

*To Be Argued By:*  
Adrienne Yaron  
*Time Requested: 15 Minutes*

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# New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT



YESTER CASTILLO,

*Plaintiff-Respondent,*

*against*

1248 ASSOCIATES LLC,

*Defendant-Appellant.*

**Docket No.**  
**2023-02328**

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## REPLY BRIEF FOR DEFENDANT-APPELLANT

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## **ARGUMENT**

### **A. LABOR LAW § 240(1) WAS NOT VIOLATED**

Labor Law 240 was not violated because there is no enumerated device that could have been used to prevent this accident without defeating the goal of the work being performed. This accident was an ordinary construction hazard not within the purview of Labor Law 240.

#### **1. Labor Law 240 was not violated because there is no enumerated device that could have been used to prevent this accident**

Plaintiff's reliance on the 1985 case Zimmer v. Chemung Cnty. Performing Arts, Inc., 65 N.Y.2d 513 (1985) is misplaced as *Zimmer* is no longer good law on the relevant issue.

Subsequent to *Zimmer*, the Court of Appeals has on numerous occasions held that in order for Labor Law 240(1) to apply, a plaintiff must also show that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute." Narducci v. Manhasset Bay, 96 N.Y.2d 259, 260 (2001). The Court of Appeals has made clear that Labor Law § 240 does not apply where it is "not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected."

Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259, 268 (2001). The “absence of a causal nexus between the worker’s injury and a lack or failure of a device prescribed by section 240 (1) mandate[s] a finding against liability.” Wilinski v. 334 E. 92nd Hous. Dev. Corp., 18 N.Y.3d 1, 9 (2011) *citing*, Misseritti v. Mark IV Constr., 86 N.Y.2d 487, 490-491, (1995); Narducci v. Manhasset Bay 96 N.Y.2d 259, 268-269 (2001). In Fabrizi v. 1095 Ave. of Americas, L.L.C., 22 N.Y.3d 658 (2014), the Court of Appeals explicitly *rejected* the position taken by plaintiff herein, stating:

Contrary to the dissent's contention, section 240(1) does not automatically apply simply because an object fell and injured a worker; “[a] plaintiff must show that the object fell ... *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute.

Id. At 663 (emphasis original).

Most importantly, “Whether plaintiff’s injuries were proximately caused by the lack of a safety device of the kind required by the statute is an issue for a trier of fact to determine.” Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1, 11 (2011)(emphasis added).

In this case, all of the expert evidence and witness testimony demonstrates that there was no lack or failure of any enumerated device that would be necessary or expected for the type of work plaintiff was performing. Plaintiff

himself testified he had always performed the task in this manner over the 20 years he had been doing this work, handing up single 20-30-pound plywood sheets between workers and without the use of any enumerated device. R. 227-228; R. 254-255. Clearly, no such device was necessary or expected by plaintiff or anyone else!

Both Mr. Brong (Rinaldi's project manager) and Mr. Barnett (a certified safety professional) agreed that the activity being performed by Plaintiff, namely lifting a sheet of plywood to a co-worker on a scaffold several feet above, did not require the use of a safety device such as a hoist, pulley, or sling. Mr. Brong averred that the plywood being used in such a manner would not be secured and having workers pass plywood sheets to each other to build the roof of an elevator shaft is the method employed by Rinaldi Builders Inc., and that the plywood did not need to be secured and in fact could not be secured because doing so would prevent the work from being accomplished:

The activity being performed by Mr. Castillo did not require the use of any safety devices such as a hoist, pulley, or sling, and Rinaldi Builders customarily has its workers pass plywood by hand to each other in similar situations...

The plywood sheet did not require securing because it was among the materials used to build the walls of the elevator shaft which was the task that Mr. Castillo and his co-worker were performing when the accident occurred. The plywood was being passed and securing it would have defeated the purpose

of the work being performed. Simply put, the work could not be performed if the plywood was secured

R. 259-260.

Similarly, Mr. Barnett opined:

The plywood sheet involved in the accident did not require securing and would not normally be secured situation because it was among the materials used to build the walls of the elevator shaft which was the task that Plaintiff and his co-worker were performing when the accident occurred ... Plaintiff confirmed that he had built elevator shafts using the same method as the one used on this project for twenty years and that his work did not involve ropes or pulleys (see R. 227-228; R. 254-255).

R. 970-971.

Plaintiff even differentiated between *his work materials* and *those requiring securing* when he testified “[the] people that use the pulleys, they’re doing another thing. They usually use to pull up other things that you have to *tie up and things and we don’t really do any of that.*” R. 255-256 (emphasis added).

Contrary to plaintiff’s counsel’s assertion (Resp. Brief p. 24), plaintiff himself *never testified* that they could or should have used ropes or pulleys for this work. This claim – directly contradictory to his own testimony quoted above – was submitted for the first time in opposition to Defendant’s motion for summary judgment, in a belated affidavit which counsel has not disputed on appeal was

feigned, self-serving, and intended solely to avoid the consequences of his earlier testimony and is therefore legally insufficient to withstand summary judgment and should never have been considered by the motion court. *See Chalu v. Hariraj*, 304 A.D.2d 515, 516 (2 Dept 2003) (“[this] vague, unsupported, self-serving allegation appears to be a feigned issue, raised by the plaintiff for the first time in response to a motion for summary judgment to avoid the consequences of his earlier admissions”); *Haxhia v Varanelli*, 170 AD3d 679 (2 Dept 2019).

Plaintiff cannot be permitted to escape the consequences of his own deposition testimony wherein he acknowledged never using any ropes or pulleys or other devices in the 20 years he worked in the construction industry, and that no such devices were necessary or expected for this work. R. 228-229 and 254-255. Mr. Brong corroborated this testimony stating that Rinaldi workers moved the materials by hand in similar situations. R. 959-60. This was an ordinary workplace hazard where none of the enumerated devices were necessary or expected, as plaintiff himself admitted at deposition.

“[N]ot every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)”. *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 (2001). As set forth above, none of the enumerated devices described by Labor Law 240(1) were necessary or expected in this

situation, and Defendant is entitled to summary judgment dismissing this cause of action as a matter of law. At the very least, the conflicting testimony on this issue (indeed, the conflict just between plaintiff's deposition testimony and his subsequent self-serving affidavit alone!) is sufficient to raise a question of fact which the Court of Appeals made clear in Wilinski, supra, is for the jury to decide.

Accordingly, this Court should reverse the motion court and grant summary judgment to Defendants-Appellants, or at the very least deny plaintiff's motion on the question of fact and remand the case for trial.

**2. Plaintiff Has Not Disputed that Securing the Plywood would have Defeated the Goal of the Work being Performed and therefore Labor Law 240 was not violated**

It is undisputed that the plywood at issue was in the process of being positioned into place and installed so as to finish the elevator shaft. It is similarly undisputed that the plywood had to be lifted and moved in order to be correctly positioned. As plaintiff testified:

*A It was the part of the finalization of the elevator. So once you get up to the top you have to duplicate that space at the top of the elevator.*

...

*Q What was Ismail doing ten feet above you?*

*A He was just finishing up the walls with the plywood.*

Id. at pp. 50-52 (emphasis added).

There is further evidence that this work could not have been performed if the plywood had been secured by pulleys and ropes. As Mr. Brong affirmed:

The plywood was being passed and securing it would have defeated the purpose of the work being performed. Simply put, the work could not be performed if the plywood was secured.

R. 960 (emphasis added).

Similarly, Mr. Barnett opined:

Securing the plywood would have defeated the purpose of the work being performed. This is corroborated by Plaintiffs testimony that their assigned task was to build the elevator shaft's walls (see R. 230-232). Plaintiff confirmed that he had built elevator shafts using the same method as the one used on this project for twenty years and that his work did not involve ropes or pulleys (see R. 227-228; R. 254-255).

R. 970-971 (emphasis added).

Plaintiff has made no argument whatsoever in his respondent's brief that this work could have been performed if the plywood was secured, or that there is any evidence to support such a conclusion. In fact, no such evidence exists.

“Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted.” Kuehne & Nagel, Inc. v. Baiden, 36 N.Y.2d 539, 544 (1975). “By not denying the statements made in the affidavit of the [movant]'s president in support of the ... motion for summary judgment, the [opposing party] has admitted [all the relevant facts at issue]. Accordingly, the [movant] is entitled to summary judgment.” Schneider Fuel Oil v. DeGennaro, 238 A.D.2d 495, 496 (2 Dept 1997)(internal citations omitted).

The Court of Appeals has held that that Labor Law §§240(1) and 241(6) “should be construed with a commonsense approach to the realities of the workplace at issue” Salazar v. Novalex Contr. Corp., 18 N.Y.3d 134 (2011). In particular, the Labor Law is not violated when the action proposed by plaintiff would have been illogical and “contrary to the objectives of the work plan.” Id.

Put simply, there is no evidence that a single sheet of plywood *that needed to be secured* caused this accident. On the contrary, Plaintiff’s testimony is that his co-worker needed to move and position the plywood into place. Labor Law § 240(1) should be construed with a commonsense approach to the realities of the workplace at issue. Salazar v. Novalex Contr. Corp., 18 N.Y.3d 134, 140 (2011). In Salazar, the Court noted that it “would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a

three- or four-foot deep hole when *the very goal of the work is to fill that hole with concrete.*” Id., 18 N.Y.3d at 140 (emphasis added). Likewise, here, securing the plywood sheet would prevent it from being used to build out the elevator shaft which is, by Plaintiff’s own admission, the very goal of the work he was performing when the accident occurred. Plaintiff has not shown how else the task could have been performed when the plywood was being installed, a fact he does not address, because there was no other way to perform the task and no safety device could have been used which would not have defeated the purpose of the installation. Logic dictates that an item that is by plaintiff’s own estimation no more than 20 pounds – the weight of a grocery bag – does not require hoisting or securing.

The common sense approach to the realities of the worksite at issue therefore requires a dismissal of the Labor Law §§240(1) and 241(6) causes of action in this case.

**3. The Case Law Cited By Plaintiff is Inapplicable to these facts**

None of the cases cited by plaintiff are analogous to these facts. Most of the cases cited by plaintiff involve situations where an enumerated safety device was in fact in use and either failed or was removed. The remaining cases he cites involve very heavy objects which the courts held triggered Labor Law liability due

to their weight. None of the cases cited by plaintiff concern a situation such as this case, in which a lightweight object (less than 20 pounds) was being moved and positioned and all of the evidence supports a finding that no enumerated device was necessary or expected and in fact any such securing device would be contrary to the work.

In Hill v. Acies Grp., LLC, 122 A.D.3d 428 (1 Dept 2014), for example, the plaintiff was struck by a falling brick because safety netting that had previously been installed had been removed. Id. At 429. In Arnaud v. 140 Edgecomb LLC, 83 A.D.3d 507 (1 Dept 2011), plaintiff and his co-worker were using a pulley and ropes to move wood planks from the fourth floor to the second floor, and these devices failed to secure the plank. Id. At 508. Similarly, in Escobar v. Safi, 150 A.D.3d 1081 (2 Dept 2017), plaintiff's co-worker was using ropes to hoist plywood which failed to secure it. Id. At 1082. In Stawski v. Pasternack, Popish & Reif, P.C., 54 A.D.3d 619 (1 Dept 2008), a cinder block had been cut from the column where plaintiff was working, and was returned to the open cavity from which it had been cut without being cemented or secured in any way. Id. At 620. In Metus v. Ladies Mile Inc., 51 A.D.3d 537, 538 (1 Dept 2008), the junior beam that fell was not in the process of being moved or positioned, it was already in place and simply had not been clamped to the header beam on which it rested.

There is no evidence (or even any argument) in this case that any enumerated device failed or was removed, and therefore all of the above cases are inapposite.

The remaining two cases relied on by plaintiff, Rutkowski v. New York Convention Ctr. Dev. Corp., 146 A.D.3d 686, 686 (1 Dept 2017) and Gutierrez v. Harco Consultants Corp., 157 A.D.3d 537, 537 (1 Dept 2018) both involved very heavy objects which the deciding courts explicitly noted supported a finding of Labor Law 240 liability. In Gutierrez the court noted: “Assuming that the piece of rebar that allegedly struck plaintiff weighed what defendants claimed it weighed, it still presented an elevation-related risk.” In Rutkowski, the court held: “in view of the weight of the lighting bar, we cannot conclude as a matter of law that the distance it fell was de minimis.”

These cases are entirely distinguishable from the instant case. Here, plaintiff himself stated the plywood was only 20-30 pounds, no more than a filled grocery bag, and calling him a “human hoist” does not change the fact that logic dictates no “hoist” is necessary to lift 20 or 30 pounds. And, here, it was two people lifting that light weight. It is noted that in both Rutkowski and Gutierrez cases there is also no indication that there were any arguments made that no enumerated devices were necessary or expected, or that they were contrary to the objectives of the work.

Rather, the most analogous case to this one is Millette v. Tishman Constr. Corp., 144 A.D.3d 1113 (2 Dept 2016). In Millette, this Court affirmed an order granting the defendants summary judgment on a cause of action alleging a violation of Labor Law § 240(1) with circumstances virtually identical to those in the instant matter. In Millette, workers were framing on the 16<sup>th</sup> floor of a building when a piece of plywood *accidentally* fell and struck a plaintiff who was situated on the 15<sup>th</sup> floor below. *See Id.*, 2014 WL 12659834 at \*1 (N.Y. Sup. Kings 2014).

In arriving at its decision, the lower court noted the following:

the accident happened when a worker dropped the plywood as he was about to place it atop the joists. As noted, this activity did not require securing and thus was not a falling object under the Labor Law. Therefore, this accident was an ordinary incident associated with a worksite outside the purview of the Labor Law. Therefore, the motion of defendant seeking to dismiss the Labor Law § 240(1) cause of action is granted.

Id. at \*2 (internal citations omitted, emphasis added).

The plywood here, just like the plywood in *Millette*, did not require securing and therefore this was an ordinary incident associated with a worksite and falls outside of the purview of the Labor Law. Plaintiff testified that his co-worker was lifting a sheet of plywood to the scaffold and *accidentally* dropped it while trying to adjust his grip. *See R. 236-237 and R. 261-262.*

Moreover, plaintiff has not disputed that Plaintiff's co-worker's decision to adjust his grip on the plywood sheet was an *intervening* and *superseding* event that caused the accident. Plaintiff testified the sheetrock fell because his co-worker "tossed" it:

Q What did your coworker do with the plywood after you let go?

A He did a movement where he wanted to throw it up and that's when it fell.

R. 261.

Under these circumstances, the Courts have consistently held that Labor Law § 240(1) does not apply. See Moncayo v. Curtis Partition Corp., 106 A.D.3d 963 (2 Dept 2013) (Labor Law § 240[1] did not apply where a plaintiff was struck by a piece of sheetrock that fell from the third floor of a building); Fried v. Always Green, LLC, 77 A.D.3d 788 (2 Dept 2010) (bag of construction debris which was thrown from a roof and struck a plaintiff on the head did not implicate Labor Law § 240[1]); Cabezas v. Consolidated Edison, 296 A.D.2d 522 (2 Dept 2002) (Labor Law § 240[1] inapplicable where pipe fell on a plaintiff as his co-worker was unloading a truck); Belcastro v. Hewlett-Woodmere Union Free School District, 286 A.d.2d 744 (2 Dept 2001) (Labor Law § 240[1] inapplicable where a piece of wood that struck a plaintiff fell from or was thrown from a roof).

***B. PLAINTIFF'S PROCEDURAL OBJECTIONS ARE WITHOUT MERIT***

**1. Plaintiff Has Not Disputed that the DOB Hearing Information is Admissible**

Plaintiff has not contested that the Department of Buildings hearing records and OATH decision are admissible as a public record, and because they were authenticated by Tyler Brong, who was personally present at the hearing. Accordingly, this Court should accept as additional evidence the finding of the OATH Hearing Officer:

I find that not every accident results in a failure to safeguard or rises to a level of Class 1. By Mr. Brong's credible testimony... I find that petitioner has not credibly established that respondent failed to institute and maintain safety equipment and measures at the time of inspection or that the condition was immediately hazardous. Therefore, I dismiss the summons.

This finding of the OATH Hearing office wholly supports Defendants-Appellants position that no enumerated safety devices were necessary or expected for the work being performed by plaintiff.

**2. Plaintiff Has Not Disputed that an Expert May be Disclosed at Any Time up to 30 Days Before Trial and Mr. Barnett's Affidavit Sufficiently Establishes his Credentials as an Expert**

Plaintiff has not disputed that there is no requirement that an expert be disclosed earlier than thirty days before trial, and it is entirely proper for this Court to consider the affidavit of expert Rush Barnett here. “Although C.P.L.R. § 3101(d)(1)(i) requires a party, upon request, to identify the expert witnesses the party expects to call at trial, it does not require a party to respond to a demand for expert witness information at any specific time.” Begley v. City of New York, 111 A.D.3d 5, 36 (2 Dept 2013). Moreover, this Court has explicitly held that “a party’s failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party’s experts in the context of a timely motion for summary judgment” *See Rivers v. Birnbaum*, 102 A.D.3d 26, 31 (2 Dept 2012).

As discussed in Appellant’s main brief, plaintiff’s attempt to attack Mr. Barnett’s credentials are similarly without merit. Mr. Barnett stated his credentials and expertise as a Certified Safety Professional – and they are considerable – in the first two paragraphs of his affidavit. R. 962. There is no requirement that a “CV” be submitted and plaintiff cited to no such case law. In

any case, Mr. Barnett's resume is readily available on Westlaw at 2000 WL 35769034 and this Court may take judicial notice of same. Moreover, Mr. Barnett has been accepted as an expert in both the state and federal courts of New York State. *See e.g. Tyler v. Kawaguchi, Inc.*, No. 00 CV 6366, 2006 WL 581184, at \*4 (W.D.N.Y. 2006), where the court explicitly described Mr. Barnett as a qualified expert:

DSM's expert, E. Rush Barnett, concludes that DSM's warnings in its packaging were adequately sufficient and met OSHA standards. Thus, these disputed opinions by qualified experts present questions of fact.

Id. (emphasis added).

Moreover, there is no requirement that an expert must physically examine the scene of an alleged accident, particularly where there is no claim that a condition at the scene was the causative factor. The black letter law on admissibility of an expert is:

“[T]o be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; second, where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion and the out-of-court

material is accompanied by evidence establishing its reliability”

Jimenez v. Gasque, 111 A.D.3d 675, 675 (2 Dept 2013). *See also* Hamsch v. New York City Transit Auth., 63 N.Y.2d 723, 725 (1984) (“It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness”)(emphasis added).

The courts of this State have repeatedly held that an expert’s opinion is admissible where it is based on testimony and/or photographs in evidence. For example, in Abdelall v. Niagara Frontier Transit Metro Sys., Inc., 194 A.D.3d 1375 (4 Dept 2021), the court held: “the expert's opinions were not speculative or devoid of factual support in the record, but instead were properly based on photographs and testimony of the witnesses.” Id. (internal punctuation omitted). This Court held in Gagliardi v. Am. Suzuki Motor Corp., 303 A.D.2d 718 (2 Dept 2003): “The trial court properly admitted the testimony of the plaintiff's expert, as it was based upon facts and material in evidence, as well as his experience in the subject area.”

As Mr. Barnett specified in his affidavit, his opinion therein is based on a plethora of admissible evidence in this action, including plaintiff’s own testimony, the affidavit of Mr. Brong, the OATH Hearing materials, photographs, and various other documents exchanged in this case, as well as on Mr. Barnett’s own “expertise in the areas of construction and industrial safety and material

handling.” R. 963. This foundation more than satisfies the requirements of Gagliardi, Abdelall, Jiminez, and Hambusch, *supra*.

As with the rest of the case law cited by plaintiff in this appeal, the cases plaintiff cites for this issue are entirely inapposite to the facts of this case and therefore irrelevant. Each of the cases plaintiff cites involved a theory of liability resting on a claim of a defective condition – either of equipment or of the job site itself: a ladder (Merino), a crack in a home’s foundation (Tedone), a safety line and/or plaintiff’s harness (Lazo), and planks of a scaffold collapsed (Jarama). In those cases, it was logical to hold that the expert should have examined the allegedly defective condition. The instant case, however, contains no such allegation. The plaintiff’s allegation here is based on the “methods” used by plaintiff and his coworker to position the piece of plywood. The relevant evidence is plaintiff’s own testimony about how he and his co-worker were performing the task, the affidavit of Mr. Brong as to the method of doing the task, and findings of the OATH Hearing. No defective condition was alleged and therefore there was nothing relevant to be examined at the scene of the accident.

Mr. Barnett’s affidavit is fully supported by admissible evidence and testimony in this action and his own expertise in the relevant industry and is therefore admissible under Gagliardi, Abdelall, Jiminez, and Hambusch, *supra*.

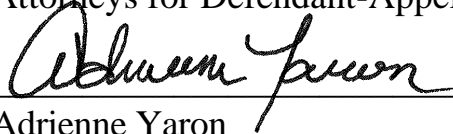
**CONCLUSION**

WHEREFORE, it is respectfully requested that this Court modify the decision of the trial court to the extent of granting dismissal of plaintiff's Labor Law 240 cause of action and denying plaintiff's motion in its entirety; or, in the alternative, denying plaintiff's motion for summary judgment and remanding the case for trial; and for such other and further relief as this Court deems just and proper.

Dated: New York, New York  
September 21, 2023

Yours, etc.,

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## **PRINTING SPECIFICATIONS STATEMENT**

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194 A.D.3d 1375  
Supreme Court, Appellate Division, Fourth Department, New York.

Habiba ABDELALL, Plaintiff-Respondent,  
v.  
NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., and Niagara Frontier  
Transportation Authority, Defendants-Appellants.

204.1  
|  
CA 20-00037  
|  
Entered: May 7, 2021

**Synopsis**

**Background:** Pedestrian who was injured when she was struck by an open bus panel brought personal injury action against transit system and transit authority. The Supreme Court, Erie County, [Timothy J. Walker, J.](#), denied defendants' motion for a directed verdict and entered judgment upon jury verdict that found defendants liable for pedestrian's injuries. Defendants appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

expert witness for pedestrian was properly allowed to testify;

jury instruction regarding doctrine of res ipsa loquitur was warranted; and

jury instruction regarding emergency doctrine as not warranted.

Affirmed.

**\*\*569** Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 13, 2019. The judgment, among other things, adjudged that defendants were liable for plaintiff's injuries.

**Attorneys and Law Firms**

RUSSO & TONER, LLP, NEW YORK CITY ([JOSH H. KARDISCH](#) OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CONNORS LLP, BUFFALO ([LAWLOR F. QUINLAN, III](#), OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PRESENT: [WHALEN, P.J.](#), [CENTRA](#), [PERADOTTO](#), [LINDLEY](#), AND [TROUTMAN, JJ.](#)

MEMORANDUM AND ORDER

\*1375 It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Defendants appeal from a judgment entered upon a jury verdict that, inter alia, found that they were liable for injuries sustained by plaintiff when she was struck by an open panel on one of defendants' passing buses. The panel protruded approximately 30 inches from the side of the bus at an obtuse angle, and it struck plaintiff while she was standing on the side of the road.

Contrary to defendants' contention, Supreme Court properly allowed plaintiff's expert to testify. It is well established that " 'opinion evidence must be based on facts in the record or personally known to the witness' " (*Hamsch v. New York City Tr. Auth.*, 63 N.Y.2d 723, 725, 480 N.Y.S.2d 195, 469 N.E.2d 516 [1984]; see *Tornatore v. Cohen*, 162 A.D.3d 1503, 1504-1505, 78 N.Y.S.3d 542 [4th Dept. 2018]). Here, the expert's opinions were not "speculative or devoid of factual support in the record," but instead were properly "based on photographs and testimony of the witnesses" (*Pember v. Carlson*, 45 A.D.3d 1092, 1094, 845 N.Y.S.2d 566 [3d Dept. 2007]; see also *Morreale v. Froelich*, 125 A.D.3d 1280, 1281, 3 N.Y.S.3d 479 [4th Dept. 2015]). Defendants failed to preserve their challenge to the expert's use of a latch and key for demonstration purposes (see generally CPLR 5501 [a] [3]; \*\*570 *Shoemaker v. State of New York*, 247 A.D.2d 898, 898, 668 N.Y.S.2d 859 [4th Dept. 1998]).

Defendants further contend that the court erred in charging the jury with respect to the doctrine of res ipsa loquitur because plaintiff failed to establish that the latch securing the panel was " 'within the exclusive control' " of defendants (*James v. Wormuth*, 21 N.Y.3d 540, 546, 974 N.Y.S.2d 308, 997 N.E.2d 133 [2013], quoting *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494, 655 N.Y.S.2d 844, 678 N.E.2d 456 [1997]). We reject that contention. "[E]xclusivity of control is 'a relative term, not an absolute', because the permissible inference of negligence under the res ipsa loquitur doctrine is grounded on the remoteness of any probability that the negligent act was caused by someone other than the defendant" (*Wen-Yu Chang v. Woolworth Co.*, 196 A.D.2d 708, 708, 601 N.Y.S.2d 904 [1st Dept. 1993]). Here, the evidence supporting \*1376 exclusivity of control afforded a rational basis for concluding that " 'it is more likely than not' " that plaintiff's injuries were caused by defendants' negligence (*Kambat*, 89 N.Y.2d at 494, 655 N.Y.S.2d 844, 678 N.E.2d 456; see *Backus v. Kaleida Health*, 91 A.D.3d 1284, 1286, 937 N.Y.S.2d 773 [4th Dept. 2012]). Specifically, the trial testimony established that defendants' maintenance workers manipulated the panel the day before the accident in order to perform routine maintenance, and there was no testimony that anyone else, such as a vandal, tampered with the latch or panel between that maintenance work and the accident (see *Nesbit v. New York City Tr. Auth.*, 170 A.D.2d 92, 98-99, 574 N.Y.S.2d 179 [1st Dept. 1991]; cf. *Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2d 219, 228, 501 N.Y.S.2d 784, 492 N.E.2d 1200 [1986]).

Contrary to defendants' contention, the court properly refused to charge the jury with respect to the emergency doctrine. Here, the bus driver was not aware that she was operating the bus with the panel open, and thus the emergency doctrine does not apply (see *Starkman v. City of Long Beach*, 106 A.D.3d 1076, 1078, 965 N.Y.S.2d 609 [2d Dept. 2013]).

Contrary to defendants' next contention, the court properly denied their motion for a directed verdict. Viewing the evidence in the light most favorable to plaintiff and affording her every available inference (see *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556, 664 N.Y.S.2d 252, 686 N.E.2d 1346 [1997]), we conclude that the parties' conflicting evidence presented a question of fact for the jury to resolve (see *Defisher v. PPZ Supermarkets, Inc.*, 186 A.D.3d 1062, 1062-1063, 129 N.Y.S.3d 599 [4th Dept. 2020]). To the extent that defendants contend that the verdict is against the weight of the evidence, we likewise reject that contention (see *id.* at 1063-1064, 129 N.Y.S.3d 599; see generally *Lolik v. Big V Supermarkets*, 86 N.Y.2d 744, 746, 631 N.Y.S.2d 122, 655 N.E.2d 163 [1995]).

Defendants failed to preserve their challenge to the instructions that the court provided to the jury after the jury returned its initial, inconsistent verdict (see CPLR 4111 [c]), both because they failed to object to the instructions before the jury resumed deliberations and because the objection that defendants' attorney eventually did make failed to bring the court's attention to the grounds raised on appeal (see generally *Byrd v. Genesee Hosp.*, 110 A.D.2d 1051, 1052, 489 N.Y.S.2d 22 [4th Dept. 1985]).

We have reviewed defendants' remaining contention and conclude that it does not require reversal or modification of the judgment.

**Abdelall v. Niagara Frontier Transit Metro System, Inc., 194 A.D.3d 1375 (2021)**

148 N.Y.S.3d 568, 2021 N.Y. Slip Op. 02902

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**All Citations**

194 A.D.3d 1375, 148 N.Y.S.3d 568, 2021 N.Y. Slip Op. 02902

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83 A.D.3d 507  
Supreme Court, Appellate Division, First Department, New York.

Jose ARNAUD, Plaintiff–Appellant,  
v.  
140 EDGECOMB LLC, et al., Defendants–Respondents.

4788, 24487/05

|  
April 14, 2011.

### Synopsis

**Background:** Worker brought action against building owner and others under the Scaffold Law, seeking damages for injuries he sustained when struck by wood plank. The Supreme Court, Bronx County, [Kenneth L. Thompson, J.](#), denied worker’s motion for partial summary judgment as to liability, and he appealed.

The Supreme Court, Appellate Division, held that wood plank that struck worker was object that required securing for the purposes of the undertaking, and thus injuries worker sustained were within scope of Scaffold Law.

Reversed.

### Attorneys and Law Firms

**\*\*292** Blank & Star, PLLC, Brooklyn ([Helene E. Blank](#) of counsel), for appellant.

**\*\*293** Stein McGuire Pangtages & Gigi, New York ([Gerald J. Gunning](#) of counsel), for respondents.

[MAZZARELLI, J.P.](#), [FRIEDMAN, ACOSTA, DeGRASSE, ROMÁN, JJ.](#)

### Opinion

**\*508** Order, Supreme Court, Bronx County ([Kenneth L. Thompson, J.](#)), entered October 12, 2010, which denied plaintiff’s motion for partial summary judgment as to liability on his [Labor Law § 240\(1\)](#) cause of action, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff was employed by non-party Galaxy Construction at a building owned by 140 Edgecomb LLC, and being renovated by general contractor, S & Z Construction Corp. Plaintiff and a co-worker were moving wood planks from the fourth floor to the second floor, by use of a pulley and ropes. While plaintiff was on the second floor, with his arms outstretched through a window to grab the wood as it was lowered, he was suddenly struck by a plank, which caused multiple fractures to his wrist and fingers.

The extraordinary protections of [Labor Law § 240\(1\)](#) extend only to a narrow class of special hazards, and the decisive question as to whether the statute applies to a particular accident is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against harm directly flowing from the application of the force of gravity to an object or person (see *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 604, 895 N.Y.S.2d 279, 922 N.E.2d 865 [2009], citing *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82 [1993]).

In the context of falling objects, the risk to be guarded against is the unchecked or insufficiently checked descent of the object (see *Apel v. City of New York*, 73 A.D.3d 406, 901 N.Y.S.2d 183 [2010] ). In this case, the wood was an object that required securing for the purposes of the undertaking (see *Outar v. City of New York*, 5 N.Y.3d 731, 799 N.Y.S.2d 770, 832 N.E.2d 1186 [2005]; *Baker v. Barron's Educ. Serv. Corp.*, 248 A.D.2d 655, 670 N.Y.S.2d 587 [1998] ). A lack of certainty as to exactly what preceded plaintiff's accident does not create an issue of fact as to proximate cause (see *Vergara v. SS 133 W. 21, LLC*, 21 A.D.3d 279, 800 N.Y.S.2d 134 [2005] ). Nor does the fact that plaintiff did not point to any particular defect in the pulley defeat his entitlement to summary judgment (see *Harris v. 170 E. End Ave., LLC*, 71 A.D.3d 408, 896 N.Y.S.2d 51 [2010], *lv. dismissed* 15 N.Y.3d 911, 913 N.Y.S.2d 124, 939 N.E.2d 141 [2010]; *Orellano v. 29 E. 37th St. Realty Corp.*, 292 A.D.2d 289, 740 N.Y.S.2d 16 [2002] ). Labor Law § 240(1) provides for liability where safety equipment such as hoists are not "placed and operated as to give proper protection." Thus, it is not necessary that plaintiff establish that the pulley was defective, only that he was not given "proper protection" (see *Williams v. 520 Madison Partnership*, 38 A.D.3d 464, 834 N.Y.S.2d 32 [2007] ).

### All Citations

83 A.D.3d 507, 922 N.Y.S.2d 292, 2011 N.Y. Slip Op. 02951

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111 A.D.3d 5  
Supreme Court, Appellate Division, Second Department, New York.

Karen BEGLEY, etc., et al., respondents-appellants,  
v.  
CITY OF NEW YORK, defendant, New York City Department of Education, respondent, [The Forum School](#), et al., appellants.

2010-06370, 101681/05

|  
Sept. 18, 2013.

### Synopsis

**Background:** Parents of developmentally disabled student who died after suffering anaphylactic reaction to blueberries at private school, individually and as administrators of student's estate, brought action against city and its department of education, school, and registered nurse, alleging that defendants negligently permitted student to become exposed to blueberries, breached their duty to monitor, supervise, and control student, failed to exercise reasonable care in protecting student from injury, and failed to properly diagnose, manage, and treat student's allergic reaction. Defendants brought various cross-claims. The Supreme Court, Richmond County, [Thomas P. Aliotta, J., 15 Misc.3d 1107\(A\), 2007 WL 846565](#), denied school's motion for summary judgment, and, [29 Misc.3d 579, 907 N.Y.S.2d 373](#), granted in part and denied in part defendants' motions for summary judgment. Parties appealed.

**Holdings:** The Supreme Court, Appellate Division, [Eng, P.J.](#), held that:

mandate to provide free and appropriate public education (FAPE) did not expand department's duty of care;

department was not vicariously liable for acts of student's private nurse;

school provided adequate supervision of student;

deficiencies in school's supervision of student was not proximate cause of his death;

school responded reasonably to student's anaphylactic reaction;

even if school's nurse owed duty of care to student, she did not depart from good and accepted practice; and

private nurse did not depart from good and accepted practice.

Affirmed in part and reversed in part.

### Attorneys and Law Firms

**\*\*52** Callan, Koster, Brady & Brennan, LLP, New York, N.Y. ([Michael P. Kandler](#) of counsel), for appellant The Forum School.

Catalano Gallardo & Petropoulos, LLP, Jericho, N.Y. ([James P. Connors](#) and [William Schleifer](#) of counsel), for appellant Michelle Timothy.

Guercio & Guercio, LLP, Farmingdale, N.Y. ([Gregory J. Guercio](#) of counsel), for respondents-appellants.

[Michael A. Cardozo](#), Corporation Counsel, New York, N.Y. ([Leonard Koerner](#) and [Ronald E. Sternberg](#) of counsel), for respondent.

[RANDALL T. ENG](#), P.J., [RUTH C. BALKIN](#), [JOHN M. LEVENTHAL](#), and [CHERYL E. CHAMBERS](#), JJ.

## Opinion

[ENG](#), P.J.

\*9 Jonathan Begley, a nine-year-old autistic boy who suffered from asthma as well as allergies to a wide range of foods and substances, was enrolled in the summer of 2004 as a student in The Forum School located in Waldwick, New Jersey. His placement in this private educational facility for special needs children came as the result of an Individualized Education Program prepared by his local Staten Island school district, which directed that, in light of his history of severe asthma and allergies, he be provided with such exceptional services as a registered nurse to accompany him while he traveled to and from school and monitor him throughout the school day. Jonathan’s mother interviewed and selected several nurses to share the duties of caring for the child on school days, and the New York City Department of Education (hereinafter the DOE) paid for the nurses’ services. Jonathan had just finished lunch at school on \*\*53 the afternoon of July 21, 2004, when he began to experience difficulty in breathing. Believing that Jonathan was having an asthma attack, the nurse who accompanied him to school that day administered Proventil to the child through his nebulizer. However, when Jonathan’s condition did not improve, his nurse realized that he was having a severe allergic reaction, and administered epinephrine by injecting him with an “epi-pen.” School personnel called 911, and the school nurse assisted Jonathan’s nurse as she attempted to alleviate his respiratory distress by injecting him with two more epi-pens. When an ambulance arrived, paramedics transported Jonathan to a nearby hospital, where he died two days later. Although the allergen which triggered Jonathan’s reaction has never been conclusively determined, his parents, the plaintiffs Karen Begley and Brian Begley, suspect that it may have been caused by Jonathan’s exposure to blueberries during a classroom lesson that morning.

Following the death of their son, the plaintiffs commenced this action against, among others, the DOE, The Forum School, and Jonathan’s nurse, Michelle Timothy, alleging that they negligently allowed Jonathan to be exposed to a substance to which he was allergic, and failed to properly respond when he began exhibiting symptoms of an anaphylactic (that is, a severe \*10 allergic) reaction. After extensive discovery, the DOE, The Forum School, and Timothy separately moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against each of them. The Supreme Court (Aliotta, J.) granted the DOE’s motion in its entirety, concluding that it could not be held liable on a negligent supervision theory because Jonathan was not in its physical custody at the time of his injury, and that it could not be held vicariously liable for Timothy’s alleged negligence because she was an independent service provider. However, the Supreme Court denied the respective motions of The Forum School and Timothy for summary judgment dismissing the complaint and all cross claims insofar as asserted against them except to the extent of dismissing the cause of action to recover punitive damages. For the reasons that follow, we conclude that the Supreme Court properly granted the DOE’s motion, and we take this opportunity to clarify the extent of the DOE’s duty to supervise a child who is not in its physical custody. We also conclude that the motions of The Forum School and Timothy should have been granted in their entirety.

I

Jonathan Begley, the child whose tragic death is at the center of this litigation, was born on January 10, 1995, the second of the plaintiffs’ two children. Jonathan first exhibited symptoms of asthma at the age of 10 months, when he started to wheeze. The family pediatrician prescribed Proventil, administered through a nebulizer, for use during asthma attacks. When Jonathan was about a year old, a pediatric immunologist began testing him for various allergies. The first round of testing determined that Jonathan was allergic to milk, eggs, wheat, soy, and gluten. As Jonathan grew older, he also developed food allergies to tree nuts and rye. He was further determined to be allergic to a number of other substances, including dust mites, animal dander, flowers, cigarette smoke, perfume, and certain soaps and hand creams. In addition to his health problems, when

Jonathan was about two years old, he was diagnosed as autistic.

In the summer of 2001, when Jonathan was six, his local School District's Committee on Special Education acknowledged, during the course of a hearing, that it was **\*\*54** unable to provide him with an educational program that would meet both his educational and medical needs. The plaintiff parents located a **\*11** placement for Jonathan at The Forum School in Waldwick, New Jersey, and the District concurred that The Forum School, which specializes in the education of disabled students, would be an appropriate setting for Jonathan. In accordance with the hearing officer's directive, on July 24, 2001, the Committee on Special Education prepared an Individualized Education Program (hereinafter IEP), which called for Jonathan to attend The Forum School, and have a registered nurse to accompany him while he traveled to and from school on a bus dedicated to his sole use, as well as to monitor his condition throughout the school day. The 2001 IEP noted that Jonathan was allergic to all dairy, wheat, gluten, eggs, bread, crackers, and yogurt, and that due to his extreme allergies, "an epi-pen must be present at all times." An updated IEP prepared in 2004 stated that Jonathan was severely allergic to "wheat, gluten, eggs, all dairy, perfume," that he required "nursing services to administer a nebulizer for asthma two to three times a week," and should have two epi-pens "present at all times."

Jonathan entered The Forum School in September 2001. The DOE paid his tuition at the school, and also paid for the cost of transportation and nursing care. The nurses who shared the duty of accompanying Jonathan to school and monitoring his medical condition throughout the school day were interviewed and chosen by his mother, the plaintiff Karen Begley. The plaintiff mother packed lunch and snacks for Jonathan to take to school each day, and also prepared a medical bag for Jonathan that contained a portable nebulizer and all of his medications, including Proventil, Benadryl, and four epi-pens. To alert the school staff and Jonathan's nurses to potential allergens, the plaintiff mother prepared laminated cards which indicated that Jonathan had severe allergies to dairy products, eggs, and foods containing these ingredients, and that ingesting or touching these foods would cause an anaphylactic reaction. In addition, she provided the nurses and the school with a letter from Jonathan's physician advising that he had severe asthma and life threatening food allergies, and setting forth a "partial list" of his allergies. The physician's letter noted that "all dairy products," eggs, and tree nuts would cause anaphylaxis, which should be treated by injecting with an epi-pen, to be repeated in 15 minutes, and, if conscious, the administration of liquid Benadryl. The letter further directed "[g]ive Proventil via nebulizer for wheezing."

Despite Jonathan's severe asthma and allergies, during the nearly three-year period that he attended The Forum School, he **\*12** was able to experience some of the normal joys of childhood by participating in activities which included swimming in the school pool with other children, playing basketball, and going on the swings during recess. From the time he entered The Forum School in September 2001 through the end of the spring semester in 2004, Jonathan's private nurses sat inside the classroom next to him. However, in the spring of 2004, Jonathan's teacher expressed concern that one of the nurses was "hovering over" Jonathan, impeding his development of independence. As a result, at the beginning of the summer 2004 semester, a new policy was implemented requiring the nurses to sit in the hallway outside Jonathan's classroom. From this vantage point, the nurses were still able to see Jonathan, who was about five feet away. The defendant nurse, Michelle Timothy, recalls that at the time this seating policy was implemented, the teacher assigned to Jonathan's class for the 2004 **\*\*55** summer session assured her that she could enter the classroom if she needed closer access to Jonathan, and that she usually did so about once a day.

Jonathan suffered the severe reaction that ultimately resulted in his death on July 21, 2004. That morning, his teacher, Ann Schwartzstein, noticed that Jonathan was a little red in the face and a little agitated, but he "returned to normal very quickly," and went to gym class with his classmates. After the children returned from gym, Schwartzstein conducted a "multi-sensory" lesson on the State of Maine, reading the children a book called "Blueberries for Sal," and displaying a basket of blueberries to make the story come alive for them. Both Schwartzstein and Timothy, the nurse who accompanied Jonathan to school that morning, agree that Jonathan was seated at least five feet away from the blueberries, and they did not see him touch or handle the blueberries in any way. The next scheduled activity for the children after the lesson was lunch, which took place in the school lunchroom between 11:45 a.m. and 12:15 p.m.

As the lunch period came to a close and Jonathan finished eating, he and Timothy got up to empty their trays into the garbage. As they were returning to the lunch table, Jonathan told Timothy that he was having trouble breathing and asked for his "nebi." Timothy checked Jonathan's breathing with a stethoscope and detected wheezing. Initially believing that Jonathan was experiencing an asthma attack triggered by agitation, Timothy poured a vial of Proventil into his nebulizer and began to administer it. She then walked Jonathan back to his **\*13** classroom so that she could assess him in a quiet environment. When

Jonathan's breathing did not improve and he became increasingly agitated, Timothy gave him another Proventil treatment, and administered an epi-pen. She administered a second epi-pen about 10 to 15 minutes later, and a third epi-pen at some point thereafter. The plaintiffs allege that the first epi-pen used, which came from Jonathan's own medical bag, had an expiration date of December 2003, and was thus expired on the date it was administered. The Forum School's nurse, Elizabeth Golub, received a call summoning her to Jonathan's classroom sometime between 12:15 and 12:20 p.m. Golub arrived in the classroom about a minute later, accompanied by The Forum School's director, Dr. Steven Krapes. At that point, Timothy was in the process of giving Jonathan a nebulizer treatment. Jonathan's face was red, and he was trying to pull off the nebulizer mask. When Timothy told Golub that Jonathan was "having a reaction to something," Golub contacted the school office manager via intercom, and instructed her to call 911 immediately. According to local police department records, the request for an ambulance was made at 12:24 p.m. Golub then helped stabilize Jonathan's position so that Timothy could administer the second epi-pen. According to Golub, she and Timothy also decided to attempt to administer oxygen to Jonathan because they "felt [they] needed to do anything [they] could do to try to help him get some air." Dr. Krapes assisted by attempting to calm Jonathan down, and holding Jonathan so that the nurses could place a mask on his face. According to Dr. Krapes, a police officer who responded to the school's 911 call before medical personnel arrived stated that the ambulance had been delayed because three other calls for medical assistance had been made at the same time. Dr. Krapes estimated that an ambulance first arrived at about 12:40 p.m., about 20 minutes after the school contacted 911. Once paramedics arrived at the scene, they took over Jonathan's care, intubating him and administering medication through an

**\*\*56 IV.** Jonathan was transported to Valley Hospital, where he died two days later. Although Jonathan's death certificate initially indicated that he died of natural causes, the plaintiff mother asked the hospital to amend the certificate to indicate the specific cause of death. As amended, the death certificate lists the cause of Jonathan's death as "Hypoxic Ischemic Encephalopathy, Acute Anaphylaxis, and Severe Atrophy."

#### **\*14 II**

Eleven months after the death of their son, the plaintiffs, individually and as the administrators of Jonathan's estate, commenced this action asserting claims sounding in negligent supervision against the DOE and The Forum School, and claims sounding in both nursing malpractice and negligent supervision against Timothy<sup>1</sup>. Among other things, the plaintiffs alleged that the DOE and The Forum School had negligently allowed Jonathan to be "exposed to agents known and/or unknown to cause a serious allergic reaction," had failed to administer aid to Jonathan "pursuant to the protocol specifically known to defendants," and had failed to timely contact emergency rescue services. The plaintiffs also asserted that the DOE and The Forum School had denied Jonathan's right under his IEP "to have the nurse specifically assigned to him in his presence throughout the school day." The plaintiffs further charged that Timothy had negligently failed to timely diagnose the true nature of Jonathan's condition, had failed to properly manage and treat his condition, and had failed to provide him with a safe and sterile lunch area and protect him from injury while he was under her care and control. Extensive discovery was conducted, including depositions of the plaintiff parents, Timothy, a representative of the DOE, teacher Ann Schwartzstein, school nurse Elizabeth Golub, Dr. Krapes, and three of Jonathan's treating physicians.

#### **III**

After discovery was completed, The Forum School moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. In support of its motion, the school argued that the testimony adduced during pretrial depositions demonstrated that it provided Jonathan with a safe environment, and that there was no evidence that Jonathan was exposed to his known allergens or anything else that could reasonably have been anticipated to be harmful. More specifically, the school submitted that it complied with Jonathan's IEP **\*15** by allowing his private duty nurse to observe him at all times, and ensuring that all staff was aware that Jonathan was to eat only food brought from home. The school further maintained that its teacher-to-student ratio was "beyond reasonable," and added that "[s]hort of completely isolating Jonathan, it is difficult to conceive of any precaution or measure that could have prevented this unfortunate incident." The school also contended that there was no evidence that its alleged negligence proximately caused Jonathan's anaphylactic reaction, stressing in this regard that the cause of the reaction remained unknown. The school additionally **\*\*57** noted that

while the plaintiffs claimed that Jonathan's anaphylactic reaction was caused by his exposure to blueberries, the deposition testimony of the plaintiff mother revealed that Jonathan had never actually been tested for an allergy to blueberries.

In opposition to the motion, the plaintiffs argued that The Forum School was negligent in its supervision and monitoring of Jonathan both before and after he suffered an anaphylactic reaction. According to the plaintiffs, the school's negligence included preventing Timothy "from discharging her professional duties to monitor and assess Jonathan's medical condition," resulting in her failure to ensure that Jonathan did not come into contact with life-threatening food allergens. In addition, the plaintiffs asserted, for the first time in the litigation, that the school was vicariously liable for the "medical malpractice" of school nurse Elizabeth Golub, which included her alleged failure to discharge an appropriate degree of professional care in attempting to treat Jonathan's anaphylactic reaction.

In support of their position, the plaintiffs relied upon the affidavit of Karen McDonald, a registered nurse certified in oncology, who averred that she had been specifically trained in how to recognize, manage, and treat allergic reactions, and in emergency response to anaphylaxis. Based on her review of evidence including deposition testimony, medical records, and Jonathan's death certificate, McDonald opined that Golub deviated from good and accepted standards of nursing practice by failing to provide Jonathan with a safe environment, and failing to follow his physician's protocol when he exhibited signs and symptoms of anaphylaxis. More specifically, McDonald maintained that it was a departure for Golub to have failed to provide a student with known severe food allergies with a "disinfected lunch environment." In her view, Golub should have created a protocol to manage Jonathan's environment which included ensuring \*16 that his private nurse, Michelle Timothy, disinfected the school's microwave oven before using it to heat Jonathan's lunch, disinfected Jonathan's place mat, which was stored with the place mats of other children, and disinfected the lunch table.

