2020)

In this MV accident case, Ds moved for S/J on the ground P did not sustain a serious injury as a result of the accident. In support it submitted the affidavit of a biomechanical engineer. He analyzed the subject collision to calculate the change in velocity for each vehicle involved and concluded that, because P was rear-ended, the forward motion would be limited by her seat belt

and shoulder harness, and the impact could not have caused P's cervical spine injury. Court held this proof together with other proof was sufficient to meet D's burden.

Public Administrator v. New York Presbyterian Hospital
2019 NY Slip Op. 50557(U) (Sup Ct. Kings Co.) (Genovesi, J.)

In this med mal action, P alleged that decedent developed amyloidosis as a result of extravasation of urine into peritoneum following renal transplant. Court dismissed complaint, finding P's medical affidavit in support of P's theory of liability was legally insufficient under *Frye*. Court initially noted that *Frye* is concerned about whether the expert's deductions are based on principles that are sufficiently established to have gained general acceptance as reliable and not with the reliability of the expert's conclusion. It then found P had failed to provide medical literature, legal writings or judicial opinions, or other expert opinions which support Dr. Poznansky's broader theory of causation herein, which, stated succinctly, is that the decedent developed amyloidosis from: (1) peritonitis, caused by both chronic inflammation and bacterial or fungal infection; (2) the urine leak acting akin to peritoneal dialysis; and (3) the inflammation in the peritoneum acting akin to pyelonephritis. Most of the articles submitted by the plaintiffs' experts generally address different types of amyloidosis within the context of renal transplant patients. The remaining articles, fail to support the expert's theories as to the cause of the decedent's amyloidosis.

Murray v. Cayuga Med. Ctr.
2019 NY Slip Op 51912(U) (Sup. Ct. Tomkins Co.) (McBride, J.)

On April 24, 2015, P, a physician, fell and injured his leg at a drainage inlet on CMC's premises. He was diagnosed with a quadriceps muscle tear involving the vastus intermedius and lateralis muscles centered at the mid and distal musculotendinous junctions. By May 11, 2015, at his first physical therapy session, he had developed symptoms of numbness, muscle spasms, and pain. Throughout May and June, his symptoms increased, and he developed additional symptoms including increased unexplained falls. After his symptoms increased significantly, he was admitted for a hospital stay and eventually diagnosed with Guillain-Barre Syndrome (GBS). P provided expert disclosure on April 10, 2019 and an amended disclosure on June 9, 2019 which opined that Dr. Murray's GBS diagnosis was caused by the muscle tear from the fall on CMC's property. Subsequently, CMC a *motion in limine* seeking to preclude the opinions of Ps' various experts on the basis that they are not founded on theories generally accepted in the relevant scientific community. P filed opposition stating that while the result may be novel, the methodology that led to the theory is based on established scientific theory generally accepted in the relevant scientific community. Court conducted a *Frye* hearing at which P's and D's respective experts, all internationally renowned neurologists testified. P's experts testified that his leg injury resulted in a traumatically induced variant of GBS. CMC's experts, on the other hand, testifird that there is no scientific basis for the theory that a muscle tear could cause GBS which is most often causally linked to bacterial infections. Supreme Court in a carefully reasoned opinion upon a thorough review of the medical testimony denied the motion. The court accepted P's expert's testimony based on deduction, extrapolation and drawing inferences from the existing accepted scientific theories. **COMMENT**: Significantly, the court observed that general acceptance does not mean that the majority of scientists come to the same conclusion. For further discussion, *see* Hoenig,

Recent *Frye* Gatekeeping Rulings, NYLJ, Nov. 12, 2019, p.3 col 3.

VIII. PRIVILEGE

A. Fifth Amendment

Andrew Carothers, MD, PC v. Progressive Ins. Co.
33 N.Y.3d 389 (2019)

P sought to recover unpaid claims of no-fault benefits assigned to P. D withheld payment, arguing that P was improperly controlled by non-physicians. At the trial, two non-physician's depositions in which they repeatedly invoked the Fifth Amendment were read into evidence and the trial court charged that the jury could draw an adverse inference against P on the basis of the invocations of the Fifth Amendment. The Appellate Division held no such inference could be drawn. When the case got to the Court of Appeals, the Court noted it had never addressed the issue of whether the adverse inference would be permissible by a non-party's invocation of the Fifth Amendment. However, it did not resolve the issue here as any error was harmless.
COMMENT: The Appellate Division decision is reported at 150 A.D.3d 192 (2d Dep't 2017). In *Bikowica v. Sterling Drug* (161 A.D.2d 982 [3d Dep't 1990]), the Third Department held the adverse inference could be given upon a non-party's invocation of the Fifth Amendment.