Focusing on the day that Jonathan suffered the anaphylactic reaction, McDonald submitted that "the record evidence reflects, that Jonathan Begley was exposed to a substance which he was allergic to, likely blueberries, beginning at approximately 10:00 a.m.," while he was under Timothy's care.<sup>2</sup> Based in part on her belief that Jonathan had been exposed to a known allergen, McDonald opined that when the child exhibited symptoms of wheezing, increased respirations, redness in the face, and agitation on July 21, 2004, at approximately 12:20 or 12:25 p.m., a reasonably prudent nurse should have immediately recognized that he was having an anaphylactic reaction, and followed the protocol for responding to an anaphylactic reaction prescribed by Jonathan's pediatrician. In support of her opinion that both Golub and Timothy failed to follow the protocol set forth by Jonathan's pediatrician for an anaphylactic reaction, McDonald claimed that 24 minutes elapsed between the time Jonathan first began exhibiting symptoms of anaphylaxis and the call to 911 at 12:24 p.m., and that Benadryl should have been administered before an \*\*58 epi-pen. Furthermore, the first epi-pen administered had expired seven months earlier, and thus there was a "substantial likelihood" that "the first epi-pen administered was non-effective or had little effect." In McDonald's opinion, Golub had an independent obligation to act in accordance with sound nursing practice despite Timothy's presence, and Golub's departures included permitting Timothy to administer an expired epi-pen, failing to alert emergency services in a timely manner, and failing to ensure that Jonathan's airway remained clear prior to the arrival of paramedics.

In reply, The Forum School urged that the errata sheets which attempted to alter the plaintiff mother's deposition testimony by adding blueberries in the list of substances that Jonathan was allergic to should be disregarded, both because the errata sheets had been submitted well beyond the 60-day deadline for \*17 correcting deposition testimony imposed by [CPLR 3116\(a\)](#), and because the plaintiff mother had offered no explanation for making a substantive change in her testimony. In addition, the school disputed a number of the factual assertions underlying McDonald's opinion that Golub departed from sound nursing practice, including the claim that 24 minutes elapsed between the time Jonathan first began exhibiting symptoms of anaphylaxis and the 911 call.

#### IV

Shortly after The Forum School's motion was filed, the defendant Michelle Timothy also separately moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against her, arguing that she had appropriately provided Jonathan with emergency respiratory care under the most challenging of circumstances, and had not departed from good and accepted standards of nursing care. To support her claim, Timothy relied upon the affidavit of her expert, Maureen

Walls Sileo, a registered nurse with training in emergency care. Sileo averred that based upon her review of evidence including deposition testimony, Timothy did not depart from good and accepted nursing practice while providing care to Jonathan on July 21, 2004. In support of her conclusion, Sileo opined that as a private nurse, Timothy had no duty to insulate or guard Jonathan from exposure to substances not known to cause an allergic reaction in that child. She also emphasized that neither blueberries or berries of any kind were included in a written list of Jonathan's known allergens provided by his physician.

Further, Sileo submitted that when Timothy observed Jonathan becoming upset and demonstrating signs of shortness of breath after finishing lunch at about 12:20 p.m., she properly recognized the signs of respiratory distress and timely and properly administered a Proventil treatment via nebulizer in the lunchroom. In her opinion, Timothy's impression that Jonathan was having an asthma attack was in accordance with accepted nursing practice and consistent with Jonathan's underlying medical condition, medical history, and symptoms. Sileo further opined that when Timothy observed Jonathan's condition worsening despite the initial Proventil treatment, she properly administered a second Proventil treatment while appropriately developing a differential impression of anaphylaxis. In addition, Timothy properly administered an epi-pen, which was appropriate treatment for suspected anaphylaxis, and \*18 properly requested that 911 be called after the administration of the epi-pen. Furthermore, according to Sileo, the administration of liquid Benadryl was contraindicated in a child experiencing respiratory distress due to the risk of aspiration.

**\*\*59** Sileo additionally opined that the administration of a second epi-pen when Jonathan's condition continued to worsen was also appropriate, and that under the circumstances presented, Timothy was not required to wait 15 minutes between the administration of epi-pens. She also averred that it was her opinion, with a reasonable degree of nursing certainty, that an epi-pen that had been expired for less than a year would still contain a therapeutic dose and would not have contributed negatively to the child's medical condition. According to Sileo, Timothy appropriately maintained Jonathan's airway at all times despite the child's resistance and respiratory distress, and appropriately administered oxygen. In addition, when Jonathan's color worsened, Timothy properly administered a third epi-pen and continued Proventil treatment until Basic Life Support personnel arrived on scene, and took over Jonathan's care. In opposition, the plaintiffs urged the court to reject Sileo's expert affidavit because Timothy had failed to disclose that she had retained an expert and disclose her expert's opinions as required by **CPLR 3101(d)**. On the merits, the plaintiffs argued that the affidavit of Sileo was insufficient to establish that Timothy had committed no departures from good and accepted nursing practice. In this regard, the plaintiffs contended that Sileo had failed to address why Timothy did not initially assess Jonathan's condition as being an anaphylactic reaction, or the timeliness of Timothy's administration of the epi-pens. Moreover, Sileo failed to address whether Timothy violated her duty of care to Jonathan by failing to provide him with a clean lunch area and preparing his lunch in an unclean microwave oven. The plaintiffs further argued that even if the expert affidavit was sufficient to satisfy Timothy's prima facie burden, summary judgment should be denied because there were triable issues of fact as to whether Timothy departed from good and accepted practice by failing to follow the doctor's protocol which required the administration of Benadryl and contacting 911 immediately in the event of an anaphylactic reaction.

Evidence submitted by the plaintiffs in opposition to Timothy's motion included the same expert affidavit by registered nurse Karen McDonald that had been offered in response to The Forum School's motion.

**\*19** In reply, Timothy argued that she had not violated **CPLR 3101(d)** because a defendant does not have an obligation to disclose the identity of expert witnesses until the defendant has identified the expert he or she intends to call at trial. She added that, in any event, the plaintiffs could not demonstrate any prejudice because they had more than two months to obtain an expert to oppose the motion. Timothy further argued that her duty to Jonathan was to monitor his medical condition, and that the child's IEP did not require her to be at his side at all times, and ensure that he was never exposed to an unknown allergen. Timothy also noted that the only evidence that Jonathan was actually allergic to blueberries was provided by the errata sheets which improperly attempted to alter the plaintiff mother's deposition testimony, and that she had a separate motion pending before the court to strike these alterations.

In further support of her position that Jonathan had no known allergy to blueberries, Timothy also submitted the deposition testimony of Jonathan's pediatric immunologist. The immunologist testified that she had never tested Jonathan for an allergy to blueberries. However, she had performed a scratch test for cranberries which was negative, and cranberries are in **\*\*60** the same family of allergens as blueberries.

V

While the separate motions of The Forum School and Timothy were pending, the DOE also moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. In support of its motion, the DOE argued that it did not owe the plaintiffs a duty to supervise Jonathan because The Forum School had physical custody and control over the child. Indeed, it was The Forum School's decision to place Jonathan's nurse in the hallway to monitor Jonathan instead of inside the classroom, and the DOE was not advised of this move. Moreover, the DOE maintained that it could not be held vicariously liable for Timothy's alleged negligence because Timothy was an independent contractor recruited and selected by the plaintiffs, and its involvement was limited to reimbursing the plaintiffs for Timothy's services. Although the DOE acknowledged that several cases had extended a municipality's duty of care beyond its orbit of authority where the municipality was discharging a nondelegable duty imposed by statute, they argued that those cases were distinguishable because they involved either the commission of intentional torts, or a local school district's failure \*20 to include crucial medical information on the IEP of a child placed in another school district. Here, in contrast, the DOE submitted that it had fulfilled its statutory obligation by formulating an appropriate IEP which flagged Jonathan's medical needs.

As evidentiary support for its position that Timothy was an independent contractor, the DOE relied on the deposition testimony of the plaintiff mother and Timothy, in which both described how Timothy was selected to be one of Jonathan's nurses, and the instructions and supervision the plaintiff mother provided to Timothy. The DOE also submitted the deposition testimony of Catherine Frisca, Deputy Director of the DOE Office of Related and Contractual Services. At her deposition, Frisca explained that when the DOE cannot find an appropriate individual to provide the services a child is entitled to receive pursuant to his or her IEP, it gives parents a Related Services Authorization, which enables the parents to select their own licensed provider. After the parents select a provider willing to accept the DOE's payment rates, the DOE performs a fingerprint check and obtains a copy of the provider's license. According to Frisca, the DOE does not review the experience of a provider selected by the parents, or monitor the provider's conduct. Frisca further noted that no nurse actually employed by the DOE would be assigned to a private school out-of-state.

In opposition, the plaintiffs argued that despite Jonathan's placement at The Forum School, he remained within the DOE's orbit of authority, and thus the DOE was independently liable for its own failure to monitor, supervise, and implement Jonathan's placement at The Forum School. In support of their position, the plaintiffs argued that the DOE had a statutory duty under the Individuals with Disabilities Education Act (20 USC § 1400 *et seq.*) to provide Jonathan with a free and appropriate public education in conformity with his IEP, and that while the DOE chose to provide this education at The Forum School, it was nevertheless still required to supervise and direct that education. They submitted that the DOE, pursuant to its statutory duties, "should have known that The Forum School was placing the student in a precarious situation by removing [Timothy] from the classroom and limiting her ability to monitor and assess the student in the classroom and lunchroom."

\*\*61 The plaintiffs further argued that the DOE could be held vicariously liable for Timothy's alleged negligence because Timothy was either an employee or an agent of the DOE. More \*21 specifically, the plaintiffs submitted that Timothy must be considered an employee of the DOE because she was hired to fulfill the DOE's obligation to provide Jonathan with nursing services pursuant to his IEP, which required a nurse to be present with Jonathan at all times. The plaintiffs also claimed that Timothy had been issued a DOE "employee identification card," even though independent contractors are not provided with such identification, and that she was interviewed by the DOE before she was hired. Furthermore, the plaintiffs maintained that the Related Services Authorization signed by the plaintiff mother and Timothy demonstrated an employment relationship because it set forth Timothy's obligation to comply with the IEP, and demonstrated the DOE's control over Timothy.

Evidence offered in opposition to the DOE's motion for summary judgment included the DOE Related Services Authorization signed by the plaintiff mother and Timothy. Under the terms of the authorization, Timothy was required to carry her own malpractice insurance. The authorization further provided that no individual who was an employee of the DOE could provide services, and recited that "signatures below indicate approval of the agreement by the parent and provider." The plaintiffs also submitted memoranda issued by the DOE in May 2005 pertaining to the use of consultants, which were generated based on "IRS concerns that many individuals previously hired as consultants should more appropriately have been

acquired as employees.”

In reply, the DOE highlighted deposition testimony which indicated that Timothy was interviewed, selected, retained, and directly supervised by the mother. The DOE also contended that the memoranda relating to the utilization of consultants submitted by the plaintiffs were irrelevant because Timothy was not a “consultant.” In support of its position, the DOE offered the affidavit of the Chief Executive Officer of its Division of Human Resources, who averred that the DOE does not use consultants to provide related services, such as nursing, to disabled students.

## VI

In an order dated May 24, 2010, the Supreme Court granted the DOE’s motion for summary judgment in its entirety. The court found that the DOE had made a prima facie showing that it contracted to have Jonathan’s educational needs met by a private educational facility selected by his parents and over which it lacked any authority or control. \*22 Accordingly, Jonathan must be deemed to have passed outside the DOE’s orbit of authority, and any claims against it sounding in negligent supervision by The Forum School must be dismissed. Continuing its analysis, the court concluded that the DOE had also made a prima facie showing that it could not be held vicariously liable for Timothy’s alleged negligence because she was an independent contractor rather than an employee. In this regard, the court pointed out that the Related Services Authorization entered into by the plaintiffs and the nurse expressly stated that it was an agreement by the parent and independent provider for nursing services, and that the independent provider was required to carry his or her own professional liability insurance. Moreover, the DOE memoranda pertaining to the use of consultants issued nearly a year after Jonathan’s death had no bearing on Timothy’s status because the evidence submitted by the DOE \*\*62 established that it did not use the consultant process to hire nurses.

However, the Supreme Court denied the motions of The Forum School and Timothy for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, except to the extent of dismissing the sixth cause of action, which sought punitive damages. The court found that The Forum School had failed to make a prima facie showing of its entitlement to judgment as a matter of law because the voluminous submissions of the parties raised triable issues of fact including, but not limited to, whether the school “adequately supervised Jonathan relative to his exposure to potential allergens on the day in question,” the reasonableness of the school’s decision to require Timothy to remain outside of Jonathan’s classroom, and whether the school “acted reasonably in responding to [Jonathan’s] emergency or in assessing, monitoring and treating Jonathan’s anaphylactic reaction.” The court also found that triable issues of fact existed, inter alia, regarding the sufficiency of Timothy’s supervision, and whether she acted in accordance with good and accepted nursing standards and pursuant to the protocol of Jonathan’s physician in assessing, monitoring, and treating Jonathan.

The Forum School and Timothy appeal from so much of the order as denied their separate motions for summary judgment dismissing the complaint and all cross claims insofar as asserted against them except to the extent of dismissing the cause of action to recover punitive damages, and the plaintiffs cross-appeal \*23 from so much of the order as granted the DOE’s motion for summary judgment dismissing the complaint insofar as asserted against it.

## VII

Turning first to the issue of whether the DOE’s motion for summary judgment dismissing the complaint was properly granted, we begin our analysis by examining whether the DOE’s statutory mandate to provide the children of New York City with a free and appropriate education expands its duty of care by requiring it to directly supervise a child who is not in its physical custody.

A school’s duty to supervise the students in its charge arises from its physical custody over them (*see Pratt v. Robinson*, 39 N.Y.2d 554, 560, 384 N.Y.S.2d 749, 349 N.E.2d 849). The rationale underlying this duty is that when a school takes custody of a child, it deprives the child of the protection of his or her parents or guardian, and thus must give the child the protection

of which the child has been deprived (see Restatement [Second] of Torts § 320, Comment b; *Pratt v. Robinson*, 39 N.Y.2d at 560, 384 N.Y.S.2d 749, 349 N.E.2d 849; *Nash v. Port Washington Union Free School Dist.*, 83 A.D.3d 136, 147, 922 N.Y.S.2d 408; *Hansen v. Bath & Tennis Mar. Corp.*, 73 A.D.3d 699, 700–701, 900 N.Y.S.2d 365). For this reason, a school’s duty to supervise is generally viewed as being “coextensive with and concomitant to its physical custody of and control over the child. When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child’s protection, the school’s custodial duty also ceases” (*Pratt v. Robinson*, 39 N.Y.2d at 560, 384 N.Y.S.2d 749, 349 N.E.2d 849; see *Stephenson v. City of New York*, 19 N.Y.3d 1031, 1034, 954 N.Y.S.2d 782, 978 N.E.2d 1251; *Hansen v. Bath & Tennis Mar. Corp.*, 73 A.D.3d at 701, 900 N.Y.S.2d 365; *Banks v. New York City Dept. of Educ.*, 70 A.D.3d 988, 990, 895 N.Y.S.2d 512).

**\*\*63** In addition to owing a duty of care to children who are in its physical custody, a school may also owe a duty of care “if a specific statutory duty has been imposed” (*Chainani v. Board of Educ. of City of N.Y.*, 87 N.Y.2d 370, 378, 639 N.Y.S.2d 971, 663 N.E.2d 283). In *Chainani*, the Court of Appeals rejected the plaintiffs’ argument that the DOE, which had contracted out the responsibility of transporting children to and from school, could be held directly liable for an alleged violation of *Vehicle and Traffic Law* § 1174(b). That provision of the *Vehicle and Traffic Law* requires a school bus **\*24** driver to instruct a child who needs to cross the street that he or she must cross in the front of the bus, and to keep the school bus stopped with red signal lights flashing until the child has reached the other side of the street. The Court of Appeals noted that the subject provision placed an affirmative obligation on bus drivers, not upon the school, and that the “web of detailed statutes and regulations concerning independent contractors engaged to provide student transportation services” showed that “[t]he Legislature obviously contemplated that schools would contract out transportation services yet nowhere specified the sort of direct responsibility it imposed on drivers under *Vehicle and Traffic Law* § 1174(b)” (87 N.Y.2d at 379, 639 N.Y.S.2d 971, 663 N.E.2d 283). The Court of Appeals further observed, in addressing a companion appeal, *Bruce v. Hasbrouck*, that the school could reasonably rely on the bus company with which it had contracted to provide transportation services “to act responsibly in protecting the safety of the children it was charged to transport and to comply with *Vehicle and Traffic Law* § 1174” (*id.* at 380, 639 N.Y.S.2d 971, 663 N.E.2d 283).

Here, the statutory predicate for the plaintiffs’ argument that the DOE can be held directly liable for the failure to provide proper supervision to Jonathan at The Forum School in New Jersey is the Individuals with Disabilities Education Act (20 USC § 1400 *et seq.*; hereinafter the IDEA). The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs” (20 USC § 1400[d]; see *Matter of Northeast Cent. School Dist. v. Sobol*, 79 N.Y.2d 598, 603, 584 N.Y.S.2d 525, 595 N.E.2d 339). The term “free appropriate public education” is defined, in part, as one that is in conformity with the child’s IEP (20 USC § 1401[9][D]; see *Matter of Northeast Cent. School Dist. v. Sobol*, 79 N.Y.2d at 603, 584 N.Y.S.2d 525, 595 N.E.2d 339). An IEP is developed jointly by a school official, the child’s teacher and parents, and where, appropriate, the child (see *Matter of Northeast Cent. School Dist. v. Sobol*, 79 N.Y.2d at 603, 584 N.Y.S.2d 525, 595 N.E.2d 339), and serves as “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs” (*School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 368, 105 S.Ct. 1996, 85 L.Ed.2d 385; see *Matter of Pawling Cent. School Dist. v. New York State Educ. Dept.*, 3 A.D.3d 821, 822–823, 771 N.Y.S.2d 572). In order to implement the IDEA and further its goal of providing an appropriate educational setting to disabled students, New York has enacted legislation, supplemented **\*25** by regulations of the Commissioner of Education, “to identify qualifying students and their needs, to review annually the efficacy of the education provided to each student, and to work toward meeting the physical and educational needs of children with handicapping conditions” (*Matter of Northeast Cent. School Dist. v. Sobol*, 79 N.Y.2d at 607, 584 N.Y.S.2d 525, 595 N.E.2d 339; see *Education Law* §§ 4402, 4403). Where appropriate special education services and programs are not available in the school district charged with the responsibility of providing a disabled student with an appropriate education, that school district may fulfill its obligations under the IDEA and *Education Law* by contracting with another school district to provide appropriate services (see *Matter of Northeast Cent. School Dist. v. Sobol*, 79 N.Y.2d at 608, 584 N.Y.S.2d 525, 595 N.E.2d 339; *Education Law* § 4401[2][b]).

In support of their position that the DOE’s statutory obligation to formulate an IEP for Jonathan imposed a duty of care to provide him with adequate supervision, the plaintiffs rely upon the Appellate Division, Fourth Department’s decision in *Troy v. North Collins Cent. School Dist.*, 267 A.D.2d 1023, 701 N.Y.S.2d 199. In that case, the Lackawanna City School District (hereinafter Lackawanna) formulated an IEP for the plaintiff’s son which was implemented by BOCES at a school in the North Collins Central School District (hereinafter North Collins). The IEP, which was “monitored and enforced by

Lackawanna,” provided for the plaintiff’s son to enroll in a technology class (*id.* at 1023, 701 N.Y.S.2d 199). The plaintiff’s son was injured in technology class while operating a miter saw. Lackawanna moved for summary judgment dismissing the complaint and cross claims asserted against it, and the Supreme Court granted its motion. The Fourth Department reversed, briefly reasoning that “[e]ven assuming that Lackawanna met its initial burden, we conclude that plaintiff and North Collins raised a triable issue of fact whether plaintiff’s son was within Lackawanna’s ‘orbit of authority’ by virtue of Lackawanna’s statutory duty to formulate and enforce the IEP and thus whether Lackawanna owed plaintiff’s son a duty of care in supervising and controlling him” (*id.* at 1023, 701 N.Y.S.2d 199, quoting *Chainani v. Board of Educ. of City of N.Y.*, 87 N.Y.2d at 378, 639 N.Y.S.2d 971, 663 N.E.2d 283). The Fourth Department further concluded that there was an issue of fact as to whether Lackawanna was negligent in placing the plaintiff’s son in a situation posing a foreseeable risk of \*26 harm by failing to indicate on his IEP that he suffered from cerebral palsy and a seizure disorder.

To the extent that *Troy* can be read as holding that a school district’s responsibility to formulate and implement an IEP brings a child who is not in its physical custody within its “orbit of authority,” this Court implicitly rejected that rationale in *Ferraro v. North Babylon Union Free School Dist.*, 69 A.D.3d 559, 892 N.Y.S.2d 507. In *Ferraro*, the infant plaintiff, who suffered from developmental delays and other disabilities, alleged that he was injured when he caught one of his fingers in a door hinge at a school in the North Babylon Union Free School District (hereinafter North Babylon), while attending a special educational program operated by Western Suffolk BOCES (hereinafter BOCES). The plaintiffs commenced an action against both North Babylon and BOCES, alleging that they were negligent in permitting the infant plaintiff to operate the door without supervision or assistance. The Supreme Court subsequently granted that branch of North Babylon’s motion which was for summary judgment dismissing so much of the complaint as alleged negligent supervision against it. This Court affirmed, noting that “[a]lthough a school has a statutory duty to provide special education services to children who require them, where the school has appropriately ‘contracted-out’ that duty, it ‘cannot be held liable on a theory that the \*\*65 children were in [the school’s] physical custody at the time of injury’ ” (*id.* at 560, 892 N.Y.S.2d 507, quoting *Chainani v. Board of Educ. of City of N.Y.*, 87 N.Y.2d 370, 639 N.Y.S.2d 971, 663 N.E.2d 283 [citation omitted] ). We then concluded that “the district discharged its duty to provide the infant plaintiff special education services by arranging for him to attend a program provided by BOCES. Since the infant plaintiff passed outside the district’s orbit of authority while attending the BOCES program, the Supreme Court properly granted that branch of the district’s motion which was for summary judgment dismissing so much of the complaint as alleged negligent supervision against it” (*Ferraro v. North Babylon Union Free School Dist.*, 69 A.D.3d at 560, 892 N.Y.S.2d 507).

In support of its motion for summary judgment, the DOE demonstrated that it fulfilled its obligations under the IDEA and the Education Law by formulating an appropriate IEP for Jonathan which called for him to attend The Forum School, a private educational facility for special needs children selected by \*27 his parents, and to receive nursing services while traveling to and from school and during the school day. In contrast to the IEP at issue in *Troy*, which was allegedly deficient because it failed to reveal that the child suffered from cerebral palsy and a seizure disorder, here, Jonathan’s IEP for the subject school year alerted The Forum School to the child’s known allergens, specifying that he was severely allergic to “wheat, gluten, all dairy, perfume” and required nursing services for both his allergies and his asthma. In opposition to the DOE’s motion, the plaintiffs failed to raise an issue of fact as to whether Jonathan’s IEP was deficient. Thus, this is not a case in which the DOE failed to properly identify, in its IEP, the child’s special needs, and the services necessary to provide the child with an appropriate education.

More fundamentally, the IDEA and the Education Law provisions implementing it recognize that there will be instances where a school district will be required to contract out the provision of educational services because it cannot provide a child with the specialized educational setting necessary to appropriately meet the child’s needs. Having placed Jonathan in a private school equipped to provide educational services to a child with both severe medical problems and developmental delays, the DOE was entitled to reasonably rely on that school to act responsibly in providing for Jonathan’s medical needs, and protecting his safety. The DOE did not exercise control over the day-to-day supervision of Jonathan while he was in the custody of The Forum School, and its statutory obligation to provide him with an appropriate education does not extend so far as to impose a duty on the DOE to supervise Jonathan while he was under the care and custody of The Forum School. To impose a direct duty of supervision on the DOE in these circumstances, where the child is in the custody of a private school in another state, would place the DOE in the position of being an insurer against the alleged acts of negligence committed by The Forum School despite its inability to exercise control over The Forum School’s staffing and educational decisions. For these reasons, we reject the plaintiffs’ argument that the statutory mandate to provide Jonathan with an appropriate education provides a basis to hold the DOE directly liable for any alleged negligence in failing to supervise Jonathan while he was in

the physical custody of The Forum School.

Further, the Supreme Court properly concluded, as a matter of law, that the DOE cannot be held vicariously **\*\*66** liable for **\*28** Timothy's alleged acts of negligence because she was not a DOE employee. Under the doctrine of respondeat superior, an employer is vicariously liable for a tort committed by an employee while the employee is acting within the scope of his or her employment (see *Riviello v. Waldron*, 47 N.Y.2d 297, 302, 418 N.Y.S.2d 300, 391 N.E.2d 1278; *Chuchuca v. Chuchuca*, 67 A.D.3d 948, 949, 890 N.Y.S.2d 573). Conversely, as a general rule, an employer may not be held liable for an independent contractor's negligent acts (see *Brothers v. New York State Elec. & Gas Corp.*, 11 N.Y.3d 251, 257, 869 N.Y.S.2d 356, 898 N.E.2d 539; *Kleeman v. Rheingold*, 81 N.Y.2d 270, 273, 598 N.Y.S.2d 149, 614 N.E.2d 712; *Rosenberg v. Equitable Life Assur. Socy. of U.S.*, 79 N.Y.2d 663, 668, 584 N.Y.S.2d 765, 595 N.E.2d 840; *A.M. Med., Servs., P.C. v. Progressive Cas. Ins., Co.*, 101 A.D.3d 53, 62, 953 N.Y.S.2d 219; *Calandrino v. Town of Babylon*, 95 A.D.3d 1054, 1055, 944 N.Y.S.2d 286). The rationale underlying this rule is that "one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor" (*Kleeman v. Rheingold*, 81 N.Y.2d at 274, 598 N.Y.S.2d 149, 614 N.E.2d 712; see *Brothers v. New York State Elec. & Gas Corp.*, 11 N.Y.3d at 257–258, 869 N.Y.S.2d 356, 898 N.E.2d 539; *Chainani v. Board of Educ. of City of N.Y.*, 87 N.Y.2d at 380–381, 639 N.Y.S.2d 971, 663 N.E.2d 283). In keeping with this rationale, control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for purposes of tort liability (see *Calandrino v. Town of Babylon*, 95 A.D.3d at 1055, 944 N.Y.S.2d 286; *Wecker v. Crossland Group, Inc.*, 92 A.D.3d 870, 871, 939 N.Y.S.2d 481; *Araneo v. Town Bd. for Town of Clarkstown*, 55 A.D.3d 516, 518–519, 865 N.Y.S.2d 281). However, the principle that an employer is not liable for the acts of independent contractors is subject to several categories of exceptions, which include an employer's negligence in selecting, instructing, or supervising the contractor, and instances in which the employer is under a specific nondelegable duty (see *Brothers v. New York State Elec. & Gas Corp.*, 11 N.Y.3d at 258, 869 N.Y.S.2d 356, 898 N.E.2d 539; *Kleeman v. Rheingold*, 81 N.Y.2d at 274, 598 N.Y.S.2d 149, 614 N.E.2d 712; *Feliberty v. Damon*, 72 N.Y.2d 112, 118, 531 N.Y.S.2d 778, 527 N.E.2d 261).

To establish that Timothy was an independent contractor and not a DOE employee, the DOE relied, inter alia, on deposition testimony which revealed the role played by the plaintiff mother in selecting Jonathan's nurses, and supervising their care of him. More specifically, the plaintiff mother testified that she found one of the registered nurses who shared in the duty of accompanying Jonathan to school by placing an advertisement in a local newspaper, and that this nurse in turn recommended Timothy. The plaintiff mother also stated that she discussed **\*29** Jonathan's asthma, allergies, and autism with the nurses, outlined the protocol for dealing with his medical problems, and gave them laminated cards to alert them to his known allergens. The plaintiff mother provided the nurses with Jonathan's lunch and snacks, and packed a medical bag for Jonathan that contained a portable nebulizer and all of his medications. Further, according to Timothy, it was the plaintiff mother who interviewed her for the position, and explained her duties to her. Although the DOE fingerprinted Timothy, gave her an identification card, and paid her, Timothy testified that the DOE never trained or supervised her. In addition, according to the deposition testimony of **\*\*67** DOE representative Catherine Frisca, the Related Services Authorization issued to the plaintiffs allowed them to select their own licensed provider, and the DOE's role was limited to performing a fingerprint check and obtaining a copy of the provider's license. These submissions established, prima facie, that Timothy was interviewed and selected by the plaintiff mother, that the plaintiff mother instructed Timothy on her duties, and that the DOE exercised no day-to-day supervision or control over Timothy's performance of her nursing services.

The evidence offered by the plaintiffs in opposition to the DOE's motion for summary judgment did not raise a triable issue of fact as to whether Timothy was a DOE employee, or whether an exception to the independent contractor rule applies. Although the plaintiffs submitted the Related Services Authorization signed by the plaintiff mother and Timothy, this document does not support their position that Timothy was a DOE employee. Further, there is no evidentiary support for the plaintiffs' assertion that the identification card issued by the DOE to Timothy was an "employee identification card," and the memoranda relating to the hiring of consultants was irrelevant in the absence of any indication that Timothy was hired through the consultant process. Moreover, Timothy was required to secure her own professional liability insurance. While the IDEA and Education Law mandate providing "related services," such as nursing services, to a child who requires them to obtain an appropriate education, they also contemplate that the provision of such services can be contracted out. The plaintiffs point to no authority which precludes the DOE from fulfilling its obligation to provide related services through independent contractors rather than employees.

Moreover, although we recognize the importance of ensuring that children who require nursing services to attend school **\*30**

receive such services from competent professionals, we cannot find that the provision of nursing services is so integral to the DOE's core responsibility of educating children that, as a matter of public policy, it can be deemed a nondelegable duty that the DOE cannot be permitted to transfer to another (see *Sandra M. v. St. Luke's Roosevelt Hosp. Ctr.*, 33 A.D.3d 875, 877–878, 823 N.Y.S.2d 463; cf. *Kleeman v. Rheingold*, 81 N.Y.2d at 275, 598 N.Y.S.2d 149, 614 N.E.2d 712). Thus, this case does not fall within the exception to the general rule that an employer cannot be held vicariously liable for the negligence of an independent contractor which applies when a nondelegable duty exists (see *Sandra M. v. St. Luke's Roosevelt Hosp. Ctr.*, 33 A.D.3d at 880, 823 N.Y.S.2d 463).

As an additional basis for the imposition of vicarious liability, the plaintiffs rely on the theory of apparent agency, arguing that by engaging Timothy to perform its legal obligations, the DOE held her out as qualified to perform nursing services. In order to create apparent authority, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses authority to act on behalf of the principal (see *Hallock v. State of New York*, 64 N.Y.2d 224, 232, 485 N.Y.S.2d 510, 474 N.E.2d 1178; *Dragotta v. Southampton Hosp.*, 39 A.D.3d 697, 698, 833 N.Y.S.2d 638). The third party must reasonably rely on the appearance of authority based on misleading words or conduct attributable to the principal, and must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill (see \*\*68 *Hallock v. State of New York*, 64 N.Y.2d at 231, 485 N.Y.S.2d 510, 474 N.E.2d 1178; *Sullivan v. Sirop*, 74 A.D.3d 1326, 1328, 905 N.Y.S.2d 240; *Sampson v. Contillo*, 55 A.D.3d 588, 589, 865 N.Y.S.2d 634; *Dragotta v. Southampton Hosp.*, 39 A.D.3d at 698, 833 N.Y.S.2d 638). None of these elements is present here. To the contrary, the evidence submitted by the DOE in support of its motion amply demonstrates that the plaintiff mother selected Timothy to be one of Jonathan's nurses based on her own assessment of Timothy's qualifications and skill, and not in reliance upon any words or conduct by the DOE. In opposition, the plaintiffs offered no evidence of any misleading conduct on the DOE's part which could give rise to a belief that Timothy was its agent, or that the plaintiffs accepted Timothy's nursing services in reliance upon her perceived relationship with the DOE. Accordingly, the Supreme Court properly concluded that the DOE cannot be held vicariously liable for Timothy's alleged negligence.

### \*31 VIII

We now address the issue of whether The Forum School's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it should have been granted in its entirety. Initially, we note that the allegations asserted against The Forum School in the plaintiffs' complaint and verified bill of particulars sounded in negligent supervision, and not in medical or nursing malpractice. Indeed, the primary claim asserted by the plaintiffs in their pleadings was that the school had failed to exercise reasonable care in supervising Jonathan and protecting him from injury, which centered largely on the specific allegation that Jonathan had been deprived of his right pursuant to his IEP "to have the nurse specifically assigned to him in his presence throughout the school day exposing him to serious and known allergens." Since "the prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" (*Foster v. Herbert Slepoy Corp.*, 76 A.D.3d 210, 214, 905 N.Y.S.2d 226; see *Carlucci v. Village of Scarsdale*, 104 A.D.3d 797, 798, 961 N.Y.S.2d 318), in moving for summary judgment, The Forum School was only required to address the allegations of negligent supervision set forth in the pleadings.

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v. City of New York*, 84 N.Y.2d 44, 49, 614 N.Y.S.2d 372, 637 N.E.2d 263; see *Braunstein v. Half Hollow Hills Cent. School Dist.*, 104 A.D.3d 893, 962 N.Y.S.2d 340; *Diana G. v. Our Lady Queen of Martyrs Sch.*, 100 A.D.3d 592, 593, 953 N.Y.S.2d 640). This duty of adequate supervision requires teachers and school personnel to provide students with the same level of care that "a parent of ordinary prudence would observe in comparable circumstances" (*Mirand v. City of New York*, 84 N.Y.2d at 49, 614 N.Y.S.2d 372, 637 N.E.2d 263 [internal quotation marks omitted]; see *Stephenson v. City of New York*, 19 N.Y.3d at 1033, 954 N.Y.S.2d 782, 978 N.E.2d 1251; *Diana G. v. Our Lady Queen of Martyrs Sch.*, 100 A.D.3d at 593, 953 N.Y.S.2d 640). However, a school is not an insurer of its students' safety (see *Stephenson v. City of New York*, 19 N.Y.3d at 1033, 954 N.Y.S.2d 782, 978 N.E.2d 1251; *Mirand v. City of New York*, 84 N.Y.2d at 49, 614 N.Y.S.2d 372, 637 N.E.2d 263; *Diana G. v. Our Lady Queen of Martyrs Sch.*, 100 A.D.3d at 593, 953 N.Y.S.2d 640).

**\*\*69** Since Jonathan was entrusted to the care of The Forum School and was in the school's physical custody at the time he suffered an anaphylactic reaction, the school unquestionably owed a duty to exercise the same degree of care toward him as **\*32** would a reasonably prudent parent. In evaluating whether The Forum School made a prima facie showing that it fulfilled this obligation, we are mindful of the fact that Jonathan faced more challenges than an average child his age because he suffered from both severe allergies and asthma, and was autistic and developmentally delayed.

Applying the reasonably prudent parent standard to the circumstances of this case, The Forum School made a prima facie showing that it provided Jonathan with adequate supervision. According to Jonathan's teacher, Ann Schwartzstein, there were usually only 8 to 10 children in her class, and she had the assistance of three teaching assistants. Thus, as The Forum School contends, the student-teacher ratio in Jonathan's class was more than reasonable for adequate supervision of the children, even taking into account their special needs. Further, while the plaintiffs' core allegation against The Forum School is that it violated Jonathan's IEP by stationing his private nurse outside the classroom, the IEP contained no specific requirement that Jonathan's nurses remain by his side at all times. The record additionally demonstrates that The Forum School's decision to station Jonathan's nurses outside of the classroom was made to foster his independence and educational development. Moreover, the nurses were seated just outside the classroom door where they could keep Jonathan in their line of sight, and were permitted to enter the classroom when necessary to monitor Jonathan. The evidence submitted by The Forum School also showed that it took reasonable steps to protect Jonathan by alerting teachers and staff to his allergies and instructing that he not be given any food except that which came from his home. In addition, The Forum School personnel appropriately called for emergency assistance at 12:24 p.m., within minutes after Jonathan first began to exhibit signs of respiratory distress at the end of the lunch period.

The Forum School also made a prima facie showing that its alleged negligent supervision was not a proximate cause of Jonathan's anaphylactic reaction. "[P]roximate cause" has been described as an "elusive" concept, "incapable of being precisely defined to cover all situations" because it stems from "policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct" (*Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 314, 434 N.Y.S.2d 166, 414 N.E.2d 666; see also *Pagan v. Goldberger*, 51 A.D.2d 508, 509, 382 N.Y.S.2d 549). Since the factors which are relevant to an assessment of legal cause vary depending on the **\*33** facts of the particular case, it is ordinarily "for the finder of fact to determine legal cause, once the court has been satisfied that a prima facie case has been established" (*Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d at 315, 434 N.Y.S.2d 166, 414 N.E.2d 666). To sustain the burden of proving a prima facie case, the plaintiff in a negligence action "must generally show that the defendant's negligence was a substantial cause of the events which produced the injury" (*id.*).

In support of its motion for summary judgment, The Forum School relied, inter alia, on the deposition testimony of the plaintiff mother, wherein she admitted that she had never actually learned what triggered Jonathan's anaphylactic reaction. The Forum School also submitted Jonathan's death certificate, which was **\*\*70** amended at the plaintiff mother's request to state that acute anaphylaxis caused his death, but did not identify what caused Jonathan to suffer the anaphylactic reaction. Although the plaintiffs theorize that blueberries may have been the triggering substance, The Forum School also offered evidence that Jonathan had never been tested to determine whether he was allergic to blueberries, that blueberries were not included on the list of known allergens provided by Jonathan's physician, and that Jonathan did not touch or handle the blueberries which Schwartzstein brought into the classroom on the morning of July 21, 2004. The Forum School argued that in the absence of evidence identifying the substance that triggered Jonathan's anaphylactic reaction, the plaintiffs cannot show that stationing Timothy outside of the classroom rather than allowing her to remain inside seated beside Jonathan while blueberries were displayed in the classroom was a proximate cause of his injury.

In opposition to The Forum School's motion, the plaintiffs failed to raise a triable issue of fact. Although the Supreme Court identified "the reasonableness of [the school's] decision to require nurse Timothy to remain outside of Jonathan's classroom" (*Begley v. City of New York*, 29 Misc.3d 579, 589, 907 N.Y.S.2d 373) as a disputed factual issue warranting denial of the motion, the plaintiffs offered no evidence that stationing Timothy just outside of the classroom door impaired her ability to observe and monitor Jonathan in any manner. Nor did the plaintiffs offer any evidence establishing that Jonathan was allergic to blueberries and that blueberries triggered his anaphylactic reaction. Thus, there is no triable issue of fact as to whether The Forum School's decision to place Jonathan's nurses, including Timothy, outside the classroom constituted negligent supervision, **\*34** or as to whether Timothy's position outside the classroom during the classroom lesson which featured a reading of "Blueberries for Sal" was a proximate cause of Jonathan's anaphylactic reaction and ensuing injuries.

Further, the affidavit of the plaintiffs' expert was insufficient to support the Supreme Court's conclusion that issues of fact exist as to whether The Forum School "adequately supervised Jonathan relative to his exposure to potential allergens on the day in question," and "acted reasonably in responding to [Jonathan's] emergency or in assessing, monitoring and treating Jonathan's anaphylactic reaction" (*id.*). McDonald's conclusions were largely based on the premise that Jonathan "was exposed to a substance to which he was allergic [ ], likely blueberries, beginning at approximately 10:00 a.m." However, McDonald's assertion that Jonathan was allergic to blueberries was based solely on the 2008 errata sheets in which the plaintiff mother attempted to alter her 2006 deposition testimony by adding blueberries to the list of foods and other substances to which Jonathan was allergic. The Supreme Court properly rejected the plaintiff mother's belated attempt to materially alter her deposition testimony to support a claim that blueberries were one of Jonathan's known allergens (*see Kuzmin v. Visting Nurse Serv. of N.Y.*, 56 A.D.3d 438, 439, 866 N.Y.S.2d 781; *Kelley v. Empire Roller Skating Rink, Inc.*, 34 A.D.3d 533, 534, 827 N.Y.S.2d 70; *Marzan v. Persaud*, 29 A.D.3d 652, 653, 817 N.Y.S.2d 297), and the plaintiffs do not challenge the portion of the Supreme Court's order which granted Timothy's motion to strike the errata sheets. Thus, McDonald's conclusion that exposure to blueberries "likely" triggered Jonathan's anaphylactic reaction lacked a proper evidentiary basis.

McDonald also faulted the failure of school nurse Elizabeth Golub to create a **\*\*71** protocol to ensure that Jonathan was provided with "disinfected lunch environment." However, even assuming that the school's duty under the reasonably prudent parent standard extended to disinfecting his lunch environment, in the absence of proof as to what triggered Jonathan's reaction, it cannot be concluded that the failure to disinfect the microwave oven used to heat Jonathan's lunch, and to disinfect his lunch table and place mat, proximately caused his injuries.

Finally, McDonald's affidavit failed to raise a triable issue of fact as to whether The Forum School responded reasonably to Jonathan's anaphylactic reaction. McDonald's claim that Jonathan exhibited signs of respiratory distress for 24 minutes **\*35** before the school called for emergency assistance is not supported by the record. The deposition testimony of both Timothy and Schwartzstein indicates that Jonathan asked for his nebulizer and began exhibiting the first symptoms of respiratory distress at approximately 12:15 p.m. or 12:20 p.m. as the lunch period was ending, and documentary evidence establishes that the school placed a call to 911 at 12:24 p.m. The plaintiffs' position that Jonathan began exhibiting symptoms of respiratory distress as early as 12:00 misconstrues a portion of Timothy's testimony in which she indicated that they had been in the lunchroom "for at least 20 minutes" when Jonathan asked for his nebulizer. Thus, there is no evidentiary foundation for McDonald's opinion that The Forum School delayed 24 minutes before calling 911.

Further, "[w]hile modern practice permits a plaintiff to successfully oppose a motion for summary judgment by relying on an unpleaded cause of action which is supported by the plaintiff's submissions" (*Comsewogue Union Free School Dist. v. Allied-Trent Roofing Sys., Inc.*, 15 A.D.3d 523, 524, 790 N.Y.S.2d 220; *see Lombardo v. Mastec N. Am., Inc.*, 68 A.D.3d 935, 936, 893 N.Y.S.2d 78), here, the plaintiffs offered no excuse for their delay in asserting a nursing malpractice claim against The Forum School for the first time in opposition to summary judgment, after discovery had been completed and their note of issue and certificate of readiness filed, which alone warrants rejection of the claim (*see Langan v. St. Vincent's Hosp. of N.Y.*, 64 A.D.3d 632, 633, 882 N.Y.S.2d 500; *Yousefi v. Rudeth Realty, LLC*, 61 A.D.3d 677, 678, 877 N.Y.S.2d 132; *Mainline Elec. Corp. v. Pav-Lak Indus., Inc.*, 40 A.D.3d 939, 836 N.Y.S.2d 294). In any event, even assuming that Golub owed a duty of professional care to Jonathan, despite the fact that The Forum School had never undertaken to provide Jonathan with nursing services and evidence that the plaintiff mother had instructed Golub that the private nurses would be completely responsible for providing such services, the affidavit of the plaintiffs' expert nurse was insufficient to raise a triable issue of fact as to whether Golub committed any departures from good and accepted nursing practice. McDonald's conclusions that Golub committed departures by permitting Timothy to administer an expired epi-pen and failing to ensure that Jonathan's airway was kept clear were not supported by the deposition testimony and evidence upon which she relied, and thus lacked an evidentiary foundation. Accordingly, these claims were insufficient to defeat summary judgment (*see \*36 Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 754 N.Y.S.2d 195, 784 N.E.2d 68; *Flushing Sav. Bank, FSB v. Bitar*, 106 A.D.3d 690, 965 N.Y.S.2d 518; *Reilly v. Ninia*, 81 A.D.3d 913, 916, 917 N.Y.S.2d 652; *Courtney v. Port Auth. of N.Y. & N.J.*, 34 A.D.3d 716, 718, 827 N.Y.S.2d 79).

**\*\*72 IX**

With regard to Timothy's motion for summary judgment, we first address the plaintiffs' claim that the Supreme Court should have disregarded the expert affidavit of registered nurse Maureen Walls Sileo because Timothy failed to disclose her expert's identity prior to the completion of discovery. Although CPLR 3101(d)(1)(i) requires a party, upon request, to identify the expert witnesses the party expects to call at trial, it "does not require a party to respond to a demand for expert witness information 'at any specific time'" (*Aversa v. Taubes*, 194 A.D.2d 580, 582, 598 N.Y.S.2d 801, quoting *Lillis v. D'Souza*, 174 A.D.2d 976, 976, 572 N.Y.S.2d 136; see *Rivers v. Birnbaum*, 102 A.D.3d 26, 35, 953 N.Y.S.2d 232). Thus, "the fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely" (*Rivers v. Birnbaum*, 102 A.D.3d at 41, 953 N.Y.S.2d 232). We have also recognized that precluding an expert's affidavit in the context of a summary judgment motion based solely on the failure to provide expert disclosure prior to the filing of the note of issue "does not necessarily advance the court's role of determining the existence of a triable issue of fact," particularly in a medical malpractice action, where a party must generally submit an affidavit or affirmation from an expert medical provider to meet its prima facie burden (*id.* at 42, 953 N.Y.S.2d 232). Thus, "[p]recluding an expert's affidavit solely on the ground that the offering party did not disclose the expert's identity pursuant to CPLR 3101(d)(1)(i) prior to the filing of the note of issue and certificate of readiness is not consistent with the purpose and procedural posture of a motion for summary judgment" (*id.*).

Applying these principles here, the Supreme Court did not improvidently exercise its discretion in considering the affidavit of Timothy's expert (see *Salcedo v. Weng Qu Ju*, 106 A.D.3d 977, 965 N.Y.S.2d 595; *LeMaire v. Kuncham*, 102 A.D.3d 659, 661, 957 N.Y.S.2d 732; *Rivers v. Birnbaum*, 102 A.D.3d at 42–43, 953 N.Y.S.2d 232). Notably, there is no indication in the record that Timothy retained Walls Sileo before the note of issue was filed and deliberately delayed in responding to the \*37 plaintiffs' expert witness demand, or that the delay in disclosing Walls Sileo's identity hampered the plaintiffs' ability to respond to her motion. Indeed, the plaintiffs responded to Walls Sileo's affidavit with the same expert affidavit they had utilized in opposing The Forum School's motion.

With respect to the merits, Timothy made a prima facie showing that she did not depart from good and accepted nursing and professional practice in her treatment and care of Jonathan on July 21, 2004, through the affidavit of her expert Walls Sileo (see *Makinen v. Torelli*, 106 A.D.3d 782, 965 N.Y.S.2d 529; *Garbowski v. Hudson Val. Hosp. Ctr.*, 85 A.D.3d 724, 727, 924 N.Y.S.2d 567; *Perro v. Schappert*, 47 A.D.3d 694, 848 N.Y.S.2d 882). Walls Sileo reviewed Timothy's response to the symptoms of respiratory distress Jonathan began to display in the lunchroom, and opined that it was not a departure from accepted nursing practice for Timothy to initially believe that Jonathan was suffering from an asthma attack based on his medical history and symptoms, and to develop a differential diagnosis of anaphylaxis once his condition worsened. She further opined that it was not within the scope of a private nurse's duty to guard a child from exposure to substances to which he was not known to be allergic. Walls Sileo also detailed Timothy's \*\*73 response to Jonathan's deteriorating condition in the classroom, and concluded, among other things, that Timothy appropriately administered epi-pens for the treatment of suspected anaphylaxis, and that the administration of liquid Benadryl was contraindicated because of the risk of aspiration. Walls Sileo further averred that an epi-pen that had been expired for less than a year would still contain a therapeutic dose and would not have contributed negatively to Jonathan's medical condition.

Timothy's evidentiary submissions also established that she was a registered nurse hired to provide Jonathan with nursing services which included the administration of nebulizer treatments for his asthma. In evaluating whether she can be held liable on a negligent supervision theory under such circumstances, we note that it is a fundamental precept of tort law that "[t]he existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the courts" (*Sanchez v. State of New York*, 99 N.Y.2d 247, 252, 754 N.Y.S.2d 621, 784 N.E.2d 675; see *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583, 657 N.Y.S.2d 377, 679 N.E.2d 616; *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 585, 611 N.Y.S.2d 817, 634 N.E.2d 189). Here, while Timothy was charged with the responsibility of accompanying Jonathan to school to monitor his medical condition \*38 and administer medications, he was not in her general physical custody during the school day. Rather, Jonathan was in the custody of The Forum School during school hours, and it was the duty of the school's teachers and personnel to provide him with adequate supervision in the absence of his parents. Under these circumstances, the scope of Timothy's duties as a nurse did not extend to providing Jonathan with adequate supervision by ensuring that The Forum School provided him with a reasonably safe environment. Accordingly, Timothy also made a prima facie showing that she was entitled to dismissal of the plaintiffs' negligent supervision claims as a matter of law.

In opposition to Timothy's prima facie showing, the plaintiffs failed to raise a triable issue of fact. The conclusion of the plaintiffs' expert nurse, Karen McDonald, that Timothy departed from good and accepted nursing practice by failing to

immediately recognize that Jonathan was suffering an anaphylactic reaction was based largely on the premise that he was exposed to a known allergen that morning, which should have heightened Timothy's awareness to the signs of anaphylaxis. However, as discussed above, that premise is without evidentiary foundation because there is no competent proof that Jonathan was known to be allergic to blueberries, and that Timothy was aware of any such allergy. Thus, McDonald's opinion that Timothy should have immediately recognized that Jonathan was suffering an anaphylactic reaction when he first experienced breathing difficulties in the lunchroom, and instituted the protocol for treatment of anaphylaxis by administering Benadryl prior to administering an epi-pen, is not grounded on facts in the record. Further, McDonald failed to address Sileo's statement that the administration of Benadryl once Timothy developed a differential diagnosis of anaphylaxis was contraindicated because of the risk of aspiration. Moreover, even assuming that the first epi-pen Timothy administered was indeed expired, as the plaintiffs allege, McDonald failed to address Sileo's opinion that an epi-pen that had been expired for less than a year would still contain a therapeutic dose, and would not have contributed negatively to the child's medical condition. Accordingly, the Supreme Court should have granted Timothy's motion for \*\*74 summary judgment dismissing the complaint and all cross claims insofar as asserted against her in its entirety.

The plaintiffs' remaining contentions are without merit.

Accordingly, the order is reversed insofar as appealed from, on the law, and the separate motions of The Forum School and \*39 Timothy for summary judgment dismissing the complaint and all cross claims insofar as asserted against each of them are granted in their entirety; and the order is affirmed insofar as cross-appealed from.

ORDERED that the order is reversed insofar as appealed from, on the law, and the separate motions of the defendants The Forum School and Michelle Timothy for summary judgment dismissing the complaint and all cross claims insofar as asserted against each of them are granted in their entirety; and it is further,

ORDERED that the order is affirmed insofar as cross-appealed from; and it is further,

ORDERED that one bill of costs is awarded to the defendants appearing separately and filing separate briefs, payable by the plaintiffs.

**BALKIN, LEVENTHAL and CHAMBERS, JJ., concur.**

#### **All Citations**

111 A.D.3d 5, 972 N.Y.S.2d 48, 297 Ed. Law Rep. 372, 2013 N.Y. Slip Op. 05867

#### **Footnotes**

<sup>1</sup> The City of New York was also named as a defendant in the action, and the City moved, together with the DOE, for summary judgment dismissing the complaint and all cross claims insofar as asserted against them. The Supreme Court granted the branch of the joint motion which sought relief on behalf of the City, concluding that the City could not be held vicariously liable for the alleged negligence of the DOE because the City and DOE are separate and distinct legal entities. The plaintiffs do not challenge the granting of the City's motion for summary judgment on this appeal.

<sup>2</sup> McDonald's assertion that Jonathan was allergic to blueberries was based on errata sheets sworn by the plaintiff mother on April 23, 2008. The errata sheets attempted to alter the plaintiff mother's May 24, 2006, deposition testimony by adding blueberries to the list of food and other substances Jonathan was allergic to, and claiming that doctors had told her not to give Jonathan blueberries.

**Begley v. City of New York, 111 A.D.3d 5 (2013)**

972 N.Y.S.2d 48, 297 Ed. Law Rep. 372, 2013 N.Y. Slip Op. 05867

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286 A.D.2d 744

Supreme Court, Appellate Division, Second Department, New York.

Michael BELCASTRO, et al., Appellants–Respondents,

v.

HEWLETT–WOODMERE UNION FREE SCHOOL DISTRICT NUMBER 14, et al.,

Respondents,

Premier–New York, Inc., et al., Respondents–Appellants

(and a third-party action).

Sept. 24, 2001.

### Synopsis

Worker brought action against site owner, general contractor, and subcontractors, seeking to recover damages for personal injuries under safe workplace laws. Defendants moved for summary judgment. General contractor cross-claimed against subcontractor for breach of contract, and site owner cross-claimed against subcontractor for common-law indemnification. The Supreme Court, Nassau County, [McCaffrey, J.](#), granted summary judgment in favor of defendants with respect to worker’s scaffold law claim, denied subcontractor’s motion for summary judgment on worker’s remaining claims and co-defendants’ cross-claims, and denied general contractor’s motion for summary judgment on its cross-claim. Parties’ appealed. The Supreme Court, Appellate Division, held that: (1) object that struck worker was not covered in scaffold law; (2) genuine issue of material fact existed as to whether defendants provided reasonable and adequate protection and safety, precluding summary judgment on claim under safe workplace statute; (3) genuine issue of material fact existed, precluding summary judgment for general contractor on cross claims for common-law and contractual indemnification, and for breach of contract; and (4) site owner might have been entitled to common-law indemnification from subcontractor.

Affirmed as modified.

### Attorneys and Law Firms

**\*\*537** [Andrew Rosner](#), Carle Place, NY, for appellants-respondents.

L’Abbate, Balkan, Colavita & Contini, LLP, Garden City, N.Y. ([Matthew K. Flanagan](#) of counsel), for respondent-appellant Premier–New York, Inc.

Baxter & Smith, P.C., Jericho, N.Y. ([Robert C. Baxter](#) of counsel), for respondent-appellant McConville Construction Corp.

Congdon, Flaherty, O’Callaghan, Reid, Donlon, Travis & Fishlinger, Garden City, N.Y. ([Kathleen D. Foley](#) and [Christine Gasser](#) of counsel), for respondent Hewlett–Woodmere Union Free School District Number 14.

Landman Corsi Ballaine & Ford, P.C., New York, N.Y. ([Laurine M. Rubin](#) of counsel), for respondent Gemma Construction Co., Inc.

[CORNELIUS J. O’BRIEN](#), J.P., [WILLIAM D. FRIEDMANN](#), [SANDRA J. FEUERSTEIN](#) and [BARRY A. COZIER](#), JJ.

### Opinion

**\*744** In an action to recover damages for personal injuries, etc., (1) the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County ([McCaffrey, J.](#)), dated March 2, 2000, as denied that branch of their motion which was for summary judgment on the issue of liability on their causes of action predicated upon [Labor Law §§](#)

240(1) and 241(6), granted that branch of the cross motion of the defendant Gemma Construction Co., Inc., which was for summary judgment dismissing the complaint insofar as asserted against it, and granted those branches of the separate cross motions of the defendants Hewlett–Woodmere Union Free School District Number 14, Premier–New York, Inc., and McConville Construction Corp. which were, in effect, for summary judgment dismissing the cause of action predicated upon Labor Law § 240(1) insofar as asserted against them, (2) McConville Construction Corp. cross-appeals, as limited by its brief, from so much of the same order as denied those branches of its cross motion which were for summary judgment dismissing the causes of action predicated upon common-law \*745 negligence and Labor Law §§ 200 and 241(6) and all cross claims insofar as asserted against it, granted that branch of the cross motion of the defendant Premier–New York, Inc., which was for summary judgment on its cross claim for breach of contract against McConville Construction Corp. based on its failure to name Premier–New York, Inc., as an additional insured, and conditionally granted that branch of the cross motion of the defendant Hewlett–Woodmere Union Free School District Number 14 which was for summary judgment on its cross claim for common-law indemnification insofar as asserted against McConville Construction Corp., and (3) the defendant Premier–New York, Inc., separately cross-appeals, as limited by its brief, from so much of the same order as denied that branch of its cross motion which was for summary judgment on its cross claims for common-law \*\*538 and contractual indemnification against the defendant McConville Construction Corp.

ORDERED that the order is modified, on the law, by (1) deleting the provision thereof granting that branch of the cross motion of the defendant Premier–New York, Inc., which was for summary judgment on its cross claim for breach of contract against the defendant McConville Construction Corp. based on its failure to name Premier–New York, Inc., as an additional insured, and substituting therefor a provision denying that branch of the cross motion, and (2) deleting the provision thereof conditionally granting that branch of the cross motion of the defendant Hewlett–Woodmere Union Free School District Number 14 which was for summary judgment on its cross claim for common-law indemnification insofar as asserted against the defendant McConville Construction Corp., and substituting therefor a provision denying that branch of the cross motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The plaintiff Michael Belcastro was employed as a welder by Babylon Iron Works, Inc., a subcontractor on a construction and renovation project at a library owned by the defendant Hewlett Woodmere Union Free School District Number 14 (hereinafter Hewlett UFSD). While working at the ground level, he was struck on the head by a piece of wood which allegedly fell or was thrown from the roof. The defendant Premier–New York, Inc. (hereinafter Premier), contracted with Hewlett UFSD to perform roofing work. Premier then subcontracted the roofing work, with the exception of certain metal work, to the defendant McConville Construction Corp. (hereinafter McConville).

The Supreme Court properly granted those branches of the \*746 separate cross motions of Hewlett UFSD, Premier, and McConville which were, in effect, for summary judgment dismissing the cause of action predicated upon Labor Law § 240(1) insofar as asserted against them. The plaintiffs were required to establish that “the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085). The evidence in the record established that the piece of wood at issue was not “a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell” (*Narducci v. Manhasset Bay Assocs.*, *supra*). The plaintiffs failed to present evidence sufficient to raise a triable issue of fact as to the liability of Hewlett UFSD, Premier, and McConville on this cause of action.

The plaintiffs moved for summary judgment on their cause of action predicated upon Labor Law § 241(6). We agree with the plaintiffs that the Industrial Code provision upon which they rely, 12 NYCRR 23–1.7(a)(1), is applicable here. However, while the violation of an Industrial Code provision “constitute[s] some evidence of negligence”, it is for a jury to determine “whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances” (*Rizzuto v. Wenger Contr. Co.*, 91 N.Y.2d 343, 351, 670 N.Y.S.2d 816, 693 N.E.2d 1068). The plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law on their cause of action predicated upon Labor Law § 241(6) insofar as asserted against McConville, or against Hewlett UFSD and Premier as the respective owner and contractor based upon a theory of vicarious liability (*see, Rizzuto v. Wenger Contr. Co.*, *supra*).

\*\*539 The plaintiffs’ contention that they are entitled to summary judgment on the issue of liability on their cause of action predicated upon Labor Law § 200 insofar as asserted against McConville is raised for the first time on appeal in their reply brief, and we decline to address it (*see, Matter of American Cyanamid Co. [Lederle Labs] v. Board of Assessors of Town of Orangetown*, 243 A.D.2d 630, 663 N.Y.S.2d 1005).

The Supreme Court properly denied that branch of Premier’s cross motion which was for summary judgment on its cross claims for common-law and contractual indemnification against McConville. In opposition to Premier’s prima facie showing of entitlement to judgment as a matter of law, McConville raised a triable issue of fact as to the supervision and control each may have exercised over the work which caused the plaintiff’s alleged injuries, as well as each other’s negligence (*see, \*747 Stevenson v. Alfredo, 277 A.D.2d 218, 715 N.Y.S.2d 444; Zeigler–Bonds v. Structure Tone, 245 A.D.2d 80, 664 N.Y.S.2d 799; Dawson v Pavarini Constr. Co., 228 A.D.2d 466, 644 N.Y.S.2d 285*).

However, the Supreme Court erred in granting summary judgment to Premier on its cross claim for breach of contract against McConville, which was based on McConville’s failure to name it as an additional insured, as a triable issue of fact remains as to whether the injury arose out of McConville’s activities. “A contractual provision which requires that a party be named as an additional insured in a liability policy has been interpreted to mean that the additional insured is insured for all liability arising out of the activities covered by the agreement” (*Ceron v. Rector, Church Wardens & Vestry Members of Trinity Church, 224 A.D.2d 475, 476, 638 N.Y.S.2d 476*).

Hewlett UFSD, as the owner which may be held vicariously liable, may be entitled to common-law indemnification from an actively-negligent subcontractor provided that it did not direct, control, or supervise the subcontractor’s work (*see, Kelly v. Diesel Constr. Div. of Carl A. Morse, 35 N.Y.2d 1, 358 N.Y.S.2d 685, 315 N.E.2d 751; Dawson v. Pavarini Constr. Co., supra*). However, as the evidence failed to establish as a matter of law that McConville was negligent, the Supreme Court erred in conditionally granting that branch of Hewlett UFSD’s cross motion which was for summary judgment on its cross claim for common-law indemnification insofar as asserted against McConville.

Finally, we agree with the Supreme Court that there was no evidence that the defendant contractor Gemma Construction Co., Inc. (hereinafter Gemma), was liable to the plaintiffs. In contrast to Premier, Gemma was involved solely with interior work on the library, and there was no evidence that it had any control over the work on the roof. Accordingly, that branch of Gemma’s cross motion which was for summary judgment dismissing the complaint insofar as asserted against it was properly granted (*see, Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 445 N.Y.S.2d 127, 429 N.E.2d 805; Williams v. Dover Home Improvement, 276 A.D.2d 626, 714 N.Y.S.2d 318; Kulaszewski v. Clinton Disposal Serv., 272 A.D.2d 855, 707 N.Y.S.2d 558; D’Amico v. New York Racing Assn., 203 A.D.2d 509, 611 N.Y.S.2d 252*).

The parties’ remaining contentions are without merit.

O’BRIEN, J.P., FRIEDMANN, FEUERSTEIN and COZIER, JJ., concur.

#### **All Citations**

286 A.D.2d 744, 730 N.Y.S.2d 535, 2001 N.Y. Slip Op. 07532

296 A.D.2d 522

Supreme Court, Appellate Division, Second Department, New York.

Carlos Francisco CABEZAS, et al., respondents,  
v.  
CONSOLIDATED EDISON, appellant, et al., defendants  
(and a third-party action).

July 22, 2002.

### Synopsis

Worker brought personal injury claim against construction site owner to recover for injuries he allegedly sustained when a concrete pipe fell on his foot. The Supreme Court, Kings County, [Rappaport, J.](#), granted worker's cross motion for summary judgment and denied owner's motion for summary judgment. Owner appealed. The Supreme Court, Appellate Division, held that worker was not injured in connection with an elevated hazard as required to impose liability under the scaffold law.

Reversed.

### Attorneys and Law Firms

**\*\*211** Torino & Bernstein, P.C., Mineola, N.Y. (Eva J. Tompkins of counsel), for appellant.

Gorayeb & Associates, P.C., New York, N.Y. ([John M. Shaw](#) of counsel), for respondents.

[FRED T. SANTUCCI, J.P.](#), [SONDRA MILLER](#), [GLORIA GOLDSTEIN](#) and [SANDRA L. TOWNES, JJ.](#)

### Opinion

**\*522** In an action to recover damages for personal injuries, etc., the defendant Consolidated Edison appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County ([Rappaport, J.](#)), dated April 12, 2001, as granted that branch of the plaintiffs' cross motion which was for partial summary judgment against it on the cause of action pursuant to [Labor Law § 240\(1\)](#), and denied that branch of its cross motion which was for summary judgment dismissing that cause of action insofar as asserted against it.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, that branch of the plaintiffs' cross motion which was for partial summary judgment on the cause of action pursuant to [Labor Law § 240\(1\)](#) is denied, that branch of the appellant's cross motion which was for summary judgment dismissing that cause of action insofar as asserted against it is granted, and that cause of action is dismissed insofar as asserted against the appellant.

The plaintiff Carlos Francisco Cabezas was injured when he and a co-worker were unloading concrete conduit pipes from the flatbed of a truck at a construction site. The injured plaintiff, who was positioned on the ground, failed to grasp one of the pipes passed to him by the co-worker from the flatbed of the truck, and the pipe fell on his foot. The plaintiffs asserted, inter alia, a cause of action pursuant to [Labor Law § 240\(1\)](#) against the defendant Consolidated Edison, which had hired his employer to install the pipes. The Supreme Court granted that branch of the plaintiffs' cross motion which was for partial summary judgment on that cause of action, and denied that **\*523** branch of Consolidated Edison's cross motion which was for summary judgment dismissing that cause of action insofar as asserted against it.

Contrary to the plaintiff's contention, the risk he faced at the time he was injured was not a special hazard that [Labor Law § 240\(1\)](#) was designed to address. Rather, it was the type of ordinary risk inherent in construction work. The task of unloading

**Cabezas v. Consolidated Edison, 296 A.D.2d 522 (2002)**

745 N.Y.S.2d 210, 2002 N.Y. Slip Op. 05949

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a truck is not an elevation-related risk simply because there is a difference in elevation between the ground and the truck bed (see *Jacome v. State of New York*, 266 A.D.2d 345, 698 N.Y.S.2d 320; *Tillman v. Triou's Custom Homes*, 253 A.D.2d 254, 687 N.Y.S.2d 506; *Phelan v. State of New York*, 238 A.D.2d 882, 661 N.Y.S.2d 109; *Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 727 N.Y.S.2d 37, 750 N.E.2d 1085; *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49, 618 N.E.2d 82; *Carroll v. Timko Contr. Corp.*, 264 A.D.2d 706, 694 N.Y.S.2d 744; see also *Rodriguez v. Margaret Tietz Ctr. For Nursing Care*, 84 N.Y.2d 841, 616 N.Y.S.2d 900, 640 N.E.2d 1134). Accordingly, that branch of the \*\*212 plaintiffs' cross motion which was for partial summary judgment on the cause of action pursuant to Labor Law § 240(1) is denied, and that branch of Consolidated Edison's cross motion which was for summary judgment dismissing that cause of action insofar as asserted against it is granted.

SANTUCCI, J.P., S. MILLER, GOLDSTEIN and TOWNES, JJ., concur.

**All Citations**

296 A.D.2d 522, 745 N.Y.S.2d 210, 2002 N.Y. Slip Op. 05949

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304 A.D.2d 515  
Supreme Court, Appellate Division, Second Department, New York.

Ramraj CHALU, et al., Respondents,  
v.  
Ramdhanie HARIRAJ, Appellant, et al., Defendants.

April 7, 2003.

### Synopsis

In an action to recover damages for personal injuries resulting from an assault of guest on defendant homeowner's property, the Supreme Court, Kings County, [Hubsher, J.](#), denied homeowner's motion for summary judgment, and homeowner appealed. The Supreme Court, Appellate Division, held that homeowner did not have a duty to prevent his brothers from assaulting a guest on his property.

Reversed.

### Attorneys and Law Firms

**\*\*132** Goldberg & Carlton, New York, N.Y. ([Gary M. Carlton](#) of counsel), for appellant.

Hankin, Handwerker & Mazel, PLLC, New York, N.Y. ([Mark Hankin](#) and [Scott Agulnick](#) of counsel), for respondents.

[SANDRA J. FEUERSTEIN, J.P.](#), [WILLIAM D. FRIEDMANN](#), [ROBERT W. SCHMIDT](#) and [WILLIAM F. MASTRO, JJ.](#)

### Opinion

**\*515** In an action to recover damages for personal injuries, etc., the defendant Ramdhanie Hariraj appeals from an order of the Supreme Court, Kings County (Hubsher, J.), dated October 1, 2002, which denied his motion for summary judgment dismissing the complaint insofar as asserted against him.

ORDERED that the order is reversed, on the law, with costs, the motion is granted, the complaint is dismissed insofar as asserted against the appellant, and the action against the remaining defendants is severed.

The action arises out of injuries sustained by the plaintiff Ramraj Chalu (hereinafter the plaintiff) as a result of an assault which took place outside the home of the defendant Ramdhanie Hariraj (hereinafter Ramdhanie), his brother-in-law. The plaintiff had been a guest at a religious celebration at Ramdhanie's home and claims he was in the driveway, in the process of leaving, when he was assaulted and beaten by Ramdhanie's two brothers. The assailants, named as codefendants, had also been guests at the celebration.

Homeowners have a duty to act in a reasonable manner to prevent harm to those on their property, which includes the duty to control the conduct of third persons on their premises when the homeowners have the opportunity to control such persons and are reasonably aware of the need for such control (see *D'Amico v. \*\*133 Christie*, 71 N.Y.2d 76, 85, 524 N.Y.S.2d 1, 518 N.E.2d 896; *De Ryss v. New York Cent. R.R. Co.*, 275 N.Y. 85, 9 N.E.2d 788; *Lindskog v. Southland Rest.*, 160 A.D.2d 842, 554 N.Y.S.2d 276).

**\*516** On a motion for summary judgment, the movant has the initial burden of presenting a prima facie case showing his or her entitlement to judgment in his favor as a matter of law before the court looks to the sufficiency of the responding papers (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572).

The appellant met his initial burden by relying, *inter alia*, on the plaintiff's affidavit and deposition. The plaintiff admitted that Ramdhanie did not participate in the assault, that Ramdhanie did not arrive on the scene until after it was over, that prior to the date of the incident the plaintiff's relationship with his assailants, who were also his brothers-in-law, was good, and that he had had no arguments with them at the celebration.

In opposition, the plaintiff belatedly attempts to show that it was reasonable for Ramdhanie to have known about the need to control his brothers. He submits an affidavit in which he alleges that he was informed by an unnamed person, at an unspecified time, that Ramdhanie had prior knowledge of his brothers' intentions. This vague, unsupported, self-serving allegation appears to be a feigned issue, raised by the plaintiff for the first time in response to a motion for summary judgment to avoid the consequences of his earlier admissions about his good relations with the defendants (*see Krohn v. Melanson, 298 A.D.2d 510, 748 N.Y.S.2d 658*). The plaintiffs' opposition papers were insufficient to defeat the summary judgment motion. The plaintiffs did not respond with evidence in admissible form and offer no acceptable explanation for this failure (*see Mendez v. City of New York, 295 A.D.2d 487, 488, 744 N.Y.S.2d 847*). Accordingly, the Supreme Court should have granted Ramdhanie's motion for summary judgment dismissing the complaint insofar as asserted against him.

The parties' remaining contentions are either academic or without merit.

#### **All Citations**

304 A.D.2d 515, 758 N.Y.S.2d 132, 2003 N.Y. Slip Op. 12822

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150 A.D.3d 1081  
Supreme Court, Appellate Division, Second Department, New York.

Jose Andres ESCOBAR, respondent,  
v.  
Bebe Halima SAFI, appellant.

11496/13, 2016-07243  
|  
May 24, 2017.

### Synopsis

**Background:** Worker who was injured while replacing roof on three-family home brought action against homeowner, alleging violation of scaffold law. The Supreme Court, Kings County, [Baily–Schiffman](#), J., granted worker’s summary judgment motion. Homeowner appealed.

The Supreme Court, Appellate Division, held that worker established prima facie entitlement to judgment as a matter of law for violation of scaffold law.

Affirmed.

### Attorneys and Law Firms

**\*\*351** Harris King Fodera & Correia (Mauro Lilling Naparty, LLP, Woodbury, NY [[Matthew W. Naparty](#) and [Seth M. Weinberg](#)], of counsel), for appellant.

Gorayeb & Associates, P.C., New York, NY ([John M. Shaw](#) of counsel), for respondent.

[REINALDO E. RIVERA](#), J.P., [LEONARD B. AUSTIN](#), [ROBERT J. MILLER](#), and [BETSY BARROS](#), JJ.

### Opinion

**\*1081** In an action to recover damages for personal injuries, the defendant appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County ([Baily–Schiffman](#), J.), dated May 19, 2016, as granted that branch of the plaintiff’s motion which was for summary judgment on the issue of liability **\*1082** on the cause of action alleging a violation of [Labor Law § 240\(1\)](#).

ORDERED that the order is affirmed insofar as appealed from, with costs.

During the replacement of the roof on the defendant’s three-family home, the **\*\*352** plaintiff was injured when a sheet of plywood fell and struck him as he was standing on the ground. The plaintiff had been cutting the sheets of plywood in the driveway before handing them off to a coworker to tie the sheets to ropes to be hoisted up to the workers installing the sheets on the roof, located 20 feet above.

The plaintiff commenced this action against the defendant alleging, inter alia, a violation of [Labor Law § 240\(1\)](#). Thereafter, the plaintiff moved for summary judgment on the issue of liability on the cause of action alleging a violation of [Labor Law §](#)

240(1) and to amend the complaint to correct the date of the accident. The defendant cross-moved for summary judgment dismissing the complaint. The Supreme Court granted the plaintiff's motion and denied the defendant's cross motion. The defendant appeals from so much of the order as granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1).

Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (see *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 374, 929 N.Y.S.2d 556, 953 N.E.2d 794; *Esteves-Rivas v. W2001Z/15CPW Realty, LLC*, 104 A.D.3d 802, 803, 961 N.Y.S.2d 497; *Martinez v. Ashley Apts Co., LLC*, 80 A.D.3d 734, 735, 915 N.Y.S.2d 620). The “extraordinary protections” (*Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 96, 7 N.Y.S.3d 263, 30 N.E.3d 154 [internal quotation marks omitted]) of Labor Law § 240(1) only relate to “ ‘special hazards’ presenting ‘elevation-related risk[s]’ ” (*id.* at 97, 7 N.Y.S.3d 263, 30 N.E.3d 154, quoting *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219, 583 N.E.2d 932).

“To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries” (*Allan v. DHL Express, Inc.*, 99 A.D.3d 828, 833, 952 N.Y.S.2d 275; see *Berg v. Albany Ladder Co., Inc.*, 10 N.Y.3d 902, 904, 861 N.Y.S.2d 607, 891 N.E.2d 723; *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287, 771 N.Y.S.2d 484, 803 N.E.2d 757). Liability under Labor Law § 240(1) depends on whether the injured worker’s “task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against” (\*1083 *Broggy v. Rockefeller Group, Inc.*, 8 N.Y.3d 675, 681, 839 N.Y.S.2d 714, 870 N.E.2d 1144). The single decisive question in determining whether Labor Law § 240(1) is applicable is whether the plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential (see *Runner v. New York Stock Exch. Inc.*, 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279, 922 N.E.2d 865). “[F]alling object” liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured (*Sarata v. Metropolitan Transp. Auth.*, 134 A.D.3d 1089, 1091, 23 N.Y.S.3d 281 [internal quotation marks omitted]; see *Quattrocchi v. F.J. Sciame Constr. Corp.*, 11 N.Y.3d 757, 758–759, 866 N.Y.S.2d 592, 896 N.E.2d 75; *Sung Kyu-To v. Triangle Equities, LLC*, 84 A.D.3d 1058, 1059–1060, 923 N.Y.S.2d 628) but also where the plaintiff demonstrates that, at the time the object fell, it “required securing for the purposes of the undertaking” (\*\*353 *Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 N.Y.3d 658, 663, 985 N.Y.S.2d 416, 8 N.E.3d 791 [internal quotation marks omitted]).

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the defendant failed to provide an adequate safety device to protect him and that this failure was a proximate cause of his injuries. This is so whether the sheet of plywood fell as it was being hoisted because it was not properly secured while it was being pulled up to the roof, as testified to by the plaintiff (see *Coque v. Wildflower Estates Developers, Inc.*, 31 A.D.3d 484, 487–488, 818 N.Y.S.2d 546; *Orner v. Port Auth. of N.Y. & N.J.*, 293 A.D.2d 517, 517–518, 740 N.Y.S.2d 414), or whether the sheet of plywood fell from the hands of the plaintiff’s coworkers on the roof as it was being installed or about to be installed due to a failure to secure it, a theory advanced by the defendant (see *Outar v. City of New York*, 5 N.Y.3d 731, 732, 799 N.Y.S.2d 770, 832 N.E.2d 1186; *Pritchard v. Tully Constr. Co., Inc.*, 82 A.D.3d 730, 730, 918 N.Y.S.2d 154), since either scenario implicates the protections of Labor Law § 240(1) (see *La Veglia v. St. Francis Hosp.*, 78 A.D.3d 1123, 1127, 912 N.Y.S.2d 611).

In opposition, the defendant failed to raise a triable issue of fact as to the absence of a statutory violation or as to whether the plaintiff’s own conduct was the sole proximate cause of his accident (see *McCallister v. 200 Park, L.P.*, 92 A.D.3d 927, 929, 939 N.Y.S.2d 538; *La Veglia v. St. Francis Hosp.*, 78 A.D.3d at 1127, 912 N.Y.S.2d 611). The defendant did not offer any evidence, other than mere speculation, in opposition to the plaintiff’s showing that he was entitled to judgment as a matter of law, which was insufficient to refute that showing or to raise a bona fide issue as to how the accident occurred (see *Carrion v. City of New York*, 111 A.D.3d 872, 873, 976 N.Y.S.2d 126; *Ernest v. Pleasantville Union Free School Dist.*, 28 A.D.3d 419, 420, 811 N.Y.S.2d 573).

\*1084 Accordingly, the Supreme Court properly granted that branch of the plaintiff’s motion which was for summary judgment on the issue of liability on his Labor Law § 240(1) cause of action.

#### All Citations

**Escobar v. Safi, 150 A.D.3d 1081 (2017)**

55 N.Y.S.3d 350, 2017 N.Y. Slip Op. 04099

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150 A.D.3d 1081, 55 N.Y.S.3d 350, 2017 N.Y. Slip Op. 04099

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22 N.Y.3d 658  
Court of Appeals of New York.

Richard FABRIZI, Respondent,  
v.  
1095 AVENUE OF the AMERICAS, L.L.C., et al., Appellants,  
and  
Verizon New York, Inc., et al., Defendants. (And Other Actions.).

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|  
Feb. 20, 2014.

### Synopsis

**Background:** Worker who was injured when conduit pipe fell on his hand brought action against building owner, tenant, and contractor, alleging scaffold law violation. The Supreme Court, New York County, [Emily Jane Goodman, J., 2011 WL 2428710](#), granted summary judgment to worker. [Defendants appealed. The Supreme Court, Appellate Division, First Department, 98 A.D.3d 864, 951 N.Y.S.2d 480](#), affirmed as modified. Question was certified.

**Holdings:** The Court of Appeals, [Pigott, J.](#), held that:

compression coupling connecting conduit that fell on worker was not safety device within the meaning of the scaffold law;

failure to use set screw coupling instead of compression coupling did not violate scaffold law's proper protection directive;  
and

tenant was not aggrieved by the Appellate Division order, and thus its appeal would be dismissed.

Reversed in part and appeal dismissed in part.

[Lippman](#), Chief Judge, filed dissenting opinion in which [Rivera, J.](#), concurred.

[Abdus-Salaam, J.](#), took no part.

### Attorneys and Law Firms

\*\*\*417 London Fischer LLP, New York City ([Daniel Zemann, Jr.](#), and [David B. Franklin](#) of counsel), for appellants.

Pollack Pollack Isaac & DeCicco, LLP, New York City ([Brian J. Isaac](#), [Michael H. Zhu](#) and [Kenneth J. Gorman](#) of counsel), and Block O'Toole & Murphy for respondent.

## OPINION OF THE COURT

PIGOTT, J.

**\*\*792 \*660** Plaintiff, an electrician employed by Forest Electric Corp. (Forest), sustained injury when a 60–80 pound conduit pipe fell on his hand. Forest had been hired by defendant J.T. Magen Construction Company, Inc. (Magen) to overhaul the electrical system in offices leased by defendant Dechert, LLP (Dechert) from the building owner, defendant 1095 Avenue of the Americas, L.L.C. (1095).

As part of the overhaul, Forest was responsible for the installation of conduit piping through the building’s floors. The conduit enabled telecommunication wires to run from the building’s sub-cellar through each floor’s respective telecommunication **\*661** closet. The run of conduit on each floor contains a “pencil box” that provides access to the telecommunication wire.

On the day of the incident, plaintiff was relocating a pencil box that Forest had installed the previous week. The pencil box was situated between, and affixed to, two pieces of conduit that were four inches in diameter. The top section of conduit was 8 to 10 feet long and ran vertically from the top of the pencil box to the **\*\*793** ceiling; the lower section ran vertically from the bottom of the pencil box to the floor. The top conduit was connected to a similar horizontal conduit near the ceiling by a four-inch compression coupling.

**\*\*\*418** The pencil box proper was secured by a metal “Kindorf support.” Because the pencil box was obstructing conduit that was to be installed adjacent to the box, plaintiff had to move it, which required him to drill holes in the floor to relocate the Kindorf support. Before drilling the holes, however, plaintiff cut through the conduit just above and below the pencil box. He then removed the pencil box leaving the top conduit dangling by the compression coupling near the ceiling. Plaintiff knelt on the floor to begin drilling. Approximately 15 minutes later, while plaintiff was drilling, the top conduit fell, striking plaintiff on the hand.

Plaintiff thereafter brought this action against defendants and others, asserting, as relevant here, that defendants violated Labor Law § 240(1). That statute provides that

“[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

After joinder of issue and completion of discovery, defendants 1095 and Magen moved for summary judgment dismissing the section 240(1) cause of action. Plaintiff opposed the motion and cross-moved for partial summary judgment on liability against **\*662** 1095, Magen and Dechert,<sup>1</sup> claiming, in reliance on plaintiff’s deposition testimony, that a more secure “set screw coupling,”<sup>2</sup> rather than the purportedly inadequate compression coupling, should have been used to secure the top conduit. Supreme Court granted plaintiff’s motion for partial summary judgment on liability, and denied defendants’ motion seeking to dismiss the section 240(1) claim, holding that the conduit, being attached to the ceiling by a compression coupling that failed, was not properly secured so as to afford plaintiff protection (2011 N.Y. Slip Op. 31529[U] [2011]).

A divided Appellate Division modified the order of Supreme Court by denying plaintiff’s motion for summary judgment, holding that plaintiff failed to establish as a matter of law that defendants’ failure to provide a protective device, i.e., a set screw coupling, was a proximate cause of his accident, but otherwise affirmed the order (98 A.D.3d 864, 865, 951 N.Y.S.2d 480 [1st Dept.2012]). The dissenting Justice contended that the coupling did not constitute a statutory safety device of the kind enumerated in section 240(1) and therefore defendants should have been granted summary judgment (*id.* at 876, 951 N.Y.S.2d 480 [Tom, J., dissenting]). The Appellate Division certified the following question to this Court: “Was the order of the Supreme Court, as modified by this **\*\*794** Court, properly made?” We answer the certified question in the negative.

Labor Law § 240(1) as cited above requires owners and contractors to provide proper protection to those working on a construction site (*see* **\*\*\*419** *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 583 N.E.2d 932 [1991]). It imposes absolute liability where the failure to provide such protection is a proximate cause of a worker’s

injury (see *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 7, 935 N.Y.S.2d 551, 959 N.E.2d 488 [2011]).

In order to prevail on summary judgment in a section 240(1) “falling object” case, the injured worker must demonstrate the existence of a hazard contemplated under that statute “and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [2001], citing *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82 [1993]). Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being \*663 “hoisted or secured” (*Narducci*, 96 N.Y.2d at 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085), or “required securing for the purposes of the undertaking” (*Outar v. City of New York*, 5 N.Y.3d 731, 732, 799 N.Y.S.2d 770, 832 N.E.2d 1186 [2005]; see *Quattrocchi v. F.J. Sciame Constr. Corp.*, 11 N.Y.3d 757, 759, 866 N.Y.S.2d 592, 896 N.E.2d 75 [2008]). Contrary to the dissent’s contention, section 240(1) does not automatically apply simply because an object fell and injured a worker; “[a] plaintiff must show that the object fell ... because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci*, 96 N.Y.2d at 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [second emphasis supplied]).

The Appellate Division properly concluded that plaintiff had not established entitlement to summary judgment on liability. It erred, however, in denying summary judgment to defendants 1095 and Magen, because they established as a matter of law that the conduit did not fall on plaintiff due to the absence or inadequacy of an enumerated safety device.

The compression coupling, which plaintiff claims was inadequate, is not a safety device “constructed, placed and operated as to give proper protection” from the falling conduit. Its only function was to keep the conduit together as part of the conduit/pencil box assembly. The coupling had been installed a week before the incident and had been serving its intended purpose until a change order was issued and plaintiff dismantled the conduit/pencil box assembly. Plaintiff’s argument that the coupling itself is a safety device, albeit an inadequate one, extends the reach of section 240(1) beyond its intended purpose to any component that may lend support to a structure. It cannot be said that the coupling was meant to function as a safety device in the same manner as those devices enumerated in section 240(1).

It follows that defendants’ failure to use a set screw coupling is not a violation of section 240(1)’s proper protection directive.<sup>3</sup> A set screw coupling, utilized in the manner proposed by plaintiff, is not a safety device within the meaning of the \*\*795 statute. Plaintiff concedes that compression and set screw couplings are “basic couplings” that serve identical purposes, namely, to function as support for the conduit/pencil box assembly, not to provide worker protection. Given that either coupling would have served the purpose, it is of no moment that defendants \*664 utilized \*\*\*420 compression couplings rather than set screw couplings as part of the assembly.

Accordingly, on the appeal by defendants 1095 and Magen, the order of the Appellate Division should be reversed, with costs, the motion by defendants 1095 and Magen for summary judgment dismissing the section 240(1) claims against them should be granted, and the certified question answered in the negative. The appeal, insofar as taken by Dechert, should be dismissed, without costs.<sup>4</sup>

Chief Judge LIPPMAN (dissenting).

It seems clear to me that plaintiff has established his entitlement to summary judgment by demonstrating that his gravity-related injury was proximately caused by the defendants’ failure to provide an adequate safety device. Therefore, I dissent.

Plaintiff, an electrician, was injured in the course of repositioning a “pencil box” that served as an access point for telecommunication wires. Plaintiff was assigned this task pursuant to a “change order” intended to remedy an error committed by his employer. Specifically, upon its original installation approximately a week earlier, the pencil box had been positioned in such a way that it threatened to obstruct part of the building infrastructure yet to be installed.

To accomplish the task, plaintiff disconnected the box from a structure known as a “Kindorf support,” which anchored the box to the floor and the wall, and also from two sections of conduit pipe running above and below the pencil box,

respectively. After the pencil box was disassembled from its supports, a considerable length of galvanized steel conduit, weighing 60–80 pounds, was left hanging above plaintiff as he knelt below to drill. The conduit was connected to another section of pipe near the ceiling by a compression coupling, which is essentially a cylindrical metal sleeve that tightens around the ends of two pipes to secure them together. Next, plaintiff drilled holes in the concrete floor in preparation for relocating the Kindorf. When he commenced the drilling, the suspended conduit came loose from its coupling and plummeted to the floor, crushing plaintiff’s right thumb.

Section 240(1) of the Labor Law imposes absolute liability on certain contractors, owners and their agents when their failure \*665 to provide an adequate safety mechanism caused a worker’s injury in a gravity-related accident. Our recent precedent in this area makes it clear that, in determining whether section 240(1) applies, “the dispositive inquiry ... does not depend upon the precise characterization of the device employed” (*Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 10, 935 N.Y.S.2d 551, 959 N.E.2d 488 [2011], quoting *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279, 922 N.E.2d 865 [2009] ). It follows that the availability of statutory protection here should not depend on whether couplings can be characterized as safety devices under section 240(1), or whether they should be considered part of a building’s permanent infrastructure.

\*\*796 “Rather, the single decisive question is whether plaintiffs injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*id.* [emphasis omitted] ). Accordingly, the crucial legal questions arising from the face of this record are whether the task of repositioning the pencil box entailed an elevation-related risk \*\*\*421 that triggered defendants’ duty to supply adequate safety devices, and whether the failure to do so caused the accident.

Clearly, plaintiff was exposed to a gravity-related hazard within the meaning of the statute. Kneeling on the floor to drill, he was situated several feet below a 60–to–80–pound segment of conduit pipe made of galvanized steel. The conduit was attached to the pipe above by only a compression coupling whose grip was inadequate to withstand the vibrations of drilling. “The elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent” (*Runner*, 13 N.Y.3d at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865).

As to the question of proximate cause, the record evidence shows that the absence of an effective safety device caused plaintiff’s injury. It requires little imagination to conclude that a tool capable of stabilizing the conduit pipe—whether brace, clamp, coupling, or otherwise—would be precisely the sort of device contemplated by section 240(1). Without such a device, however, the pipe was insufficiently secure and plaintiff incurred injury as a result. As the motion court aptly summarized, “the conduit was disconnected from the Kindorf[ ] support and only attached to the ceiling by a compression coupling, and because it fell, it was not secured as to give plaintiff proper protection” (*Fabrizi v. 1095 Ave. of the Americas, L.L.C.*, 2011 N.Y. Slip Op. 31529[U], \*11 [Sup.Ct., N.Y. County 2011] ).

\*666 By focusing myopically on whether couplings fall under the statute, the majority loses sight of defendants’ burden on summary judgment. To prevail, it is not enough for defendants to argue that a particular alternative device can be sensibly distinguished from those enumerated in the statute. Instead, they must demonstrate either the absence of a gravity-related risk or, where the risk posed by the elevation differential is readily apparent, a deficient causal nexus between the failure to provide a safety device and plaintiff’s injury.

Defendants did raise a challenge with regard to causation in arguing that plaintiffs method of performing the work unnecessarily created the risk. According to defendants, as well as the dissent in the Appellate Division, plaintiff singlehandedly caused the accident by dismantling the pencil box prior to drilling holes in the floor. However, there was no evidence presented that this modus operandi constituted anything but standard procedure in the trade. Plaintiff made a prima facie showing that he had performed the same task four or five times in the course of his career and had routinely undertaken it in an identical manner. In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff’s own conduct was the proximate cause of the accident (*see e.g. McCallister v. 200 Park, L.P.*, 92 A.D.3d 927, 929, 939 N.Y.S.2d 538 [2d Dept.2012]; *Kempisty v. 246 Spring St., LLC*, 92 A.D.3d 474, 474–475, 938 N.Y.S.2d 288 [1st Dept.2012]; *cf. Quattrocchi v. F.J. Sciamme Constr. Corp.*, 11 N.Y.3d 757, 759 [2008] [triable issue of fact as to whether plaintiff caused the accident where he was warned not to enter the accident area] ).

**\*\*797** In sum, defendants' proof failed to rebut plaintiff's prima facie showing that his injury resulted from the absence of a safety device capable of guarding against the gravity-related risk. Accordingly, I would grant summary judgment to plaintiff. In reaching a contrary result, the majority imposes an undue burden on plaintiff that serves only to frustrate the Labor Law's salutary purpose of ensuring worker protection.

**\*\*\*422** Judges [GRAFFEO](#), [READ](#) and [SMITH](#) concur with Judge [PIGOTT](#); Chief Judge [LIPPMAN](#) dissents in an opinion in which Judge [RIVERA](#) concurs; Judge [ABDUS-SALAAM](#) taking no part.

On appeal by defendants 1095 Avenue of the Americas, L.L.C. and J.T. Magen Construction Company, Inc., order reversed, with costs, motion by those defendants for summary judgment dismissing the [Labor Law § 240\(1\)](#) claim as against them **\*667** granted and certified question answered in the negative. Appeal, insofar as taken by defendant Dechert, LLP, dismissed, without costs, upon the ground that it is not a party aggrieved ([CPLR 5511](#)).

#### All Citations

22 N.Y.3d 658, 8 N.E.3d 791, 985 N.Y.S.2d 416, 2014 N.Y. Slip Op. 01206

#### Footnotes

- <sup>1</sup> Dechert did not move for summary judgment.
- <sup>2</sup> A set screw coupling has two screws on both sides that are placed into the conduit and are tightened with either a ratchet or screwdriver, thereby locking the conduit in place.
- <sup>3</sup> The Appellate Division erroneously stated that plaintiff had "requested a set screw coupling to secure the pipe to prevent the pipe from falling during the disassembly" when he had been directed to move the pencil box ([98 A.D.3d at 865](#), [951 N.Y.S.2d 480](#)). The record demonstrates that plaintiff requested a set screw coupling a week before the incident for a task unrelated to the one at issue.
- <sup>4</sup> Since Dechert did not move for summary judgment and the Appellate Division denied plaintiff's motion for summary judgment, Dechert was not aggrieved by the Appellate Division order.

77 A.D.3d 788  
Supreme Court, Appellate Division, Second Department, New York.

Joel FRIED, appellant-respondent,  
v.  
ALWAYS GREEN, LLC, defendant third-party plaintiff-respondent-appellant;  
Castle House Development Inc., third-party defendant-respondent.

36194/06, 2009-08925

|  
Oct. 19, 2010.

### Synopsis

**Background:** Laborer on construction project brought common-law negligence and Labor Law claims against premises owner, seeking damages for injuries allegedly sustained when bag of construction debris tossed from roof of building fell onto his head. Premises owner sought common-law indemnification against laborer's employer. The Supreme Court, Kings County, [Kramer, J.](#), granted owner summary judgment on claims based on common-law and statutory duty of care, granted owner summary judgment on all but one of his Industrial Code claims, and granted employer summary judgment on third-party complaint. Laborer and owner appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

scaffold law did not apply;

owner did not owe common-law or statutory duty of care to laborer;

triable issue of fact as to whether absence of "catch platform" was proximate cause of laborer's injury precluded summary judgment; and

employer was not liable to owner for indemnity.

Affirmed.

### Attorneys and Law Firms

\*\*453 Subin Associates, LLP, New York, N.Y. ([Brooke Lombardi](#) of counsel), for appellant-respondent.

Hannum Feretic Prendergast & Merlino, LLC, New York, N.Y. ([Beth A. Kennelly](#) of counsel), for defendant third-party plaintiff-respondent-appellant.

Cullen and Dykman, LLP, Brooklyn, N.Y. ([Margaret Mazlin](#) of counsel), for third-party defendant-respondent.

[WILLIAM F. MASTRO, J.P.](#), [THOMAS A. DICKERSON](#), [RANDALL T. ENG](#), and [PLUMMER E. LOTT, JJ.](#)

### Opinion

**\*788** In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his notice of appeal and brief, from so much of an order of the Supreme Court, Kings County (Kramer, J.), dated July 22, 2009, as denied his motion for summary judgment on the issue of liability and granted those branches of the cross motion of the defendant third-party plaintiff which were for summary judgment dismissing his common-law negligence and Labor Law § 200 and § 240(1) causes of action and so much of his Labor Law § 241(6) cause of action as was based on alleged violations of 12 NYCRR 23–1.7, 23–1.19, 23–1.20, and 23–6.3, and the defendant third-party plaintiff cross-appeals from so much of the same order as denied that branch of its cross motion which was for summary judgment dismissing so much the plaintiff’s Labor Law § 241(6) cause of action as was based on an alleged violation of 12 NYCRR 23–2.6 and granted the motion of the third-party defendant for summary judgment dismissing the third-party complaint.

ORDERED that the order is affirmed insofar as appealed and cross-appealed from, with one bill of costs payable by the defendant third-party plaintiff to the third-party defendant, and one bill of costs payable by the plaintiff to the defendant third-party plaintiff.

The plaintiff, an employee of the third-party defendant, Castle House Development, Inc. (hereinafter Castle House), allegedly was injured while standing outside a construction project in **\*789** Brooklyn. The plaintiff alleged that while he was standing 10 to 18 feet away from a “dumpster,” a laborer also employed by Castle House tossed a bag of construction debris from the roof of the building onto the plaintiff’s head. The plaintiff subsequently commenced this action to recover damages for personal injuries against Always Green, LLC (hereinafter Always Green), the owner of the subject premises, asserting causes of action sounding in common-law negligence and violations of Labor Law § 200, 240(1) and § 241(6). Always Green then commenced a third-party action for common-law indemnification against Castle House.