B. Attorney-Client

1. Applicability

Spicer v. Garda World Consulting
181 A.D.3d 413 (1st Dep't 2020)

Ps were the sole shareholders of Hestia prior to selling all of their shares to D; and KDC was Ps' financial advisor in connection with the sale transaction. D sought disclosure of pre-closing communications between Ps' counsel and KDC that were withheld as privileged. Court in upholding privilege claim noted that KDC was not retained to assist Ps' counsel in providing legal advice. However, the unrebutted evidence reflects that KDC spent some portion of its time helping counsel to understand various aspects of the transaction for that purpose. As such, KDC's presence was necessary to enable attorney-client communication. Court also noted that Ps also had a reasonable expectation that the confidentiality of communications between their counsel and KDC would be maintained. Ps' counsel attested that KDC promised to keep all such communications confidential. The governing Purchase and Sale Agreement also specified that all privileged documents related to the transaction would remain protected from disclosure to defendant even after closing.

Saran v. Chelsea GCA Realty
174 A.D.3d 759 (2d Dep't 2019)

In this declaratory judgment action, D moved for a protective order suppressing emails between its CEO and in-house counsel which had been inadvertently disclosed to P, claiming the emails

were protected by the privilege. Court denied the motion. It noted the communications related to the business of the D, rather than legal issues, and nothing stated by in-house counsel in the emails sets him apart as a legal advisor in the discussion. The affidavits of the D's CEO and in-house counsel, submitted in support of the motion, merely stated in a conclusory manner that the communications were confidential and privileged, and D pointed to no particular communication in which in-house counsel gave legal advice, or in which D's other employees sought legal advice from in-house counsel.

Askai v. McDermott, Will & Emery
179 A.D.3d 127 (2d Dep't 2020)

Ps commenced this action for replevin, alleging they were entitled to possession of D law firm's files relating to transactions between Ps and another entity, Specialty, who was also sued. D had represented Specialty and refused to disclose the files absent permission from its client. P contended that due to a merger transaction Specialty could not assert the privilege. In a comprehensive opinion authored by Justice Austin, the Court held NY law applied to the replevin action and where, as here documents are sought, NY law will apply the law of the forum where the evidence will be introduced at trial or the location of the proceeding seeking discovery of those documents. The Court noted that the privileged communications sought by Ps were made in NY between NY-based attorneys at D law firm and P NY corporation, involving P seller, a NY resident and the sole nexus to Delaware was the successor LLC's formation under the laws of that state. The Court then expressed the view that it would be incongruous to enforce the law of Delaware, which provides that the rights to privileged communications between a predecessor corporation and counsel pass to the surviving corporation, since doing so would effectively foreclose NY corporations merging with foreign corporations from having the ability to pursue their claims against their counsel or the newly formed, post-merger entities to prosecute potential claims . Delaware law would thus give the new corporation, a putative D, sole access to and control of the merger-related documents by the exercise of the attorney-client privilege, in contravention of NY public policy. Court then awarded SJ to Ps.

Feighan v. Feighan
180 A.D.3d 873 (2d Dep't 2020)

In this matrimonial action, as issue arose as to disclosure of the files of attorney Vecchio. In 2013, the parties retained Vecchio to create certain estate planning documents, including the 2013 Robert E. Feighan Revocable Trust. In 2016, prior to the commencement of this action D retained Vecchio to create the 2016 Robert E. Feighan Revocable Trust, a trust funded by assets previously held in the 2013 Robert E. Feighan Revocable Trust. Court noted that generally, when an attorney represents two or more parties with respect to the same matter, the attorney-client privilege may not be invoked to protect confidential communications concerning the joint matter in subsequent adverse proceedings between the clients. Here, as Vecchio's joint representation of the parties in 2013 with respect to the preparation of estate planning documents, including 2013 revocable trusts executed by each of them, constituted representation with respect to the same matter, Court held the privilege could not be invoked to protect confidential communications concerning Vecchio's representation of the parties with regard to D's 2013 revocable trust. However, the privilege could be invoked to protect confidential communications

concerning Vecchio's representation of D with regard to the 2016 revocable trust, as Vecchio's representation of P ended in 2013, and the services provided to D in 2016 did not constitute the same matter as the services provided to the parties in 2013.

People v. Henry
173 A.D.3d 1470 (3d Dep't 2019)

In this murder prosecution, County Court admitted a letter that D wrote to his counsel when he was in jail and sent to his girlfriend to forward to counsel and keep a copy. Court held letter was not protected by privilege. It held: "In these circumstances, we conclude that she was acting as D's agent. Thus, whether the letter was protected by the attorney-client privilege turns on whether D had a reasonable expectation of confidentiality when he sent it to her. In that regard, there was contradictory evidence regarding whether D authorized her to share a copy of the letter with her mother, which County Court resolved by determining that D had authorized disclosure to her mother. The determination that D specifically authorized disclosure of the letter to a third party, *i.e*., her mother, established that D had no reasonable expectation of confidentiality and, therefore, defeated the attorney-client privilege."