The Supreme Court properly denied that branch of the plaintiff’s motion which was for summary judgment on his Labor Law § 240(1) cause of action and properly granted that branch of Always Green’s cross motion which was for summary judgment dismissing that cause of action. The evidence submitted with the motion and the cross motion established that the bag of construction debris which struck the plaintiff was not material being hoisted or a load which required securing for the purposes of the undertaking at the time it fell (see **\*\*454** *Roberts v. General Elec. Co.*, 97 N.Y.2d 737, 738, 742 N.Y.S.2d 188, 768 N.E.2d 1127; *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085; *Harinarain v. Walker*, 73 A.D.3d 701, 702, 900 N.Y.S.2d 364; *Donnelly v. City of Niagara Falls*, 5 A.D.3d 1103, 1104, 773 N.Y.S.2d 631).

The Supreme Court also properly denied that branch of the plaintiff’s motion which was for summary judgment on his common-law negligence and Labor Law § 200 causes of action and properly granted that branch of Always Green’s cross motion which was for summary judgment dismissing those causes of action. The evidence established that the injury arose out of an alleged defect in the methods or materials of the work, and that Always Green did not have the authority to supervise or control the performance of the work (see *Persichilli v. Triborough Bridge & Tunnel Auth.*, 16 N.Y.2d 136, 146–147, 262 N.Y.S.2d 476, 209 N.E.2d 802; *Ortega v. Puccia*, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323).

Contrary to the contention of Always Green, the Supreme Court properly denied that branch of its motion which was for summary judgment dismissing so much of the plaintiff’s Labor Law § 241(6) cause of action as was predicated on an alleged violation of 12 NYCRR 23–2.6, as there is a triable issue of fact regarding whether the absence of a required “catch platform” was a proximate cause of the injury. Contrary to the contention of the plaintiff, however, the Supreme Court properly granted those branches of Always Green’s motion which were for summary judgment dismissing so much of the plaintiff’s **\*790** Labor Law § 241(6) cause of action as was predicated on alleged violations of 12 NYCRR 23–1.7, 23–1.19, 23–1.20, and 23–6.3, as Always Green established that those provisions are inapplicable to the case at bar (see *Marin v. AP–Amsterdam 1661 Park LLC*, 60 A.D.3d 824, 826, 875 N.Y.S.2d 242; *Aloi v. Structure–Tone, Inc.*, 2 A.D.3d 375, 376, 767 N.Y.S.2d 832), and in opposition, the plaintiff failed to raise a triable issue of fact.

Contrary to Always Green’s contention, the Supreme Court properly granted Castle House’s motion for summary judgment dismissing the third-party complaint. Castle House made a prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff did not suffer a “grave injury” as defined by Workers’ Compensation Law § 11 (see *Rubeis v. Aqua Club, Inc.*, 3 N.Y.3d 408, 788 N.Y.S.2d 292, 821 N.E.2d 530; *Goodleaf v. Tzivos Hashem, Inc.*, 68 A.D.3d 817, 889 N.Y.S.2d 478; *Dechnik v. Fortunato Sons, Inc.*, 58 A.D.3d 793, 794, 870 N.Y.S.2d 915). In opposition, Always Green failed to raise a triable issue of fact.

**Fried v. Always Green, LLC, 77 A.D.3d 788 (2010)**

910 N.Y.S.2d 452, 2010 N.Y. Slip Op. 07510

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The plaintiff's remaining contentions are without merit.

**All Citations**

77 A.D.3d 788, 910 N.Y.S.2d 452, 2010 N.Y. Slip Op. 07510

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303 A.D.2d 718  
Supreme Court, Appellate Division, Second Department, New York.

Rachel GAGLIARDI, Respondent,  
v.  
AMERICAN SUZUKI MOTOR CORPORATION, et al., Appellants.

March 31, 2003.

### Synopsis

Victim brought product liability action against manufacturer to recover damages for personal injuries. The Supreme Court, Westchester County, [Colabella, J.](#), granted judgment for victim. Manufacturer appealed. The Supreme Court, Appellate Division, held that: (1) jury verdict was based on valid line of reasoning; (2) court properly admitted testimony of expert; and (3) admission of hearsay statement of victim into evidence under excited utterance exception was within judge's exercise of discretion.

Affirmed.

### Attorneys and Law Firms

\*581 [Calinoff & Katz, LLP](#), New York, N.Y. ([Arnold I. Katz](#) of counsel), and [Sidley Austin Brown & Wood, LLP](#), Washington, D.C. ([Gene C. Schaer](#) and [Rebecca K. Smith Wood](#) of counsel; [Paul J. Zidlicky](#) and [Timothy D. Hawkes](#) on the brief), for appellants (one brief filed).

[Goldblatt & Associates](#), New York, N.Y. ([Kenneth B. Goldblatt](#) of counsel), for respondent.

[MYRIAM J. ALTMAN](#), J.P., [NANCY E. SMITH](#), [LEO F. McGINITY](#) and [STEPHEN G. CRANE](#), JJ.

### Opinion

In an action to recover damages for personal injuries, the defendants appeal from a judgment of the Supreme Court, Westchester County ([Colabella, J.](#)), dated February 7, 2002, which, upon a jury verdict, and upon the denial of their motion pursuant to [CPLR 4404](#) to set aside the verdict and for judgment as a matter of law, is in favor of the plaintiff and against them in the principal sum of \$550,000.

ORDERED that the judgment is affirmed, with costs.

\*582 Contrary to the defendants' contention, the jury verdict was based on a valid line of reasoning which could lead rational people to a similar conclusion that the defendants' product was defective and that the defect was a substantial factor in causing the plaintiff's accident (see [Cohen v. Hallmark Cards](#), 45 N.Y.2d 493, 410 N.Y.S.2d 282, 382 N.E.2d 1145; [Nicoli v. Whelan](#), 283 A.D.2d 623, 725 N.Y.S.2d 365).

Further, the trial court properly admitted the testimony of the plaintiff's expert, as it was based upon facts and material in evidence, as well as his experience in the subject area (see [Dougherty v. Milliken](#), 163 N.Y. 527, 533, 57 N.E. 757; [Commercial Cas. Ins. Co. v. Roman](#), 269 N.Y. 451, 456-457, 199 N.E. 658).

Given the activities of the plaintiff in the one-minute interval between the accident and her statement, which included crying hysterically, bleeding profusely, and picking glass out of her face, the trial court providently exercised its discretion in admitting her hearsay statement into evidence under the excited utterance exception (see [People v. Fratello](#), 92 N.Y.2d 565,

**Gagliardi v. American Suzuki Motor Corp., 303 A.D.2d 718 (2003)**

757 N.Y.S.2d 581, 2003 N.Y. Slip Op. 12619

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570, 684 N.Y.S.2d 149, 706 N.E.2d 1173, *cert. denied* 526 U.S. 1068, 119 S.Ct. 1462, 143 L.Ed.2d 548; *cf. People v. Carroll*, 95 N.Y.2d 375, 385, 718 N.Y.S.2d 10, 740 N.E.2d 1084; *People v. Vasquez*, 88 N.Y.2d 561, 579, 647 N.Y.S.2d 697, 670 N.E.2d 1328).

The defendants' remaining contentions are either unpreserved for appellate review or without merit.

**All Citations**

303 A.D.2d 718, 757 N.Y.S.2d 581, 2003 N.Y. Slip Op. 12619

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157 A.D.3d 537  
Supreme Court, Appellate Division, First Department, New York.

Jhonny GUTIERREZ, Plaintiff–Respondent,  
v.  
HARCO CONSULTANTS CORP., et al., Defendants–Appellants.  
[And a Third Party Action]

5452  
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Index 158284/12  
|  
ENTERED: JANUARY 16, 2018

### Synopsis

**Background:** Worker brought personal injury action against defendants, alleging violation of scaffold law regarding rebar that was carried by hand and allegedly struck worker while rebar was being passed to worker. The Supreme Court, New York County, [Cynthia S. Kern, J.](#), 2017 WL 529503, granted worker’s partial summary judgment motion on issue of liability, and denied defendants’ summary judgment on scaffold law claim. Defendants appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

worker was exposed to elevation-related hazard with respect to piece of rebar that struck worker as it was being passed by hand to worker, and thus rebar required a safety device as contemplated under scaffold law, and

whether worker’s injury was incurred as a result of allegedly being struck by rebar as it was being carried by hand and passed to worker was material fact issue precluding summary judgment.

Affirmed as modified.

### Attorneys and Law Firms

\*\*625 Gallo Vitucci Klar LLP, New York ([Daniel Mevorach](#) of counsel), for appellants.

Lurie, Ilchert, MacDonnell & Ryan, LLP, New York ([Dennis A. Breen](#) of counsel), for respondent.

[Friedman, J.P.](#), [Mazzarelli](#), [Kapnick](#), [Webber](#), [Moulton](#), JJ.

### Opinion

\*537 Order, Supreme Court, New York County ([Cynthia S. Kern, J.](#)), entered February 9, 2017, which, to the extent appealed from, granted plaintiff’s motion for partial summary judgment on the issue of liability on his [Labor Law § 240\(1\)](#) claim, and denied defendants’ motion for summary judgment dismissing the [section 240\(1\)](#) claim, unanimously modified, on the law, to deny plaintiff’s motion, and otherwise affirmed, without costs.

According to plaintiff’s testimony in this action, he was exposed to elevation-related hazards (*see Wilinski v. 334 E. 92nd*

*Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 9, 935 N.Y.S.2d 551, 959 N.E.2d 488 [2011] ). Assuming that the piece of rebar that allegedly struck plaintiff weighed what defendants claimed it weighed, it still presented an elevation-related risk even if it may have traveled only a short distance before striking plaintiff (see *Marrero v. 2075 Holding Co., LLC*, 106 A.D.3d 408, 409, 964 N.Y.S.2d 144 [1st Dept. 2013]; *Cardenas v. One State St., LLC*, 68 A.D.3d 436, 437, 890 N.Y.S.2d 41 [1st Dept. 2009] ). We reject defendants' contention that the rebar being passed to plaintiff did not require a safety device of the type contemplated by Labor Law § 240 because it was being carried by hand (see e.g. \*538 *Rutkowski v. New York Convention Ctr. Dev. Corp.*, 146 A.D.3d 686, 46 N.Y.S.3d 54 [1st Dept. 2017] ). However, plaintiff was not entitled to summary judgment as to liability on the claim under § 240(1) because the records of his medical treatment create an issue of fact as to whether his injury was incurred in the manner described in his testimony.

### **All Citations**

157 A.D.3d 537, 67 N.Y.S.3d 624, 2018 N.Y. Slip Op. 00252

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63 N.Y.2d 723  
Court of Appeals of New York.

Loretta HAMBSCH, Appellant,  
v.  
NEW YORK CITY TRANSIT AUTHORITY, Respondent.

Sept. 11, 1984.

### Synopsis

An action was filed to recover damages for personal injuries suffered in automobile accident. The Supreme Court, Kings County, Franklin Morton, J., on issue of liability and William T. Bellard, J., on issue of damages, awarded plaintiff principle sum of \$50,000. The Supreme Court, Appellate Division, reversed and dismissed complaint, [101 A.D.2d 807](#), [475 N.Y.S.2d 467](#). Plaintiff appealed. The Court of Appeals held that physician's testimony that plaintiff's condition was caused by a fracture was inadmissible without evidence establishing reliability of the out-of-court material relied upon by physician.

Affirmed.

### Attorneys and Law Firms

\*724 \*\*\*196 \*\*517 Stephen T. Mangiaracina, Howard Beach, for appellant.

William E. Rosa and Lawrence Heisler, Brooklyn, for respondent.

## OPINION OF THE COURT

### MEMORANDUM.

The order of the Appellate Division should be affirmed, with costs. [101 A.D.2d 807](#), [475 N.Y.S.2d 467](#).

Plaintiff seeks to recover for personal injuries sustained when she was struck by defendant's bus, asserting her right to common-law recovery because she sustained a "serious injury" as defined by subdivision 4 of section 671 of the Insurance Law. The Appellate Division found that \*725 her evidence was insufficient to establish a prima facie case and reversed the judgment of Special Term entered upon a jury verdict.

Under the "No-Fault Law" (Insurance Law, §§ 670–678), there is "no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss" (Insurance Law, § 673, subd. 1). In this case plaintiff presented evidence of three types of "serious injury"—a fracture, a permanent loss of use of a body function, and a nonpermanent impairment that prevented her from performing substantially all of her usual and customary activities for at least 90 out of the 180 days immediately following the accident. The jury found for plaintiff on the first two of these types of serious injury and against her on the third.

Plaintiff's own evidence contradicted her claim that she had sustained a permanent loss of use of a body function and the Appellate Division correctly held that plaintiff had failed to establish a prima facie case of serious injury based on a fracture

(see *Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570, 441 N.E.2d 1088).

With respect to the claimed fracture, plaintiff’s physician testified that, based on his reading of an X ray of her lower back, she was suffering from spondylolisthesis, a misalignment of the vertebra. It was error to permit the doctor’s testimony without producing the X rays and introducing them into evidence (see *Marion v. Coon Constr. Co.*, 216 N.Y. 178, 182, 110 N.E. 444; *Richter v. Trailways of New England*, 28 A.D.2d 737, 738, 282 N.Y.S.2d 148; *Cellamare v. Third Ave. Tr. Corp.*, 273 App.Div. 260, 77 N.Y.S.2d 91). There was no objection to his testimony, however, and the matter is not preserved for our review.

Plaintiff’s physician also testified that spondylolisthesis is caused by a fracture. The basis for this medical opinion was a discussion two days prior to trial with a radiologist who held that opinion because of an unknown study that he did not participate in. This evidence was objected to and the Appellate Division correctly \*\*\*197 found this opinion testimony inadmissible.

\*\*518 “It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness” ( \*726 *Cassano v. Hagstrom*, 5 N.Y.2d 643, 646, 187 N.Y.S.2d 1, 159 N.E.2d 348; *Lopato v. Kinney Rent-A-Car*, 73 A.D.2d 565, 566, 423 N.Y.S.2d 42). In *People v. Sugden*, 35 N.Y.2d 453, 363 N.Y.S.2d 923, 323 N.E.2d 169, we recognized two limited exceptions to this rule and held that an expert may rely on out-of-court material if “it is of a kind accepted in the profession as reliable in forming a professional opinion” or if it “comes from a witness subject to full cross-examination on the trial” (*id.*, at pp. 460, 461, 363 N.Y.S.2d 923, 323 N.E.2d 169).

In order to qualify for the “professional reliability” exception, there must be evidence establishing the reliability of the out-of-court material (see *Borden v. Brady*, 92 A.D.2d 983, 984, 461 N.Y.S.2d 497 [Yesawich, J., concurring]; *People v. Gupta*, 87 A.D.2d 991, 450 N.Y.S.2d 124; *People v. Branton*, 67 A.D.2d 664, 665, No Ref.; *People v. Miller*, 57 A.D.2d 668, 669, 393 N.Y.S.2d 679; *People v. Borcsok*, 114 Misc.2d 810, 811–813, 452 N.Y.S.2d 814; *People v. De Zimm*, 112 Misc.2d 753, 760–762, 447 N.Y.S.2d 585). Plaintiff presented no such evidence in the instant case and therefore the physician’s opinion was inadmissible. Without this testimony there was no basis for finding that the spondylolisthesis was the result of a fracture sufficient to constitute a “serious injury”.

COOKE, C.J., and JASEN, JONES, WACHTLER, MEYER, SIMONS and KAYE, JJ., concur.

### Opinion

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order affirmed, with costs, in a memorandum.

### All Citations

63 N.Y.2d 723, 469 N.E.2d 516, 480 N.Y.S.2d 195

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170 A.D.3d 679  
Supreme Court, Appellate Division, Second Department, New York.

Behar HAXHIA, et al., Appellants,  
v.  
Barbara VARANELLI, Respondent.

2017-08270

(Index No. 63266/15)

Argued - November 13, 2018

March 6, 2019

#### Synopsis

**Background:** Worker who was injured in fall while attempting to deliver oil to property owner's home brought cause of action to recover for his injuries. The Supreme Court, Westchester County, [William J. Giacomo, J.](#), granted property owner's motion for summary judgment, and worker appealed.

The Supreme Court, Appellate Division, held that property owner was not liable for injuries sustained by worker delivering oil to property owner's home during blizzard, when heavy hose that he was carrying to deliver oil pulled him back towards retaining wall from which he was attempting to descend.

Affirmed.

**\*\*352** In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Westchester County ([William J. Giacomo, J.](#)), dated June 19, 2017. The order granted the defendant's motion for summary judgment dismissing the complaint.

#### Attorneys and Law Firms

Law Office of Anthony R. Tirone, P.C., White Plains, N.Y. (Hasapidis Law Offices [[Annette G. Hasapidis](#)] of counsel), for appellants.

Wilson, Bave, Conboy, Cozza & Couzens, P.C., White Plains, N.Y. (Donna L. Cook of counsel), for respondent.

[MARK C. DILLON, J.P.](#), [JEFFREY A. COHEN](#), [COLLEEN D. DUFFY](#), [LINDA CHRISTOPHER, JJ.](#)

DECISION & ORDER

\*680 ORDERED that the order is affirmed, with costs.

On March 5, 2015, between 10:00 and 11:00 a.m., the plaintiff Behar Haxhia (hereinafter the plaintiff) allegedly was injured at the defendant's property as the plaintiff was attempting to deliver oil to the defendant's house in Westchester County. Subsequently, the plaintiff, and his wife suing derivatively, commenced this \*\*353 action against the defendant, and the defendant moved for summary judgment dismissing the complaint.

At his deposition, the plaintiff testified that it was snowing "heavy" when he arrived at the defendant's home, it was snowing continuously the entire time he was there, and that it had been snowing "pretty much almost every day" prior the accident. There was a "uniform blanket" of approximately two feet of snow on the defendant's lawn when he arrived at the premises. Since the driveway had not been plowed, the plaintiff opted to walk across the lawn, which was on an incline, and a rock wall, in order to reach the oil fill at the defendant's house. He was able to see three-to-six inches of the top of the rock wall. He walked from the street, up the snow-covered incline, and over the wall to the defendant's house to find a connection for the hose to deliver the oil, and back to his truck, which was parked in the street, without incident. The hill was not slick or icy. After the plaintiff returned to the truck, he turned on the pump and began to transport the hose, which he said was "pretty heavy," to the house.

When the plaintiff reached the rock wall, he put the hose down, stepped onto the wall, and picked up the hose. He placed the hose on his right shoulder and held the hose with both of his hands. He took a step on the wall and then stepped down from the wall. When he stepped down, his foot went down, and as he was about to fall, he felt the hose pull him back. The plaintiff did not want to strike the wall, so he pushed forward and fell.

The Supreme Court granted the defendant's motion for summary judgment, finding that she neither created nor had actual or constructive notice of any defective condition on the property that allegedly caused the plaintiff's accident. The plaintiffs appeal. We affirm, albeit on a ground different from that relied upon by the Supreme Court.

"A landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to \*681 others, the seriousness of the injury, and the burden of avoiding the risk" (*Cupo v. Karfunkel*, 1 A.D.3d 48, 51, 767 N.Y.S.2d 40 [internal quotation marks omitted]; see *Witkowski v. Island Trees Pub. Lib.*, 125 A.D.3d 768, 769, 4 N.Y.S.3d 65). "In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" (*Lezama v. 34-15 Parsons Blvd., LLC*, 16 A.D.3d 560, 792 N.Y.S.2d 123; see *Kruger v. Donzelli Realty Corp.*, 111 A.D.3d 897, 898, 975 N.Y.S.2d 689). "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977, 665 N.Y.S.2d 615, 688 N.E.2d 489 [internal quotation marks omitted]; see *Touloupis v. Sears, Roebuck & Co.*, 155 A.D.3d 807, 808, 63 N.Y.S.3d 518; *Witkowski v. Island Trees Pub. Lib.*, 125 A.D.3d at 769, 4 N.Y.S.3d 65). "However, '[s]ummary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous'" (*Touloupis v. Sears Roebuck & Co.*, 155 A.D.3d at 808, 63 N.Y.S.3d 518, quoting *Lezama v. 34-15 Parsons Blvd., LLC*, 16 A.D.3d at 560, 792 N.Y.S.2d 123; see *Witkowski v. Island Trees Pub. Lib.*, 125 A.D.3d at 769, 4 N.Y.S.3d 65).

\*\*354 Here, the defendant established, prima facie, her entitlement to judgment as a matter of law by submitting the transcript of the plaintiff's deposition testimony, which showed that there was no dangerous or defective condition that could have caused the plaintiff's fall. The plaintiff testified that prior to his fall, he had traversed the incline and had gone over the wall and come back down without incident. He testified that the hill was not slick or icy. His testimony regarding the circumstances of his fall demonstrated that the fall was not caused by any defect in the wall. Rather, the plaintiff's testimony shows that he fell when he picked up the oil hose, placed it on his right shoulder, stepped down from the wall, felt the hose pull him back, and then pushed himself forward in order to avoid striking the wall. In opposition, the plaintiff failed to raise a triable issue of fact.

Furthermore, even if we were to determine that the defendant had a duty to clear the snow to make a path for delivery, the defendant established, prima facie, her entitlement to judgment as a matter of law dismissing the complaint on the ground that there was a storm in progress at the time of the accident. "Under the so-called 'storm in progress' rule, a property owner

will not be held responsible for accidents occurring \*682 as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm” (*Marchese v. Skenderi*, 51 A.D.3d 642, 642, 856 N.Y.S.2d 680; see *Pankratov v. 2935 OP, LLC*, 160 A.D.3d 757, 758, 75 N.Y.S.3d 208).

Here, the plaintiff’s deposition testimony established, prima facie, that there was a storm in progress at the time of the accident. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the storm had abated and whether the defendant’s duty to remedy the snow condition that was created by the storm had arisen (see *Sherman v. New York State Thruway Auth.*, 27 N.Y.3d 1019, 1021, 32 N.Y.S.3d 568, 52 N.E.3d 231). In contradiction to his prior deposition testimony, the plaintiff stated in his affidavit that it was flurrying, not snowing, on the property when he arrived. The plaintiff’s self-serving affidavit contradicting his prior deposition testimony is insufficient to defeat summary judgment (see *Matter of Agai v. Diontech Consulting, Inc.*, 138 A.D.3d 736, 737, 29 N.Y.S.3d 441).

Accordingly, we agree with the Supreme Court’s determination to grant the defendant’s motion for summary judgment dismissing the complaint.

DILLON, J.P., COHEN, DUFFY and CHRISTOPHER, JJ., concur.

**All Citations**

170 A.D.3d 679, 95 N.Y.S.3d 351, 2019 N.Y. Slip Op. 01573

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122 A.D.3d 428  
Supreme Court, Appellate Division, First Department, New York.

**Anthony HILL**, Plaintiff–Appellant,  
v.  
**ACIES GROUP, LLC**, et al., Defendants–Respondents,  
**Stoneledge Scaffolding Corp.**, Defendant.  
[And a Third–Party Action].

305287/08, 13437

|  
Nov. 6, 2014.

### Synopsis

**Background:** In action for personal injury at construction site, plaintiff appealed order of the Supreme Court, Bronx County, 2012 WL 10027982, [Howard H. Sherman, J.](#), which denied plaintiff summary judgment on issue of liability.

The Supreme Court, Appellate Division held that construction worker’s injuries from falling brick were caused by lack of netting or protective devices.

Reversed.

### Attorneys and Law Firms

**\*\*235** Jason Levine, NY, for appellant.

Baxter, Smith & Shapiro, P.C., White Plains ([Sim R. Shapiro](#) of counsel), for Acies Group, LLC and CS Melrose Site D, LLC, respondents.

Methfessel & Werbel, P.C., New York ([Fredric P. Gallin](#) of counsel), for Skye Construction, LLC, respondent.

[SWEENY, J.P.](#), [ANDRIAS](#), [SAXE](#), [RICHTER](#), [FEINMAN](#), JJ.

### Opinion

**\*428** Order, Supreme Court, Bronx County ([Howard H. Sherman, J.](#)), entered November 27, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff’s motion for partial summary judgment on the issue of liability pursuant to [Labor Law § 240\(1\)](#), unanimously reversed, on the law, without costs, **\*429** and the motion **\*\*236** granted as against defendants Acies Group, LLC, CS Melrose Site D, LLC, and Skye Construction, LLC.

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability on his [Labor Law § 240\(1\)](#) claim by submitting, among other things, his testimony that he was performing his assigned work of cleaning debris from the ground level, just outside the north side of the subject building under construction, when he was suddenly struck by a falling brick, in the absence of any overhead netting or other such protective devices (*see Mercado v. Caithness Long Is. LLC*, 104 A.D.3d 576, 961 N.Y.S.2d 424 [1st Dept.2013]; *Zuluaga v. P.P.C. Constr., LLC*, 45 A.D.3d 479, 847 N.Y.S.2d 30 [1st Dept.2007] ). Defendants’ witnesses further established their liability by confirming that the brick fell out of the hands of a

masonry worker several stories above plaintiff, and that safety netting which had been installed on other sides of the building was absent from the north exterior. The lack of overhead protective devices was a proximate cause of plaintiff's injuries under any of the conflicting accounts (see *Arnaud v. 140 Edgecomb LLC*, 83 A.D.3d 507, 508, 922 N.Y.S.2d 292 [1st Dept.2011] ), and plaintiff's comparative negligence is not a defense to a Labor Law § 240(1) claim (see *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 920, 597 N.Y.S.2d 650, 613 N.E.2d 556 [1993] ). Moreover, contrary to defendants' argument that plaintiff had been instructed not to cross the barricade or go underneath the scaffolding while any work was being performed overhead, "an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment" (*Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 563, 606 N.Y.S.2d 127, 626 N.E.2d 912 [1993] ). In addition, the conflicting accounts of "what type of work he was doing at the time of the accident" do not raise a triable issue of fact (see *Marrero v.2075 Holding Co. LLC*, 106 A.D.3d 408, 409, 964 N.Y.S.2d 144 [1st Dept.2013] ).

### All Citations

122 A.D.3d 428, 996 N.Y.S.2d 235, 2014 N.Y. Slip Op. 07601

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111 A.D.3d 675  
Supreme Court, Appellate Division, Second Department, New York.

Justine JIMENEZ, etc. et al., respondents,  
v.  
Savanda GASQUE, et al., appellants.

Nov. 13, 2013.

### Synopsis

**Background:** Defendants appealed from judgment of the Supreme Court, Kings County, Solomon, J., [2012 WL 8682517](#), entered against them in personal injury case following preclusion of their medical expert's testimony on issue of damages.

The Supreme Court, Appellate Division, held that trial did not have basis to preclude the defendants' medical expert from testifying at trial on issue of damages.

Reversed and remitted.

### Attorneys and Law Firms

**\*\*532** Kornfeld, Rew, Newman & Simeone, Suffern, N.Y. ([Scott A. Dow](#) of counsel), for appellants.

Koenigsberg & Associates, P.C., Brooklyn, N.Y. ([Richard S. Weiss](#) of counsel), for respondents.

[REINALDO E. RIVERA](#), J.P., [JOHN M. LEVENTHAL](#), [CHERYL E. CHAMBERS](#), and [PLUMMER E. LOTT](#), JJ.

### Opinion

**\*675** In an action to recover damages for personal injuries, etc., the defendants appeal from a judgment of the Supreme Court, Kings County (Solomon, J.), entered June 15, 2012, which, upon the granting of the plaintiffs' oral application in limine to preclude the defendants' medical expert from testifying at the trial on the issue of damages, and upon a jury verdict on the issue of damages, is in favor of the plaintiffs and against them in the principal sum of \$75,000.

ORDERED that the judgment is reversed, on the law, with costs, the plaintiffs' oral application in limine to preclude the defendants' medical expert from testifying at the trial on the issue of damages is denied, and the matter is remitted to the Supreme Court, Kings County, for a new trial on the issue of damages.

“[T]o be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; second, **\*\*533** where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion and the out-of-court material is accompanied by evidence establishing its reliability” ([Wagman v. Bradshaw](#), 292 A.D.2d 84, 86–87, 739 N.Y.S.2d 421; *see* [Kinard v. South Shore Dialysis Ctr.](#), 37 A.D.3d 545, 546, 829 N.Y.S.2d 674; [Jemmott v. Lazofsky](#), 5 A.D.3d 558, 559–560, 772 N.Y.S.2d 840).

Here, the Supreme Court erred in granting the plaintiffs' oral application in limine to preclude the defendants' medical expert, Dr. Jeffrey Passick, from testifying at the trial on the issue of damages. The court made its ruling prior to the admission of any evidence and before any witness had an opportunity to \*676 testify. The Supreme Court's determination prevented Dr. Passick from rendering any opinion based upon admissible evidence, such as, inter alia, arthroscopic photographs. On this record, the court had no basis upon which to preclude Dr. Passick's testimony. Accordingly, since the error was not harmless, a new trial is warranted on the issue of damages.

#### **All Citations**

111 A.D.3d 675, 974 N.Y.S.2d 532, 2013 N.Y. Slip Op. 07453

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36 N.Y.2d 539  
Court of Appeals of New York.

KUEHNE & NAGEL, INC., Appellant,  
v.  
F. W. BAIDEN et al., Respondents.

May 7, 1975.

### Synopsis

Plaintiff, which was assignee of vessel charterer, sued insurer of vessel charterer. The Supreme Court, New York County, Andrew R. Tyler, J., denied plaintiff's and defendant's motion for summary judgment, and cross appeals were taken. The Supreme Court, Appellate Division, 44 A.D.2d 296, 354 N.Y.S.2d 648, granted defendant's motion for summary judgment dismissing complaint, and plaintiff appealed. The Court of Appeals, Gabrielli, J., held that charterer reasonably settled shipper's claim for damage to cargo by foregoing smaller claim for freight charges withheld by shipper, and thus, where insurer demonstrated no triable issue of fact with respect to insured risk, plaintiff as charterer's assignee was entitled to recover from insurer amount of such settlement.

Reversed.

### Attorneys and Law Firms

\*539 \*\*\*668 \*\*625 Nicholas J. Healy, Jr. and Jack A. Greenbaum, New York City, for appellant.

\*540 William Warner, New York City, for respondents.

### Opinion

GABRIELLI, Judge.

The record establishes the absence of any defense to the action and, accordingly, plaintiff's cross motion for summary judgment should have been granted.

Plaintiff, as assignee of Amber Maritime Corporation under a ship charterer's liability policy issued to it by defendants, commenced this action for losses sustained as a result of cargo damage during a voyage from Gdynia, Poland to Santa Maria, Colombia. At Gdynia, a cargo of 300 jeeps was booked to Santa \*541 Maria by Caribe Manufacturing Co., Ltda. (Caribe), a Colombian corporation. When the jeeps were loaded, 82 were stowed on deck and the bills of lading were invoiced to reflect the on-deck storage providing, in pertinent part that '(t)he shipper represents that the goods need not be stowed under deck unless the shipper informs the Carrier in writing before delivery of the goods to the Carrier that underdeck stowage is required. \* \* \* Goods, whether or not shipped in containers, vans, or trailers, may be carried on deck at Carrier's option and, if carried on deck, all risks of loss or damage by perils inherent in such carriage shall be borne by the shipper.'

En route, stormy weather was encountered and some of the on-deck stowed jeeps were damaged, seven being swept overboard. Upon arrival in Colombia, Caribe withheld payment of the freight due amounting to \$60,903.47 against its cargo damage claim of \$83,102. Caribe also formally complained that the carrier had breached its \*\*\*669 contract of carriage by failing to notify it of on-deck stowage of the jeeps.

The assured then promptly notified defendants of the claim and complaint against it and also requested the appointment of

Colombian counsel to assist in resisting the cargo damage claim. Defendants, however, refused assistance to the assured and disclaimed liability. Thereupon, plaintiff's assignor sought the advice of **\*\*626** American and Colombian counsel whose advice to forego the freight claim in order to avoid a countersuit for cargo damage, was followed.

After disclaimer by defendants, plaintiff commenced this action for the amount of the unpaid freight, not as freight per se but as the amount 'paid' to settle Caribe's claim for cargo damage.

As noted by the Appellate Division, and not here disputed, an insured under a maritime policy may settle claims against it and still recover under its policy so long as the settlement is found to be reasonable and the cause of the liability was an insured risk. That court held that '(f)oregoing the freight charge was a method of settlement and there can be no question of the reasonableness of the amount.' (*Kuehne & Nagel v. Baiden*, 44 A.D.2d 296, 297, 354 N.Y.S.2d 648, 650.) Nonetheless, summary judgment was granted, in error we think, to defendants on the ground that (p. 298, 354 N.Y.2d p. 650) 'the fault causing the damage was conduct not insured against'.

Plaintiff has urged, and with much logic, that Caribe could easily have proved a prima facie case against the carrier by **\*542** merely showing delivery of the cargo to the ship in good condition and receipt upon arrival in damaged condition. At that point, as urged by plaintiff, it would have the burden of going forward with evidence to refute the cargo owner's case which, it avers, is lacking. Did Caribe have a cause of action against the carrier sounding in negligence—or—put another way, did plaintiff or the carrier, by refusing to attempt collection of the freight due, in fact settle the tort claim Caribe had against it? Both parties agree that neither the Hague Rules nor the U.S. Carriage of Goods by Sea Act (U.S. Code, tit. 46, s 1300 Et seq.) apply to liability for on-deck storage. Applying the reasoning and logic underlying our decision in *Sonnesen v. Panama transp. Co.* (298 N.Y. 262, 82 N.E.2d 569), we reach the result that the general law of common carriage is applicable. In that case, we held that a New York court may not take judicial notice of the maritime law of a foreign country and, thus, in its absence, we applied the general rules of maritime law to the case (p. 267, 82 N.E.2d pp. 570—571; see, also, CPLR 4511; McLaughlin, Practice Commentary, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 4511, 1974 Supp., pp. 138—139; cf. *Matter of Petrol Shipping Corp., D.C.*, 37 F.R.D. 437, **\*\*\*670** affd. 2 Cir., 360 F.2d 103, cert. den. 385 U.S. 931, 87 S.Ct. 291, 17 L.Ed.2d 213), and we do likewise in the case before us.

Even though a shipper agrees to or permits on-deck stowage, the carrier is liable if the goods carried are damaged by improper stowage (*Pioneer Import Corp. v. The Lafcomo*, 2 Cir., 138 F.2d 907, cert. den. Sub nom. *Black Diamond Lines v. Pioneer Import Corp.*, 321 U.S. 766, 64 S.Ct. 523, 88 L.Ed. 1063) and carriers have thus been held liable in tort for inadequately protecting and securing the cargo (*Schwinger v. Raymond*, 83 N.Y. 192, 200; *Virgin Is. Corp. v. Merwin Lighterage Co.*, 3 Cir., 251 F.2d 872, cert. den. 357 U.S. 929, 78 S.Ct. 1369, 2 L.Ed.2d 1372).

With this background, we address ourselves to the respective claims regarding the burden of proof. Plaintiff has correctly urged that, as in bailment cases, Caribe could have proved a prima facie case by showing delivery of the cargo to the carrier in good condition and its damaged delivery, citing *Nichimen Co. v. M. V. Farland* (2 Cir., 462 F.2d 319, 325), and that the carrier would then be obligated to prove its freedom from any negligence (*Schnell v. The Vallescura*, 293 U.S. 296, 55 S.Ct. 194, 79 L.Ed. 373). Conversely, defendants assert that the burden is upon the consignee to establish stowage, citing *Globe Solvents Co. v. The California* (3 Cir., 167 F.2d 859) and *The \*\*627 Monte Iciar* (3 Cir., 167 F.2d 334), **\*543** where, however, the carriers succeeded in establishing damage from an accepted cause.\*

In *Schnell v. The Vallescura* (supra), Mr. Justice Stone, writing for a unanimous court, stated that (293 U.S. pp. 303—304, 55 S.Ct. p. 196): 'In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity from liability for act of God or the public enemy. \* \* \* The rule applies equally with respect to other exceptions for which the law permits him to stipulate.'

**\*\*\*671** 'The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability.' (Citations therein omitted.)

Plaintiff is entitled to summary judgment. It waived and settled its smaller claim for freight against Caribe on a reasonable and well-founded ground that the cargo owner possessed a provable larger claim for negligently damaged cargo, a claim

against which the carrier could not prevail, as it reasonably believed, because of the inability to prove freedom from negligence. Here, defendants have been unable ‘to \*544 submit evidentiary facts or materials, by affidavit or otherwise, rebutting \* \* \* (its adversary’s case) and demonstrating the existence of a triable issue of ultimate fact’ ([Indig v. Finkelstein](#), 23 N.Y.2d 728, 729, 296 N.Y.S.2d 370, 371, 244 N.E.2d 61, 62). Facts appearing in the movant’s papers which the opposing party does not controvert, may be deemed to be admitted ([Laye v. Shepard](#), 48 Misc.2d 478, 265 N.Y.S.2d 142, affd. 25 A.D.2d 498, 267 N.Y.S.2d 477; Siegel, Practice Commentaries, McKinney’s Cons.Laws of N.Y., Book 7B, CPLR 3212:16, p. 437), and where there are cross motions for summary judgment, in the absence of either party challenging the verity of the alleged facts, as is true in the instant case, there is, in effect, a concession that no question of fact exists (cf. [Schifter v. Commercial Travelers Mut. Acc. Assn.](#), 183 Misc. 74, 50 N.Y.S.2d 376, affd. 269 App.Div. 706, 54 N.Y.S.2d 408; see, also, [Ann.](#), 36 A.L.R.2d 881). It follows that plaintiff reasonably settled the damage claim advanced by the owner of the cargo, a risk insured by defendants.

Accordingly, the order of the Appellate Division should be reversed, defendants’ \*\*628 motion should be denied and plaintiff’s cross motion should be granted, with costs.

BREITEL, C.J., and JASEN, JONES, WACHTLER, FUCHSBERG and COOKE, JJ., concur.

Order reversed, etc.

**All Citations**

36 N.Y.2d 539, 330 N.E.2d 624, 369 N.Y.S.2d 667

**Footnotes**

\* Defendants have resisted liability on the additional ground that the damage suffered by Caribe was an excepted cause, that is, that the exculpatory clause in the bills of lading purporting to exonerate plaintiff from all risks, operated to nullify any claim Caribe would have had against plaintiff. However, the law does not permit a carrier to except its liability for negligence ([Schnell v. The Vallescura](#), 293 U.S. 296, 304, 55 S.Ct. 194, 79 L.Ed. 373, *Supra*; [Isthmian S.S. Co. v. Martin](#), 4 Cir., 170 F.2d 25, 27; [Pioneer Import Corp. v. The Lafcomo](#), 138 F.2d 907, *Supra*; cf. [Liverpool & Great Western Steam Co. v. Phenix Ins. Co.](#), 129 U.S. 397, 9 S.Ct. 469, 32 L.Ed. 788; see, also, 80 C.J.S. [Shipping](#) s 131(2)). Thus, in [Pioneer Import](#) (*supra*), it was held that where a shipper arranged for carriage of goods with the notation on the bills of lading ‘Shipped on deck at shipper’s risk’, the carrier was still liable for negligent stowage. The court said that ‘(t)he shipper accepted the risk of losses from carriage on deck only so far as they occurred under proper stowage’ (138 F.2d p. 908).

51 A.D.3d 537  
Supreme Court, Appellate Division, First Department, New York.

Fisnik METUS, Plaintiff–Respondent,  
v.  
LADIES MILE INC., et al., Defendants/Third–Party Plaintiffs–Appellants,  
v.  
Prestige Construction Services, Inc., Third–Party Defendant–Appellant–Respondent.

May 20, 2008.

### Synopsis

**Background:** Worker who was struck in face by falling junior beam while erecting scaffold brought action under Labor Laws against construction company and scaffolding and hoisting company, among others. Companies asserted claims against third-party defendant. The Supreme Court, New York County, [Rolando T. Acosta, J.](#), [2007 WL 3000308](#), granted worker’s motion for partial summary judgment on his scaffold law claim, denied motions of companies and third-party defendant for summary judgment dismissing worker’s workplace safety statute and common law negligence claims as against companies, and denied companies’ motion for summary judgment on their claims for contractual and common-law indemnity against third-party defendant. Companies and third-party defendant appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

junior beam was “falling object” within meaning of scaffold law, and

companies could be liable under workplace safety statute or under principles of common law negligence for worker’s injuries.

Affirmed.

### Attorneys and Law Firms

\*\*143 Fiedelman & McGaw, Jericho ([Ross P. Masler](#) of counsel), for Ladies Mile Inc, VJB Construction Corp. and Regional Scaffolding & Hoisting Co., Inc., appellants.

French & Rafter, LLP, New York (Tom E. Byrne of counsel), for Prestige Construction Services, Inc., appellant-respondent.

Pollack, Pollack, Isaac & DeCicco, New York ([Brian J. Isaac](#) of counsel), for respondent.

[GONZALEZ, J.P.](#), [CATTERSON](#), [McGUIRE](#), [MOSKOWITZ, JJ.](#)

### Opinion

\*537 Order and judgment (one paper), Supreme Court, New York County ([Rolando T. Acosta, J.](#)), entered October 15, 2007, which, to the extent appealed from as limited by the briefs, granted plaintiff’s motion for partial summary judgment on his [Labor Law § 240\(1\)](#) claim, denied the motions of defendants VJB Construction Corp. and Regional Scaffolding & Hoisting Co., Inc. and third-party defendant Prestige Construction Services, Inc. for summary judgment dismissing plaintiff’s [Labor](#)

Law § 200 and common law negligence claims as against VJB and Regional, and denied VJB’s and Regional’s motion for summary judgment on their \*\*144 claims for contractual and common-law \*538 indemnification against Prestige, unanimously affirmed, without costs.

As plaintiff handed a sheet of corrugated tin up to a coworker standing on top of a scaffold under construction, a beam (known as a “junior beam”) on which the tin sheet was to be placed became dislodged, fell from the scaffold, and struck plaintiff in the face. Although there was conflicting testimony on whether the beam at issue should have been secured, that question of fact is immaterial in the circumstances of this case. It is uncontroverted that at the time the scaffold was being erected, the junior beam was simply not clamped to the header beam on which it rested. Thus, the junior beam, situated eight to nine feet above the ground, was a “falling object” for purposes of Labor Law § 240(1) protection (see *Outar v. City of New York*, 5 N.Y.3d 731, 799 N.Y.S.2d 770, 832 N.E.2d 1186 [2005], *affg.* 286 A.D.2d 671, 730 N.Y.S.2d 138 [2001]; *Boyle v. 42nd St. Dev. Project, Inc.*, 38 A.D.3d 404, 835 N.Y.S.2d 7 [2007]; see also *Salinas v. Barney Skanska Constr. Co.*, 2 A.D.3d 619, 621–622, 769 N.Y.S.2d 559 [2003] ). Similarly, it is beyond cavil that § 240(1) protection applies not only to workers utilizing scaffold or hoisting devices in the performance of their work, but also to “the very same (and other) workers when they erect and demolish such devices” (*Kyle v. City of New York*, 268 A.D.2d 192, 197, 707 N.Y.S.2d 445 [2000], *lv. denied* 97 N.Y.2d 608, 739 N.Y.S.2d 97, 765 N.E.2d 300 [2002], quoting *Alderman v. State of New York*, 139 Misc.2d 510, 515, 528 N.Y.S.2d 280 [1988] ).

Regional’s and VJB’s arguments that their responsibility for overseeing the work and for site safety supervision did not rise to the level necessary to support a Labor Law § 200 or common law negligence claim is misplaced since these defendants were responsible for the design of the scaffold and the method of its construction (see *Griffin v. New York City Tr. Auth.*, 16 A.D.3d 202, 202–203, 791 N.Y.S.2d 98 [2005] ).

In light of the unresolved liability issues, the court did not err in denying Regional’s and VJB’s motion for summary judgment on their claims for contractual and common-law indemnification against Prestige.

We have considered the parties’ remaining arguments for affirmative relief and find them unavailing.

#### **All Citations**

51 A.D.3d 537, 858 N.Y.S.2d 142, 2008 N.Y. Slip Op. 04565

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2014 WL 12659834 (N.Y.Sup.) (Trial Order)  
Supreme Court of New York.  
Kings County

Dexter MILLETTE, Plaintiff,  
v.  
TISHMAN CONSTRUCTION CORPORATION, Cornell University d/b/a Weill Cornell  
Medical College and Weill Cornell Medical College, Defendants.

No. 74872012.  
May 8, 2014.

**Decision and order**

Leon Ruchelsman, Judge.

\*1 The plaintiff has moved seeking summary judgement pursuant to [CPLR § 3212](#) on issues of liability based upon [Labor Law § 240\(1\)](#) and [§ 241\(6\)](#). The defendants have cross moved seeking to dismiss the very causes of action. The motions have been opposed respectively and papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

This lawsuit was commenced concerning an accident that occurred on October 17, 2011 while the plaintiff was working at a construction site located at 413 East 69<sup>th</sup> Street in New York County. The property was owned by defendant Cornell University and defendant Tishman Construction Corporation was the general contractor who had hired various subcontractors including non party Pinnacle Industries the employer of the plaintiff. As noted, the plaintiff was an employee of Pinnacle who had been hired to perform construction and other work. On that date the plaintiff was working and was framing a wall on the 15<sup>th</sup> floor of the building. On the 16<sup>th</sup> floor above other workers were likewise installing decking which included positioning joists or stringers on the floor, attaching ribs atop them and then placing pieces of plywood on to the ribs. A piece of plywood accidentally fell and struck the plaintiff causing injury. The plaintiff has alleged violations of [Labor Law § 240\(1\)](#), [§ 241\(6\)](#) and [§ 200](#). The plaintiff has now moved seeking summary judgement based upon [Labor Law § 240\(1\)](#) and [§ 241\(6\)](#) arguing that there are no questions of fact that provision was violated and the plaintiff is entitled to summary relief. The defendant's oppose the motion and have cross moved seeking to dismiss those causes of action.

***Conclusions of Law***

Preliminarily, the defendant's cross motion seeking summary judgement on the issue of liability pursuant to [Labor Law § 240\(1\)](#) and [§ 241\(6\)](#) is timely. It is well settled that a cross motion which seeks resolution of identical issues of a timely filed motion may be entertained even if not filed within the time allotted by the Court (*see, Gonzalez v. City of New York*, 38 Misc3d 1226(A), 969 NYS2d 803 [Supreme Court Kings County 2013]). Since the cross motion seeks resolution of the identical issues filed by plaintiff the motion is timely.

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (*Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

[Labor Law § 240\(1\)](#) imposes absolute liability upon owners, contractors or their agents for injuries sustained by workers engaged in certain enumerated jobs which arise where the work site is elevated and elevation devices do not provide proper

protection, or materials above the worker are not properly secured or hoisted (*Ross v. Curtis Palmer Hydro Electric Co.*, 81 NY2d 494, 601 NYS2d 49 [1993], *Haimes v. New York Telephone*, 46 NY2d 132, 412 NYS2d 863 [1978]). The worker must demonstrate that proper protection was not afforded, and that such violation was a proximate cause of the injury (*Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484 [2003]). Conversely, to avoid summary judgment under Labor Law § 240(1), a defendant must show that the worker's actions were the "sole proximate cause, of the accident.

\*2 In *Narducci v. Manhasset Bay*, 96 NY2d 259, 727 NYS2d 37 [2001], the Court of Appeals explained that not every plaintiff who suffers injury from a falling object is entitled to summary judgment under § 240(1). Rather, the plaintiff must demonstrate that the object fell while being hoisted or secured due to the absence or inadequacy of safety devices. The court noted that this rule holds true even if the plaintiff is elevated by other means at the time of the injury since the hazard posed by a falling object is unrelated to the hazards posed by elevation devices. Therefore, in *Narducci*, the plaintiff could not win summary judgment under the Labor Law statute even though he was standing on a ladder and hence elevated at the time a piece of glass fell and struck him since the glass was a not a material being hoisted or a load being secured. The court concluded that the absence of any such hoisting or securing devices did not cause the glass to fall and this was a "general hazard" of the site which falls outside the scope of the Labor Law statute.