Matter of Heggen v. Sise
174 A.D.3d 1115 (3d Dep't 2019)

In this Article 78 proceeding, respondent Mercer was prosecuted for murder. After the incident he had called an attorney, respondent James G. Doyle, and the two met at the scene to discuss Mercer's legal predicament. A few weeks before Mercer's trial was to start, the DA moved *in limine* for permission to call Doyle to testify about his observations of the crime scene and Mercer's statement that he had cleaned up blood there. Mercer moved to preclude that testimony through his trial attorney. Respondent Supreme Court Justice (hereinafter respondent) ruled that Doyle's observations were protected by the attorney-client privilege and that a hearing was required to determine whether Mercer's statement was intended to be confidential so as to implicate the privilege. Petitioner thereafter commenced this CPLR article 78 proceeding seeking a writ of prohibition. Although Mercer had been connected while proceeding was pending, Court held proceeding was not moot as issue could arise again if Mercer prevailed on appeal. On the merits, Court held prohibition does not lie here as petitioner claimed respondent erred in determining the scope of the privilege. It noted "prohibition will not lie as a means of seeking collateral review of mere trial errors of substantive law or procedure, however egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or power." **COMMENT:** Court noted petitioner's argument "might be correct."

John Mezzalingua Assoc., LLC v. The Travelers Co.
178 A.D.3d 1413 (4th Dep't 2019)

In this property damage coverage action, a dispute arose as to whether certain documents were protected by the privilege as claimed by P. D argued they were not as many of the documents were shared with or prepared by third parties. Court noted that while communications made in the presence of third parties ordinarily are not subject to the attorney-client privilege, where the third party is an agent of the attorney of the client, and his or her presence is deemed necessary to

enable the attorney-client communications and the client has a reasonable expectation of confidentiality, the attorney-client privilege can be invoked. Court remanded to determine of privilege could actually be invoked.

2. "Common Interest" Exception

Ambac Assurance Corp. v. Countrywide
27 N.Y.3d 616 (2016)

After D and Bank of America signed a merger agreement, the parties and their attorneys shared numerous privileged documents, claiming the disclosure was protected by the "common interest privilege". Court held pending or reasonably anticipated litigation is not a necessary element of the common-interest doctrine, whereby a third party may be present at a communication between an attorney and a client without destroying the confidentiality of the attorney-client communication if the communication was for the purpose of furthering a nearly identical legal interest shared by the client and the third party. **COMMENT:** *See*, Hutter, "Attorney-Client Privilege and Ambac", NYLJ, 8/2/16, p.3, col.3.

3. Crime-Fraud

South Shore D'Lites v. First Class Products
178 A.D.3d 443 (1st Dep't 2019)

Supreme Court granted P's motion to compel Ds to produce an attorney-client-privileged email under the crime-fraud exception to the privilege. Court modified to remand the matter for an *in camera* review of the email to determine whether there is probable cause to believe that the communication was made in furtherance of the alleged fraud. It ruled: "An *in camera* review is needed to determine whether the subject email was sent "in furtherance" of the fraud, so as to bring the email within the crime-fraud exception to the attorney-client privilege."

People v. Gannon
174 A.D.3d 1054 (3d Dep't 2019)

In this sexual assault prosecution, police seized several items from the Public Defender's Office pursuant to a search warrant. D claimed the certain of the items seized were protected by the privilege. Court rejected the argument. It noted the crime-fraud exception applied because there was reasonable cause to believe that the items seized pursuant to the search warrant constituted physical evidence of a crime and that their delivery to counsel was for the purpose of concealing evidence, not for seeking legal advice**.** **COMMENT**: The items in issue were not identified in the opinion.

C. Attorney Work-Product and Materials Prepared in Anticipation of Litigation

Dabo v. One Hudson Yards Owner
176 A.D.3d 631 (1st Dep't 2019)

In this P/I action, Court granted Ds' motion for a protective order to prevent disclosure of their insurer's accident investigation report, pursuant to CPLR 3101(d)(2). It noted that although documents in a first-party insurance action prepared in an insurer's ordinary course of business in investigating whether to accept or reject coverage are discoverable there is no indication that such documents are being protected here. In the absence of any demonstration of hardship by P, the insurer's accident investigation report remains privileged.

John Mezzalingua Assoc., LLC v. The Travelers Co.
178 A.D.3d 1413 (4th Dep't 2019)

See Mezzalingua discussion *supra*. P also argued that certain documents were not discoverable because they were material prepared in anticipation of litigation. Court noted the materials here that were prepared by third parties were mixed purpose reports, and P failed to establish that they were prepared solely in anticipation of litigation. Because P did not establish that the requested material was protected by the qualified immunity privilege set forth in CPLR 3101(d) for material prepared exclusively in anticipation of litigation, the burden did not shift to D to establish that they had substantial need for the material and could not obtain it without undue hardship.

John Mezzalingua Assoc., LLC v. The Travelers Co.
178 A.D.3d 1413 (4th Dep't 2019)

See *Mezzalingua* discussion *supra*. P also argued that some of the documents were protected by the attorney work product privilege. D argued that the privilege could not be invoked as it was waived because the documents were shared with third parties. Court rejected the argument, noting the privilege can extend to experts retained as consultants to assist in analyzing or preparing the case. Court remanded for a determination as to whether the privilege actually could be invoked.

D. Medical

Brito v. Gomez
33 NY3d 1126 (2019), *revg*., 168 AD.3d 1 (1st Dep't 2018)

In this MV accident case, P sought to recover for lost earnings and loss of enjoyment of life. In her BOP she alleged injuries only to her cervical spine, lumbar spine and left shoulder. After EBT, she testified that in 2009 she had surgery on her left knee and in 2012 she had surgery on her right knee. Ds sought authorizations for P's medical records relating to her knee surgeries. Court in an opinion by Justice Singh, with Justice Friedman writing a dissent, held P did not waive the physician/patient privilege with regard to her knee surgeries as neither her BOP or EBT placed these injuries in controversy. It noted

further her claims for lost earnings and loss of enjoyment of life alleged in the BOP were limited to her spinal and shoulder injuries. P did not claim that her prior knee injuries were exacerbated or aggravated as a result of the MV accident. Moreover, a claim for loss of enjoyment of life is not a separate item of recoverable damages, but a factor in assessing pain and suffering. The factfinder, in evaluating damages for pain and suffering, may consider the effect of the injuries on P's capacity to lead a normal life. **COMMENT:** Court noted that in *Creco v. Wellington Leasing L.P.* (144 A.D.3d 981, 43 N.Y.S.3d 64 [2d Dep't 2016]) the Second Department held that a party places his or her entire medical condition in controversy through "broad allegations of physical injuries and claimed loss of enjoyment of life due to those injuries. **COMMENT:** Court of Appeals reversed in Memorandum (SSM), stating only: "P affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages. (*see generally, Arons v. Jutkowitz*, 9 NY3d 393, 409, 850 NYS2d 345 [2007]; *Dillenbeck v. Hess*, 73 NY2d 278, 287, 539 NYS2d 707 [1989]). Under the particular circumstances of this case, P therefore waived the physician-patient privilege with respect to the prior treatment of her knees and the discovery sought by authorizations pertaining to the treatment of P's knees is "material and necessary" to Ds' defense of the action. Accordingly, Supreme Court erred in denying Ds' motion to compel P to provide discovery related to the prior treatment of her knees." How was the condition in fact placed in controversy? For further discussion, *see* Hutter, "Waiver of the Physician-Patient Privilege," NYLJ, Oct. 3, 2019.

Abrew v. Triple C Properties
178 A.D.3d 526 (1st Dep't 2019)

P, as a result of his accident, underwent two back surgeries. According to the two post-operative reports, P's surgeries were complicated and protracted due to a prior hernia operation. Court held privilege was waived as to records from the hernia operation as they were relevant to the injuries to the parts of the body that were placed in controversy. However, Court refused to find a waiver as to records of P's general medical condition both before and after the accident based on P's claim that his injuries are permanent and have prevented him from enjoying life. As to the latter, Court cited its prior precedent relied on by the panel in *Brito*. **COMMENT:** Court did not cite to *Brito* and its reversal by the Court of Appeals.

People v. Narducci
177 A.D.3d 511 (1st Dep't 2019)

In this grand larceny prosecution, Court held trial court properly admitted evidence of D's treatment by a psychiatrist. D waived the privilege by disclosing records of this treatment to government employees who were not involved in treating D. **COMMENT:** Decision provides no information regarding the nature of the disclosure.

Nesbitt v. Advanced Service Solutions
173 A.D.3d 1056 (2d Dep't 2019)

In this slip and fall action, Ds served discovery demands seeking, inter alia, authorizations for the release of medical records, including an authorization for records from Walgreens Pharmacy relating to "Alcohol/Drug Treatment/Mental Health Information/HIV-Related Information."

Court held PHL §2785(2)(a) barred disclosure for HIV related information as Ds failed to make the requisite showing of "compelling need" that would justify disclosure. However, demand for other records were proper as P placed his medical condition in issue as he alleged accident exacerbated existing injuries.

DeLeon v. Nassau Health Care Corp.
178 A.D.3d 897 (2d Dep't 2019)

In this P/I action arising out of an assault on D's premises committed by a third-party, Court upheld Supreme Court's determination denying that branch of P's motion which sought disclosure of the assailant's admission chart. It noted the assailant is not a party to the action, his medical records were subject to the physician-patient privilege, and he has not waived the privilege.