In subsequent cases, the Court of Appeals relaxed the standard enunciated in *Narducci* to include cases holding the object could be classified a "falling object" as long as the object "required securing for the purposes of the undertaking" (see, *Outar v. New York*, 5 NY3d 731, NYS2d 770 [2005], see also, *Quattrocchi v. F.J. Sciamè Construction Company, Inc.*, 11 NY3d 757 866 NYS2d 592[2008]). Likewise, in *Runner v. New York Stock Exchange Inc.*, 13 NY3d 599, 895 NYS2d 279 [2009] the court held that Labor Law § 240(1) was applicable even where there was no falling object and no falling worker. The *Runner* court explained that "the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*id.*).

Of course, that does not mean that every falling object at a construction site is a violation of the Labor Law. The case of *Novak v. Del Savio*, 64 AD3d 636, 883 NYS2d 558 [2d Dept., 2009] is instructive. In that case a worker was injured when a pipe in a ceiling became dislodged and fell upon him. The court dismissed the labor Law claims finding that "the pipe which fell was not in the process of being hoisted or secured, and did not require securing for the purpose of being affixed to the ceiling" and therefore did not fall within the scope of the Labor Law statute. Thus, items which fall that have no legitimate connection to the specific Labor Law activities being performed are not classified as falling objects under the Labor Law (see, *Bednarczyk v. Vornado Realty Trust*, 63 AD3d 427, 881 NYS2d 51 [1st Dept., 2009], holding that a light fixture which fell upon a worker was not a falling object under the Labor Law since the "light fixture did not pose an elevation-related risk of the kind that would be addressed by safety devices of the kinds enumerated in the statute").

In this case there is no question of fact that the individual pieces of plywood, including one that fell and struck plaintiff, were not items that required securing for the purpose of the undertaking. Thus, William Fennell the general superintendent of defendant Tishman Construction Corporation was asked concerning work done with the plywood once it arrived at the precise location at the site "for example, when it was being carried; however, from a stack to where it was being nailed to a rib, during that process, would it be secured in any manner?" (See, Deposition of William Fennell, page 35) and he responded "so it was being carried. By definition it wasn't secured" (*id.*). Moreover, the use of the plywood did not involve lowering it to a floor below where securing or hoisting would be a reasonable precaution. Rather, the pieces of plywood were merely placed on top of joists and were then nailed in place. According to eyewitness Gerald McIntosh the accident happened when a worker dropped the plywood as he was about to place it atop the joists. As noted, this activity did not require securing and thus was not a falling object under the Labor Law. Therefore, this accident was an ordinary incident associated with a worksite outside the purview of the Labor Law (see, *Banscher v. Actus Lend Lease LLC*, 103 AD3d 823, 960 NYS2d 183 [2d Dept., 2013]). Therefore, the motion of defendant seeking to dismiss the Labor Law § 240(1) cause of action is granted.

\*3 Concerning Labor Law § 241(6) an action to recover under Labor Law § 241(6) may be maintained only where the regulations or industrial codes at issue mandate compliance with concrete specifications, thus regulations which only establish general safety standards by invoking general descriptive terms are not legally sufficient to establish an action (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]).

While 12 NYCRR 23-1.7(a) is specific (*Zervos v. New York*, 8 AD3d 477, 779 NYS2d 106 [2d Dept., 2004]), however, it is inapplicable to the facts of this case and the motion seeking its dismissal is granted. 12 NYCRR 23-1.7(a) only applies where the site is “normally exposed” to falling objects (see *Marin v. AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 875 NYS2d 242 [2d Dept., 2009]). The affidavit of the eyewitness Gerald McIntosh states that the location where the accident occurred “was not an area normally exposed to falling objects or materials” and the plaintiff has not presented any evidence raising any question of fact. Therefore, the defendant’s motion seeking dismissal of that industrial code is granted.

So ordered.

ENTER:

DATED: May 8, 2014

Brooklyn N.Y.

<<signature>>

Hon. Leon Ruchelsman JSC

106 A.D.3d 963  
Supreme Court, Appellate Division, Second Department, New York.

Galo MONCAYO, et al., appellants,  
v.  
CURTIS PARTITION CORPORATION, et al., respondents.

5971/10, 2011-11671

|  
May 22, 2013.

### Synopsis

**Background:** Worker on school construction site brought Labor Law claims, seeking damages for injuries allegedly sustained when he was struck by piece of sheetrock that had fallen from third floor of the building. The Supreme Court, Queens County, Pineda–Kirwan, J., granted defendants summary judgment on scaffold law claim and on claim based on violation of Industrial Code provision governing overhead hazards. Worker appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

scaffold law was not implicated, and

Industrial Code provision did not apply.

Affirmed.

### Attorneys and Law Firms

**\*\*593** Robert A. Cardali & Associates, LLP (Arnold E. DiJoseph, P.C., New York, N.Y. [[Arnold E. DiJoseph III](#)], of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains, N.Y. ( **\*\*594** [Mathew P. Ross](#), [Debra A. Adler](#), and [Patrick Lawless](#) of counsel), for respondents.

[REINALDO E. RIVERA](#), J.P., [RUTH C. BALKIN](#), [THOMAS A. DICKERSON](#), and [JEFFREY A. COHEN](#), JJ.

### Opinion

**\*963** In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Pineda–Kirwan, J.), entered November 7, 2011, as denied that branch of their motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of [Labor Law § 240\(1\)](#), and granted those branches of the defendants’ cross motion which were for summary judgment dismissing the causes of action alleging a violation of [Labor Law § 240\(1\)](#) and a violation of [Labor Law § 241\(6\)](#) insofar as predicated upon an alleged violation of [12 NYCRR 23–1.7\(a\)](#).

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff Galo Moncayo, a worker at a school construction \*964 site, allegedly was injured when, while standing on the ground outside the school, he was struck by a piece of sheetrock that had fallen from the third floor of the school building. Another worker, Michael McNerny, had been working on the third floor, using a power saw to cut out a piece of sheetrock from the ceiling to facilitate the installation of a grill for the air conditioning system. McNerny was cutting the sheetrock into small pieces so he could handle each one himself without assistance, but in this instance, a small piece of sheetrock slipped from his hand and bounced off a window sill before falling through an empty window frame and striking Galo on the ground. Galo, and his wife suing derivatively, alleging negligence and violation of Labor Law §§ 200, 240(1), and 241(6). The plaintiffs then moved for summary judgment on the issue of liability on various causes of action, and the defendants cross-moved for summary judgment dismissing the complaint. The Supreme Court, inter alia, denied that branch of the plaintiffs' motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1), and granted those branches of the defendants' cross motion which were for summary judgment dismissing the causes of action alleging a violation of Labor Law § 240(1) and a violation of Labor Law § 241(6) insofar as predicated upon an alleged violation of 12 NYCRR 23-1.7(a).

The Supreme Court properly granted that branch of the defendants' cross motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1) and denied that branch of the plaintiffs' motion which was for summary judgment on that cause of action. As the Court of Appeals has observed, not every injury caused by a falling object at a construction site is covered by the extraordinary protections of Labor Law § 240(1) (see *Toefer v. Long Is. R.R.*, 4 N.Y.3d 399, 407, 795 N.Y.S.2d 511, 828 N.E.2d 614; *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37, 750 N.E.2d 1085). Rather, in a "falling object" case under Labor Law § 240(1) (cf. *Runner v. New York Stock Exch.*, 13 N.Y.3d 599, 604, 895 N.Y.S.2d 279, 922 N.E.2d 865), a plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d at 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085) or "required securing for the purposes of the undertaking" (*Outar v. City of New York*, 5 N.Y.3d 731, 732, 799 N.Y.S.2d 770, 832 N.E.2d 1186; see \*\*595 *Quattrocchi v. F.J. Sciamme Constr. Corp.*, 11 N.Y.3d 757, 758, 866 N.Y.S.2d 592, 896 N.E.2d 75; *Andresky v. Wenger Constr. Co., Inc.*, 95 A.D.3d 1247, 1248-1249, 945 N.Y.S.2d 186). The plaintiff also must show that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d at 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085; see *Mendez v. Jackson Dev. Group, Ltd.*, 99 A.D.3d 677, 678, 951 N.Y.S.2d 736; cf. \*965 *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d at 603-604, 895 N.Y.S.2d 279, 922 N.E.2d 865). The statute does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected (see *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 8, 935 N.Y.S.2d 551, 959 N.E.2d 488; *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d at 268-269, 727 N.Y.S.2d 37, 750 N.E.2d 1085).

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1). McNerny testified that the sheetrock debris was placed in piles and then bagged. It was not discarded in pieces through the window openings. Because those small pieces of sheetrock were not in the process of being hoisted or secured and did not require hoisting or securing, the "special protection" of Labor Law § 240(1) was not implicated (*Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d at 7, 935 N.Y.S.2d 551, 959 N.E.2d 488; see *Roberts v. General Elec. Co.*, 97 N.Y.2d 737, 738, 742 N.Y.S.2d 188, 768 N.E.2d 1127; *Fried v. Always Green, LLC*, 77 A.D.3d 788, 789, 910 N.Y.S.2d 452; *Galvan v. Triborough Bridge & Tunnel Auth.*, 29 A.D.3d 517, 518, 814 N.Y.S.2d 256; cf. *Outar v. City of New York*, 5 N.Y.3d at 732, 799 N.Y.S.2d 770, 832 N.E.2d 1186; *Baker v. Barron's Educ. Serv. Corp.*, 248 A.D.2d 655, 655-656, 670 N.Y.S.2d 587). In opposition, the plaintiffs failed to raise a triable issue of fact.

The Supreme Court also properly granted that branch of the defendants' cross motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241(6) insofar as that cause of action was predicated upon a violation of 12 NYCRR 23-1.7(a) (see 12 NYCRR 23-1.7[a]). That section requires suitable overhead protection in areas that are "normally exposed to falling material or objects" (12 NYCRR 23-1.7[a] [1]). The defendants established, prima facie, that 12 NYCRR 23-1.7(a)(1) is inapplicable to the facts of this case because the area where the accident occurred was not normally exposed to falling material or objects. In opposition, the plaintiffs failed to raise a triable issue of fact (see *Fried v. Always Green, LLC*, 77 A.D.3d at 790, 910 N.Y.S.2d 452; *Marin v. AP-Amsterdam 1661 Park LLC*, 60 A.D.3d 824, 825, 875 N.Y.S.2d 242; cf. *Roosa v. Cornell Real Prop. Servicing, Inc.*, 38 A.D.3d 1352, 1354, 831 N.Y.S.2d 784).

## All Citations

**Moncayo v. Curtis Partition Corp., 106 A.D.3d 963 (2013)**

965 N.Y.S.2d 593, 292 Ed. Law Rep. 1022, 2013 N.Y. Slip Op. 03644

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106 A.D.3d 963, 965 N.Y.S.2d 593, 292 Ed. Law Rep. 1022, 2013 N.Y. Slip Op. 03644

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96 N.Y.2d 259  
Court of Appeals of New York.

Alex NARDUCCI et al., Respondents,  
v.  
MANHASSET BAY ASSOCIATES et al., Appellants, et al., Defendants.  
Manhasset Bay Associates et al., Third-Party Plaintiffs-Appellants,  
v.  
[Atlantic Windows](#), Third-Party Defendant-Respondent, et al., Third-Party Defendants.  
(And Other Actions.)  
Louis A. Capparelli, Jr., et al., Appellants,  
v.  
Zausmer Frisch Associates, Inc., et al., Respondents.  
Zausmer Frisch Construction Co., Inc., Third-Party Plaintiff-Respondent,  
v.  
Burns Electric Co., Inc., Third-Party Defendant-Respondent.

63, 62  
|  
May 10, 2001.

### Synopsis

Worker who was injured while removing window frames from third floor of fire-damaged building as part of renovation project when falling glass fell and struck him brought suit against building owner, its lessee, and project's construction manager. The Supreme Court, Bronx County, [Bertram Katz, J.](#), denied defendants' motion for summary judgment, and they appealed. The Supreme Court, Appellate Division, affirmed, [270 A.D.2d 60](#), [704 N.Y.S.2d 233](#), and granted permission to appeal. In second case, electrician who was injured when fluorescent light fixtures he had hoisted into ceiling grid fell on him as he was descending ladder brought suit under Scaffold Law. The Supreme Court, Onondaga County, [John J. Elliott, J.](#), denied electrician's motion for partial summary judgment. After denial was affirmed as modified by the Supreme Court, Appellate Division, [256 A.D.2d 1141](#), [682 N.Y.S.2d 751](#), and matter was remanded, the Supreme Court, Onondaga County, [John V. Centra, J.](#), dismissed complaint. After granting permission to appeal, and consolidating matters, the Court of Appeals, Ciparick, J., held that: (1) first worker was not injured by an object being hoisted or secured, and thus could not recover under Scaffold Law, and (2) electrician's injuries did not come within scope of Scaffold Law, even though gravity had acted on light fixture.

Reversed and certified question answered in the negative in part, and affirmed in part.

### Attorneys and Law Firms

**\*\*39 \*261 \*\*1087** Fiedelman & McGaw, Jericho ([James K. O'Sullivan](#) of counsel), and [Alan I. Lamer](#), Elmsford, for Manhasset Bay Associates and another, defendants and third-party plaintiffs-appellants in the first above-entitled action.

**\*262** Bunin & DiGiulio, New York City ([Sheldon Bunin](#) of counsel), for EBH Construction, Ltd., defendant and third-party plaintiff-appellant in the first above-entitled action.

**\*263** [Alexander J. Wulwick](#), New York City, and Mitchell Parnes for respondents in the first above-entitled action.

Colligan & Hickey, Roslyn Heights ([Anita Nissan Yehuda](#) of counsel), for third-party defendant-respondent in the first

above-entitled action.

\***264** Hancock & Estabrook, L.L.P., Syracuse ([Janet D. Callahan](#) of counsel), and Cherundolo, Bottar & Leone, P.C. ([Edward S. Leone](#) of counsel), for appellants in the second above-entitled action.

Costello, Cooney & Fearon, L.L.P., Syracuse ([Paul G. Ferrara](#) of counsel), for defendants and third-party plaintiffs-respondents in the second above-entitled action.

Mackenzie Smith Lewis Michell & Hughes, L.L.P., \***265** Syracuse Nancy L. Pontius of counsel), and James P. O'Connor, New York City, for third-party defendant-respondent in the second above-entitled action.

Fiedelman & McGaw, Jericho ([Andrew Zajac](#) of counsel), [Kenneth M. Dalton](#), \*\*\***40** \*\***1088** [Dawn C. DeSimone](#), [Elizabeth Anne Bannon](#), Kathleen B. Foley and [Richard B. Polner](#) for Defense Association of New York, Inc., amicus curiae in the second above-entitled action.

## OPINION OF THE COURT

CIPARICK, J.

These appeals require us to examine the circumstances under which [Labor Law § 240\(1\)](#) liability may be imposed upon property owners and contractors when an object falls on a worker at a construction site. Neither situation presented here gives rise to liability under [Labor Law § 240\(1\)](#).

Plaintiff Alex Narducci, an employee of Atlantic Windows, was assigned the task of removing steel window frames, as part of a larger restoration project, from the third floor exterior \***266** of a fire-damaged Long Island City warehouse owned by Manhasset Bay Associates and leased to Thypin Steel. To oversee the restoration, Thypin hired Preferred Restoration Experts as its general contractor and Preferred, in turn, hired EBH Construction as its construction manager on the site. Preferred also hired the window subcontractor, A & D Windows who hired Atlantic.

On the day of his accident, plaintiff began by working on the window frame furthest to the right of the three that he was assigned to remove. As he stood on a ladder propped against the right-most window frame sawing the frame loose, plaintiff paused, looked over and saw a large piece of glass from an adjacent window frame falling toward him. He turned to avoid being hit in the face by the glass, but was severely cut on his right arm. Plaintiff did not fall from the ladder, nor did the ladder malfunction in any way.

Plaintiff brought suit under [Labor Law § 240\(1\)](#), alleging that he should have been given a scissor jack—a type of hydraulic platform—to perform his work properly. Supreme Court denied motions by defendants Manhasset Bay Associates, Thypin Steel and EBH Construction to dismiss plaintiff's [Labor Law § 240\(1\)](#) claim, holding that issues of fact existed as to whether scaffolding could have prevented the accident. Further, the court denied EBH Construction's motion to dismiss plaintiff's [Labor Law § 200](#) claim against it. A divided Appellate Division affirmed. We now reverse.

Plaintiff Louis Capparelli, Jr., a journeyman electrician employed by Burns Electric Co., was assigned the job of installing fluorescent light fixtures into a dropped ceiling grid as part of the renovation of Onondaga Plaza, a facility in Syracuse. The owner of the facility, Council House Realty Corp., hired Zausmer Frisch Construction, Inc. as its general contractor for the renovation, and Zausmer Frisch contracted with Burns Electric.

Planning to install a ceiling fixture, plaintiff climbed about half-way up an eight-foot step ladder in order to reach the ten-foot ceiling. From his position on the ladder, plaintiff lifted the light fixture into the ceiling grid so that its edges rested on the grid. Plaintiff's next step would have been to secure the fixture to the ceiling grid by twisting metal tabs attached to the fixture; however, as he was about to descend the ladder in order to change position to perform that step, the light fixture

began to fall from the grid. Plaintiff immediately reached out \*267 to stop the fixture from hitting him, but the fixture slid as he tried to hold it, cutting his right hand and wrist. Plaintiff did not fall from the ladder.

Plaintiff brought suit under Labor Law § 240(1), alleging that he should have been given a scaffold to perform his work that day. Supreme Court denied cross motions \*\*\*41 \*\*1089 for summary judgment on the Labor Law § 240(1) claim, holding that issues of fact existed. The Appellate Division modified by granting the cross motion of third party defendant Burns Electric, holding that plaintiff's injury was caused by "the usual and ordinary dangers of a construction site" and not the "extraordinary elevation risks" covered by Labor Law § 240(1) (256 A.D.2d 1141, 682 N.Y.S.2d 751). Following a judgment of Supreme Court dismissing the remaining causes of action, plaintiff appealed. We now affirm.

### Discussion

Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein (see, *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82).\*

Labor Law § 240(1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was \* \* \* framed" (*Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 319, 83 N.E.2d 133, quoting *Quigley v. Thatcher*, 207 N.Y. 66, 68, 100 N.E. 596), however, this principle operates to impose absolute liability only *after* a violation of the statute has been established. Even "a violation of [Labor Law § 240(1)] cannot 'establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of the injury'" (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 583 N.E.2d 932, quoting *DeHaen v. Rockwood Sprinkler Co.*, 258 N.Y. 350, 353, 179 N.E. 764).

Labor Law § 240(1) applies to both "falling worker" and "falling object" cases. With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related \*268 to "a significant risk inherent in \* \* \* the relative elevation \* \* \* at which materials or loads must be positioned or secured" (*Rocovich v. Consolidated Edison Co.*, *supra*, 78 N.Y.2d, at 514, 577 N.Y.S.2d 219, 583 N.E.2d 932). Thus, for section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute (see, e.g., *Pope v. Supreme-K.R.W. Constr. Corp.*, 261 A.D.2d 523, 690 N.Y.S.2d 632; *Baker v. Barron's Educ. Serv. Corp.*, 248 A.D.2d 655, 670 N.Y.S.2d 587).

In addition, the fact that an injured plaintiff may have been working at an elevation when the object fell is of no moment in a "falling object" case, because a different type of hazard is involved. Working at an elevation does not increase the risk of being hit by an improperly hoisted load of materials from above. The hazard posed by working at an elevation is that, in the absence of adequate safety devices (e.g., scaffolds, ladders), a worker might be injured in a fall. By contrast, falling objects are associated with the failure to use a different type of safety device \*\*1090 \*\*\*42 (e.g., ropes, pulleys, irons) also enumerated in the statute (see, *Ross v. Curtis-Palmer Hydro-Elec. Co.*, *supra*, 81 N.Y.2d, at 501, 601 N.Y.S.2d 49, 618 N.E.2d 82). Because the different risks arise from different construction practices, the hazard from one type of activity cannot be "transferred" to create liability for a different type of accident.

Applying these principles to the facts in *Narducci*, the glass that fell on plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell, and thus Labor Law § 240(1) does not apply. No one was working on the window from which the glass fell, nor was there evidence that anyone worked on that window during the renovation. The glass that fell was part of the pre-existing building structure as it appeared before work began. This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected.

Furthermore, while the risk of falling glass is assuredly greater at a warehouse whose windows have been damaged in a fire, that is not the type of risk that Labor Law § 240(1) was intended to address. Absolute liability for falling objects under Labor Law § 240(1) arises only when there is a failure to use necessary and adequate hoisting or securing devices. The absence of a

necessary hoisting or securing device of the kind enumerated in Labor Law § 240(1) did not cause the falling \*269 glass here. This was clearly a general hazard of the workplace, not one contemplated to be subject to Labor Law § 240(1) (see, *Misseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 634 N.Y.S.2d 35, 657 N.E.2d 1318).

Nor does the fact that plaintiff was working at an elevation bring this scenario within the ambit of Labor Law § 240(1). Plaintiff does not contest that the ladder on which he was standing functioned properly. He was not injured as a result of a fall. Thus, since the ladder had no legally sufficient causal connection to this injury, it could not be deemed “inadequate” under these facts (see, *Rocovich v. Consolidated Edison Co.*, supra, 78 N.Y.2d, at 513, 577 N.Y.S.2d 219, 583 N.E.2d 932).

Plaintiff argues that if he had performed the task on a scissor jack it might have prevented the accident since he would have performed his work horizontally instead of vertically and, as a result, would have been in a different location when the glass fell. Also, plaintiff asserts that a scissor jack might have protected him from falling glass. As noted, however, a scissor jack is designed to protect the *worker* from falling, an entirely different risk. Here, plaintiff was adequately secured. The only risk was the glass. Since the glass was not an object being hoisted or secured, Labor Law § 240(1) does not apply.

With respect to plaintiff Narducci’s Labor Law § 200 and common-law negligence claims against EBH Construction, we hold that the motion by defendant EBH Construction to dismiss those claims against it should have been granted. There was insufficient evidence, as a matter of law, to rebut EBH’s argument that it did not exercise sufficient control of the activities of subcontractors to justify the imposition of liability (*Lombardi v. Stout*, 80 N.Y.2d 290, 294, 590 N.Y.S.2d 55, 604 N.E.2d 117).

The plaintiff in *Capparelli* similarly fails to state a claim under Labor Law § 240(1). Plaintiff’s job was to secure the light fixture into place after he hoisted it into the ceiling grid. The ceiling that \*\*\*43 \*\*1091 plaintiff was working at was ten feet high, while the ladder he was given was eight feet tall. Plaintiff was standing no less than halfway up the ladder when the light fixture fell on his arm, causing the injury.

Under these undisputed facts, there was no height differential between plaintiff and the falling object. Plaintiff was working at ceiling level when his accident occurred. That being so, this is not a case that entails the hazards presented by “a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured” \*270 (*Rocovich v. Consolidated Edison Co.*, supra, 78 N.Y.2d, at 514, 577 N.Y.S.2d 219, 583 N.E.2d 932). The fact that gravity worked upon this object which caused plaintiff’s injury is insufficient to support a section 240(1) claim (see, *Rodriguez v. Tietz Ctr. for Nursing Care*, supra, 84 N.Y.2d 841, 616 N.Y.S.2d 900, 640 N.E.2d 1134; *Terry v. Mutual Life Ins. Co.*, 265 A.D.2d 929, 695 N.Y.S.2d 808; *Sutfin v. Ithaca Coll.*, 240 A.D.2d 989, 659 N.Y.S.2d 555).

While many workplace accidents, including this one, could be classified as “gravity-related” occurrences stemming from improperly hoisted or inadequately secured objects, courts may nonetheless distinguish those occurrences that do not fit within the Legislature’s intended application of Labor Law § 240(1) (see, *Ross v. Curtis–Palmer Hydro–Elec. Co.*, supra, 81 N.Y.2d, at 501, 601 N.Y.S.2d 49, 618 N.E.2d 82; see also, Temkin, *New York’s Labor Law section 240: Has it Been Narrowed or Expanded by the Courts Beyond the Legislative Intent?*, 44 N.Y.L. Sch. L. Rev. 45 [2000] ). The exclusion made for the *de minimis* elevation differential in this case is appropriate.

Accordingly, in *Narducci*, the order of the Appellate Division should be reversed, with costs, plaintiffs’ Labor Law § 240(1) cause of action against EBH Construction, Ltd., Manhasset Bay Associates and Thylin Steel Company dismissed, plaintiffs’ Labor Law § 200 and common-law negligence causes of action as against EBH Construction, Ltd. likewise dismissed, and the certified question answered in the negative.

In *Capparelli*, the judgment appealed from and order of the Appellate Division brought up for review should be affirmed, with costs.

Chief Judge KAYE and Judges SMITH, LEVINE, WESLEY, ROSENBLATT and GRAFFEO concur.

## Opinion

In *Narducci v. Manhasset Bay Assocs.*: Order reversed, etc.

In *Capparelli v. Zausmer Frisch Assocs.*: Judgment appealed from and order of the Appellate Division brought up for review affirmed, with costs.

### All Citations

96 N.Y.2d 259, 750 N.E.2d 1085, 727 N.Y.S.2d 37, 2001 N.Y. Slip Op. 04249

### Footnotes

- \* [Labor Law § 240\(1\)](#) provides, in relevant part: “All contractors and owners and their agents, \* \* \* in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

102 A.D.3d 26  
Supreme Court, Appellate Division, Second Department, New York.

Joanne Berrouet RIVERS, et al., plaintiffs-appellants-respondents,  
v.  
Eliot L. BIRNBAUM, etc., et al., defendants,  
[Robin Bliss](#), etc., et al., defendants-respondents,  
Kim Rosary DeCastro, etc., defendant-appellant.

2010-11646, 26729/08  
|  
Oct. 17, 2012.

#### Synopsis

**Background:** Patient, and her husband, brought action against nurse practitioner, medical clinic, hospital, surgeons, and pathologist alleging medical malpractice, negligent hiring and supervision, and lack of informed consent for alleged failure to properly diagnose and advise of conditions that led to development of choriocarcinoma. The Supreme Court, Suffolk County, Robert T. Gazzillo, J., granted summary judgment in favor of pathologist, surgeon, and hospital, and denied nurse practitioner's motion for summary judgment.

**Holdings:** The Supreme Court, Appellate Division, Belen, J., held that:

Supreme Court providently exercised its discretion in considering experts' affirmations submitted by defendants despite the fact that they did not disclose those experts prior to filing of note of issue and certificate of readiness;

summary judgment affidavits of patient's experts were conclusory; and

physician that removed staples was not liable for medical malpractice.

Affirmed in part and reversed in part.

[Miller](#), J., filed opinion concurring in the result.

#### Attorneys and Law Firms

**\*\*235** Mark R. Bower, P.C., New York, N.Y., for plaintiffs-appellants-respondents.

Catalano Gallardo & Petropoulos, LLP, Jericho, N.Y. ([Wayne E. Spaeth](#) of counsel), for defendant-appellant.

Rogak & Gibbons, LLP, Uniondale, N.Y. ([Louise H. Feffer](#) and [David B. De Siver](#) of counsel), for defendant-respondent Robin Bliss.

Anthony P. Vardaro, P.C., Smithtown, N.Y. ([Rosemary Martinson](#) of counsel), for defendant-respondent Alan MacDonald.

Bower Monte & Greene, P.C., New York, N.Y. ([Mitchell A. Greene](#) of counsel), for defendant-respondent St. Catherine of Siena Medical Center.

RUTH C. BALKIN, J.P., ARIEL E. BELEN, L. PRISCILLA HALL, and ROBERT J. MILLER, JJ.

## Opinion

BELEN, J.

**\*30** This case presents us with an opportunity to clarify the rule regarding a court’s consideration of an expert’s affirmation or affidavit submitted on a timely motion for summary judgment where the offering party did not disclose the expert during **\*31** discovery pursuant to CPLR 3101(d)(1)(i) before the filing of a note of issue and certificate of readiness. We hold that a party’s failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party’s experts in the context of a timely motion for summary judgment.

The plaintiffs allege that the defendants committed medical malpractice in failing to properly diagnose and advise the allegedly injured plaintiff, Joanne Berrouet Rivers (hereinafter the injured plaintiff), of conditions that led to the development in her of a gynecological cancer known as choriocarcinoma. On March 1, 2006, the injured plaintiff was seen by the defendant Kim Rosary DeCastro, a nurse practitioner and an employee of the defendant Women’s Health Care of Suffolk County (hereinafter WHC),<sup>1</sup> during a healthcare visit. DeCastro conducted a pelvic exam, which proved to be within normal limits, and assessed that the injured plaintiff was 5 ½ weeks pregnant. The injured plaintiff was next seen by DeCastro on March 15, 2006. At this visit, the injured plaintiff complained of pain radiating to her back and shortness of breath, and was prescribed amoxicillin to treat chlamydia.

On March 22, 2006, after the injured plaintiff complained of cramping and a “pink, yogurty discharge,” she underwent a sonogram, which showed that there were very faint fetal heart tones and that the fetus was at 7 weeks’ gestation. A sonogram from March 29, 2006, showed that the fetus had died.

On April 3, 2006, the injured plaintiff went to the defendant St. Catherine of Siena Medical Center (hereinafter the Medical Center) for a dilation and curettage, which was performed by the defendant Eliot L. Birnbaum. The tissue that was recovered during the procedure was examined by the defendant Alan MacDonald, a pathologist.

**\*\*236** According to a Surgical Pathology Report written by MacDonald dated April 5, 2006, the tissue contained no fetal parts. MacDonald made the following diagnosis:

“Uterus, Uterine Contents:

\* Immature chorionic villi, with focal zones of surface trophoblast hyperplasia noted.

**\*32** \* Necrotic decidual tissue.

\* Probable portions of placental implantation site.”

MacDonald indicated in his report that he spoke with Birnbaum on April 4, 2006, about his findings.

At her deposition, DeCastro testified that the recognition and diagnosis of trophoblastic disease is outside her training, knowledge, and experience as a nurse practitioner. She further testified that she generally does not review pathology reports, as such a task is usually performed by Birnbaum or Bliss, or by whichever surgeon performed the dilation and curettage.

By August 2006, the injured plaintiff had become pregnant again. Sonograms during this pregnancy showed that the fetus was growing and developing normally. In February 2007, the injured plaintiff complained of back pain, and a renal ultrasound was ordered. The injured plaintiff underwent renal ultrasounds on February 2, 2007, and March 21, 2007, which were interpreted by nonparty Moses Williams, a radiologist at the Medical Center who prepared reports pertaining to his findings. Williams described in his reports the presence of an echogenic lesion in the mid-section of the right kidney, which he identified as “hyperechoic” and consistent with an angiomyolipoma, which is a benign tumor. On April 2, 2007, the injured plaintiff gave birth to a healthy baby boy by caesarean section. Soon thereafter, in June 2007, she was diagnosed with

metastatic choriocarcinoma.

The injured plaintiff and her husband commenced this action in June 2008, asserting, on behalf of the injured plaintiff, causes of action to recover damages for medical malpractice, negligent hiring and supervision, and lack of informed consent, and a derivative cause of action on behalf of the injured plaintiff's husband. By demand dated August 26, 2008, the plaintiffs requested, pursuant to CPLR 3101(d)(1)(i), that the defendants disclose information regarding their expected expert trial witnesses. On or about January 26, 2010, the plaintiffs disclosed their expert trial witness information to the defendants. Before any of the defendants responded to the plaintiffs' CPLR 3101(d)(1)(i) request, on or about February 3, 2010, the plaintiffs filed a note of issue and certificate of readiness.<sup>2</sup>

\*33 Thereafter, the defendants Bliss, MacDonald, the Medical Center, and DeCastro<sup>3</sup> (hereinafter collectively the moving \*\*237 defendants) separately moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against each of them, relying on, inter alia, affirmations from physicians-experts whose identity they had not disclosed during discovery. Bliss argued that she was entitled to judgment on the ground that she never provided any medical care to the plaintiff.<sup>4</sup>

The plaintiffs opposed the motions and cross-moved for summary judgment on the issue of liability against MacDonald. In opposing the motions of MacDonald, the Medical Center, and DeCastro, the plaintiffs argued, in pertinent part, that the expert affirmations submitted by those defendants should be precluded because they failed to respond to their request, made during discovery, for expert disclosure pursuant to CPLR 3101(d)(1)(i) before the note of issue and certificate of readiness were filed.

In rejecting the plaintiffs' argument, the Supreme Court held that the failure of MacDonald, the Medical Center, and DeCastro to respond to the plaintiffs' CPLR 3101(d)(1)(i) request did not warrant preclusion of their expert affirmations since the statute does not require expert disclosure at any particular time and does not mandate preclusion for noncompliance. The Supreme Court also found no evidence that the failure of these \*34 defendants to disclose their expert information was intentional or willful, and there was no showing that their nondisclosure prejudiced the plaintiffs.

Turning to the merits of the moving defendants' motions, the Supreme Court determined that MacDonald, the Medical Center, and DeCastro each established their prima facie entitlement to judgment as a matter of law through the affirmations of their respective experts. The Supreme Court further determined that the affirmations<sup>5</sup> of the plaintiffs' experts submitted in opposition to the motions of MacDonald and the Medical Center were technically defective because the experts were not licensed to practice medicine in New York. However, the Supreme Court determined that the affirmation of the plaintiffs' expert submitted in opposition to DeCastro's motion raised a triable issue of fact as to whether DeCastro departed from accepted standards of medical care. Accordingly, the Supreme Court granted the motions of MacDonald and the Medical Center for summary judgment, and denied DeCastro's motion for summary judgment. The Supreme Court granted Bliss's motion for summary judgment, concluding that the plaintiffs did not raise a triable issue of fact in opposition to Bliss's prima facie case, since they submitted only the affirmation of their attorney (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718).

With respect to the plaintiffs' cross motion, in effect, for summary judgment on \*\*238 the issue of liability against MacDonald, the Supreme Court determined that the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law because their out-of-state expert's affirmation was technically defective.

The plaintiffs appeal from so much of the Supreme Court's order as granted those branches of the separate motions of MacDonald, the Medical Center, and Bliss which were for summary judgment dismissing the complaint insofar as asserted against each of them, and denied their cross motion, in effect, for summary judgment on the issue of liability against MacDonald. Among other things, the plaintiffs argue that the Supreme Court should not have considered the affirmations submitted by these defendants, since they failed to disclose their experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of the note of issue and certificate of readiness. DeCastro separately appeals \*35 from so much of the same order as denied that branch of her motion which was for summary judgment dismissing the complaint insofar as asserted against her, arguing that the plaintiffs failed to raise a triable issue of fact in opposition to her prima facie showing of entitlement to judgment as a matter of law. We affirm the order insofar as appealed from by the plaintiffs, and reverse the order insofar as appealed from by DeCastro.

CPLR 3101(d)(1)(i) provides as follows:

“Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to *testify*, the qualifications of each expert witness and a summary of the grounds for each expert’s opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of *trial* to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert’s testimony at the *trial* solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at *trial*, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph” (emphasis added).

Although the statute mandates that, “[u]pon request,” a party “shall” identify the experts it “expects to call as an expert witness at trial” (CPLR 3101[d][1][i] ), it does not specify when a party must disclose its expected trial experts upon receiving a demand (*compare* Fed. Rules Civ. Pro. rule 26[a][2][D] [requiring parties to disclose their experts “at the times and in the sequence that the court orders”]). As such, a CPLR 3101(d)(1)(i) demand made during discovery “does not require a party to respond to a demand for expert witness information ‘at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance \*36 with the statute’ ” (*Aversa v. Taubes*, 194 A.D.2d 580, 582, 598 N.Y.S.2d 801, quoting *Lillis v. D’Souza*, 174 A.D.2d 976, 976, 572 N.Y.S.2d 136; *see* David D. Siegel, *New York Practice*, § 348A, at 583 [5th ed.] [noting that CPLR 3101(d)(1)(i) “sets forth no particular time for the making of the request, and no particular time for responding to it”]).

When interpreting a law, a court must always look to legislative intent, \*\*239 which “is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction” (*McKinney’s Cons. Laws of N.Y., Book 1, Statutes* § 94). Further, where the Legislature “ ‘includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the Legislature] acts intentionally and purposefully in the disparate inclusion or exclusion’ ” (*INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, 107 S.Ct. 1207, 94 L.Ed.2d 434, quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 [internal quotation marks omitted] ).

Of note, the next subdivision of the statute, CPLR 3101(d)(1)(ii), contains a specific provision requiring, in medical, dental, or podiatric malpractice actions, a party, “[w]ithin twenty days of service,” to accept or reject an opponent’s written “offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial” (emphasis added). Given the inclusion of a specific deadline in CPLR 3101(d)(1)(ii) and the omission of such a deadline in CPLR 3101(d)(1)(i), we presume that the Legislature purposefully omitted a deadline in CPLR 3101(d)(1)(i) (*see INS v. Cardoza-Fonseca*, 480 U.S. at 432, 107 S.Ct. 1207, 94 L.Ed.2d 434).

We recognize that CPLR 3101(d)(1)(i) is part of CPLR article 31, which governs the discovery process. We further recognize that, generally, when a party files a note of issue and certificate of readiness, it must affirm that “[d]iscovery proceedings now known to be necessary [have been] completed” (22 NYCRR 202.21). However, as previously discussed, the Legislature omitted a specific deadline by which a party must respond to a CPLR 3101(d)(1)(i) request, and the statute itself specifically vests a trial court with the discretion to allow the testimony of an expert who was disclosed near the commencement of trial. Thus, the statutory scheme provides that, even where one party requests trial expert disclosure during discovery pursuant to \*37 CPLR 3101(d)(1)(i), a recipient party who does not respond to the request until after the filing of the note of issue and certificate of readiness will not automatically be subject to preclusion of its expert’s trial testimony. Accordingly, the failure of a party to exchange expert information pursuant to CPLR 3101(d)(1)(i) before the filing of a note of issue and certificate of readiness will not divest a trial court of the discretion to consider an affirmation or affidavit submitted by that party’s experts in the context of a timely motion for summary judgment.

Turning to the legislative history, as originally enacted in 1962, CPLR 3101 exempted expert witnesses from disclosure (*see* CPLR former 3101 [L. 1962, ch. 308]; Governor’s Program Bill 1985 Memo., Bill Jacket, L. 1985, ch. 294 at 6). Through the 1985 amendment to CPLR 3101, of which subdivision (d)(1)(i) is a part, the Legislature intended to “expand disclosure” (David D. Siegel, 1986 Supp. Practice Commentaries, *McKinney’s Cons. Laws of N.Y., Book 7B, CPLR C3101:9*, at 5), by

requiring, for the first time, that parties disclose their experts, but deliberately did so only in the limited context of requiring a party, upon request, to make a pretrial disclosure of expected expert witnesses at trial.

CPLR 3101(d)(1)(i) was originally conceived as part of a major overhaul of medical malpractice litigation procedures. The new requirement in this overhaul that parties disclose their expert trial witnesses **\*\*240** was intended to reduce the delay between the “medical malpractice event and the ultimate disposition,” which was a major contributor to increased medical malpractice insurance premiums (Governor’s Program Bill 1985 Memo., Bill Jacket, L. 1985, ch. 294 at 9). Therefore, the amendment was conceived as part of a multi-pronged effort “to expedite litigation, to encourage prompt settlements and to deter parties from asserting frivolous claims and defenses” (*id.* at 9).

Thereafter, the provision was “plucked out” of its place in the original medical malpractice litigation reform bill and made applicable to all forms of litigation (*see* David D. Siegel, 1986 Supp. Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR C3101:9, at 4; Rep. No. 95 of Comm. on State Legis., Bill Jacket, L. 1985, ch. 294 at 16). Modeled on [Rule 26 of the Federal Rules of Civil Procedure](#), the proposed amendment marked a departure from the prohibition on expert disclosure in civil litigation by generally allowing parties “to conduct basic disclosure regarding experts without court order” (1985 Rep. of the **\*38** Advisory Comm. on Civ. Prac. at 49). However, this expansion was relatively limited, as it only required, upon request, pretrial disclosure of the identity and qualifications of each person expected to be called at trial as an expert witness and the substance of their expected testimony, but did not require a party to disclose the experts it had retained but had not determined would be called at trial (*see id.*; Governor’s Program Bill 1985 Memo., Bill Jacket, L. 1985, ch. 294 at 4 [noting that “(s)ection four (of the bill) would require the disclosure of the qualifications of experts and the substance of their testimony prior to trial in civil actions”]).

Moreover, although the Legislature recognized that “the testimony of expert witnesses is often the single most important element of proof in malpractice and other personal injury actions” (Governor’s Program Bill 1985 Memo., Bill Jacket, L. 1985, ch. 294 at 9), the Legislature limited disclosure inasmuch as it did not provide for examinations before trial of expert witnesses (*see* Rep. No. 95 of Comm. on State Legis., Bill Jacket, L. 1985, ch. 294 at 16; *compare id. with Fed. Rules Civ. Pro. 26[b][4][A]* [“A party may depose any person who has been identified as an expert whose opinions may be presented at trial”]).<sup>6</sup>

In its current form, CPLR 3101(d)(1)(i) requires a party, upon request, to disclose information regarding each person it expects to call as an expert witness prior to trial, without specifying that such disclosure must be made prior to the filing of the note of issue and certificate of readiness. Further, the language of CPLR 3101(d)(1)(i) anticipates that the **\*\*241** disclosure of expert trial witnesses might not occur until near the commencement of trial. As such, the statute implicitly recognizes **\*39** that parties often delay the retaining of an expert until it is apparent that settlement is unlikely and a trial will be necessary. Significantly, even if a party has retained an expert during discovery and is the recipient of a CPLR 3101(d)(1)(i) request for trial expert disclosure, it has no affirmative obligation to disclose that expert during discovery unless it “expects to call [that expert] as an expert witness at trial” (CPLR 3101[d][1][i]; *see Vigilant Ins. Co. v. Barnes*, 199 A.D.2d 257, 604 N.Y.S.2d 248).

Based on the plain language and intent of the statute, which do not automatically preclude experts disclosed near the commencement of trial from testifying at trial, there is no basis for concluding that a court must reject a party’s submission of an expert’s affidavit or affirmation in support of, or in opposition to, a timely motion for summary judgment solely because the expert was not disclosed pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness, or prior to the making of the motion.<sup>7</sup> We further note that a court has the discretion, under its general authority to supervise disclosure, to impose a specific deadline for expert disclosure under CPLR 3101(d)(1)(i), for example, prior to the filing of a note of issue and certificate of readiness or prior to a motion for summary judgment (*see Mauro v. Rosedale Enters.*, 60 A.D.3d 401, 873 N.Y.S.2d 627). Moreover, where a trial court sets a specific deadline for expert disclosure, it has the discretion, pursuant to CPLR 3126, to impose appropriate sanctions if a party fails to comply with the deadline (*see MacDonald v. Leif*, 89 A.D.3d 995, 933 N.Y.S.2d 363; *Pirro Group, LLC v. One Point St., Inc.*, 71 A.D.3d 654, 896 N.Y.S.2d 152; *Bomzer v. Parke–Davis*, 41 A.D.3d 522, 839 N.Y.S.2d 110; *Maiorino v. City of New York*, 39 A.D.3d 601, 834 N.Y.S.2d 272).

We recognize that certain decisions of this Court may have been interpreted as standing for the proposition that a party’s failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness,

by itself, requires preclusion of an expert's affirmation or affidavit submitted in support of a motion for summary judgment. For example, in *Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702, a subcontractor hired in a home construction project commenced an action against the general contractor, J.C. Construction Management Corp. (hereinafter J.C.), and J.C.'s \*40 client, Sheldon Lowe, trustee under the Sheldon Lowe declaration of trust dated January 15, 1999 (hereinafter Lowe), to recover money it allegedly was owed in connection with the project. Lowe cross-claimed against J.C. seeking, inter alia, to recover damages for breach of warranty based on J.C.'s allegedly improper installation of the flooring and insulation systems in the home, and seeking payment pursuant to a liquidated damages clause that had been added to the contract between himself and J.C.

After the completion of discovery, J.C. moved for summary judgment dismissing, inter alia, the aforementioned cross claims. In opposition, Lowe submitted, among other things, affidavits from purported experts in the flooring and air conditioning \*\*242 industries, opining that the flooring and insulation systems in the home were faulty, and estimating the costs to repair each system. A majority of the panel of Justices affirmed the determination of the Supreme Court to grant J.C.'s motion for summary judgment, concluding that J.C. established its prima facie entitlement to judgment as a matter of law, and that Lowe failed to raise a triable issue of fact in opposition. As to Lowe's opposition, the majority stated that "[t]he Supreme Court did not improvidently exercise its discretion in declining to consider the affidavits of the purported experts proffered by Lowe, since Lowe failed to identify the experts in pretrial disclosure and served the affidavits after the note of issue and certificate of readiness attesting to the completion of discovery were filed in this matter" (*id.* at 863, 866 N.Y.S.2d 702 [emphasis added]). The majority further explained:

"As it is undisputed that Lowe failed to identify any experts in pretrial disclosure whom he intended to call to testify at trial concerning whether the work was faulty or the extent of his alleged compensatory damages arising from that breach of warranty, and did not proffer any explanation for such failure, it was not an improvident exercise of discretion for the Supreme Court to have determined that the specific expert opinions set forth in the affidavits submitted in opposition to the motion for summary judgment could not be considered at trial" (*id.*).

Additionally, in addressing the dissent by Justice Carni, which concluded that CPLR "3101(d)(1)(i) applies only to an expert \*41 whom a party intends to call at trial," and not an expert used in a motion for summary judgment, the majority indicated that the affidavits of Lowe's experts were inadmissible at trial (*id.*). The majority arguably found the affidavits of Lowe's experts inadmissible in part because of Lowe's failure to disclose its experts prior to the filing of the note of issue and certificate of readiness. Such a conclusion suggests, first, that Lowe's failure to disclose the experts prior to the filing of the note of issue and certificate of readiness rendered the disclosure untimely pursuant to CPLR 3101(d)(1)(i), and, second, that such untimely disclosure rendered the experts' affidavits inadmissible. Indeed, some of our decisions may be interpreted as so holding and as setting forth a bright-line rule in which expert disclosure pursuant to CPLR 3101(d)(1)(i) is untimely if it is made after the filing of the note of issue and certificate and readiness and, thus, in the absence of a valid excuse for such a delay, a court must preclude an affidavit or affirmation from an expert whose identity is disclosed for the first time as part of a motion for summary judgment (*see e.g., Stolarski v. DeSimone*, 83 A.D.3d 1042, 1044–1045, 922 N.Y.S.2d 151; *Ehrenberg v. Starbucks Coffee Co.*, 82 A.D.3d 829, 918 N.Y.S.2d 556; *Pellechia v. Partner Aviation Enters., Inc.*, 80 A.D.3d 740, 916 N.Y.S.2d 130; *Vailes v. Nassau County Police Activity League, Inc.*, 72 A.D.3d 804, 898 N.Y.S.2d 856; *Gerardi v. Verizon N.Y., Inc.*, 66 A.D.3d 960, 888 N.Y.S.2d 136; *Wartski v. C.W. Post Campus of Long Is. Univ.*, 63 A.D.3d 916, 917, 882 N.Y.S.2d 192; *King v. Gregross Mgt. Corp.*, 57 A.D.3d 851, 852–853, 870 N.Y.S.2d 103; *Colon v. Chelsea Piers Mgt., Inc.*, 50 A.D.3d 616, 855 N.Y.S.2d 201; *see also DeLeon v. State of New York*, 22 A.D.3d 786, 787, 803 N.Y.S.2d 692; *Herrera v. Lever*, 34 Misc.3d 1239[A], 2012 N.Y. Slip Op. 50477[U], \*2–4, 2012 WL 874788).

We now clarify that the fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness \*\*243 does not, by itself, render the disclosure untimely. Rather, the fact that pretrial disclosure of an expert pursuant to CPLR 3101(d)(1)(i) has been made after the filing of the note of issue and certificate of readiness is but one factor in determining whether disclosure is untimely. If a court finds that the disclosure is untimely after considering all of the relevant circumstances in a particular case, it still may, in its discretion, consider an affidavit or affirmation from that expert submitted in the context of a motion for summary judgment, or it may impose an appropriate sanction.