DeLeon v. Nassau Health Care Corp.
178 A.D.3d 897 (2d Dep't 2019)

In this P/I action arising out of an assault on D's premises committed by a third-party, Court granted Ps' motion seeking disclosure of all incident reports related to the assault. Court noted that pursuant to Education Law §6527(3), certain documents generated in connection with the "performance of a medical or a quality assurance review function," or which are "required by the Department of Health pursuant to Public Health Law § 2805-l," are generally not discoverable. A D, as the party seeking to invoke the privilege, has the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes. Here, D merely asserted that a privilege applied to the requested documents without making any showing as to why the privilege attached.

Almalahi v. NFT Metro Systems, Inc.
175 A.D.3d 1043 (4th Dep't 2019)

In this bus accident case, P alleged she sustained a "serious injury" with respect to her cervical spine and right shoulder when she fell from the bus before she could disembark. P executed authorizations for D to obtain her medical records, but only with respect to her cervical spine, left shoulder, and lumbar spine. D eventually moved to compel P to execute additional unrestricted authorizations covering other health conditions in P's medical history, including prior injuries to her left and right knees; a replacement of her right knee; injuries to her hip, buttock, elbow, hands and left upper arm as a result of two prior falls in 2014 and 2015; a carpal tunnel surgery five days before her fall on the bus; diabetes; and high blood pressure (collectively, disputed health conditions). The record established that some of those disputed health conditions, among others, had rendered P permanently disabled since the 1990s and required her to use a walker outside the home since the year 2000. Supreme Court granted motion and Court affirmed. It held P waived the privilege because she affirmatively placed in controversy her health conditions, which involved her ability to stand, steady herself and ambulate, by her allegation that D's negligence was the sole cause of her accident and injuries. The records sought may contain relevant information material and necessary to the defense of the action as to causation or to D's related defense of comparative negligence. **COMMENT:** Result

the same after *Brito*?

Jayne v. Smith
__ A.D.3d __ (2d Dep't 6/3/20)

P was seriously injured when he was assaulted by a patient at a psychiatric facility where P worked as a nurse. He commenced an action against Ds who were the patient's treating psychiatrists. P moved pursuant to CPLR 3124 to compel Ds to appear for depositions and to answer questions seeking non-privileged information regarding the patient. Court initially observed that information relating to the nature of medical treatment and the diagnoses made, including "information communicated by the patient while the physician attends the patient in a professional capacity, as well as information obtained from observation of the patient's appearance and symptoms," is privileged and may not be disclosed. (citing Mental Hygiene Law § 33.13[c][1]). However, the physician-patient privilege generally does not extend to information obtained outside the realms of medical diagnosis and treatment." Thus, the privilege is generally limited to "information acquired by the medical professional through application of professional skill or knowledge.'" Here, the patient did not waive the physician-patient privilege and P has not demonstrated "that the interests of justice significantly outweigh the need for confidentiality." (Mental Hygiene Law § 33.13[c][1]). Thus, P was not entitled to any privileged information regarding the patient, such as information regarding the treatment rendered to him by the individual Ds or information they collected in their professional capacity so as to render a diagnosis or treatment plan. Nevertheless, P is entitled to inquire into any nonprivileged information regarding the patient.

Johnson v. Hillis
64 Misc.3d 208 (Sup. Ct. St. Lawrence Co. 2019) (Farley, J.)

In this medical malpractice action, P sought to conduct a supplemental deposition of D midwife as to what D physician said at a quality assurance meeting regarding P's labor and delivery. Court permitted it, finding such a deposition was permitted by Education Law §6527(3). Court noted that the statute's narrow exception to confidentiality is limited to statements given at an otherwise privileged peer review meeting by a party to a lawsuit that involves the same underlying conduct that is the topic of discussion at the meeting. Here, D midwife testified during her EBT that she did not remember what she said during the quality assurance meeting concerning P's labor and delivery, but did remember what D physician said, and defense counsel instructed her not to recount what D physician said based on the quality assurance privilege. Education Law §6527(3), however, does not specify that a D witness may only be required to testify as to what he or she, as opposed to another D treatment provider, said at a quality assurance meeting. Moreover, although D physician could be deposed and asked what he said at the meeting, the ability to obtain a particular fact by one discovery method does not foreclose use of another and Ds' recollections of what D physician said could differ.

People v. J.R.
65 Misc.3d 754 (Co. Ct. Nassau Co. 2019) (Singer, J.)

In this prosecution of D juvenile offender arising from his alleged involvement in a shootout, court denied D's motion to quash the People's subpoena for the production of his medical records for the day of and the day after the shooting as his medical information was excepted from the privilege. Penal Law §265.25 created an exception to the privilege as the records fell within its scope.

IX. NON-TESTIMONIAL EVIDENCE

A. Photographs

People v. Pendell
33 N.Y.3d 972 (2019), *affg*. 164 A.D.3d 1063 (3d Dep't 2018)

In this rape and related crimes prosecution, Court held the photographs in issue which had been extracted from D's cell phone and computers were properly authenticated through testimony of complainant and law enforcement agents who extracted the photographs. The complainant identified herself in all of the photographs and explained that D had taken the photos at a motel he had admitted he took her to and agents explained how the extraction was conducted and made. **COMMENT:** See discussion of Third Department decision below.

Singh v. New York City Housing Auth.
177 A.D.3d 475 (1st Dep't 2019)

In this construction accident action, Court granted P's motion for partial S/J on liability. It held photographs submitted by P in support of his motion, and in particular Exhibit B, which reflected the sidewalk bridge in question, as well as the location where he fell, which he marked, and that the depicted sidewalk bridge barriers were not in place when he fell, were adequately authenticated by P's EBT testimony.

People v. Lewis
178 A.D.3d 952 (2d Dep't 2019)

In this sexual abuse of a child prosecution, trial court admitted, without objections, photographs depicting the complaint's genitals and anus. Court held admission denied D a fair trial. It noted the complainant's pediatrician testified there were no injures in that area. Thus, the photographs served no purpose other than to inflame the jury.

People v. Pendell
164 A.D.3d 1063 (3d Dep't 2018), *affd.* 33 N.Y.3d 972 (2019)

In this prosecution for rape in the second degree and related crimes involving a 14-year-old girl, Court held 25 photographs depicting the complainant, most of which were recovered from either D's prepaid cell phone or home computer, were sufficiently authenticated. Court related:

"Although the foundations questioning here was brief, the controlling point is that the victim identified herself in all of the photographs. She confirmed that she took several of the photographs of herself in her room at home and sent those photographs to D. She also explained that D took some of the photographs of her at the motel, where he admitted her took her on multiple occasions. We thus have the victim authenticating, as both photographer and subject, the pictures that she took of herself and that she provided to D. As for photographs taken by D at the hotel, the victim, as subject, confirmed that she was depicted in the photographs, without qualification. We also know from her testimony that these photographs were taken between October 2012 and March 2013. There was also explicit testimony from a special agent with the US Secret Service, explaining the process that she utilized to extract seven of the photographs from D's cell phone, and testimony from her colleague, who performed a forensic analysis of D's computer to extract the remaining photographic image."

People v. Serrano
173 A.D.3d 1484 (3d Dep't 2019)

In this murder prosecution, Court held trial court did not abuse its discretion in admitting two photographs showing bullet wounds in the victim's body. Court noted that after the trial court found that a picture of the deceased victim on the ground with his eyes open and blood around his head was "horrible" and "gory," the People agreed to crop the proffered exhibit to show only the victim's torso, in a manner that is not gruesome. Two pictures were used because it was impossible to include all three bullet wounds in one photo, considering that one bullet entered the chest and the others entered the flank and buttocks. Although D did not contest the cause of death, the photos were relevant to the material issue of intent to commit murder, and the People could rely on them despite the existence of other evidence as to that element.

People v. Brinkley
174 A.D.3d 1159 (3d Dep't 2019)

In this cruelty to animals prosecution, Court held in thoughtful opinion by Judge Mulvey trial court did not abuse its discretion in admitting two sets of photographs. Addressing first photographs taken during the D's intent to cause serious physical injury with aggravated cruelty, and they help illustrate and corroborate the medical testimony. As to the photographs of D's apartment, they depicted its layout and corroborate the testimony about the movements throughout the incident. Although some of the pictures contain smears or small pools of what appears to be blood, they were not particularly gruesome. Because aggravated cruelty was a contested issue, we cannot say that County Court abused its discretion in admitting all of the photographs, or that they were cumulative to the testimony. **COMMENT:** Court noted: "Once a relevant purpose for a photograph is demonstrated, the question of whether the probative value of the photograph outweighs any prejudice to the defendant rests within the trial court's sound discretion.

People v. Saunders
176 A.D.3d 1384 (3d Dep't 2019)

In this murder and assault prosecution, Court held the admission of three photographs was not so unduly prejudicial so as to deny D a fair trial. A photo of victim A's post-surgery elbow wound, was relevant and material to the charge of assault in the second degree in that it demonstrated the seriousness of victim A's injuries. Assuming without deciding that the prejudicial value of admitting photographs which show the layout of the crime scene, including victim B's body outweighed the probative value of same, given the overwhelming proof of D's guilt, we find any such error to be harmless as there was no significant probability that the jury would have acquitted D but for the admission of these exhibits. **COMMENT:** Relevant of layout of crime scene showing B's body?

People v. Heimroth
181 A.D.3d 967 (3d Dep't 2020)

In this murder prosecution, Court held the trial court did not abuse its discretion in admitting photographs of the victim's deceased bodies. Court noted they were relevant on the issue of intent and to show the locations of one of the victim's bodies, the severity of the inflicted injuries and the nature of the weapon used upon each victim. While the photographs were graphic in nature taking into account their relevancy and the trail court's cautionary instruction, no abuse of discretion in their admission was made.