We further reiterate that a trial court, under its general authority to supervise disclosure deadlines, and consistent with \*42 its discretion to supervise the substance of discovery, may impose a specific deadline (for example, prior to the filing of the note of issue and certificate of readiness or prior to the making of a motion for summary judgment), for the disclosure of experts

to be used in support of a motion for summary judgment, or who are expected to testify at trial, or both. Moreover, where a trial court has set a specific deadline for expert disclosure, it has the discretion, pursuant to CPLR 3126, to impose appropriate sanctions if a party fails to comply with the deadline (see *MacDonald v. Leif*, 89 A.D.3d 995, 933 N.Y.S.2d 363; *Pirro Group, LLC v. One Point St., Inc.*, 71 A.D.3d 654, 896 N.Y.S.2d 152; *Bomzer v. Parke-Davis*, 41 A.D.3d 522, 839 N.Y.S.2d 110; *Maiorino v. City of New York*, 39 A.D.3d 601, 834 N.Y.S.2d 272).

As clarified, this rule is consistent both with the statute and with the general purpose of summary judgment itself. Summary judgment is the procedural equivalent of a trial and “must be denied if any doubt exists as to a triable issue or where a material issue of fact is arguable” (*Dykeman v. Heht*, 52 A.D.3d 767, 769, 861 N.Y.S.2d 732). In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist (see *Gitlin v. Chirinkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712; *Dykeman v. Heht*, 52 A.D.3d at 769, 861 N.Y.S.2d 732; *Tunison v. D.J. Stapleton, Inc.*, 43 A.D.3d 910, 841 N.Y.S.2d 615).

The preclusion of an expert’s affirmation or affidavit submitted in the context of a motion for summary judgment based solely on a party’s failure to disclose the expert pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not necessarily advance the court’s role of determining the existence of a triable issue of fact. In the context of a motion for summary judgment in a medical malpractice action, generally, a party must submit an affidavit or affirmation from an expert medical provider to meet its prima facie burden, or to raise a triable issue of fact in opposition (see *Post v. County of Suffolk*, 80 A.D.3d 682, 685, 915 N.Y.S.2d 124; *Dunn v. Khan*, 62 A.D.3d 828, 829, 880 N.Y.S.2d 653). Precluding an expert’s affidavit solely on the ground that the offering party did not disclose the expert’s identity pursuant to CPLR 3101(d)(1)(i) prior to the filing of the note of issue and certificate of readiness is not consistent with the purpose and procedural posture of a motion for summary judgment.

In the matter at bar, the Supreme Court providently exercised its discretion in considering the experts’ affirmations submitted by the moving defendants, and the additional affidavits submitted \*43 by Bliss, in support of their respective motions for summary judgment, despite the fact that they did not disclose those experts pursuant to CPLR 3101(d)(1)(i) prior \*\*244 to the filing of the note of issue and certificate of readiness.<sup>8</sup>

Turning to the merits of the moving defendants’ respective motions, in a medical malpractice action, the requisite elements of proof are a deviation or departure from accepted community standards of medical care and evidence that such departure was a proximate cause of injury or damage (see *Orsi v. Haralabatos*, 89 A.D.3d 997, 998, 934 N.Y.S.2d 195, *lv. granted* 18 N.Y.3d 809, 2012 WL 996903; *Geffner v. North Shore Univ. Hosp.*, 57 A.D.3d 839, 842, 871 N.Y.S.2d 617; *Elliot v. Long Is. Home, Ltd.*, 12 A.D.3d 481, 482, 784 N.Y.S.2d 615). A defendant seeking summary judgment in a medical malpractice action bears the burden of establishing, prima facie, either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff’s injuries (see *Swanson v. Raju*, 95 A.D.3d 1105, 1106, 945 N.Y.S.2d 101). In opposition, the plaintiff must demonstrate the existence of a triable issue of fact only as to the elements on which the defendant has met his or her initial burden (see *Stukas v. Streiter*, 83 A.D.3d 18, 23–24, 918 N.Y.S.2d 176).

Here, in support of their separate motions for summary judgment, MacDonald and the Medical Center demonstrated their prima facie entitlement to judgment as a matter of law by submitting, inter alia, affirmations from experts that established that these defendants did not depart from good and accepted standards of medical care and that, in any event, any departures were not a proximate cause of the injured plaintiff’s injuries. MacDonald’s expert, Leonard B. Kahn, a board-certified pathologist, opined that the pathology slides from the injured plaintiff’s dilation and curettage confirm that the tissue specimen is a missed abortion with no evidence of a hydatidiform mole. Kahn observed that the slides showed the presence of immature chorionic villi, the majority of which were “well vascularized and normal in caliber,” while other villi “showed hydropic changes without trophoblastic overgrowth,” and that “[f]ocally, there is hyperplasia or overgrowth of syntrophoblastic and cytotrophoblastic \*44 tissue noted to be polar in relation to the involved villi.” Accordingly, Kahn opined that MacDonald’s diagnosis, set forth in the pathology report, of “[i]mmature chorionic villi, with focal zones of surface trophoblast hyperplasia[,] [n]ecrotic decidual tissue[,] [and] [p]robable portions of placental implantation site” was adequate, correct, and conformed with good and accepted medical practice. He further opined that MacDonald’s diagnosis was not the proximate cause of the plaintiff’s injuries.

In opposition to MacDonald’s motion, the plaintiffs submitted, inter alia, an affidavit from pathologist Theonia Boyd, a

board-certified pathologist licensed to practice in Massachusetts, which was notarized in Massachusetts but not accompanied by a certification in accordance with CPLR 2309(c). However, this defect was not fatal, as MacDonald was not prejudiced thereby (see CPLR 2001; *U.S. Bank N.A. v. Dellarmo*, 94 A.D.3d 746, 748, 942 N.Y.S.2d 122; *Betz v. Daniel Conti, Inc.*, 69 A.D.3d 545, 892 N.Y.S.2d 477). Accordingly, the Supreme Court improvidently \*\*245 exercised its discretion in not considering Boyd’s affidavit.

As to the substance of Boyd’s affidavit, she opined that MacDonald departed from good and accepted medical practice by misinterpreting the injured plaintiff’s pathology slides in light of the “unequivocal features of a hydatidiform molar pregnancy” allegedly revealed therein. Notably, however, Boyd failed to describe or quantify in any way the “unequivocal features of a hydatidiform molar pregnancy” that she alleged MacDonald failed to observe. Boyd’s opinion is, therefore, conclusory and fails to raise a triable issue of fact as to whether MacDonald departed from good and accepted medical practice (see *Ahmed v. New York City Health & Hosps. Corp.*, 84 A.D.3d 709, 711, 922 N.Y.S.2d 202; *Dunn v. Khan*, 62 A.D.3d 828, 829, 880 N.Y.S.2d 653). In any event, Boyd’s assertion that the correct diagnosis would have led to an appropriate follow-up plan is conclusory and speculative, and thus, fails to raise a triable issue of fact as to causation (see *Forrest v. Tierney*, 91 A.D.3d 707, 709, 936 N.Y.S.2d 295; *Graziano v. Cooling*, 79 A.D.3d 803, 805, 913 N.Y.S.2d 302). Accordingly, the Supreme Court properly granted that branch of MacDonald’s motion which was for summary judgment dismissing the complaint insofar as asserted against him.

In support of its motion for summary judgment, the Medical Center demonstrated its prima facie entitlement to judgment as a matter of law by submitting, inter alia, an affirmation from David A. Fisher, a board-certified diagnostic \*45 radiologist. In his affirmation, Fisher opined that the diagnosis by the Medical Center’s radiologist, Moses Williams, based on the injured plaintiff’s February 2, 2007, obstetrical and renal ultrasound studies, correctly interpreted a small echogenic lesion on the injured plaintiff’s mid-right kidney as angiomyolipoma, and properly recommended follow-up evaluation of the lesion. Further, Williams’s identical diagnosis, based on the injured plaintiff’s March 21, 2007, renal ultrasound, was similarly correct. Fisher also opined, with a reasonable degree of medical certainty, that his own review of the renal ultrasound studies showed no evidence of metastatic choriocarcinoma. Based on the foregoing assertions, Fisher concluded that the Medical Center did not depart from good and accepted medical practice, and that, in any event, no action or inaction on the Medical Center’s part was a proximate cause of the injured plaintiff’s injuries.

The record reflects that, in opposition to the Medical Center’s motion, the plaintiffs submitted a redacted affirmation from an unnamed board-certified radiologist who is licensed to practice in Connecticut. Like Boyd’s affirmation, this redacted affirmation, which indicates that it was drafted in Connecticut, was not accompanied by a certification in accordance with CPLR 2309(c). However, unlike Boyd’s affirmation, the radiologist’s affirmation was not signed, not dated, and not notarized, and therefore was inadmissible (see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Fredette v. Town of Southampton*, 95 A.D.3d 940, 942, 944 N.Y.S.2d 206, lv. denied 19 N.Y.3d 811, 2012 WL 3930678).

In any event, the affirmation is speculative and conclusory, as it opines that the Medical Center, through its radiologist, incorrectly interpreted the ultrasound studies as indicative of angiomyolipoma, rather than choriocarcinoma, without setting forth any basis for this opinion (see *Ahmed v. New York City Health & Hosps. Corp.*, 84 A.D.3d at 711, 922 N.Y.S.2d 202; *Dunn v. Khan*, 62 A.D.3d at 829, 880 N.Y.S.2d 653). Further, \*\*246 the vague assertion that the Medical Center had a “duty to recommend an additional work-up, specifying studies that would more likely than not have resulted in the correct diagnosis,” was speculative and failed to raise a triable issue of fact, as this opinion failed to set forth the rationale for such additional studies or the specific additional studies the Medical Center should have recommended (see *Ahmed v. New York City Health & Hosps. Corp.*, 84 A.D.3d at 711, 922 N.Y.S.2d 202; *Dunn v. Khan*, 62 A.D.3d at 829, 880 N.Y.S.2d 653). Similarly, the affirmation’s conclusion that, to the extent the Medical Center’s expert radiologist “avers otherwise, \*46 ... he is mistaken” is insufficient to raise a triable issue of fact, as the affirmation again sets forth no basis for such opinion (see *Ahmed v. New York City Health & Hosps. Corp.*, 84 A.D.3d at 711, 922 N.Y.S.2d 202; *Dunn v. Khan*, 62 A.D.3d at 829, 880 N.Y.S.2d 653). Accordingly, the Supreme Court properly granted that branch of the Medical Center’s motion which was for summary judgment dismissing the complaint insofar as asserted against it.

In support of her motion for summary judgment, DeCastro demonstrated her prima facie entitlement to judgment as a matter of law by submitting, inter alia, an affirmation from John L. Lovecchio, who is board certified in obstetrics and gynecology, and the sub-specialty of gynecological oncology. Lovecchio’s affirmation established that DeCastro did not depart from good

and accepted standards of medical care. Specifically, Lovecchio averred that DeCastro provided the injured plaintiff with appropriate care and treatment during her visits on March 1, 2006, and March 15, 2006, “insofar as she obtained a proper medical history; conducted appropriate physical examinations; and arranged for appropriate follow up diagnostic test studies.” Moreover, since MacDonald’s pathology report, which was based on the dilation and curettage procedure performed at the Medical Center on April 13, 2006, indicated “essentially a normal finding” that did not indicate that the injured plaintiff “was in a potentially pre-cancerous state for development of choriocarcinoma,” Lovecchio opined, with a reasonable degree of medical certainty, that DeCastro’s failure to undertake any follow-up plan based on the pathology report was not a departure from good and accepted medical practice.

Lovecchio further averred that DeCastro’s act of ordering a follow-up human chorionic gonadotropin (hereinafter HCG) test for the injured plaintiff during the injured plaintiff’s May 17, 2006, visit was within good and accepted standards of medical care. HCG testing on July 26, 2006, revealed that the injured plaintiff had an HCG level of 5, which both showed that she was not pregnant and “definitely ruled out the possible existence of a molar pregnancy and/or a choriocarcinoma up to this point.” Moreover, HCG testing between May and August 2006 followed a normal trajectory, inasmuch as the HCG levels decreased following the first pregnancy, which ended in a miscarriage, and increased at the beginning of the second pregnancy. Taken together, MacDonald’s pathology report and the HCG testing between May 2006 and August 2006 “consistently demonstrated that the [injured] [p]laintiff did not have a \*47 molar pregnancy as a precursor to potential development of choriocarcinoma during this time span.” Furthermore, the injured plaintiff did not exhibit any signs or symptoms at any of the visits to DeCastro that should have caused DeCastro to suspect that the injured plaintiff was in a potentially pre-cancerous state. In sum, Lovecchio opined, with a reasonable degree of medical certainty, that DeCastro did not depart \*\*247 from good and accepted medical practice in her care and treatment of the injured plaintiff.

In opposition to DeCastro’s motion, the plaintiffs submitted an affirmation from Lawrence Ross, who did not specify his qualifications, except to describe himself as a “physician licensed to practice in N.Y. ... with more than 50 years’ experience,” who was “familiar with the standards of care for nurse practitioners.” Even assuming that Ross was a qualified expert on the practice of nurse practitioners, his affirmation was conclusory and speculative and, thus, failed to raise a triable issue of fact as to whether DeCastro departed from good and accepted medical practice. For example, although Ross opined that the statement in MacDonald’s pathology report—“[r]esults of histologic findings are discussed with Dr. Birnbaum on April 4, 2006. A differential diagnosis is renewed to interpret the histologic findings. Options for the follow-up care of the patient are discussed[ ]”—which he asserts DeCastro admits to having read,<sup>9</sup> was a “ ‘red flag’ that should alert the reader that something very unusual was going on,” he failed to explain why the statement was a red flag or specify the accepted standard of care. Instead, he merely concluded that DeCastro’s failure to follow up with a physician in light of the alleged red flag was an “obvious departure from the standard of care.” Accordingly, Ross’s opinion that DeCastro departed from good and accepted medical practice by not following up on the alleged red flag in the pathology report was speculative and conclusory, and, thus, did not raise a triable issue of fact (see *Ahmed v. New York City Health & Hosps. Corp.*, 84 A.D.3d at 711, 922 N.Y.S.2d 202; *Dunn v. Khan*, 62 A.D.3d at 829, 880 N.Y.S.2d 653). Consequently, the Supreme Court should have granted that branch of DeCastro’s motion which was for summary judgment dismissing the complaint insofar as asserted against her.

Finally, we turn to Bliss’s motion for summary judgment. Bliss established, prima facie, through her affidavits and the affirmation of her expert, that she was not involved with \*48 providing medical care to the injured plaintiff and, thus, did not depart from good and acceptable medical care with respect to the injured plaintiff (see *Leon v. Southside Hosp.*, 227 A.D.2d 384, 642 N.Y.S.2d 72; *Tessier v. New York City Health & Hosps. Corp.*, 177 A.D.2d 626, 576 N.Y.S.2d 331; *Latiff v. Wyckoff Hgts. Hosp.*, 144 A.D.2d 650, 535 N.Y.S.2d 2). In opposition, the plaintiffs did not raise a triable issue of fact as to whether Bliss provided medical care to the injured plaintiff or departed from good and accepted medical practice with respect to the injured plaintiff. The affirmation of the plaintiffs’ counsel is of no probative value (see *Zuckerman v. City of New York*, 49 N.Y.2d at 563, 427 N.Y.S.2d 595, 404 N.E.2d 718). Moreover, to the extent the plaintiffs rely on the injured plaintiff’s deposition, which Bliss submitted with her moving papers, in which she testified that she “believe[d]” that Bliss removed her staples following her cesarean section, such testimony does not raise a triable issue of fact as to whether Bliss treated her (see *Latiff v. Wyckoff Hgts. Hosp.*, 144 A.D.2d at 651, 535 N.Y.S.2d 2). Further, even if Bliss did remove the injured plaintiff’s staples, the plaintiffs did not submit an affidavit or affirmation from an expert that could have raised a triable issue of fact as to whether Bliss’s actions or inactions \*\*248 proximately caused the injured plaintiff’s injuries (see *Tessier v. New York City Health & Hosps. Corp.*, 177 A.D.2d 626, 576 N.Y.S.2d 331). Indeed, the plaintiffs do not allege that the staples were improperly removed following the injured plaintiff’s cesarean section or that the injured plaintiff sustained any injuries

resulting from the removal of her staples. Accordingly, the Supreme Court properly granted that branch of Bliss's motion which was for summary judgment dismissing the complaint insofar as asserted against her.

The plaintiffs' remaining contentions are without merit.

Accordingly, the order is affirmed insofar as appealed from by the plaintiffs. In addition, the order is reversed insofar as appealed from by DeCastro, on the law, and that branch of DeCastro's motion which was for summary judgment dismissing the complaint insofar as asserted against her is granted.

BALKIN, J.P., and HALL, J., concur.

MILLER, J., concurs in the result and votes to affirm the order insofar as appealed from by the plaintiffs and reverse the order insofar as appealed from by the defendant Kim Rosary DeCastro, on the law, and to grant that branch of the motion of the defendant Kim Rosary DeCastro which was for summary judgment dismissing the complaint insofar as asserted against her, with the following memorandum:

I concur in the result reached by my colleagues to affirm the order insofar as appealed from by the plaintiffs and reverse the order insofar as appealed from by the defendant Kim Rosary DeCastro. I write separately to express my views regarding the duty CPLR 3101(d)(1)(i) imposes on parties to provide pretrial expert disclosure and the extent to which a court has the discretion to fashion penalties for a party's failure to comply. \*49 It is my belief that further analysis of CPLR 3101(d)(1)(i) and of this Court's case law will help clarify this area of the law and permit the application of the statute in a manner that is predictable for the bar, workable for the bench, and consistent with the Legislature's purpose in enacting it.

As enacted in 1962, CPLR 3101 provided that evidence pertaining to expert witnesses was generally exempt from pretrial disclosure unless certain exceptions applied which would result in injustice or undue hardship (*see* CPLR former 3101 [L. 1962, ch. 308]; *see also* Weinstein–Korn–Miller, N.Y. Civ. Prac. ¶ 3101.52a [2012]; Governor's Program Bill 1985 Mem., Bill Jacket, L. 1985, ch. 294 at 6). An advisory committee's report shows that the decision to distinguish expert testimony from other forms of evidence was motivated, at least in part, by the desire to shield tactical considerations from adverse parties (1957 Rep. of Temporary Comm. on the Cts., First Prelim. Rep. of Advisory Comm. on Practice and Procedure, Title 34 at 120).

In 1985, the Legislature enacted legislation, known as the Medical Malpractice Reform Act, which was intended to "expedite the resolution of malpractice claims and thereby reduce the cost of malpractice litigation" (*Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 7, 550 N.Y.S.2d 572, 549 N.E.2d 1143; *see* L. 1985, ch. 294, § 1; *see also* Governor's Program Bill 1985 Mem., Bill Jacket, L. 1985, ch. 294 at 4). As one of the steps intended to expedite litigation and facilitate settlements, section four of the legislation "require[d] the disclosure of the qualifications of experts and the substance of their testimony prior to trial in civil actions" (Governor's Program Bill 1985 Mem., Bill Jacket, L. 1985, ch. 294 at 4; *see* \*\*249 *Tewari v. Tsoutsouras*, 75 N.Y.2d at 7, 550 N.Y.S.2d 572, 549 N.E.2d 1143; *see also* 1985 Rep. of the Advisory Comm. on Civ. Prac. at 43).

The rationale for expanding the scope of discovery to include experts was provided in the Governor's Approval Memorandum:

"Although virtually all other information is now shared by litigants in civil practice, information concerning expert witnesses and their opinions remains shielded from disclosure. Since the testimony of expert witnesses is often the single most important element of proof in malpractice and other personal injury actions, sharing information concerning these opinions encourages prompt settlement by providing both parties an accurate measure \*50 of the strength of their adversaries' case. In addition, both parties will be discouraged from asserting unsupportable claims or defenses, knowing that they will be required to disclose what, if any expert evidence will support their allegations" (Governor's Program Bill 1985 Mem., Bill Jacket, L. 1985, ch. 294 at 9–10).

Though the Legislature was specifically motivated to reduce the cost of litigating medical malpractice actions when it amended CPLR 3101, its provisions regarding disclosure, as relevant here, do not make reference to specific types of actions and are applicable to all kinds of experts. In its current form, CPLR 3101 provides that, once requested, “each party shall identify each person whom the party expects to call and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert’s opinion” (CPLR 3101[d][1][i]).

Although the statute mandates that “[u]pon request” a party “shall” identify the experts it “expects to call as an expert witness at trial” (CPLR 3101 [d] [1] [i]), it does not specify a particular date by which a party must retain or disclose its expected trial experts (*compare* CPLR 3101[d][1][i] with Fed. Rules Civ. Pro. Rule 26[a][2][D] [requiring experts to be disclosed “at least 90 days before the date set for trial or for the case to be ready for trial” absent a stipulation or court order]). Although, as it is often stated, CPLR 3101(d)(1)(i) “does not require a party to retain an expert at any *specific* time” (*Lillis v. D’Souza*, 174 A.D.2d 976, 976, 572 N.Y.S.2d 136 [emphasis added]; see *Saldivar v. I.J. White Corp.*, 46 A.D.3d 660, 661, 847 N.Y.S.2d 224), it nevertheless does indicate that noncompliance occurs when a party “retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof” (CPLR 3101[d] [1] [i]).

The statute provides little guidance as to how to determine when a failure to disclose is untimely, as it only makes reference to an “appropriate” amount of time (CPLR 3101[d][1][i]). However, the fact that this time limitation has been left vague does not warrant the conclusion that the Legislature did not intend for there to be any time limitation. Indeed, such a reading \*51 would be contrary to the purpose of the statute to expand pretrial disclosure so as to encompass the parties’ experts.

It is evident from the plain language of the statute, which contemplates disclosure “before the commencement of trial” (CPLR 3101[d][1] [i]), that the disclosure must occur at some point prior to trial (see *Vigilant Ins. Co. v. Barnes*, 199 A.D.2d 257, 257–258, 604 N.Y.S.2d 248; *Bauernfeind v. Albany Med. Ctr. Hosp.*, 195 A.D.2d 819, 819–820, 600 N.Y.S.2d 516; see also *Mankowski v. Two Park Co.*, 225 A.D.2d 673, 673–674, 639 N.Y.S.2d 847). In determining whether there has been \*\*250 compliance with CPLR 3101(d)(1)(i), this Court has consistently cited to the filing of a note of issue and certificate of readiness as the procedural event after which disclosure is untimely under the statute (see e.g. *Lombardi v. Alpine Overhead Doors, Inc.*, 92 A.D.3d 921, 921, 939 N.Y.S.2d 528; *Kopeloff v. Arctic Cat, Inc.*, 84 A.D.3d 890, 890–891, 923 N.Y.S.2d 168; *Ehrenberg v. Starbucks Coffee Co.*, 82 A.D.3d 829, 830–831, 918 N.Y.S.2d 556; *Pellechia v. Partner Aviation Enters., Inc.*, 80 A.D.3d 740, 741, 916 N.Y.S.2d 130; *Gerardi v. Verizon N.Y., Inc.*, 66 A.D.3d 960, 961, 888 N.Y.S.2d 136; *Dawson v. Cafiero*, 292 A.D.2d 488, 489, 739 N.Y.S.2d 190; *Blade v. Town of N. Hempstead*, 277 A.D.2d 268, 269, 715 N.Y.S.2d 735; *Ortega v. New York City Tr. Auth.*, 262 A.D.2d 470, 470, 692 N.Y.S.2d 131; *Martin v. NYRAC, Inc.*, 258 A.D.2d 443, 443–444, 684 N.Y.S.2d 605). Where a party has failed to provide expert disclosure prior to the filing of the note of issue and certificate of readiness, this Court has upheld penalties imposed for noncompliance with CPLR 3101(d)(1)(i), even where the penalties ultimately resulted in the dismissal of a party’s case (see e.g. *Lombardi v. Alpine Overhead Doors, Inc.*, 92 A.D.3d at 921, 939 N.Y.S.2d 528).

Indeed, the filing of a note of issue and certificate of readiness for trial requires a party to represent to the court that discovery is complete and that there are no outstanding requests for discovery (see Uniform Rules for Trial Cts. [22 NYCRR] § 202.21[b]). A party that certifies that discovery is complete or that does not move to vacate the note of issue within 20 days (see Uniform Rules for Trial Cts. [22 NYCRR] § 202.21[e]) has effectively represented to the court that the additional disclosure of experts is unnecessary. To require expert disclosure prior to the completion of discovery is consistent with the Legislature’s purpose of expanding the scope of discovery.

A court has the discretionary authority to impose a penalty on a party for its failure to comply with discovery deadlines imposed by CPLR 3101(d)(1)(i) or in a discovery order issued by the court overseeing discovery (see CPLR 3126, 3406 [b]; see also Uniform Rules for Trial Cts. [22 NYCRR] §§ 202.12[f]; \*52 202.56[b][2]). These enforcement mechanisms are vital to the integrity of the discovery process and to the court’s responsibility to oversee discovery (*cf. Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431), and are therefore necessary to effectuate the Legislature’s goal, in enacting CPLR 3101(d)(1)(i), of expanding pretrial discovery to encompass experts.

However, CPLR 3101(d)(1)(i) contains provisions which, if triggered, serve to limit a court’s discretion to preclude expert evidence which has not been timely disclosed. A plain reading of this portion of the statute indicates that an expert’s testimony shall not be precluded solely for noncompliance where good cause is shown as to why an expert was not retained

far enough in advance of trial to give appropriate notice (see CPLR 3101(d)[1][i]; *Benedict v. Seasille Equities Corp.*, 190 A.D.2d 649, 649–650, 593 N.Y.S.2d 67; *Simpson v. Bellew*, 161 A.D.2d 693, 693, 555 N.Y.S.2d 829; see also *Corning v. Carlin*, 178 A.D.2d 576, 576, 577 N.Y.S.2d 474). As such, a showing of good cause limits the court’s discretion to sanction a noncomplying party with preclusion. The party seeking to limit the court’s discretion (i.e., the noncomplying party) has the burden of demonstrating good cause so as to invoke the protection of CPLR 3101(d)(1)(i). If this burden is not met, preclusion as a penalty for noncompliance is an available remedy for the court to consider in the exercise of its discretion \*\*251 and in light of the other circumstances of the case.

However, as it is often stated, “ ‘CPLR 3101(d)(1)(i) does not ... ‘mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute’ ” ( *Saldivar v. I.J. White Corp.*, 46 A.D.3d at 661, 847 N.Y.S.2d 224, quoting *Aversa v. Taubes*, 194 A.D.2d 580, 582, 598 N.Y.S.2d 801, quoting *Lillis v. D’Souza*, 174 A.D.2d at 976, 572 N.Y.S.2d 136). In other words, the statute does not require preclusion for noncompliance, and the decision of whether and to what extent a court should impose the penalty of preclusion or some lesser penalty for noncompliance, is still left to the providently exercised discretion of the court.

Some commentators may have interpreted this Court’s case law as standing for the proposition that a party’s failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of the note of issue and certificate of readiness requires a court to preclude an expert’s affirmation or affidavit submitted in support of a motion for summary judgment (see e.g. Robert Tolchin, Concerns Over Adoption Of ‘Singletree’ on Expert Affidavits, NYLJ, [online] July 26, 2012). However, this Court has never so held, and in cases where this Court has approved of the penalty \*53 of preclusion, this Court has consistently done so on the ground that the trial court “did not improvidently exercise its discretion” in imposing such a penalty for noncompliance with the disclosure deadlines imposed under CPLR 3101(d)(1)(i) (*Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 863, 866 N.Y.S.2d 702; see e.g. *Liang v. Yi Jing Tan*, 98 A.D.3d 653, 949 N.Y.S.2d 761; *Crawford v. Village of Millbrook*, 94 A.D.3d 1036, 1037, 943 N.Y.S.2d 180; *Mohamed v. New York City Tr. Auth.*, 80 A.D.3d 677, 678–679, 915 N.Y.S.2d 599; *Parlante v. Cavallero*, 73 A.D.3d 1001, 1003, 900 N.Y.S.2d 749; *Safrin v. DST Russian & Turkish Bath, Inc.*, 16 A.D.3d 656, 656, 791 N.Y.S.2d 443; cf. *Bernardis v. Town of Islip*, 95 A.D.3d 1050, 1051, 944 N.Y.S.2d 626; *Hayden v. Gordon*, 91 A.D.3d 819, 820, 937 N.Y.S.2d 299). Although this Court may have referred to an expert’s affidavit as “not admissible,” it was only rendered inadmissible by a preclusion order, imposed as a penalty for noncompliance by a trial court in the provident exercise of its discretion (*Colon v. Chelsea Piers Mgt., Inc.*, 50 A.D.3d 616, 617, 855 N.Y.S.2d 201).

In sum, under this Court’s precedent, the failure of a party to exchange expert information pursuant to CPLR 3101(d)(1)(i) before the filing of a note of issue and certificate of readiness constitutes noncompliance under the statute. However, such a failure does not divest a trial court of the discretion to consider an affirmation or affidavit submitted by that party’s experts in the context of a motion for summary judgment (accord. *Bernardis v. Town of Islip*, 95 A.D.3d at 1051, 944 N.Y.S.2d 626; *Hayden v. Gordon*, 91 A.D.3d at 820, 937 N.Y.S.2d 299). Rather, the determination of whether and to what extent a penalty should be imposed upon a party for its failure to comply with CPLR 3101(d)(1)(i) is left to the providently exercised discretion of the court. In considering whether preclusion is an appropriate penalty for noncompliance, a court should look to whether the party seeking to avoid preclusion has demonstrated good cause for its noncompliance, whether the noncompliance was willful or whether it served to prejudice the other party, and any other circumstances which may bear on the appropriateness of preclusion. These may include, but are not limited to, the length of time that has passed since the commencement of the litigation, the amount of time that has passed since expert disclosure \*\*252 was demanded, and the extent to which the nature of the case or the relevant theories asserted therein rendered it apparent that expert testimony would be necessary to prosecute or defend the matter.

Where, in the provident exercise of its discretion, a court determines that preclusion is an appropriate remedy, such a determination \*54 may impact the disposition of a motion for summary judgment, inasmuch as “a preclusion order may serve as a basis for summary judgment dismissing the complaint” (*Anderson v. RC Dolner, Inc.*, 43 A.D.3d 837, 838, 842 N.Y.S.2d 50; see e.g. *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448, 824 N.Y.S.2d 584, 857 N.E.2d 1114; *Rahman v. MacDonald*, 17 A.D.3d 438, 438–439, 793 N.Y.S.2d 144; *Contarino v. North Shore Univ. Hosp. at Glen Cove*, 13 A.D.3d 571, 572, 786 N.Y.S.2d 326). It is appropriate to consider an argument that expert evidence should be precluded in the context of a motion for summary judgment because such a motion is “the procedural equivalent of a trial” (*Dykeman v. Heht*, 52 A.D.3d 767, 769, 861 N.Y.S.2d 732). Where a party is precluded from tendering evidence necessary to establish an essential element of a cause of action, or to raise a triable issue of fact in opposition to a prima facie case, judgment as a matter of law is warranted

with respect to that cause of action (*see generally* [Parker v. Mobil Oil Corp.](#), 7 N.Y.3d at 448, 824 N.Y.S.2d 584, 857 N.E.2d 1114; [Rahman v. MacDonald](#), 17 A.D.3d at 438–439, 793 N.Y.S.2d 144; [Contarino v. North Shore Univ. Hosp. at Glen Cove](#), 13 A.D.3d at 572, 786 N.Y.S.2d 326).

As set forth in the majority opinion, given the circumstances of this case, the Supreme Court providently exercised its discretion when it declined to preclude the experts’ affirmations submitted by Bliss, MacDonald, the Medical Center, and DeCastro in support of their respective motions for summary judgment. Accordingly, I concur in the result reached by my colleagues to affirm the order insofar as appealed from by the plaintiffs and reverse the order insofar as appealed from by DeCastro.

ORDERED that the order is affirmed insofar as appealed from by the plaintiffs; and it is further,

ORDERED that the order is reversed insofar as appealed from by the defendant Kim Rosary DeCastro, on the law, and that branch of the motion of the defendant Kim Rosary DeCastro which was for summary judgment dismissing the complaint insofar as asserted against her is granted; and it is further,

ORDERED that one bill of costs is awarded to the defendants appearing separately and filing separate briefs, payable by the plaintiffs.

#### All Citations

102 A.D.3d 26, 953 N.Y.S.2d 232, 2012 N.Y. Slip Op. 06935

#### Footnotes

- <sup>1</sup> In his deposition testimony, the defendant Eliot L. Birnbaum testified that WHC is a professional corporation, of which he and the defendant Robin Bliss are shareholders. The official name of WHC is Eliot L. Birnbaum, MD, PC, and it does business as WHC.
- <sup>2</sup> The preliminary conference order dated October 14, 2008, in this action directed the parties as follows: “Expert Disclosure shall be provided by all parties pursuant to [CPLR 3101](#).” Notably, the order did not set a specific deadline for the filing of a note of issue and certificate of readiness and specifically exempted expert disclosure from the other discovery deadlines set forth in the order.
- <sup>3</sup> We note that DeCastro moved for summary judgment on or about June 1, 2010. Thereafter, on or about June 11, 2010, she disclosed her expected expert trial witness, John L. Lovechio, in response to the plaintiffs’ request pursuant to [CPLR 3101\(d\)\(1\)\(i\)](#). Although DeCastro’s disclosure was prior to the plaintiffs’ deadline for opposing her motion for summary judgment, it was after the filing of the note of issue and certificate of readiness. Thus, under the circumstances, we find no reason to differentiate her procedural posture with respect to expert disclosure from that of the other defendants, none of whom disclosed their experts to the plaintiffs in response to the plaintiffs’ [CPLR 3101\(d\)\(1\)\(i\)](#) request prior to the filing of the note of issue and certificate of readiness.
- <sup>4</sup> The defendant Genevieve Kraus, a nurse practitioner, moved pursuant to [CPLR 3211](#) to dismiss the derivative cause of action asserted by the injured plaintiff’s husband insofar as asserted against her on the ground that he lacked standing to bring the cause of action, since the plaintiffs were not married during the period Kraus rendered treatment to the injured plaintiff. The plaintiffs did not oppose Kraus’s motion. In the order appealed from, the Supreme Court treated this motion as one, in effect, for summary judgment dismissing the complaint insofar as asserted against Kraus, and granted the motion. The plaintiffs do not appeal from this portion of the order.
- <sup>5</sup> We disregard the plaintiffs’ error in denominating their expert’s affirmations as affidavits (*see* [CPLR 2001](#)).

- <sup>6</sup> As noted previously, the next subdivision of the statute, CPLR 3101(d)(1)(ii), contained in a subsequent amendment to CPLR 3101, governs the procedures by which expert witnesses may be examined before trial. We note that discovery of expert witnesses continues to be limited, since, unlike notice or fact witnesses, an expert witness is not automatically subject to deposition (see CPLR 3101[d][1][ii]; *Kane v. Triborough Bridge & Tunnel Auth.*, 40 A.D.3d 1040, 1042, 837 N.Y.S.2d 245; *Columbia Telecommunications Group v. General Acc. Ins. Co. of Am.*, 275 A.D.2d 340, 712 N.Y.S.2d 426; *North Shore Towers Apts. v. Zurich Ins. Co.*, 262 A.D.2d 468, 691 N.Y.S.2d 327). Rather, where special circumstances exist, a party may obtain an order permitting it to depose its adversary's expert (see e.g. *Dixon v. City of Yonkers*, 16 A.D.3d 542, 792 N.Y.S.2d 514 [trial court providently exercised its discretion in denying defendants' motion to quash subpoena directing defendants' expert to appear for a deposition where expert examined key evidence before it was rendered unavailable to the plaintiff]).
- <sup>7</sup> In light of the deadlines for motions for summary judgment to which parties must strictly adhere (see *Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431), a motion for summary judgment made near the commencement of trial generally will not be considered.
- <sup>8</sup> The plaintiffs do not assert that the motions for summary judgment were untimely or that the experts' affirmations are infirm on procedural or technical grounds. Notably, the record does not indicate that the trial court, pursuant to its general authority to supervise disclosure, directed the parties to disclose, prior to the filing of the note of issue and certificate of readiness, or prior to moving for summary judgment, any experts they anticipated using in the context of the motion for summary judgment.
- <sup>9</sup> In fact, DeCastro testified at her deposition that it was not her practice as a nurse practitioner to read such pathology reports.

146 A.D.3d 686  
Supreme Court, Appellate Division, First Department, New York.

**Michael RUTKOWSKI**, et al., Plaintiffs–Appellants,  
v.  
**NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION**, et al.,  
Defendants–Respondents,  
Freeman Decorating Services, Inc., et al., Defendants.  
[And Third–Party Actions].

590847/11, 2878, 590542/13, 109544/10  
|  
Jan. 26, 2017.

### Synopsis

**Background:** Worker brought action against convention center owner and others to recover for injuries sustained while removing furniture from an exhibition booth at the conclusion of a trade show. The Supreme Court, New York County, [Richard F. Braun, J.](#), granted owner’s motion for summary judgment. Worker appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

worker was engaged in “demolition” work when injured;

owner did not fulfill its obligation under scaffold law to provide appropriate safety equipment; and

Industrial Code regulation requiring safety hats established a standard of conduct sufficient to impose liability.

Reversed.

### Attorneys and Law Firms

**\*\*54** Finkelstein & Partners, LLP, Newburgh ([George M. Levy](#) of counsel), for appellants.

Hannum, Feretic, Prendergast & Merlino, New York ([David P. Feehan](#) of counsel), for respondents.

**\*\*55** [ACOSTA](#), J.P., [MAZZARELLI](#), [FEINMAN](#), [WEBBER](#), JJ.

### Opinion

**\*686** Order, Supreme Court, New York County ([Richard F. Braun, J.](#)), entered October 23, 2015, which, to the extent appealed from as limited by the briefs, granted defendants New York Convention Center Development Corporation, Nielsen Business Media, Inc. and the Nielsen Company (US), LLC’s motion for summary judgment dismissing as against New York Convention Center Development Corporation the [Labor Law § 240](#) claim and the [Labor Law § 241\(6\)](#) claim insofar as it is predicated on Industrial Code ([12 NYCRR](#)) § 23–1.8(c)(1), unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Michael Rutkowski was removing furniture from an exhibition booth at the conclusion of a trade show when a lighting bar simultaneously being removed from the top of the booth by electricians fell and struck him in the head. Since his specific task at the moment the accident occurred was ancillary to and part of the larger demolition job of dismantling the booths, in which he was to participate, plaintiff was engaged in an activity within the purview of Labor Law §§ 240(1) and 241(6) (see *Prats v. Port Auth. of N.Y. & N.J.*, 100 N.Y.2d 878, 882–883, 768 N.Y.S.2d 178, 800 N.E.2d 351 [2003]; *Pino v. Robert Martin Co.*, 22 A.D.3d 549, 802 N.Y.S.2d 501 [2d Dept.2005] ).

We reject defendant’s contention that the lighting bar did not require securing with a safety device of the type contemplated by Labor Law § 240 because it was being carried by hand (see *Pritchard v. Tully Constr. Co., Inc.*, 82 A.D.3d 730, 918 N.Y.S.2d 154 [2d Dept.2011] ). The lighting bar was an object that required securing to prevent it from becoming dislodged or falling during the work (see *Outar v. City of New York*, 5 N.Y.3d 731, 799 N.Y.S.2d 770, 832 N.E.2d 1186 [2005] ). Further, in view of the weight of the lighting bar, we cannot conclude as a matter of law that the distance it fell was de minimis (see *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 605, 895 N.Y.S.2d 279, 922 N.E.2d 865 [2009] ). Nor did defendants demonstrate that any securing device would have defeated the task of removing the lighting bar (cf. *Salazar v. Novalex Contr. Corp.*, 18 N.Y.3d 134, 139–140, 936 N.Y.S.2d 624, 960 N.E.2d 393 [2011] [“the installation of a protective device of the kind that (plaintiff) posits ... would have been contrary to the objectives of the work plan”] ).

\*687 12 NYCRR 23–1.8(c)(1), which mandates approved safety hats for persons “required to work or pass within any area where there is a danger of being struck by falling objects or materials,” is sufficiently concrete to give rise to Labor Law § 241(6) liability (see *Bornschein v. Shuman*, 7 A.D.3d 476, 478, 776 N.Y.S.2d 307 [2d Dept.2004]; *Sikorski v. Burroughs Dr. Apts.*, 306 A.D.2d 844, 845, 762 N.Y.S.2d 718 [4th Dept.2003]; but see *Sajta v. Latham Four Partnership*, 282 A.D.2d 969, 971, 723 N.Y.S.2d 716 [3d Dept.2001] ).

#### All Citations

146 A.D.3d 686, 46 N.Y.S.3d 54, 2017 N.Y. Slip Op. 00555

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18 N.Y.3d 134  
Court of Appeals of New York.

Raul SALAZAR, Respondent,  
v.  
NOVALEX CONTRACTING CORP. et al., Appellants.  
(And a Third-Party Action.).

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|  
Nov. 21, 2011.

### Synopsis

**Background:** Worker filed action against property owner and others under scaffold law provision requiring erection of safe scaffolding or other devices so as to give proper protection, and statutory provision requiring provision of reasonable and adequate safety in construction areas. The Supreme Court, Bronx County, [Mary Brigantti-Hughes, J.](#), dismissed complaint. Worker appealed. The Supreme Court, Appellate Division, [72 A.D.3d 418](#), [897 N.Y.S.2d 423](#), reversed and granted leave to appeal.

**Holdings:** The Court of Appeals, [Pigott, J.](#), held that:

property owner's failure to cover or barricade trench, into which worker stepped while laying concrete floor in basement, did not expose worker to elevation-related risk within scope of scaffold law, and

regulation did not require property owner to cover or provide safety railing around trench.

Reversed.

[Lippman](#), Chief Judge, filed dissenting opinion in which [Ciparick](#) and [Jones, JJ.](#), concurred.

### Attorneys and Law Firms

\*\*\*[625 White Quinlan & Staley, L.L.P.](#), Garden City ([Arthur T. McQuillan](#) of counsel), for Novalex Contracting Corp., appellant.

Law Offices of Epstein & Rayhill, Elmsford ([Jonathan R. Walsh](#) of counsel), for 96 Rockaway, LLC, appellant.

Kral Clerkin Redmond Ryan Perry & Girvan, Melville ([James V. Derenze](#) of counsel), for T-Construction Co., Inc., appellant.

The Perceman Firm, P.L.L.C., New York City ([Peter Rigelhaupt](#) and [David H. Perceman](#) of counsel), for respondent.

## OPINION OF THE COURT

PIGOTT, J.

**\*\*394 \*137** Plaintiff Raul Salazar was injured in May 2004, while working in the basement **\*\*395 \*\*\*626** of a Brooklyn building undergoing renovations. The property was owned by 96 Rockaway, LLC. Salazar was employed by T–Construction Co., Inc.; the general contractor was Novalex Contracting Corp. The accident occurred in the largest room of the basement, which had a trench system for piping. Salazar and the other workmen were laying a concrete floor. They were directed to pour and spread concrete over the entire basement floor, including the trenches. Before he began **\*138** work on the day he was injured, Salazar looked for, and visually located, the trenches.<sup>1</sup>

The concrete flowed from a truck into wheelbarrows placed in the basement, via a chute fed through a window. Workmen poured the wet concrete from the wheelbarrows onto the floor of the basement, where Salazar and others “pulled” the concrete with rakes, ensuring that the floor would be level. As Salazar explained the next stage of the process at his deposition, the trench system fills with concrete “by itself because the concrete runs and it fills it out ... the concrete kind of slides down or runs down” into the trenches.

Salazar was injured after he stepped into a trench that was partially filled with concrete. He had been walking backwards across the floor, “pulling” concrete with a rake held in front of him, and looking forward, rather than in his direction of motion. As Salazar recalled the incident, “one of the trenches began to fill out with concrete, and at some point when I was pulling, walking backwards, ... my foot got inside, into that hole.” After Salazar’s right foot hit the bottom of the trench, his right leg folded beneath him. Before being assisted out of the trench by his coworkers, Salazar tried to pull his leg out “on my own, myself, and that’s how I hurt myself.”

According to Salazar, the portion of the trench system into which he stepped was about two feet wide and “[b]etween 3 and 4 feet deep.” There was no railing, barricade, or cover around or over the trench.

Salazar commenced a lawsuit against 96 Rockaway, LLC, Novalex Contracting Corp., and T–Construction Co., Inc., alleging, among other things, violations of [Labor Law § 240\(1\)](#) and [§ 241\(6\)](#). Discovery and a third-party action ensued. T–Construction Co. moved for summary judgment, seeking dismissal of the complaint, and all cross claims against it. 96 Rockaway and Novalex Contracting Corp. cross-moved for identical relief. Supreme Court granted defendants’ motions, and dismissed Salazar’s complaint in its entirety (2007 N.Y. Slip Op. 52680[U], 2007 WL 7616053 [2007] ).

The Appellate Division reversed so much of Supreme Court’s order as granted defendants’ motions for summary judgment dismissing Salazar’s [Labor Law § 240\(1\)](#) and [§ 241\(6\)](#) claims, **\*139** denied the motions, and reinstated those claims (72 A.D.3d 418, 897 N.Y.S.2d 423 [2010] ). One Justice dissented. The Appellate Division granted defendants leave to appeal to this Court, certifying the question whether its order had been properly made (2010 N.Y. Slip Op. 79687[U], 2010 WL 3220230 [2010] ). We now reverse.

Liability under [Labor Law § 240\(1\)](#) depends on whether the injured worker’s “task creates an elevation-related risk of the kind that the safety devices listed in [section 240\(1\)](#) protect against” **\*\*396 \*\*\*627** (*Broggy v. Rockefeller Group, Inc.*, 8 N.Y.3d 675, 681, 839 N.Y.S.2d 714, 870 N.E.2d 1144 [2007] ). The kind of accident triggering [section 240\(1\)](#) coverage is one that will sustain the allegation that an adequate “scaffold, hoist, stay, ladder or other protective device” would have “shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 604, 895 N.Y.S.2d 279, 922 N.E.2d 865 [2009] [emphasis removed], quoting *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82 [1993] ). Salazar argues that the trench into which he stepped should have been covered or barricaded in such a way as to prevent his fall.

In *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 935 N.Y.S.2d 551, 959 N.E.2d 488 (2011), the plaintiff was injured when a nearby wall that was being demolished fell into two 10–foot–high unsecured metal pipes, causing them to topple onto him. This Court denied summary judgment to both parties, holding that an issue of fact existed as to whether the worker’s injury resulted from the absence of a safety device statutorily prescribed under [Labor Law § 240\(1\)](#). In doing so, the Court contrasted the facts of *Wilinski* with other cases in which summary judgment dismissing the complaint would have been warranted:

“Here, the pipes that caused plaintiff’s injuries were not slated for demolition at the time of the accident. This stands in contrast to cases where the objects that injured the plaintiffs were themselves the target of demolition when they fell. In those instances, imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical. Here, however, securing the pipes in place as workers demolished nearby walls would not have been contrary to the objectives of the work plan” (*id.* at 11, 935 N.Y.S.2d 551, 959 N.E.2d 488 [citation omitted] ).

Here, the installation of a protective device of the kind that Salazar posits—assuming that such a device, although not \*140 listed in Labor Law § 240(1), was an “other device[ ]” within the meaning of the statute—would have been contrary to the objectives of the work plan in the basement. Salazar testified that he was directed to pour and spread concrete over the entire basement floor, a task that included filling the trenches.<sup>2</sup> Put simply, it would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a three- or four-foot-deep hole when the very goal of the work is to fill that hole with concrete. Moreover, the record is clear that the purpose of the work here was to lay concrete over the entire basement. Since the liquid concrete would necessarily fill the trench and pour out over the surrounding floor areas, it would be impractical and contrary to the very work at hand to cover the area where the concrete was being spread, particularly since the settling of concrete requires that the work of leveling be done with celerity. Given that Labor Law § 240(1) should be construed with a commonsense approach to the realities of the workplace at issue, defendants are entitled to summary judgment dismissing that claim.

Salazar’s Labor Law § 241(6) cause of action, predicated on a violation of 12 NYCRR 23–1.7(b)(1)(i), fails for similar \*\*397 \*\*\*628 reasons.<sup>3</sup> That regulation states that “[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part.” Even assuming that the trench here constituted a “hazardous opening,” 12 NYCRR 23–1.7(b)(1)(i) cannot be reasonably interpreted to apply to a case like this one, where covering the opening in question would have been inconsistent with filling it, an integral part of the job. Hence, defendants are also entitled to summary judgment dismissing the Labor Law § 241(6) claim.

Accordingly, the order of the Appellate Division should be reversed, with costs, plaintiff’s Labor Law § 240(1) and § 241(6) claims dismissed, and the certified question answered in the negative.

Chief Judge LIPPMAN (dissenting).

The majority misapplies this Court’s recent holding in \*141 *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 935 N.Y.S.2d 551, 959 N.E.2d 488 (2011), and errs by viewing the evidence in the light most favorable to defendants, rather than in the light most favorable to plaintiff, on defendants’ motions for summary judgment. Therefore, I respectfully dissent.

The majority endeavors to create exceptions to Labor Law § 240(1) that should not exist and to narrow arbitrarily the scope of the statute in concluding that it does not apply to this case in which an elevation-related risk was clearly present and the accident, which was caused by the force of gravity acting on the body of plaintiff, could have been prevented by the simple placement of a cover over the trench or a barrier around its perimeter.\* Contrary to the position taken by the majority, this is precisely the type of case to which section 240(1) was intended to apply. I also see no reason why the trench in this case is not a “hazardous opening” within the meaning of 12 NYCRR 23–1.7(b)(1) that should have been covered. Because there exist triable issues of fact with regard to plaintiff’s Labor Law § 240(1) and § 241(6) claims, I respectfully dissent.

In *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279, 922 N.E.2d 865 (2009), we held that the “single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” and that test is certainly met in this case. In *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 577 N.Y.S.2d 219, 583 N.E.2d 932 (1991), we clarified that “extent of the elevation differential” (here, measured by the depth of the trench) is not necessarily dispositive (*id.* at 514, 577 N.Y.S.2d 219, 583 N.E.2d 932) and on this basis I conclude that based on plaintiff’s deposition testimony as to the depth of the trench (which we must take as true for purposes of deciding defendants’ motions for summary judgment), there was a

significant elevation differential in this case. It is undisputed that no safety device was provided to plaintiff.

Instead of viewing the facts in the light most favorable to plaintiff and allowing this case to proceed to a trial, the majority sidesteps a glaring set of triable factual issues—principally, whether the trench was being actively filled at the time of the accident, and if it was not, whether it could **\*\*398 \*\*\*629** have been temporarily covered or blocked off prior to being filled. During a deposition, plaintiff testified that at the time of the accident,

**\*142** “I was walking backwards, and at the same time I was pulling the concrete, and at the same time we were smoothing the concrete, then one of the trenches began to fill out with concrete, and at some point when I was pulling, walking backwards ... my foot got inside, into that hole,” and he also testified with regard to the trench that “it fill[ed] out by itself because the concrete r[an] and it fill[ed] it out.”

When asked directly “is it not true that someone had actually poured concrete from the wheelbarrow into that trench prior to the accident?” plaintiff responded “[n]ot directly, because the concrete kind of slides down or runs down.” It is therefore not clear from the record that the trench was purposely being filled at the time of the accident, yet the majority nevertheless concludes that this was the case. Plaintiff’s testimony suggests otherwise—that the concrete in the trench into which his right leg fell had unintentionally seeped in. Defendants maintain that the trench was being purposely filled by plaintiff’s coworkers at the time. In sum, based on this record we know only that the plan was to fill the trench at some point before the job was complete, but we do not know precisely when. There is a factual dispute about the sequencing of this aspect of the project that should not be resolved by this Court on an appeal from the denial of a summary judgment motion.

I agree that “[Labor Law § 240\(1\)](#) should be construed with a commonsense approach to the realities of the workplace at issue” (majority op. at 140, 936 N.Y.S.2d at 627, 960 N.E.2d at 396). This is the principle we described in *Wilinski*, which simply means that courts should not lay down rules that are, as a practical matter, impossible to follow. We implicitly recognized in that case that it would be irrational to require the shoring up of a structure being demolished. However, in this case, because we do not know enough about the realities of this workplace, a trial is required in order for key factual determinations to be made regarding the specifics of the work plan as well as the feasibility of a cover or barrier in light of those parameters. A covering over or a barrier surrounding the trench would undoubtedly have greatly decreased the likelihood of an accident like the one that befell plaintiff and there is no reason why such a device could not have been used if the trench was not being filled at the time that plaintiff approached it while walking backwards.

Even if we were to assume a disputed fact, I believe that the majority’s pronouncement that “it would be illogical to require **\*143** an owner or general contractor to place a protective cover over, or otherwise barricade, a three- or four-foot-deep hole when the very goal of the work is to fill that hole with concrete” (majority op. at 140, 936 N.Y.S.2d at 627, 960 N.E.2d at 396) is premature. This Court is not in a position to determine conclusively that it was impossible to fill the trench and protect plaintiff from the accident at the same time. That is a finding of fact that should be made after experts on construction techniques present their views regarding this subject at trial for the consideration of the factfinder. The factual assumption underlying the majority’s entire analysis—that the planned order of the work was for the concrete to be poured onto the floor and then seep into the trench, such that the seepage was intentional—is not entirely consistent with the evidence or, on the present state of the record, with any coherent work strategy.

The majority’s approach runs counter to the fundamental purpose of [Labor Law § 240\(1\)](#). The statute, which is aimed at **\*\*399 \*\*\*630** protecting workers from elevation-related risks and fostering safer working environments, should be construed liberally (see *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 520–521, 493 N.Y.S.2d 102, 482 N.E.2d 898 [1985] [holding that “with respect to section 240, ... ‘this statute is ... for the protection of workmen from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed’ ”], quoting *Quigley v. Thatcher*, 207 N.Y. 66, 68, 100 N.E. 596 [1912] ). Plaintiffs in cases such as this should be afforded the protections of the statute designed to ensure the safety and physical well-being of workers.

I also believe that there are material factual issues as to plaintiff’s [Labor Law § 241\(6\)](#) claim. The trench here was a “hazardous opening” under [12 NYCRR 23–1.7\(b\)\(1\)\(i\)](#) and the regulation states that “[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place.” The majority’s rationale for rejecting plaintiff’s [Labor Law § 241\(6\)](#) claim is identical to that which it uses to reject the [Labor Law § 240\(1\)](#) claim and thus fails for the same reasons.

As there are genuine issues of material fact rendering the drastic remedy of summary judgment unavailable to defendants in

this case, I dissent and would affirm the order of the Appellate Division and answer the certified question in the affirmative.

\*144 Judges [GRAFFEO](#), [READ](#) and SMITH concur with Judge [PIGOTT](#); Chief Judge [LIPPMAN](#) dissents and votes to affirm in a separate opinion in which Judges [CIPARICK](#) and [JONES](#) concur.

Order reversed, etc.

### All Citations

18 N.Y.3d 134, 960 N.E.2d 393, 936 N.Y.S.2d 624, 2011 N.Y. Slip Op. 08446

### Footnotes

- <sup>1</sup> Salazar testified at deposition that there were multiple trenches in the room. The general contractor's vice-president described a single, continuous trench. This dispute is not relevant to the disposition of the case.
- <sup>2</sup> Contrary to the dissent's reading (*see* dissenting op. at 142, 936 N.Y.S.2d at 629, 960 N.E.2d at 398), Salazar's testimony does not suggest that the process of seepage whereby the trench he stepped in had filled with concrete "by itself" was unintentional.
- <sup>3</sup> Although the Appellate Division dissent analyzes [12 NYCRR 23-1.7\(b\)\(1\)\(iii\)](#), Salazar's brief makes clear that he relies upon [12 NYCRR 23-1.7\(b\)\(1\)\(i\)](#).
- \* Covers and barriers qualify as "other [safety] devices" within the meaning of the statute, which is not limited to devices expressly enumerated therein.

238 A.D.2d 495  
Supreme Court, Appellate Division, Second Department, New York.

SCHNEIDER FUEL OIL, INC., Appellant,  
v.  
Peter DeGENNARO, Respondent.

April 21, 1997.

### Synopsis

Creditor sued to recover payment for goods sold and delivered and to recover payment on account stated. The Supreme Court, Westchester County, [Rosato, J.](#), denied creditor's motion for summary judgment. Creditor appealed. The Supreme Court, Appellate Division, held that: (1) computer records supplied by creditor were sufficient to support its motion for summary judgment, and (2) defendant failed to establish triable issue of fact as to whether certain corporate entities were responsible for balance due to creditor, thus entitling creditor to summary judgment on its cause of action for account stated.

Reversed and remitted.

### Attorneys and Law Firms

\*\*[668 Kevin A. Stevens](#), Suffern, for appellant.

Russ & Russ, P.C., Massapequa, ([Jay Edmond Russ](#), of counsel), for respondent.

Before [ROSENBLATT, J.P.](#), and [RITTER, THOMPSON](#) and [SULLIVAN, JJ.](#)

### Opinion

MEMORANDUM BY THE COURT.

\*[495](#) In an action to recover payment for goods sold and delivered and to recover payment on an account stated, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County ([Rosato, J.](#)), entered May 24, 1996, as denied its motion for summary judgment.

ORDERED that the order is reversed insofar as appealed from, the plaintiff's motion for summary judgment is granted, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings.

The computer records supplied by the plaintiff were sufficient \*[496](#) to support the plaintiff's motion for summary judgment (see, [Guth Realty v. Gingold](#), 34 N.Y.2d 440, 451–452, 358 N.Y.S.2d 367, 315 N.E.2d 441; [Matter of Thomma](#), 232 A.D.2d 422, 648 N.Y.S.2d 453). Thus, the plaintiff met its initial burden of submitting evidentiary proof in admissible form that the defendant received and retained the plaintiff's accounts without objection and made partial payments on those accounts. The defendant failed to establish a triable issue of fact as to whether certain corporate entities were responsible for the balance due to the plaintiff. By not denying the statements made in the affidavit of the plaintiff's president in support of the plaintiff's motion for summary judgment, the defendant has admitted that all invoices and account statements issued by the plaintiff were issued in the defendant's name personally, not in those of any corporations, and that he never informed the plaintiff that the corporations were responsible for the billed amounts (see, \*\*[669 Kuehne & Nagel v. Baiden](#), 36 N.Y.2d 539, 544, 369 N.Y.S.2d 667, 330 N.E.2d 624). Accordingly, the plaintiff is entitled to summary judgment on its cause of action for an account stated (see, [PPG Industries v. A.G.P. Systems](#), 235 A.D.2d 979, 652 N.Y.S.2d 876; [Francis W. King Petroleum](#)

**Schneider Fuel Oil, Inc. v. DeGennaro, 238 A.D.2d 495 (1997)**

656 N.Y.S.2d 668

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*Products v. Geiger, 231 A.D.2d 906, 648 N.Y.S.2d 359).*

**All Citations**

238 A.D.2d 495, 656 N.Y.S.2d 668

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54 A.D.3d 619  
Supreme Court, Appellate Division, First Department, New York.

Adam STAWSKI, et al., Plaintiffs–Appellants,  
v.  
PASTERNAK, POPISH & REIF, P.C., et al., Defendants–Respondents,  
Michael B. Parson, Esq., et al., Defendants.

Sept. 23, 2008.

### Synopsis

**Background:** Clients brought legal malpractice action against law firm and attorneys who represented them in personal injury action arising from injuries sustained by one client while working on construction project. The Civil Court, New York County, Jeffrey K. Oing, J., denied defendants’ motion for summary judgment dismissing legal malpractice claim as it related to scaffold law. Defendants appealed. The Supreme Court, Appellate Term, reversed. Clients appealed.

The Supreme Court, Appellate Division, held that clients would have succeeded on merits of their scaffold law claim, as required to prevail in legal malpractice action.

Reversed.

### Attorneys and Law Firms

\*\*413 Morelli Ratner, P.C., New York (Scott J. Kreppein of counsel), for appellants.

Hawkins, Feretic & Daly, L.L.P., New York (Matthew J. Zizzamia of counsel), for respondents.

LIPPMAN, P.J., TOM, WILLIAMS, McGUIRE, FREEDMAN, JJ.

### Opinion

\*620 Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered May 23, 2007, which reversed, to the extent appealed from, an order of the Civil Court, New York County (Jeffrey K. Oing, J.), entered September 14, 2005, denying the motion of defendants-respondents for summary judgment dismissing plaintiffs’ legal malpractice claim as it relates to [Labor Law § 240\(1\)](#), unanimously reversed, on the law, without costs, respondents’ motion denied and plaintiffs’ cross motion for summary judgment on the legal malpractice claim as it relates to [Labor Law § 240\(1\)](#) granted.

Plaintiffs commenced this action for legal malpractice based on respondents’ representation of them in a personal injury action arising from injuries sustained by plaintiff Adam Stawski while working on a construction project. Plaintiffs allege that as a result of respondents’ failure to file a timely notice of claim, they were precluded from prosecuting their claims against the owner of the school building under construction, including a claim for violations of [Labor Law § 240\(1\)](#).

To establish a prima facie case of legal malpractice, plaintiffs must show that they would have succeeded on the merits of the underlying action but for the attorney’s negligence (*Davis v. Klein*, 88 N.Y.2d 1008, 648 N.Y.S.2d 871, 671 N.E.2d 1268 [1996]; *Aquino v. Kuczinski, Vila & Assoc., P.C.*, 39 A.D.3d 216, 218–219, 835 N.Y.S.2d 16 [2007] ). The evidence

demonstrates that plaintiffs established their entitlement to summary judgment on the legal malpractice claim as it relates to Labor Law § 240(1). It is undisputed that while installing a temporary window, plaintiff was injured after he was struck by a falling cinder block. Part of the construction project involved work on pipes inside a cinder block column approximately 10 feet above where plaintiff was working. To facilitate this work, a cinder block was cut from the column, and was returned to the open cavity from which it had been cut without being cemented or secured in any way. Under these circumstances and inasmuch as falling-object liability is not limited to cases in which the falling object is being hoisted or secured at the precise time it falls, plaintiffs would have succeeded on the merits of a Labor Law § 240(1) claim (*Boyle v. 42nd St. Dev. Project, Inc.*, 38 A.D.3d 404, 835 N.Y.S.2d 7 [2007]; see *Quattrocchi v. F.J. Sciame Constr. Co., Inc.*, 11 N.Y.3d 757, 866 N.Y.S.2d 592, 896 N.E.2d 75 [2008]; *Outar v. City of New York*, 5 N.Y.3d 731, 799 N.Y.S.2d 770, 832 N.E.2d 1186 [2005]; *Zuluaga v. P.P.C. Constr., LLC*, 45 A.D.3d 479, 847 N.Y.S.2d 30 [2007]; cf. *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [2001]).

### All Citations

54 A.D.3d 619, 864 N.Y.S.2d 412, 2008 N.Y. Slip Op. 07036

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2006 WL 581184  
United States District Court,  
W.D. New York.

John P. TYLER, Plaintiff,

v.

KAWAGUCHI INC., General Plastex, Inc. and DSM Engineering Plastics Inc. Defendants.

No. 00 CV 6366.

|  
March 8, 2006.

#### Attorneys and Law Firms

[George G. Mackey](#), Hiscock & Barclay LLP, Rochester, NY, for Plaintiff.

[Matthew Hawthorne McNamara](#), Thorn, Gershon, Tymann & Bonanni, LLP, Albany, NY, [Brian F. Sutter](#), Sugarman Law Firm LLP, [Christopher E. Wilkins](#), Walsh & Wilkins, Buffalo, NY, [Christopher C. Esker](#), Buckingham, Doolittle & Burroughs, LLP, Akron, OH, for Defendants.

DECISION and ORDER

[TELESCA, J.](#)

#### INTRODUCTION

\*1 Plaintiff, John P. Tyler, (“plaintiff” or “Tyler”) brings this action for negligence, strict products liability, and breach of express and implied warranties against defendants Kawaguchi, Inc. (“Kawaguchi”), General Plastex, Inc. (“Plastex”), and DSM Engineering Plastics, Inc. (“DSM”). Plaintiff alleges that each defendant is liable for the injuries he sustained in a work related accident. Each defendant moves for summary judgment dismissing the complaint pursuant to [Federal Rule of Civil Procedure 56\(c\)](#). In addition, defendants, Kawaguchi and Plastex move to preclude plaintiff’s proposed expert testimony as conclusory and unreliable pursuant to [Federal Rule of Evidence 702](#).

For the reasons set forth below, defendants’ motions to preclude plaintiff’s expert testimony are denied. Kawaguchi’s motion for summary judgment with respect to plaintiff’s negligence claim is denied, with respect to plaintiff’s strict products liability claim is denied, and with respect to plaintiff’s breach of warranty claim is granted. Plastex’s motion for summary judgment is denied in its entirety. DSM’s motion for summary judgment with respect to plaintiff’s negligence claim is denied, with respect to plaintiff’s strict products liability claim is granted, and with respect to plaintiff’s breach of warranty claim is granted.

## OVERVIEW

Harbec Plastics is an Ontario, New York-based plastics manufacturing company that produces plastics for various industrial uses. Plaintiff was employed by Harbec Plastics as a maintenance person. His job included maintaining complex machines such as plastic injection molding machines. At the time of plaintiff's injury, Harbec utilized between 14 and 20 plastic injection molding machines for the manufacture of plastics parts. Two of these injection molding machines were manufactured by the defendant Kawaguchi, and of the two Kawaguchi machines, the K265-B plastic injection molding machine was involved in the incident giving rise to this litigation. The machine contained a 55-millimeter screw manufactured by defendant, Plastex. The Plastex screw was not the original screw, but was a replacement part that Harbec had purchased from Plastex when the original Kawaguchi screw had worn out. Additionally in manufacturing the plastic parts, a heat stabilized nylon plastic manufactured by defendant, DSM, called Stanyl flowed inside the machine. The Kawaguchi plastic injection molding machine, the Plastex screw and, the DSM Stanyl plastic all are subjects of the present action.

## BACKGROUND

On May 7, 1999, the plaintiff was told by his shift supervisor that a hydraulic line had broken on the Kawaguchi K 265-B plastic injection machine ("the machine"). Plaintiff, together with his supervisor, cleaned the hydraulic spill, replaced the hydraulic line, and refilled the machine with hydraulic fluid. The machine was shut down for approximately three hours while the repair was completed during which time the Stanyl plastic inside the machine was allowed to harden in the machine's barrel. When the machine was turned back on, the screw within the barrel would not move or purge because the Stanyl plastic inside the machine had hardened. In an attempt to dislodge the plastic, the plaintiff and his co-workers pivoted the barrel away from its normal operating position and away from its guards into the aisle of the factory. They removed the nozzle, the end cap and the screw collar, leaving the barrel end exposed. The employees unsuccessfully tried to push the screw out using a hydraulic press and a brass rod. Plaintiff then left the area to complete another task. Fellow employees continued to attempt to loosen the screw. One employee, whose identity remains a point of contention, turned the temperature on the machine up to 700 degrees Fahrenheit in a final attempt to loosen the screw. The Stanyl plastic continued to heat for an additional twenty minutes. However, this high degree of temperature was in excess of the stability point for the Stanyl plastic and during this time, the barrel became excessively hot and dripped melted plastic. In the meantime, the plaintiff returned to the machine and approached his toolbox which was immediately in front of the barrel. As the plaintiff was walking from his toolbox down the factory aisle in front of the barrel, the fractured screw tip and molten plastic were forcibly ejected from the barrel inflicting numerous burns on his chest and neck. Plaintiff claims the injuries caused permanent scarring on his arms and neck.

\*2 Plaintiff alleges that Kawaguchi, the manufacturer of the machine, General Plastex, the manufacturer of the screw and DSM, the manufacturer of the Stanyl, are responsible for his injuries. Defendants claim that Harbec Plastics, Inc., plaintiff's employer, is solely responsible for the accident.

## DISCUSSION

### I. Preclusion of Expert Testimony

Defendants Kawaguchi and Plastex move to preclude plaintiff's expert testimony because they allege the expert's opinions are conclusory and unreliable pursuant to [Federal Rule of Evidence 702](#).

Federal Rule of Evidence 702 outlines the admissibility of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Court must determine whether or not proposed expert testimony is sufficiently reliable under the standards set forth in Rule 702, and if the proposed testimony is not reliable, such testimony must be precluded. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (holding that the Court, “must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”) Moreover, “the principles governing admissibility of evidence do not change on a motion for summary judgment.” *Raskin v. The Wyatt Co.*, 125 F.3d 55, 66 (2d Cir.1997).

Here, plaintiff’s expert Igor Paul (“Paul”) is a qualified registered professional engineer with extensive education and training, and experience with the history, development and practice of industrial machine and product design and safety in the workplace. He has personally participated in the design, evaluation and/or testing of clamping equipment, hydraulic systems, point-of-operation guarding, injection and heating barrels, and the associated control systems for various horizontal and vertical injection molding machinery. In addition, Paul has also evaluated plant safety in various industrial plants producing injection molding products.

In his opinion, plaintiff’s expert opined that the defective design and manufacture of the machine by Kawaguchi, and its failure to warn and instruct on how to deal with the stuck screw were significant factors in causing this accident. Furthermore, he opined to a reasonable degree of engineering certainty that the violent ejection of the fracture screw tip assembly and molten plastic, would have been prevented if the screw bore manufactured by Plastex had been machined within the design tolerances instead of being oversized by 300%. Lastly, he maintained that if DSM had provided proper warnings this accident could have been prevented. The expert bases his opinions on sufficient facts outlined in this case.

\*3 Accordingly, the Court finds that his opinions conform with the requirements of Federal Rule of Evidence 702 and are sufficiently reliable to be submitted to a jury. Thus, defendants’ Kawaguchi and Plastex motions to preclude plaintiff’s expert testimony are denied. Defendants’ requests for an evidentiary hearing on this matter are also denied.

## II. Summary Judgment Standard

Summary judgment is proper when “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). In evaluating a motion for summary judgment, courts must draw all reasonable inferences in favor of the non-movant. See, generally, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

### A. Plaintiff’s Claim of Negligence

Plaintiff alleges that all defendants were negligent and/or reckless in designing and manufacturing their products and for failing to provide adequate warnings about their products.

“In the ordinary products liability case, the failure to warn follows a negligence formula ... 1) a duty on the part of the defendant to conform to a certain standard of conduct with respect to the plaintiff, 2) a failure by the defendant to so conform, and 3) a reasonably close causal connection between the defendant’s conduct and some resulting injury to the plaintiff

[proximate cause].” *Cresser v. American Tobacco Company*, 174 Misc.2d 1, 662 N.Y.S.2d 374, 379 (N.Y.Sup.Ct.1997).

1. *As to Kawaguchi*

Plaintiff alleges that Kawaguchi failed to provide adequate warnings about its machine. Plaintiff’s expert, Paul, states that Kawaguchi should have provided proper warnings and instructions in the manual, on the equipment, and on the diagnostic and problem screens to *never* heat the product in the barrel while it was in the service position. Moreover, Paul maintains that Kawaguchi should have provided instructions as to how to safely remove a “frozen” screw tip and screw from the barrel. Kawaguchi’s expert disagrees with these statements, maintaining Kawaguchi’s warnings and/or instruction information was adequate and did not, as claimed by Paul, cause or contribute to the plaintiff’s injuries. Therefore, genuine issues of material fact exist. These conflicting opinions create a genuine issue of material fact, and accordingly, Kawaguchi’s motion for summary judgment is denied with respect to plaintiff’s claim of negligence against Kawaguchi.

2. *As to Plastex*

Plaintiff alleges that Plastex failed to provide adequate warnings about its screw. Plastex contends that it cannot be held responsible for failure to warn of the danger that was obvious and known to the plaintiff, and that it cannot be held responsible for failure to warn of a danger that was unforeseeable. This dispute presents a question of material fact, thus, Plastex’s motion for summary judgment is denied as to plaintiff’s claim of negligence against Plastex.

3. *As to DSM*

\*4 Plaintiff alleges that DSM failed to provide adequate warnings about its product, Stanyl. Plaintiff’s expert states that DSM failed to provide adequate and effective warnings about the severe over-heating hazards associated with the Stanyl plastic. DSM’s expert, E. Rush Barnett, concludes that DSM’s warnings in its packaging were adequately sufficient and met OSHA standards. Thus, these disputed opinions by qualified experts present questions of fact. DSM’s motion for summary judgment is denied as to plaintiff’s claim of negligence against DSM.

B. *Plaintiff’s Claims of Strict Products Liability*

Plaintiff maintains that defendants should be liable under the theory of strict products liability.

“The doctrine of strict products liability renders the manufacturer of a defective product liable to any person injured thereby, regardless of privity, foreseeability or due care, if the defect was a substantial factor in bringing about the injury and provided (1) that at the time of the occurrence the product was being used for the purpose and in the manner normally intended, (2) that if the person injured is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger and (3) that by the exercise of reasonable care the person injured would not otherwise have averted the injury.” *Van Iderstine v. Lane Pipe Corporation*, 89 A.D.2d 459, 455 N.Y.S.2d 450, 451–452 (N.Y.App. Div. 4<sup>th</sup> Dep’t 1982)(citing *Codling v. Paglia*, 32 N.Y.2d 330, 342, 345 N.Y.S.2d 461, 298 N.E.2d 622 (N.Y.1973)).

1. *As to Kawaguchi*

Plaintiff maintains that Kawaguchi owed a duty of strict products liability not to harm the plaintiff through the use of its product and that the defective conditions of its product brought forth the injuries sustained by the plaintiff. According to plaintiff's expert Paul, the design of the Kawaguchi injection molding machine was defective in that it allowed plastic to be heated in the injection barrel while the barrel was pivoted out of its safely guarded, normal operating position to a completely unguarded maintenance service position. Furthermore, Paul opines that Kawaguchi should have provided a mechanism which would have prevented the barrel from being pivoted out of its safe operating position while there was heated plastic in the barrel. In addition, plaintiff's expert provides details as to how this safer design could have been accomplished. Kawaguchi's expert, William Eaton disputes these opinions and claims that the machine was designed in accordance with the state of the industry at the time of its manufacture and sale and was reasonably safe for its intended industrial use. Because of this conflicting testimony by qualified experts with respect to whether or not the Kawaguchi machine was defectively designed, genuine issues of material fact exist, which preclude the granting of summary judgment on plaintiff's claim of strict products liability against Kawaguchi.

2. *As to Plastex*

\*5 Plaintiff maintains that Plastex owed a duty of strict products liability not to harm the plaintiff through the use of its product and that the defective conditions of its product brought forth the injuries sustained by the plaintiff. Specifically, plaintiff maintains that Plastex is liable for the defective design and manufacture of the 55–millimeter single stage screw it sold to Harbec. Plaintiff's expert maintains that had the Plastex screw bore been designed within the tolerances of the original equipment instead of being oversized by more than 300%, the ejection of the fractured screw and the molten plastic would have been prevented. Plastex's expert, Thomas Butler, refutes this testimony, maintaining that the screw was not defectively designed and was indeed reasonably safe for its intended use. Because there is a conflict between these expert testimonies, genuine issues of material fact exist. Thus with respect to whether or not the screw was defectively designed, Plastex's motion for summary judgment is denied as to plaintiff's claim of strict products liability against Plastex.

3. *As to DSM-*

Plaintiff maintains that DSM owed a duty of strict products liability not to harm the plaintiff through the use of its product and that the defective conditions of its product brought forth the injuries sustained by the plaintiff. However, plaintiff has only provided issues of fact concerning DSM's potential negligence liability and has failed to provide sufficient evidence to substantiate a claim for strict products liability. Plaintiff has provided no proof either through its expert or on its own that the Stanyl was defective. Therefore, DSM's motion for summary judgment is granted in-part with respect to plaintiff's claim of strict products liability against DSM.

C. *Plaintiff's Claim of Breach of Implied/Express Warranty*

Plaintiff alleges that defendants breached their express and/or implied warranties.

To state a claim for an implied warranty with respect to a product, the plaintiff must, inter alia, prove that the product was defective or not fit for the purpose for which it was intended. See, *Codling v. Paglia*, 32 N.Y.2d 330, 338, 345 N.Y.S.2d 461, 298 N.E.2d 622 (N.Y.1973). To establish the breach of an express warranty, the plaintiff must show that there was an "affirmation of fact or promise by the seller, the natural tendency of which [was] to induce the buyer to purchase" and that the warranty was relied upon to the plaintiff's detriment. *Friedman v. Medtronic, Inc.* 42 A.D.2d 185, 345 N.Y.S.2d 637, 643 (N.Y.App. Div.2d Dep't 1973).

1. *As to Kawaguchi-*

Plaintiff alleges that Kawaguchi warranted that the injection molding machine was free of defects, of merchantable quality, and fit for the purpose and manner intended. Furthermore, plaintiff maintains that Kawaguchi wantonly and recklessly breached its warranties both express and implied. A cause of action for breach of warranty is governed by a four-year statute of limitations. *See, N.Y. U.C.C. Law § 2-725*. The cause of action against a manufacturer accrues on the date the party charged tenders delivery of the product, not the date that the product was sold to the plaintiff. *See, Heller v. U.S. Suzuki Motor Corp.*, 64 N.Y.2d 407, 488 N.Y.S.2d 132, 477 N.E.2d 434 (N.Y.1985).

\*6 In May of 1987, the machine was sold by Kawaguchi to Tomen, Ltd. The accident which is the subject of this litigation did not occur until more than ten years later. Thus, the breach of warranty claims are time barred. Kawaguchi's motion for summary judgment is granted in respect to the plaintiff's breach of warranties claim against Kawaguchi.

2. *As to Plastex-*

Plaintiff alleges that Plastex warranted that the screw was free of defects, of merchantable quality, and fit for the purpose and manner intended. Furthermore, plaintiff maintains that Plastex wantonly and recklessly breached its warranties both express and implied. Specifically, plaintiff claims that Plastex expressly represented and warranted that it would design and manufacture a "new 55 mm Kawaguchi single stage screw..finished to OEM [original equipment manufacturer] specifications....". Furthermore, plaintiff claims that because the screw fractured under the intense pressure caused by heating of the Stanyl plastic, it breached its warranty. Plastex maintains no such warranty was ever given. Thus, a question of fact is presented as to whether Plastex breached an express and/or implied warranty. Plastex's motion for summary judgment is denied with respect to plaintiff's claim of breach of warranty by Plastex.

3. *As to DSM-*

Plaintiff alleges that DSM warranted that the Stanyl plastic was free of defects, of merchantable quality, and fit for the purpose and manner intended. Furthermore, plaintiff maintains that DSM wantonly and recklessly breached its warranties both express and implied. However, plaintiff has only provided issues of fact concerning DSM's potential negligence liability and has failed to provide sufficient evidence to substantiate a breach of warranty claim. Thus, DSM's motion for summary judgment is granted with respect to plaintiff's claim of breach of warranty against DSM.

*CONCLUSION*

For the reasons set forth above, defendants' motions to preclude plaintiff's expert testimony are denied.

Kawaguchi's motion for summary judgment with respect to plaintiff's negligence claim is denied, with respect to plaintiff's strict products liability claim is denied, and with respect to plaintiff's breach of warranty claim is granted.

Plastex's motion for summary judgment is denied in its entirety.

DSM's motion for summary judgment with respect to plaintiff's negligence claim is denied, with respect to plaintiff's strict

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products liability claim is granted, and with respect to plaintiff's breach of warranty claim is granted.

**All Citations**

Not Reported in F.Supp.2d, 2006 WL 581184, Prod.Liab.Rep. (CCH) P 17,549

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18 N.Y.3d 1  
Court of Appeals of New York.

Antoni WILINSKI et al., Respondents–Appellants,  
v.  
334 EAST 92ND HOUSING DEVELOPMENT FUND CORP. et al., Appellants–Respondents.

168  
|  
Oct. 25, 2011.

### Synopsis

**Background:** Worker brought action against building owner and others, seeking to recover damages for injuries he allegedly sustained when, while engaged in demolition of a wall, he was struck in the head by two large pipes that had been standing unsecured following removal of floor and ceiling above and toppled over when they were hit by debris from another wall undergoing demolition. The Supreme Court, New York County, [Debra A. James, J., 2009 WL 803448](#), granted summary judgment in favor of worker on issue of liability, and denied defendants’ cross-motion for summary judgment dismissing the complaint. Defendants appealed. The Supreme Court, Appellate Division, [71 A.D.3d 538, 898 N.Y.S.2d 15](#), affirmed as modified, and leave to appeal was granted.

**Holdings:** The Court of Appeals, [Ciparick, J.](#), held that:

a worker who sustains an injury caused by a falling object whose base stands at the same level as the worker is not categorically barred from recovery under the scaffold law, abrogating [Brink v. Yeshiva Univ., 259 A.D.2d 265, 686 N.Y.S.2d 15](#), [Matter of Sabovic v. State of New York, 229 A.D.2d 586, 645 N.Y.S.2d 860](#), and [Corsaro v. Mt. Calvary Cemetery, 214 A.D.2d 950, 626 N.Y.S.2d 634](#);

fact issue as to whether worker’s injuries were proximately caused by the lack of a safety device precluded summary judgment on his scaffold law claim;

worker was not required to show that the pipes fell or collapsed due to wind pressure or vibration to state a Labor Law claim under regulation providing that parts of a building may not “be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration,” abrogating [German v. City of New York, 14 Misc.3d 1204\(A\), 2006 WL 3717684](#), [Maternik v. Edgemere By the Sea Corp., 19 Misc.3d 1118\(A\), 2008 WL 1056916](#), and [Gonzalez v. Fortway LLC, 22 Misc.3d 1115\(A\), 2009 WL 211789](#); and

fact issue as to whether owner and contractor complied with regulation requiring ongoing inspections during hand demolition operations or whether their non-compliance caused worker’s accident precluded summary judgment on worker’s Labor Law claim.

Affirmed as modified.

[Pigott, J.](#), filed opinion dissenting in part, in which [Graffeo](#) and [Read, JJ.](#), concurred.

### Attorneys and Law Firms

\*\*\*553 Gallo Vitucci & Klar, New York City ([Yolanda L. Ayala](#) of counsel), for appellants-respondents.

Law Office of Souren A. Israelyan, New York City (Souren A. Israelyan of counsel), and Slawek W. Platta, PLLC, for respondents-appellants.

## OPINION OF THE COURT

CIPARICK, J.

**\*\*490 \*4** Some New York courts have interpreted our decision in *Misseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 634 N.Y.S.2d 35, 657 N.E.2d 1318 (1995) to preclude **\*5** recovery under Labor Law § 240(1) where a worker sustains an injury caused by a falling object whose base stands at the same level as the worker. We reject that interpretation and hold that such a circumstance does not categorically bar the worker from recovery under section 240(1). However, in this case, an issue of fact exists as to whether the worker’s injury resulted from the lack of a statutorily prescribed protective device.

### I.

On September 28, 2005, at approximately 8:30 a.m., plaintiff Antoni Wilinski<sup>1</sup> and other workers were demolishing brick walls at a vacant warehouse located on premises owned by defendant 334 East 92nd Housing Development Fund Corp.<sup>2</sup> Previous demolition of the ceiling and floor above had left two metal, vertical plumbing pipes unsecured. The pipes were each four inches in diameter and rose out of the floor on which plaintiff was working to a height of approximately 10 feet.<sup>3</sup> The pipes were to be left standing until their eventual removal. Earlier that morning, plaintiff voiced concerns to his supervisor that leaving the pipes standing during demolition of the surrounding walls could be dangerous. Nevertheless, no safety measures were taken to secure the pipes. Shortly thereafter, debris from a nearby wall that was being demolished hit the pipes, causing them to topple over. The pipes fell approximately four feet and landed on plaintiff, who is five feet, eight inches tall. The first pipe knocked plaintiff’s hard hat off from his head, then struck his right shoulder and arm, cutting his elbow. The second pipe struck plaintiff’s uncovered head, cutting it and causing a concussion. Plaintiff suffered serious **\*\*491 \*\*\*554** and lasting injuries to his shoulder, arm and spine, as well as neuropsychological injuries.

Plaintiff commenced suit alleging violations of Labor Law § 240(1) and Labor Law § 241(6), the latter pursuant to **\*6 12 NYCRR 23–3.3(b)(3) and (c)**. Plaintiff moved for summary judgment on his section 240(1) claim and defendants cross-moved for summary judgment seeking dismissal of plaintiff’s claims. Supreme Court granted plaintiff’s motion for summary judgment and denied defendants’ motion in its entirety (2009 N.Y. Slip Op. 30605[U], 2009 WL 803448 [2009] ). The court held that plaintiff suffered a gravity-related injury and had established entitlement to judgment as a matter of law by demonstrating that the absence of a statutorily enumerated safety device proximately caused his injury. The court also held that defendants were subject to duties under 12 NYCRR 23–3.3(b)(3) and (c), which provided a sufficient predicate for liability under Labor Law § 241(6).

The Appellate Division modified the order of Supreme Court by denying plaintiff’s motion for summary judgment and by partially granting defendants’ summary judgment motion to the extent of dismissing plaintiff’s section 240(1) claim (*Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 71 A.D.3d 538, 539, 898 N.Y.S.2d 15 [1st Dept.2010] ). Relying on our decision in *Misseritti*, the court stated that the accident was “not the type of elevation-related accident that [the statute] is intended to guard against ... Since both the pipes and plaintiff were at the same level at the time of the collapse the incident was not sufficiently attributable to elevation differentials to warrant imposition of liability” (*id.* [internal quotation marks omitted] ). The court otherwise affirmed Supreme Court’s denial of defendants’ motion to dismiss plaintiff’s section 241(6) claims (*see id.*).

The parties each moved at the Appellate Division for leave to appeal to this Court. In separate orders granting those motions, the Appellate Division certified the following question: “Was the order of this Court, which modified the order of the Supreme Court, properly made?” For the reasons that follow, we modify the court’s order and answer in the negative.

## II.

### Plaintiff’s Labor Law § 240(1) Claim

Labor Law § 240(1) mandates that building owners and contractors

“in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such \*7 labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

The statute imposes absolute liability on building owners and contractors whose failure to “provide proper protection to workers employed on a construction site” proximately causes injury to a worker (see *Misseritti*, 86 N.Y.2d at 490, 634 N.Y.S.2d 35, 657 N.E.2d 1318). Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies (see *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 583 N.E.2d 932 [1991] [“violation of the statute cannot establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of the injury” (internal quotation marks omitted) ] ).

\*\*\*555 \*\*492 Our jurisprudence defining the category of injuries that warrant the special protection of Labor Law § 240(1) has evolved over the last two decades, centering around a core premise: that a defendant’s failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability. Beginning in *Rocovich*, we stated that section 240(1)’s contemplated hazards are

“those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured” (78 N.Y.2d at 514, 577 N.Y.S.2d 219, 583 N.E.2d 932).

In *Rocovich*, the plaintiff was injured at his work site when his right ankle and foot accidentally became immersed in hot oil in a 12–inch–deep trough (see *id.* at 511, 577 N.Y.S.2d 219, 583 N.E.2d 932). We denied recovery, finding it “difficult to imagine how plaintiff’s proximity to the 12–inch trough could have entailed an elevation-related risk which called for any of the protective devices of the types listed in section 240(1)” (*id.* at 514–515, 577 N.Y.S.2d 219, 583 N.E.2d 932). Subsequently, in *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49, 618 N.E.2d 82 (1993), we refined *Rocovich*, stating that the reach of Labor Law § 240(1) is “limited to such specific gravity-related accidents as [a worker] falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*id.* at 501, 601 N.Y.S.2d 49, 618 N.E.2d 82).

\*8 In *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 727 N.Y.S.2d 37, 750 N.E.2d 1085 (2001), though we noted that section 240(1) applies to both “falling worker” and “falling object” cases, we declined to impose liability where a plaintiff was cut by a piece of glass that fell from a nearby window pane (*id.* at 266, 727 N.Y.S.2d 37, 750 N.E.2d 1085). We concluded that “[t]his was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected” and that the absence of such a device “did not cause the falling glass here” (*id.* at 268–269, 727 N.Y.S.2d 37, 750 N.E.2d 1085). Therefore, the accident was outside the scope of section 240(1) (see *id.*).

In *Misseritti*, we applied a similar rationale. The plaintiff’s decedent in that case sustained severe injuries, leading to his eventual death, when a completed, concrete firewall collapsed on top of him (see 86 N.Y.2d at 489, 634 N.Y.S.2d 35, 657 N.E.2d 1318). Before the wall collapsed, “decedent and his co-worker had just dismantled the scaffolding used to erect the

completed fire wall and ... [m]asons had not yet vertically braced the wall with the ... planks it had on the work site” (*id.* at 491, 634 N.Y.S.2d 35, 657 N.E.2d 1318). We held that section 240(1) did not apply to those facts, as the firewall did not collapse due to a failure to provide a protective device contemplated by the statute (*see id.*). We determined that, in fact, the kind of braces referred to in section 240(1) are “those used to support elevated work sites not braces designed to shore up or lend support to a completed structure” (*id.*). Thus the firewall’s collapse, though tragic in its consequences, was simply “the type of peril a construction worker usually encounters on the job site” (*id.*).

Intermediate appellate courts have cited *Misseritti* as support for the proposition that a plaintiff injured by a falling object has no claim under section 240(1) where the plaintiff and the base of the object \*\*493 \*\*\*556 stood on the same level (*see e.g. Brink v. Yeshiva Univ.*, 259 A.D.2d 265, 686 N.Y.S.2d 15 [1st Dept.1999] [citing *Misseritti* and holding that the collapse of an interior chimney at the same floor level as plaintiff was not attributable to elevation differentials to warrant the imposition of liability]; *Matter of Sabovic v. State of New York*, 229 A.D.2d 586, 587, 645 N.Y.S.2d 860 [2d Dept.1996] [“the wall which collapsed was at the same level as the work site and is not considered a falling object for purposes of Labor Law § 240(1)”]; *Corsaro v. Mt. Calvary Cemetery*, 214 A.D.2d 950, 950, 626 N.Y.S.2d 634 [4th Dept.1995] [holding that a concrete form standing at ground level and estimated between 12 and 20 feet high was not a falling object because it was at the same level as the work site and not an elevation-related risk] ). Here, the Appellate Division also relied on *Misseritti* in holding that the collapse of the pipes, like \*9 the collapse of a wall, was not an elevation-related accident and stated that “[s]ince both the pipes and plaintiff were at the same level at the time of the collapse the incident was not sufficiently attributable to elevation differentials to warrant imposition of liability” under section 240(1) (*Wilinski*, 71 A.D.3d at 539, 898 N.Y.S.2d 15 [internal quotation marks omitted] ). Defendants urge the Court to endorse the “same level” rule now by affirming the lower court’s dismissal of plaintiff’s section 240(1) claim.

We do not agree that *Misseritti* calls for the categorical exclusion of injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff. *Misseritti* did not turn on the fact that plaintiff and the base of the wall that collapsed on him were at the same level. Rather, just as in *Narducci*, the absence of a causal nexus between the worker’s injury and a lack or failure of a device prescribed by section 240(1) mandated a finding against liability (*see Misseritti*, 86 N.Y.2d at 490–491, 634 N.Y.S.2d 35, 657 N.E.2d 1318; *Narducci*, 96 N.Y.2d at 268–269, 727 N.Y.S.2d 37, 750 N.E.2d 1085). Thus, we decline to adopt the “same level” rule, which ignores the nuances of an appropriate section 240(1) analysis.<sup>4</sup>

Moreover, the so-called “same level” rule is inconsistent with this Court’s more recent decisions, namely *Quattrocchi v. F.J. Sciamme Constr. Corp.*, 11 N.Y.3d 757, 866 N.Y.S.2d 592, 896 N.E.2d 75 (2008) and *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 895 N.Y.S.2d 279, 922 N.E.2d 865 (2009), neither of which are cited by the dissent. In *Quattrocchi*, we articulated for the first time that liability is not limited to cases in which the falling object was in the process of being hoisted \*\*494 \*\*\*557 or secured (*see* 11 N.Y.3d at 759, 866 N.Y.S.2d 592, 896 N.E.2d 75). Next, in *Runner*, the Court had occasion to apply section 240(1) to novel factual circumstances that did not involve a falling worker or falling object (*see* 13 N.Y.3d at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865). \*10 In *Runner*, the plaintiff was injured while he and coworkers moved an 800 pound reel of wire down a flight of four stairs (*see id.* at 602, 895 N.Y.S.2d 279, 922 N.E.2d 865). The workers were instructed to tie one end of a 10-foot length of rope to the reel and then to wrap the rope around a metal bar placed horizontally across a door jamb on the same level as the reel (*see id.*). The plaintiff, acting as a counterweight, held the loose end as other workers pushed the reel down stairs (*see id.*). As the reel descended, the plaintiff was pulled horizontally into the bar, injuring his hands as they jammed against it (*see id.*). After a review of our precedents, we concluded that

“the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, *the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential*” (*id.* at 603, 895 N.Y.S.2d 279, 922 N.E.2d 865 [emphasis added] ).

As the “elevation differential ... [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent” (*id.* at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865), we held the defendants liable under Labor Law § 240(1) for using a “jerry-rigged device” rather than hoists or pulleys as provided under the statute (*see id.* at 602, 605, 895 N.Y.S.2d 279, 922 N.E.2d 865).

Applying *Runner* to the instant case, we hold that plaintiff is not precluded from recovery under section 240(1) simply because he and the pipes that struck him were on the same level. The pipes, which were metal and four inches in diameter, stood at approximately 10 feet and toppled over to fall at least four feet before striking plaintiff, who is five feet, eight inches

tall. That height differential cannot be described as *de minimis* given the “amount of force [the pipes] w[ere] [able [to] generat[e]” (*id.* at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865) over their descent. Thus, plaintiff suffered harm that “flow[ed] directly from the application of the force of gravity to the [pipes]” (*id.* at 604, 895 N.Y.S.2d 279, 922 N.E.2d 865; *see also Rocovich*, 78 N.Y.2d at 514, 577 N.Y.S.2d 219, 583 N.E.2d 932). However, though the risk here “ar[ose] from a physically significant elevation differential” (*Runner*, 13 N.Y.3d at 603, 895 N.Y.S.2d 279, 922 N.E.2d 865), it remains to be seen whether plaintiff’s injury was “the direct consequence of [defendants’] failure to provide adequate protection against [that] risk” (*id.*).

\*11 In this regard, this case is distinguishable from *Misseritti* in a significant way: while, in *Misseritti*, the kinds of protective devices section 240(1) prescribes were shown to be inapplicable to the circumstances of the decedent’s injury, here, neither party has met its burden with respect to that issue. Plaintiff asserts, but does not demonstrate, that protective devices such as blocks or ropes could have been used to secure the pipes and prevent the accident. Defendants assert, but fail to demonstrate, that no protective devices were called for.

\*\*\*558 \*\*495 Moreover, there is an important distinction between the facts of this case and other cases where summary judgment has been granted in defendants’ favor. Here, the pipes that caused plaintiff’s injuries were not slated for demolition at the time of the accident. This stands in contrast to cases where the objects that injured the plaintiff’s were themselves the target of demolition when they fell (*see e.g. Brink*, 259 A.D.2d at 265, 686 N.Y.S.2d 15). In those instances, imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical. Here, however, securing the pipes in place as workers demolished nearby walls would not have been contrary to the objectives of the work plan.

We conclude, therefore, that while there is a potential “causal connection between the object[s’] inadequately regulated descent and plaintiff’s injury” (*Runner*, 13 N.Y.3d at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865), neither party is entitled to summary judgment on plaintiff’s Labor Law § 240(1) claim. Whether plaintiff’s injuries were proximately caused by the lack of a safety device of the kind required by the statute is an issue for a trier of fact to determine.

### III.

#### Plaintiff’s Claims Under Labor Law § 241(6)

Plaintiff’s remaining claims arise under Labor Law § 241(6), which provides:

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

As the statute is not self-executing, a plaintiff must set forth a violation of a specific rule or regulation promulgated pursuant \*12 to it (*see Ross*, 81 N.Y.2d at 503, 601 N.Y.S.2d 49, 618 N.E.2d 82). In this case, plaintiff invokes 12 NYCRR 23–3.3(b)(3), which provides: “Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration.”