People v. White-Span
182 A.D.3d 909 (3d Dep't 2020)

In this murder prosecution, Court held trial court did not err in admitting autopsy photographs of the victim at trial. Court noted that as a general rule, "photographs of a victim's deceased body ... are admissible if they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered[,] and should be excluded only if their sole purpose is to arouse the emotions of the jury and to prejudice D." Given that the photographs depicted the entry and exit wounds to the victim, they were properly admitted for the purposes of showing intent and the cause of death. Moreover, the photographs were not overly gruesome and the court provided a proper limiting instruction to the jury. As the photographs were relevant to material, disputed issues and their sole purpose was not to arouse the jury's emotions or prejudice D, the court did not abuse its discretion in admitting the photographs.

B. Recordings: Video and Audio

People v. Houston
181 A.D.3d 477 (1st Dep't 2020)

In this criminal possession of a weapon prosecution, Court held surveillance videotapes showing Ds holding pistols were properly authenticated. It noted: "The totality of the evidence, including the relationship of the videotapes at issue to other videotapes that were undisputedly

authenticated, supported the inference that the videotapes at issue depicted the relevant events and any alleged uncertainty went to the weight to be accorded the evidence rather than its admissibility. By a variety of methods, testifying officers were able to verify the accuracy of the videos at issue and the times at which they were recorded. Accordingly, the foundation was established by reasonable inferential linkages that were far from being tenuous and amorphous."

People v. Watson
183 A.D.3d 1191 (3d Dep't 2020)

In this robbery prosecution, D argued that a cell phone video recording should not have been admitted under the best evidence rule and that the detective should not have been allowed to testify about what he saw on a surveillance video showing the inside of the bar. Court held: "Contrary to the court's reasoning the best evidence rule can apply to videos. Furthermore, the People did not call the bar manager or a person who installed the video equipment to authenticate the surveillance video. Accordingly, the court erred in overruling D's objection to this evidence. Nevertheless, in view of the overwhelming circumstantial evidence, including the DNA evidence, and because there was no significant probability that the jury would have acquitted D of all charges had his objection to the evidence at issue been sustained, we conclude that any error was harmless."

People v. Vernoy
174 A.D.3d 1485 (4th Dep't 2019)

In this DWI prosecution, Court held trial court properly admitted into evidence the testimony of the 911 operator. The best evidence rule did not bar the testimony by reason of a recording of the underlying conversations with vehicle's passenger because those conversations existed independently of the recording.

C. Digital Imaging and Related Information

L. 2019, c. 223, added CPLR 4532-b, relocating it from CPLR 4511
It provides a method for authenticating digital mapping images, *e.g.*, Google maps and related information. Authentication is made by a court taking judicial notice of the images or information presented. **COMMENT:** For further discussion, *see* Hutter, "Streamlining the Authentication Process," NYLJ, Feb. 7, 2019, p. 3, col. 3.

D. Writings/Voices

People v. Saunders
176 A.D.3d 1384 (3d Dep't 2019)

In this assault and murder prosecution, Court held trial court did not abuse its discretion in excluding the testimony of an expert witness on voice identification offered by D. Court noted that although there was no scientific or DNA evidence presented at trial linking D to the crime scene, victim A identified D's voice as one of the masked perpetrators of the subject crimes, and her identification was corroborated by ample other evidence connecting D to the crime, including

his threatening Facebook message to victim B's sister, having been dropped off hear the crime scene on the morning in question, his roommate observing him unloading the victims' stolen property from victim B's truck and possessing blood-stained money. Thus, given the strength of the corroborating evidence connecting D to the commission of the subject crimes, exclusion was not error.

People v. Gunther
172 A.D.3d 1403 (2d Dep't 2019)

In this larceny and forgery prosecution, Court held computer reproductions of bank withdrawal slips were properly admitted into evidence under CPLR 4539(b). The original withdrawal slips were scanned to store a digital 'image' of the hard copy document. Court noted a reproduction of such a digital image is "admissible in evidence as the original" where is it "authenticated by competent testimony or affidavit," which must include information about "the manner or method by which tampering or degradation of the reproduction is prevented." Here, the reproductions of the withdrawal slips were properly authenticated by the testimony of a document review specialist, which included information about the prevention of tampering or degradation.

Mutlu v. Mutlu
177 A.D.3d 979 (2d Dep't 2019)

In this divorce action, P moved to admit a copy of the parties' post-nuptial agreement, claiming that she did not have the original and did not know its whereabouts. D objected, arguing he did not sign the agreement and that none of the signatures on the document were his. Trial court admitted the agreement. Court held trial court erred. It noted that P failed to sufficiently explain the unavailability of the original as all she testified to was that she did not possess the original and believed it was either stolen or lost, which testimony did not establish the foundation for the admission of the alleged copy.

E. Demonstration

People v. Sadiku
64 Misc.3d 387 (App. T.2d Dep't 2019)

In this prosecution for possession of stolen property (mail), Court held trial court properly allowed People to introduce a photograph of a device of the type employed by mail thieves to remover mail from mailboxes and the device itself. Both were introduced as demonstrative evidence, and the offense of mailbox fishing and the mechanism by which it is committed were novel. Whatever risk of prejudice may have resulted was ameliorated by the court's curative instruction that no fishing device was recovered in this case and that the photograph and device were admitted as "demonstrative evidence." Moreover, defense counsel neither objected to the sufficiency of that instruction, which the jury was presumed to have followed, nor proposed, as the conclusion of the evidence, any modified or additional language in support of his request, which was denied, for further instruction.

F. Authentication by Production

L. 2018, c. 219, Enacting CPLR 4540-a

CPLR 4540-a establishes a method for authenticating a document, digital record or other tangible matter, namely, showing the item was produced by the opposing party and had been created by the party, in response to a demand to produce made pursuant to CPLR article 31. It became effective on January 1, 2019. **COMMENT:** For further discussion, *see* Hutter, "Streamlining the Authentication Process," NYLJ, Feb. 7, 2019, p. 3, col. 3.

G. Electronic Evidence

People v. Washington
179 A.D.3d 522 (1st Dep't 2020)

In this sex prosecution, Court held trial court providently exercised its discretion in admitting a series of text messages exchanged between a person purporting to be D's mother and the victim two days after the crime. Court stated: "There was sufficient authentication, because an extensive chain of circumstantial evidence left no doubt that the texts came from D. Among other things, these intimidating texts, which contained damaging admissions, reached the victim at a disguised phone number that she had shared with D shortly after the crime, but had not shared with anyone else. The texts revealed a detailed knowledge of the incident and the relationship between D and the victim, and they explicitly discussed the sexual encounter. The sender admitted having the victim's car, bag and phone, which were taken during the incident, and D was apprehended a day later driving the victim's car. Viewed as a whole, and not as individual fragments, the circumstantial evidence made it highly improbably that anyone other than D sent the texts. In addition, the sender's phone number was registered to a former female friend of D."

People v. Enoksen
175 A.D.3d 624 (2d Dep't 2019)

In this prosecution of an attorney for grand larceny, Court found no error in the trial court's permitting the People to admit a document created by the complainant reflecting a series of text messages between the complainant and D. The complainant's testimony that the text messages were accurately and fairly reproduced was sufficient to authenticate the document.

People v. Serrano
173 A.D.3d 1484 (3d Dep't 2019)

In this murder prosecution, Court held the trial court did not err in determining that the People established a proper foundation for evidence of the wife's electronic communications with D. It noted D's recorded conversation—such as a printed copy of the content of a set of cell phone instant messages—may be authenticated through, among other methods, the testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered. The wife's testimony established her phone number, D's phone number

and D's Facebook account. D's girlfriend also testified as to D's phone number. Other proof showed that while he was in police custody, D asked for his cell phone and advised the police that it was in a certain vehicle, where a police officer located the phone at issue. Data recovered from that phone included a photo used as the profile picture for D's Facebook account, as well as text messages and private Facebook messages between D and his wife. The wife testified regarding the accuracy of those messages. A sufficient foundation was established.
COMMENT: Court noted that D's claim that someone else could have sent the message did not preclude admissibility. Court also noted that the claim was belied by testimony form a computer forensic technician explaining that it was extremely difficult to obtain access to D's phone because it was locked with a pass code.

H. Telephone Calls

People v. Cotto
172 A.D.3d 595 (1st Dep't 2019)

In this attempted murder prosecution, Court held trial court properly permitted police officers to testify about the conversation they heard shortly after the incident when D's girlfriend put her phone on speaker so the officers could hear it. Although the girlfriend did not testify, there was sufficient circumstantial evidence to establish that D was the caller. This included the girlfriend addressing the caller by D's first name, and the fact that the content of the call was obviously about the incident that had just occurred, about which the caller was making potentially incriminating statements.

People v. Sostre
172 A.D.3d 1623 (3d Dep't 2019)

In this weapons and drug prosecution, Court held trial court did not err in admitting a redacted audio recording of a phone call placed from the jail where D was held prior to trial, rejecting D's argument that the People failed to lay a foundation that D was the speaker. Court noted "a speaker's identity may be proven through circumstances surrounding the recorded conversation, which must include sufficient indicia of reliability, such as the substance of the conversation confirming the identity of the party." Use of personal identification numbers that are required to place a phone call are sufficient indicia of reliability. Here, a sergeant in the Albany Crime Analysis Center, testified that, to place a phone call from the jail where D was held, an inmate must enter two PINs that are assigned to him or her by the jail and, further, that the PINs assigned to D were used to place the relevant phone call. Moreover, the phone call was placed to D's mother, and the caller referred to the woman with whom he is speaking as his mother.