Defendants contend that this regulation is inapplicable to the instant matter because neither wind pressure nor vibration caused the pipes to fall, collapse or become weakened. Defendants argue that the Appellate Division’s interpretation of the regulation—specifically, that “[a] fair reading of the section ... leads to the conclusion that the phrase ‘by wind pressure or vibration,’ does not attach to the words ‘fall’ or ‘collapse,’ but only to the immediately preceding words, ‘be weakened’ ” (*Wilinski*, 71 A.D.3d at 539, 898 N.Y.S.2d 15)—is incorrect and contradicts the purpose of the regulation.

While lower courts ruling on this issue have largely adopted defendants’ proposed reading of the regulation (*see German v. City of New York*, 14 Misc.3d 1204[A], 2006 N.Y. Slip Op. 52406[U], \*5, 2006 WL 3717684 [Sup. Ct., N.Y. County 2006]; *Maternik v. Edge-mer By-The-Sea Corp.*, 19 Misc.3d 1118 [A], 2008 N.Y. Slip Op. 50763[U], \*7 n. 11, 2008 WL 1056916

[Sup. Ct., Kings County 2008]; *Gonzalez v. Fortway LLC*, 22 Misc.3d 1115[A], 2009 N.Y. Slip Op. 50132[U], \*7, 2009 WL 211789 [Sup. Ct., Kings County 2009] ), we believe that the Appellate Division’s interpretation is the better one. Thus, we affirm the court’s finding that plaintiff is not required to show that the pipes fell or collapsed due \*\*496 \*\*\*559 to wind pressure or vibration to state a claim under 12 NYCRR 23–3.3(b)(3).

Plaintiff’s second section 241(6) claim arises under 12 NYCRR 23–3.3(c), which provides:

“During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means.”

“The thrust of this subdivision is to fashion a safeguard, in the form of ‘continuing inspections,’ against hazards which are created by the progress of the demolition work” (*Monroe v. City of New York*, 67 A.D.2d 89, 100, 414 N.Y.S.2d 718 [2d Dept.1979] ). Here, defendants failed to meet their burden of showing either that they complied \*13 with the regulation or that their noncompliance did not cause plaintiff’s accident. Thus, we conclude that the courts below properly denied summary judgment to defendants on plaintiff’s Labor Law § 241(6) claims.

Accordingly, the order of the Appellate Division should be modified, without costs, in accordance with this opinion and, as so modified, affirmed, and the certified questions answered in the negative.

PIGOTT, J. (dissenting in part).

Because the majority runs far afield from this Court’s Labor Law § 240(1) precedent, I dissent.

To prevail on a motion for summary judgment on the issue of liability under Labor Law § 240, a plaintiff must demonstrate that his or her injuries resulted from “dangerous conditions posed by elevation differentials” at a work site (*Misseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 491, 634 N.Y.S.2d 35, 657 N.E.2d 1318 [1995] ), and that the elevation-related risk occurred “because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [2001] ).

At the time of the accident, plaintiff was demolishing the walls of a warehouse building. In front of the brick wall that plaintiff was demolishing were two metal plumbing pipes, approximately 8 to 10 feet in height stretching vertically from the floor on which plaintiff was standing. Two workers, using hammers and crowbars, demolished an adjacent wall about four feet away from plaintiff, causing that wall to collapse into the pipes. The pipes toppled onto plaintiff causing injury.

On this record, plaintiff has not demonstrated his entitlement to summary judgment because he failed to articulate either an elevation-related risk or an enumerated safety device that would have prevented his injuries. To the contrary, in my view, defendants are entitled to summary judgment since the uncontested facts establish that plaintiff’s injuries were not the result of a hazard contemplated by section 240(1).

In *Misseritti*, we ruled that the injuries sustained, caused by the collapse of a completed fire wall, were not the result of an elevation-related accident subject to the protections of section 240(1), because the plaintiff failed to demonstrate that “the decedent was working at an elevated level at the time of his tragic accident” and it could not “be said that the collapse of a completed fire wall is the type of elevation-related accident that section 240(1) is intended to guard against” (86 N.Y.2d at 491, 634 N.Y.S.2d 35, 657 N.E.2d 1318). \*14 Likewise, in \*\*497 \*\*\*560 *Melo v. Consolidated Edison Co. of N.Y.*, 92 N.Y.2d 909, 680 N.Y.S.2d 47, 702 N.E.2d 832 (1998), the plaintiff and a coworker were attempting to cover a trench with a heavy steel plate, which was attached, by a chain with a hook, to the shovel of a backhoe. As the plate was being moved to the trench, its edge was resting on the ground or slightly above it. When the hook unfastened and the plate fell over, the plaintiff sustained injuries. We upheld the dismissal of the plaintiff’s section 240(1) claim, explaining that the statute was not implicated because “[t]he steel plate was not elevated above the work site” (*id.* at 911, 680 N.Y.S.2d 47, 702 N.E.2d 832).

These principles were reinforced in *Capparelli v. Zausmer Frisch Assoc., Inc.*, decided at the same time as *Narducci*, wherein the plaintiff cut his right hand and wrist when he attempted to stop a falling light fixture from hitting him while stationed halfway up a ladder. There, we concluded that the plaintiff's claim did not fall within the ambit of section 240(1), stating that the statute does not apply when "there [is] no height differential between [the] plaintiff and the falling object" (96 N.Y.2d at 269, 727 N.Y.S.2d 37, 750 N.E.2d 1085).

The vertical plumbing pipes in this case are akin to the completed fire wall in *Misseritti* and the steel plate in *Melo*. It is of no moment that the pipes rose at least four feet above the plaintiff's height, since it is undisputed that the base of the pipes were at the same level as plaintiff and his work site.

Nor did plaintiff demonstrate that an enumerated safety device would have prevented the accident from occurring. In his motion for summary judgment, plaintiff merely claimed that defendants failed to provide him with an enumerated safety device to adequately secure the pipes. But that's not enough. To merit summary judgment on the issue of liability under section 240(1) plaintiffs must show that there was a specific, enumerated safety device that would have prevented the accident. Here, plaintiff offered only conclusory statements, thereby failing to demonstrate an issue of fact warranting trial.

In denying defendants' motion for summary judgment, the majority adds confusion and uncertainty to our decisions in *Misseritti*, *Narducci*, and *Melo* and to the reasonable interpretation given them by the Appellate Divisions (see e.g. *Brink v. Yeshiva Univ.*, 259 A.D.2d 265, 686 N.Y.S.2d 15 [1st Dept.1999]; *Matter of Sabovic v. State of New York*, 229 A.D.2d 586, 587, 645 N.Y.S.2d 860 [2d Dept.1996]; \*15 *Corsaro v. Mt. Calvary Cemetery*, 214 A.D.2d 950, 950–951, 626 N.Y.S.2d 634 [4th Dept.1995]).\* I see no reason to stray from the overwhelming and settled body of case law that establishes that section 240(1) does not apply when the base of the falling object is at the same level as the worker and the work being performed. Therefore, I would affirm the Appellate Division order.

Chief Judge LIPPMAN and Judges SMITH and JONES concur with Judge CIPARICK; Judge PIGOTT dissents and votes to affirm in a separate opinion in which Judges GRAFFEO and READ concur.

Order modified, etc.

#### All Citations

18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551, 2011 N.Y. Slip Op. 07477

#### Footnotes

- <sup>1</sup> Halina Wilinski is also a plaintiff, having sued derivatively. We will refer only to the injured worker as plaintiff.
- <sup>2</sup> Defendant 334 East 92nd Housing Development Fund Corp., (the HDFC) owned the premises located at 334 East 92nd Street in Manhattan. The HDFC executed a nominee agreement in favor of defendant East 92nd Street Senior Housing Limited Partnership, which, in turn, retained defendant Empire Developers Corp. (Empire) as general contractor. Empire hired Gramercy Group, Inc. (Gramercy) as subcontractor to demolish a vacant warehouse on the property. Gramercy employed plaintiff as a demolition worker.
- <sup>3</sup> In his deposition testimony, plaintiff stated that the pipes were two different heights, the shorter ranging from 8 to 10 feet and the taller ranging from 10 to 12 feet. Plaintiff's coworker testified that he did not want to estimate the height of the pipes but stated that

“they went up a good way.”

<sup>4</sup> Some lower courts have already reached this conclusion. For example, in *Brown v. VJB Constr. Corp.*, 50 A.D.3d 373, 857 N.Y.S.2d 56 (1st Dept.2008), the plaintiff was injured when a 1,000 pound slab that fell from a defective clamp as it was being hoisted by a forklift landed at ground level and then tipped over, pinning the plaintiff’s wrist between the slab and a wall (*see id.* at 374, 857 N.Y.S.2d 56). Defendants had argued, based on *Misseritti*, that because the “[plaintiff] admit[ted] that at the time of the accident, he worked at the same level as the stone panel being installed” the court should affirm the dismissal of plaintiff’s section 240(1) claim (*see* brief for defendant-respondent and second third-party defendant-respondent in *Brown v. VJB Constr. Corp.*, 50 A.D.3d 373, 857 N.Y.S.2d 56 [2008], available at 2007 WL 5830407, \*14–18). The Appellate Division aptly rejected that argument, finding it “of no consequence that the ultimate destination of the slab was the same level where the forklift was positioned, or where [the] plaintiff was standing” (*Brown*, 50 A.D.3d at 377, 857 N.Y.S.2d 56). Had the court accepted the defendants’ same level defense, mere circumstance would have arbitrarily precluded what we agree was clearly a viable claim under section 240(1).

\* The majority cites *Brown v. VJB Constr. Corp.*, 50 A.D.3d 373, 857 N.Y.S.2d 56 (1st Dept.2008) as evidence that the Appellate Division has begun to reject the “same level” rule. That is not the case. The concrete slab in *Brown* fell from a height of three feet (*id.* at 376, 857 N.Y.S.2d 56), and therefore that case does not involve a situation where the base of the object is at the same elevation as plaintiff.

65 N.Y.2d 513  
Court of Appeals of New York.

Charles T. ZIMMER, Jr., Appellant,

v.

CHEMUNG COUNTY PERFORMING ARTS, INC., Respondent,

and

Elcon Contractors, Inc., et al., Defendants and Third-Party Plaintiffs-Respondents.

Mac-Dan Erectors, Inc., Third-Party Defendant-Respondent.

John HUNT, Respondent,

v.

WERNER SPITZ CONSTRUCTION COMPANY, INC., Defendant-Appellant and Third-Party

Plaintiff-Appellant, et al., Defendant and Third-Party Plaintiff.

Railing Supply Company, Inc., Third-Party Defendant-Appellant.

July 11, 1985.

### Synopsis

In first action, steelworker who was injured while erecting steel skeleton for construction project brought action against reputed owner of construction project and general contractors. The Supreme Court, Trial Term, Tioga County, Robert E. Fischer, J., entered judgment in favor of defendants and later entered order denying steelworker's motion to set aside verdict. On appeal, the Supreme Court, Appellate Division, 102 A.D.2d 993, 477 N.Y.S.2d 873, affirmed, and steelworker appealed. In second case, welder brought action for personal injuries against contractor. The Supreme Court, Trial Term, Monroe County, Elizabeth W. Pine, J., set aside verdict for contractor and found contractor liable, and contractor appealed. The Supreme Court, Appellate Division, 99 A.D.2d 671, 472 N.Y.S.2d 46, affirmed, and appeal was brought. The Court of Appeals, Alexander, J., held that building owners and contractors were liable to workers who fell while working on construction projects, as no safety devices were provided to workers at work sites.

First case reversed, and second case affirmed.

### Attorneys and Law Firms

\*514 \*\*\*103 \*\*899 Russell T. Quinlan, Paul William Beltz and C.A. Krenzer, Buffalo, for appellant in the first above-entitled action.

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Samuel M. Hall, Canandaigua, for Elcon Contractors, Inc., defendant and third-party plaintiff-respondent in the first above-entitled action.

\*516 Stephen D. Smyk, Binghamton, for Elsand Steel, Inc., defendant and third-party plaintiff-respondent in the first above-entitled action.

Peter H. Bouman, Binghamton, for Mac-Dan Erectors, Inc., third-party defendant-respondent in the first above-entitled action.

Merle M. Troeger, Rochester, for defendant-appellant and third-party plaintiff-appellant in the second above-entitled action.

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action.

\*518 Wayne M. Harris and Melvin L. Olver, Rochester, for respondent in the second above-entitled action.

## OPINION OF THE COURT

ALEXANDER, Judge.

We are called upon on these appeals to determine the extent to which [Labor Law § 240\(1\)](#)<sup>1</sup> imposes liability upon an \*519 owner or contractor who has failed to provide any safety devices for workers at a building worksite, and the absence of such devices is the proximate cause of injury to a worker. Based on the clear language of the statute and its purpose as articulated by the Legislature, we hold that an owner or contractor under these circumstances is \*\*\*104 absolutely liable in damages for injuries sustained by such worker.

In *Zimmer v. Chemung County Performing Arts*, 102 A.D.2d 993, 477 N.Y.S.2d 873, plaintiff, an ironworker, was injured while working as a member of a crew \*\*900 erecting a steel skeleton for an addition to a building owned by defendant Chemung County Performing Arts. Plaintiff's duties as a "connector" involved his assembling beams and columns that formed the skeleton. The accident occurred when plaintiff, in the manner usually employed by connectors in performing this task, scaled a 31-foot vertical column in order to direct a crane operator who was raising a horizontal beam to a position where plaintiff could reach it and effect the connection with the vertical column. In pulling himself over the top of the beam, plaintiff lost his grip and fell. He struck a horizontal beam in his descent and landed in an excavation outside of the structure's perimeter.

Ladders were present at the worksite, but none had been erected for plaintiff's specific task. In addition, it is uncontroverted that no safety devices were erected or provided to plaintiff. Defendants, the building owner and several contractors, presented evidence at trial that various devices, such as netting, metal decking and lifelines, normally are not used during the early stages of construction projects such as this where the steel skeleton has not yet been plumbed and securely bolted and that it would have been infeasible, even dangerous, to have used any such devices. At the close of the evidence, the trial court denied plaintiff's motion for a directed verdict, and the jury returned a verdict in defendants' favor. Plaintiff's motions to set aside the verdict and for a new trial were denied.

The Appellate Division, with one Justice dissenting, affirmed, holding that questions of fact as to whether defendants had violated the provisions of the Labor Law were raised by the conflicting expert testimony concerning the utility and feasibility of safety devices at this early stage of the construction, which issues of fact were properly submitted to the jury and resolved adversely to plaintiff.

In *Hunt v. Spitz Constr. Co.*, 99 A.D.2d 671, 472 N.Y.S.2d 46, the plaintiff ironworker sustained serious injuries when he fell 25 feet from the flat roof of a \*520 building on which he was welding corrugated decking. Plaintiff sought to recover damages from Kelview, Incorporated, the owner of the property, and Werner Spitz Construction Company, Inc., the general contractor, asserting their liability grounded both in negligence and violations of [Labor Law §§ 200, 240\(1\)](#) and [§ 241\(6\)](#). As in *Zimmer*, it is conceded that no safety device was furnished to plaintiff. Defendants introduced evidence of industry custom and usage in an attempt to establish that devices such as scaffolding, nets, safety lines and safety belts were never used on the type of building involved. They also presented evidence of various State and Federal regulations that require safety devices for work places, which they argue are either inapplicable to the situation here presented or were satisfied, thus negating any claimed violation that would constitute negligence.

Decision was reserved on plaintiff's motion for a directed verdict made at the close of the evidence and the issue of defendants' liability was submitted to the jury. The jury returned a verdict of no cause of action under either a negligence

theory or violation of the Labor Law. The trial court granted plaintiff's motion to set aside the verdict and for a directed verdict on liability, reasoning that in view of the uncontroverted proof that no safety devices were provided, there was no view of the evidence by which the jury could reasonably find that defendants' failure to provide safety devices was not a contributory factor in bringing about plaintiff's injuries and thus that there was a violation of Labor Law § 240(1). Trial Term's order and judgment were affirmed by the Appellate Division (99 AD2d 671) and the ensuing trial on damages resulted in a judgment of \$450,000 for plaintiff. We granted defendants leave to appeal from the final judgment pursuant to CPLR 5602(a)(1)(ii). We now reverse the \*\*\*105 Appellate Division's order in *Zimmer* and affirm the order in *Hunt*.

We begin our analysis by again observing that the legislative history of the Labor Law, particularly sections 240 and 241, makes clear the Legislature's intent to \*\*901 achieve the purpose of protecting workers by placing "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" (1969 NY Legis Ann, at 407), instead of on workers, who "are scarcely in a position to protect themselves from accident" (*Koenig v. Patrick Constr. Co.*, 298 N.Y. 313, 318, 83 N.E.2d 133).

We gave early recognition to this legislative intent when we declared with respect to section 240, which was then substantially in its present form, that "this statute is one for the \*521 protection of workmen from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Quigley v. Thatcher*, 207 N.Y. 66, 68, 100 N.E. 596, quoted in *Koenig v. Patrick Constr. Co.*, *supra*, 298 N.Y. at p. 319, 83 N.E.2d 133).

Thus, we held unavailable to a defendant owner charged with a violation of section 240 the defense of the worker's contributory negligence, noting that "both sound reason and persuasive decisions, involving statutes whose content and purpose are similar to section 240, require the conclusion that that statute does not permit the worker's contributory negligence to be asserted as a defense [citations omitted]" (*Koenig, supra*, at p. 317, 83 N.E.2d 133). So, too, in *Joyce v. Rumsey Realty Corp.*, 17 N.Y.2d 118, 122, 269 N.Y.S.2d 105, 216 N.E.2d 317, in considering the liability of a contractor for a violation of section 241(1) as it existed prior to 1962, which required that the contractor complete the flooring as the building progresses, we cited *Koenig* in holding that "[t]he duty imposed by the statute and violated by defendant [contractor] was 'a flat and unvarying' one \* \* \* '[F]or breach of that duty, thus absolutely imposed, the wrongdoer is rendered liable without regard to his care or lack of it' " (*Joyce v. Rumsey Realty Corp.*, *supra*, at p. 122, 269 N.Y.S.2d 105, 216 N.E.2d 317). We held that a violation of such a statute is conclusive evidence of negligence and conclusive evidence of negligence calls for a directed verdict (*Joyce v. Rumsey Realty Corp.*, *supra*; see, *Major v. Waverly & Ogden*, 7 N.Y.2d 332, 334, 197 N.Y.S.2d 165, 165 N.E.2d 181).

Further support for the conclusion that the failure to provide any protective devices for workers at the worksite establishes an owner or contractor's liability as a matter of law is found in our previous holdings regarding the defenses available to an owner or contractor charged with a violation of section 240(1) and the first five subdivisions of section 241, as contrasted to those available where the charge is a violation of a rule or regulation promulgated pursuant to section 241(6). In *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 448 N.Y.S.2d 132, 433 N.E.2d 115, the issue was whether the contributory (now comparative) negligence of the plaintiff is a defense in an action based upon the violation of administrative rules adopted pursuant to the authorization of section 241(6). We held that although the Legislature had placed the ultimate responsibility for safety practices at the worksite on the owner and general contractor where such responsibility actually belonged, the owner and general contractor's "ultimate responsibility" or "ultimate liability" under section 241(6) was "unavoidable" only in the sense that it could not be delegated to another and not in the sense that it precluded an owner or contractor from \*522 raising any defense to the imposition of liability. We held that because a "violation of the administrative rules adopted pursuant to the authorization of subdivision 6 of section 241 of the Labor Law cannot rise to the level of negligence as a matter of law, contributory negligence was, and comparative negligence now is, a defense to an action based on such a dereliction" (*Long*, at p. 161, 448 N.Y.S.2d 132, 433 N.E.2d 115).

\*\*\*106 We found this conclusion reinforced by the long-established principle that a rule of an administrative agency or an ordinance of a local government is merely some evidence to be considered on the question of a defendant's negligence and lacks the force and effect of a substantive legislative enactment. Thus, "[u]nlike a violation of the \*\*902 explicit provisions of a statute proper, a breach of an administrative rule \* \* \* does not establish negligence as a matter of law, [thus it] does not render a plaintiff's own negligence irrelevant and, therefore, unacceptable as a defense [citations omitted]" (*Long v. Forest-Fehlhaber, supra*, at p. 160, 448 N.Y.S.2d 132, 433 N.E.2d 115). We further observed that subdivision 6, which "does

no more than broadly provide that the owner and contractor see to it that the area where the work is to be performed is ‘so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety’ \* \* \* does not in terms provide how these ends are to be met [and is] \* \* \* but a reiteration of common-law standards” (*id.*; citations omitted). Finally, we observed that [section 241\(6\)](#) is to be contrasted with the first five subdivisions of [section 241](#), in which specific safeguards are set out, and with [section 240](#), “a self-executing statute which, containing its own specific safety measures, does not defer to the rule-making authority of the board (*Haimes v. New York Tel. Co.*, [46 N.Y.2d 132, 412 N.Y.S.2d 863, 385 N.E.2d 601] )” (*id.*, at p. 160, 448 N.Y.S.2d 132, 433 N.E.2d 115; *Brant v. Republic Steel Corp.*, 91 A.D.2d 841, 458 N.Y.S.2d 374; *Kenny v. Fuller Co.*, 87 A.D.2d 183, 450 N.Y.S.2d 551, *lv. denied* 58 N.Y.2d 603, 459 N.Y.S.2d 1026, 445 N.E.2d 218; *Larabee v. Triangle Steel*, 86 AD2d 289, 451 N.Y.S.2d 258; *France v. Niagara Mohawk Power Corp.*, 89 A.D.2d 757, 453 N.Y.S.2d 901; *Monroe v. City of New York*, 67 A.D.2d 89, 105–106, 414 N.Y.S.2d 718). Thus, a violation of [section 240\(1\)](#) or the first five subdivisions of [section 241](#) creates absolute liability. The failure to provide any safety devices is such a violation.

In *Zimmer*, the claimed violations were of [sections 240\(1\)](#) and [241\(4\)](#)<sup>2</sup> of the Labor Law. Thus, the Appellate Division \*523 correctly observed that there was no allegation of common-law negligence, and that there was no error in the trial court’s failure to instruct the jury on the applicable rules and regulations issued by the Board of Standards and Appeals. However, in light of the uncontroverted fact that no safety devices were provided at the worksite, it was error to submit to the jury for their resolution the conflicting expert opinion as to what safety devices, if any, should be used during the very early stages of the construction. Rather, a verdict of liability should have been directed in plaintiff’s favor. Conversely, in *Hunt*, in light of the uncontroverted fact that no safety devices were provided to plaintiff at the worksite, the jury’s verdict of no liability in respect to the claimed violation of [section 240\(1\)](#) was unsupportable and was properly set aside.

As indicated above, where an owner or contractor fails to provide any safety devices, liability is mandated by the statute without regard to external considerations such as rules and regulations, contracts or custom and usage. Although in *Hunt*, evidence of custom and usage was admissible to determine the standard of care in a negligence context under the claimed violation of [sections 200](#) and [241\(6\)](#), where injury is allegedly caused through a violation of [section 240\(1\)](#), which establishes its own unvarying standard, evidence of industry \*\*\*107 practice is immaterial (*cf. International Harvester Co. v. Town of Ellery*, 28 A.D.2d 1081, 285 N.Y.S.2d 104 [“custom, usage and practice may not waive, or in effect avoid, a mandatory statute which is clear and unambiguous on its face”] ). Neither [section 241\(6\)](#), nor [section 200](#), in \*\*\*903 contrast to [section 240\(1\)](#), is self-executing, but rather, both require reference to outside sources to determine the standard by which a defendant’s conduct must be measured. As noted by the Second Department in *Kenny v. Fuller Co.*, 87 A.D.2d 183, 450 N.Y.S.2d 551, *lv. denied* 58 N.Y.2d 603, 459 N.Y.S.2d 1026, 445 N.E.2d 218, *supra*, “[t]he primary distinction between [sections 240 \(subd. 1\)](#) and [241 \(subd. 6\)](#) is that the latter requires a determination of whether the safety measures actually employed on a job site were ‘reasonable and adequate’, while the former is mandatory in its nature and imposes absolute liability for any injury arising from its breach. The question of \* \* \* circumstantial reasonableness is therefore irrelevant under [subdivision 1 of section 240](#)” (*id.*, at p. 186, 450 N.Y.S.2d 551 [citations omitted] ).

To determine an owner or contractor’s liability for a violation of [section 240\(1\)](#) by reference to whether safety devices customarily are used, and, if so, which ones give “proper protection” \*524 would allow owners and contractors to diminish their obligations under that statute and to set their own standard of care for the protection of workers at the worksite. This would clearly contravene the legislative purpose of placing “ultimate responsibility for safety \* \* \* on the owner and general contractor” (1969 NY Legis Ann, at 407). As observed by Justice Mikoll, in her dissent in *Zimmer*, “[i]f the state of the building art is such that no devices have yet been devised to protect workers operating at such heights in dangerous work, it is illogical to conclude, given the purpose of the statute, that the responsibility of owners and contractors is then negated” (*Zimmer v. Chemung County Performing Arts*, 102 AD2d 993, 995, 477 N.Y.S.2d 873).

Appellants in *Hunt* and respondents in *Zimmer* contend that it is always an issue of fact whether “proper protection” has been provided under [section 240\(1\)](#). However, when the evidence establishes the absence of *any* safety devices at the worksite, the statute’s clear dictates have not been met. The mere presence of ladders or safety belts somewhere at the worksite does not establish “proper protection”, leaving for the jury only the question whether the absence of safety devices was a proximate cause of the plaintiff’s injury (*Brant v. Republic Steel Corp.*, 91 A.D.2d 841, 458 N.Y.S.2d 374, *supra* ). Although the plaintiff is “required to show that the violation of [section 240 of the Labor Law](#) was a contributing cause of [his accident]” (*Phillips v. Flintkote Co.*, 89 A.D.2d 724, 725, 453 N.Y.S.2d 847), and this issue should be determined by the jury, where there is no view of the evidence at trial to support a finding that the absence of safety devices was not a proximate

cause of the injuries, the court may properly direct a verdict in the plaintiff's favor (*Rea v. Elia Bldg. Co.*, 79 A.D.2d 1102, 435 N.Y.S.2d 849; see, *Duda v. Rouse Constr. Corp.*, 32 N.Y.2d 405, 410, 345 N.Y.S.2d 524, 298 N.E.2d 667; *Joyce v. Rumsey Realty Corp.*, 17 N.Y.2d 118, 122–123, 269 N.Y.S.2d 105, 216 N.E.2d 317, *supra*; *Heath v. Soloff Constr.*, 107 A.D.2d 507, 512, 487 N.Y.S.2d 617; *Brant v. Republic Steel Corp.*, *supra*). If proximate cause is established, the responsible parties have failed, as a matter of law, to “give proper protection.”

Accordingly, in *Zimmer v. Chemung County Performing Arts*, we hold that the trial court erred in denying plaintiff's motion for a directed verdict. The evidence established a breach of the statutory duty, and thus absolute liability, by defendants' failure to provide any safety devices. There is no view of the evidence by which defendants' violation of [section 240\(1\)](#) could not have been a proximate cause of plaintiff's injury. Thus, a new trial is required on the issue of damages only.

\*\*\***108** For the same reasons, in *Hunt v. Spitz Constr. Corp.*, we affirm the judgment appealed from and the Appellate Division \***525** order brought up for review which affirmed the granting to plaintiff of judgment notwithstanding the verdict.

SIMONS, Judge (concurring).

I concur with the court's holding that an owner or contractor is absolutely liable under \*\***904** [sections 240\(1\)](#) and [241\(1\)–\(5\)](#) of the Labor Law for injuries caused to workers because of a failure to supply safety devices and see to their proper placement and operation.

I would add that *Smith v. Hooker Chems. & Plastics Corp.*, 89 A.D.2d 361, 455 N.Y.S.2d 446, *appeal dismissed* 58 N.Y.2d 824, relied on by defendants is distinguishable from the appeals before us. The plaintiff in that action was the on-site supervisor of a roofing subcontractor's crew and sued the owner of the premises for injuries he sustained when he fell from the roof of a building under construction. He moved for partial summary judgment before trial contending that under [section 240\(1\)](#) the owner was absolutely liable to him. The moving papers demonstrated, however, that there were two versions of how he sustained his injuries, plaintiff's version that he fell when the safety equipment supplied him failed and the version of Toth, a coemployee, who alleged that plaintiff fell while working without safety equipment. Toth testified that it had been his job to repair the roof but that on the day of the accident he had refused to go onto the roof until plaintiff replaced the safety equipment which had been removed after completion of work the day before. Plaintiff refused to replace the equipment, Toth said, for what he considered a minor job and because Toth refused to go onto the roof without it plaintiff decided to perform the work himself. Thus, in the *Smith* case equipment was actually at the place it was to be used, it had been used the day before and the worker assigned to do the job had requested that it be put in place. Plaintiff, the subcontractor's employee charged with supervising the crew's work, was injured when he fell from the roof after deciding to risk doing the work without troubling to replace the equipment.

Arguing the motion, plaintiff claimed he was entitled to partial summary judgment on the issue of liability regardless of the version accepted because defendant was an insurer of the workers' safety, obliged not only to supply and place the equipment but to compel him to use it.

The Appellate Division reversed Trial Term's order granting plaintiff partial summary judgment, finding a factual issue on whether the injuries were caused by the failure to supply and properly place safety devices or by the refusal of the worker to use the devices supplied. In responding to plaintiff's argument, \***526** the court distinguished [section 240\(1\)](#) from the broader provisions of Labor Law § 202 which specifically mandate that employers and contractors must *require* employees to use available safety devices. Its ruling was a narrow one, that [section 240\(1\)](#) does not impose a duty on an owner, as a matter of law, to compel a worker who refuses to use available satisfactory equipment to do so. That decision has no application to the facts of these cases in which those charged with responsibility for supplying safety devices deny the obligation or feasibility of doing so and rely alternatively upon evidence that there were ladders or safety belts available for use somewhere in the area of the construction site.

WACHTLER, Chief Judge (dissenting).

Nothing in either the legislative history of [Labor Law § 240\(1\)](#)\* or in our decisions \*\*\*109 construing that statute suggests that it contemplates holding contractors and owners responsible for providing safety devices where the proof establishes that no such devices were available or could be adapted to the situation in which the employee was injured. Although it is true, as the majority suggests, that the statute places responsibility for safety practices at construction sites on the owner and general contractor, \*\*905 it does not impose upon them insurers' liability when they fail to do the impossible.

The majority relies primarily on the legislative intent underlying [Labor Law § 240\(1\)](#) in support of its conclusion that the statute was intended to impose insurers' liability upon those owners and contractors whose employees have been injured on the job. However, as I have noted, nothing in the available legislative history or in our prior decisions supports such a conclusion.

Read in its entirety, the memorandum of Senator Calandra and Assemblyman Amann (1969 N.Y.Legis. Ann., at 407) makes it clear that the 1969 amendments to [section 240](#) (L.1969, ch. 1108) were intended to effect an expansion only of *who* could be held liable under the statute, not an expansion of the bases for liability. Thus, as the majority suggests, the amendment "places ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the \*527 owner and general contractor" (at 407); it does so because the statute prior to amendment allowed subcontractors to "relieve the owner or general contractor of liability for safe work practices merely by securing the basic workmen's compensation coverage" (*id.*). The amendment, intended to reestablish the exposure of general contractors and owners, changed those covered by its provisions from "A person employing or directing another to perform labor of any kind" to "All contractors and owners and their agents" (L.1969, ch. 1108, § 1). The amendment only changed the parties liable, the "who" not "the what" of the statute (*Haines v. New York Tel. Co.*, 46 N.Y.2d 132, 412 N.Y.S.2d 863, 385 N.E.2d 601; *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 405 N.Y.S.2d 630, 376 N.E.2d 1276, *rearg. denied* 45 N.Y.2d 776, 408 N.Y.S.2d 1027, 380 N.E.2d 350; *Smith v. Hooker Chems. & Plastics Corp.*, 89 A.D.2d 361, 364, n. 3, 455 N.Y.S.2d 446, *appeal dismissed* 58 N.Y.2d 824). We recognized that there were limits to the so-called "absolute" liability imposed by [section 240](#) in *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 319, 83 N.E.2d 133, where we noted that the legislative purpose was to require "the employer to safeguard the workers from injury caused by faulty or inadequate equipment" (emphasis added).

Nowhere in this account is there any indication that the Legislature intended to impose upon owners and contractors the responsibility for accidents they could not have prevented. The majority points to no case which has so held. I believe the imposition of such liability, predicated upon generalized expressions of legislative intent, taken out of context, is an unwarranted usurpation of the legislative function by this court with which I cannot concur.

In addition, proximate cause is a necessary element in an action based on [Labor Law § 240](#) (*Duda v. Rouse Constr. Corp.*, 32 N.Y.2d 405, 410, 345 N.Y.S.2d 524, 298 N.E.2d 667) and, when the establishment of that element has turned on whether the missing safety devices, if provided, could have prevented the plaintiff's injury, the question has been one for the jury (*Giulmi v. Toys "R" Us*, 94 A.D.2d 663, 462 N.Y.S.2d 225, *affd.* 62 N.Y.2d 664, 476 N.Y.S.2d 283, 464 N.E.2d 981).

Because I read the statutory policy underlying [Labor Law § 240](#) as encouraging owners and contractors to provide safety devices where possible, and not to provide insurance coverage to their employees (who are already covered by workers' compensation), I respectfully dissent, and urge the Legislature to amend the statute to make this intent more clear. The imposition of insurers' liability on owners and contractors will not further the goal of protecting workers, because the absent devices cannot \*\*\*110 protect them. It will, however, hurt the building industry and perhaps cost those already adequately protected workers their \*528 jobs. In *Zimmer v. Chemung County Performing Arts*, therefore, the order of the Appellate Division should be affirmed, and in *Hunt v. Spitz Constr. Co.*, the judgment appealed from and order of the Appellate Division brought up for review should be reversed and the jury's verdict reinstated.

\*\*906 Judges MEYER, SIMONS and KAYE, JJ., concur with ALEXANDER, J.

SIMONS, J., concurs in a separate concurring opinion.

WACHTLER, C.J., dissents and votes to affirm in another opinion in which JASEN, J., concurs.

TITONE, J., taking no part.

In *Zimmer v. Chemung County Performing Arts*: Order reversed, with costs, plaintiff's motion for a directed verdict granted, and case remitted to Supreme Court, Tioga County, for a new trial on the issue of damages only.

In *Hunt v. Spitz Constr. Co.*: Judgment appealed from and order of the Appellate Division brought up for review affirmed, with costs.

### All Citations

65 N.Y.2d 513, 482 N.E.2d 898, 493 N.Y.S.2d 102

### Footnotes

<sup>1</sup> Labor Law § 240(1) provides, in pertinent part: "1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

2 Labor Law § 241(4) provides that:

"All contractors and owners and their agents \* \* \* when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:


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"4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over, except spaces reasonably required for proper construction of the iron or steel work, for raising or lowering of materials or for stairways and elevator shafts designated by the plans and specifications."

\* Labor Law § 240(1) provides, in pertinent part: "1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

 KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Limited on Preemption Grounds by *Lee v. Astoria Generating Co., L.P.*, N.Y., Nov. 23, 2009

 KeyCite Yellow Flag - Negative Treatment Proposed Legislation

McKinney's Consolidated Laws of New York Annotated

Labor Law (Refs & Annos)

Chapter 31. Of the Consolidated Laws (Refs & Annos)

Article 10. Building Construction, Demolition and Repair Work (Refs & Annos)

McKinney's Labor Law § 240

§ 240. Scaffolding and other devices for use of employees

Currentness

1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers as provided for in article one hundred forty-five of the education law, architects as provided for in article one hundred forty-seven of such law or landscape architects as provided for in article one hundred forty-eight of such law who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provision of law.

2. Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.

3. All scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use.

**Credits**

(L.1921, c. 50. Amended L.1930, c. 603, § 3; L.1947, c. 683, §§ 1 to 3; L.1962, c. 450, § 2; L.1969, c. 1108, § 1; L.1980, c. 670, § 1; L.1981, c. 241, § 1.)

[Notes of Decisions \(5781\)](#)

McKinney's Labor Law § 240, NY LABOR § 240

Current through L.2023, chapters 1 to 418. Some statute sections may be more current, see credits for details.


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 KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Validity Called into Doubt by [Engel v. Defeo](#), N.Y.Sup., Sep. 28, 2001

 KeyCite Yellow Flag - Negative Treatment Proposed Legislation

McKinney's Consolidated Laws of New York Annotated  
Civil Practice Law and Rules (Refs & Annos)  
Chapter Eight. Of the Consolidated Laws  
Article 31. Disclosure (Refs & Annos)

McKinney's CPLR § 3101

## § 3101. Scope of disclosure

Effective: December 31, 2021

[Currentness](#)

(a) Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

(b) Privileged matter. Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.

(c) Attorney's work product. The work product of an attorney shall not be obtainable.

(d) Trial preparation.

1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the

expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with [rule thirty-one hundred seven](#) of this chapter. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

(iv) *Repealed eff. Feb. 17, 2014 by L.2013, c. 23, § 4.*

2. Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

(e) Party's statement. A party may obtain a copy of his own statement.

(f) Contents of insurance agreement. (1) No later than ninety days after service of an answer pursuant to [rule three hundred twenty](#) or [section three thousand eleven](#) or [three thousand nineteen](#) of this chapter, any defendant, third-party defendant, or defendant on a cross-claim or counter-claim shall provide to the plaintiff, third-party plaintiff, plaintiff on counter-claim, and any other party in the action proof of the existence and contents of any insurance agreement in the form of a copy of the insurance policy in place at the time of the loss or, if agreed to by such plaintiff or party in writing, in the form of a declaration page, under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment. A plaintiff or party who agrees to accept a declaration page in lieu of a copy of any insurance policy does not waive the right to receive any other information required to be provided under this subdivision, and may revoke such agreement at any time, and upon notice to an applicable defendant of such revocation, shall be provided with the full copy of the insurance policy in place at the time of the loss. Information and documentation,

as evidenced in the form of a copy of the insurance policy in place at the time of the loss or the declaration page, pursuant to this subdivision shall include:

(i) all primary, excess and umbrella policies, contracts or agreements issued by private or publicly traded stock companies, mutual insurance companies, captive insurance entities, risk retention groups, reciprocal insurance exchanges, syndicates, including, but not limited to, Lloyd's Underwriters as defined in [section six thousand one hundred sixteen of the insurance law](#), surplus line insurers and self-insurance programs insofar as such documents relate to the claim being litigated;

(ii) if the insurance policy in place is provided, a complete copy of any policy, contract or agreement under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment as referred to in this paragraph, including, but not limited to, declarations, insuring agreements, conditions, exclusions, endorsements, and similar provisions;

(iii) the contact information, including the name and e-mail address, of an assigned individual responsible for adjusting the claim at issue; and

(iv) the total limits available under any policy, contract or agreement, which shall mean the actual funds, after taking into account erosion and any other offsets, that can be used to satisfy a judgment described in this subdivision or to reimburse for payments made to satisfy the judgment.

(2) A defendant, third-party defendant, or defendant on a cross-claim or counter-claim required to produce to a plaintiff or third-party plaintiff or plaintiff on a counter-claim all information set forth in paragraph one of this subdivision must make reasonable efforts to ensure that the information remains accurate and complete, and provide updated information to any party to whom this information has been provided at the filing of the note of issue, when entering into any formal settlement negotiations conducted or supervised by the court, at a voluntary mediation, and when the case is called for trial, and for sixty days after any settlement or entry of final judgment in the case inclusive of all appeals.

(3) For purposes of this subdivision, an application for insurance shall not be treated as part of an insurance agreement. Disclosure of policy limits under this section shall not constitute an admission that an alleged injury or damage is covered by the policy.

(4) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial.

(5) The requirements of this subdivision shall not apply to actions brought to recover motor vehicle insurance personal injury protection benefits under article fifty-one of the insurance law or regulation sixty-eight of title eleven of the New York codes, rules and regulations.

(g) Accident reports. Except as is otherwise provided by law, in addition to any other matter which may be subject to disclosure, there shall be full disclosure of any written report of an accident prepared in the regular course of business operations or practices of any person, firm, corporation, association or other public or private entity, unless prepared by a police or peace officer for a criminal investigation or prosecution and disclosure would interfere with a criminal investigation or prosecution.

(h) Amendment or supplementation of responses. A party shall amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading. Where a party obtains such information an insufficient period of time before the commencement of trial appropriately to amend or supplement the response, the party shall not thereupon be precluded from introducing evidence at the trial solely on grounds of noncompliance with this subdivision. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. Further amendment or supplementation may be obtained by court order.

(i) In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under [section eighty-seven of the public officers law](#).

#### Credits

(L.1962, c. 308. Amended L.1975, c. 668, § 1; L.1979, c. 268, § 1; L.1980, c. 283, § 1; L.1984, c. 294, § 2; L.1985, c. 294, § 4; L.1986, c. 485, § 4; L.1988, c. 184, § 2; L.1991, c. 165, § 45; L.1993, c. 98, §§ 1, 2; L.1993, c. 574, § 1; L.2012, c. 438, § 5, eff. Feb. 17, 2014; L.2013, c. 23, § 4, eff. Feb. 17, 2014; L.2021, c. 832, § 2, eff. Dec. 31, 2021; L.2022, c. 136, § 1, eff. Dec. 31, 2021.)

#### Editors' Notes

### SUPPLEMENTARY PRACTICE COMMENTARIES

by Professor Patrick M. Connors

2022

#### C3101:18B. Disclosure of Collateral Source Information.

#### First Department Holds That Defendants Are Entitled to Authorizations from Plaintiff to Obtain Medical Records in Anticipation of a [CPLR 4545](#) Collateral Source Hearing

We note in the main Practice Commentary that the courts have held that pretrial disclosure is available so defendants can acquire information and documents that may later be used at a [CPLR 4545](#) collateral source hearing. In *Winslow v. New York-Presbyterian/Weill-Cornell Medical Center*, 203 A.D.3d 533, 534, 161 N.Y.S.3d 775, 776 (1st Dep't 2022), the First Department reaffirmed the point, holding that defendants were entitled to authorizations from plaintiff to obtain medical records in anticipation of a collateral source hearing.

#### C3101:18D. Disclosure of Cellular/Smart Phone Records.

#### Fourth Department Orders Production of Plaintiff's Cell Phone

In *Tousant v. Aragona*, 208 A.D.3d 1044, 172 N.Y.S.3d 789 (4th Dep't 2022), a negligence action arising from a collision with defendants' school bus, defendants moved to compel production of plaintiff's cell phone and related

information to ascertain if he was using the phone at or near the time of the accident. The supreme court denied the motion to the extent it sought production of the cell phone, but required production of cell phone records from plaintiff's service provider.

The cell phone records obtained from the provider established that plaintiff was not talking on his phone at the time of the accident, but we all know that cell phones are now rarely used for conversation and are equipped with an abundance of other features. The provider's records did not indicate, for example, whether plaintiff opened or sent text messages during the relevant time period or was using any other “applications on his phone, such as Snapchat or Facebook.” *Id.* at 1045, [172 N.Y.S.3d at 791](#).

Defendants made a second motion to compel production of, and access to, plaintiff's cell phone, arguing that an examination of the phone itself was necessary to ascertain if plaintiff was using it at the time of the accident for purposes other than verbal communication. The court denied the motion because defendants failed to put forward a factual basis to suggest that the phone was being used for texting at the time of the accident.

The Fourth Department reversed, citing to New York's liberal disclosure rule in CPLR 3101(a). The court also quoted from the Court of Appeals' 2018 decision in *Forman v. Henkin*, [30 N.Y.3d 656, 664, 70 N.Y.S.3d 157, 164 \(2018\)](#), which ruled that “New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information.” In *Forman*, a case in which defendant sought disclosure of relevant materials on plaintiff's social media site, the Court found that defendant “more than met his threshold burden of showing that .... the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to Supreme Court's order were reasonably calculated to contain evidence ‘material and necessary’ to the litigation.” *Id.* at 666-67, [70 N.Y.S.3d at 166](#).

Applying this standard, the Fourth Department ruled that defendants were entitled to production of, or access to, plaintiff's cell phone. In support of their second motion to compel, defendants submitted evidence that plaintiff was traveling at close to 80 miles per hour on a residential road near an elementary school just before the accident, and that he did not brake before colliding with the school bus. The court concluded that “[e]vidence concerning whether [plaintiff] was distracted before the collision is relevant to the issues involved in this negligence action, and defendants’ request for production of or access to his cellular phone is reasonably calculated to yield relevant information ..., especially considering that [plaintiff] is unable, due to his injuries [that left him in a vegetative state], to provide any information regarding his activities in the moments before the accident.” *Tousant*, [208 A.D.3d at 1046, 172 N.Y.S.3d at 792](#).

#### **C3101:22. The “Circumstances” Rule of CPLR 3101(a)(4).**

### **Relying on Third Department's *Loiselle* Decision, Court Orders Production of Nonparty Doctors' Financial Records for Seven-Year Period**

In last year's Supplementary Practice Commentaries under this section, we discussed *Loiselle v. Progressive Casualty Insurance Co.*, [190 A.D.3d 17, 135 N.Y.S.3d 500 \(3d Dep't 2020\)](#), where the Third Department aligned itself with the Fourth Department's position and concluded that financial records of nonparty doctors performing CPLR 3121(a) exams are subject to disclosure. In *Beaudette v. Infantino*, [73 Misc. 3d 864, 865, 157 N.Y.S.3d 243, 246 \(Sup. Ct., Warren County 2021\)](#), two doctors who were hired by defendant to perform CPLR 3121(a) exams on the plaintiff were served with subpoenas seeking, among other things, “[a]ll billing records, invoices, payment records, checks and 1099 statements for independent medical examination (IME) services performed on behalf of insurance companies and defense attorneys for the years 2014 through 2020.” The doctors moved under [CPLR 2304](#) to quash, modify and fix conditions upon plaintiff's subpoena.

The doctors conceded that, based on the authority of *Loiselle*, the documents sought were subject to disclosure, but attempted to limit production to the five-year period from 2016 through 2020, rather than the seven-year period commencing in 2014. The court denied the motion, finding that the doctors had “not set forth an adequate basis to explain why the disclosure of financial records for the additional two-year period would present an undue burden or otherwise be abusive (*see* CPLR 3103 [a]), when producing five years of records is apparently not.” *Id.* at 867, 157 N.Y.S.3d at 247.

Plaintiff's subpoena also sought disclosure of “[a]ll reports, expert disclosures, and written memoranda for each examination or record review for which [the doctors] received payment” for the seven-year period from 2014 through 2020. *Id.* at 865, 157 N.Y.S.3d at 246. Plaintiff contended, among other things, that these documents would reveal that the doctors' medical opinions are overwhelmingly unfavorable to personal injury plaintiffs and contain boilerplate language. The *Loiselle* court did not address whether disclosure of the medical records relating to the doctors' performance of CPLR 3121(a) exams were subject to disclosure because the issue was not preserved before supreme court in that action.

The *Beaudette* court ruled that the portions of the subpoenas seeking these documents were “directed at minimally relevant information” and should be quashed “‘to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice’ to the nonparties, their prior examinees and the court.” *Id.* at 871-72, 157 N.Y.S.3d at 250-51 (quoting CPLR 3103(a)).

#### **C3101:29A. Experts.**

##### ***Paragraph 1, Subparagraph (i)***

#### **F) Miscellaneous Expert Disclosure Issues**

### **Second Department Affirms Supreme Court's Order Declaring Agreement Between Doctor and Patient Limiting Patient's Ability to Bring Medical Malpractice Actions and Call Expert Witnesses Void and Unenforceable**

In the 2020 Supplementary Practice Commentaries, we discussed the *Mercado* decision from Supreme Court, Suffolk County, which has been affirmed by the Second Department. *See Mercado v. Schwartz*, 209 A.D.3d 30, 174 N.Y.S.3d 82 (2d Dep't 2022). On appeal, the defendants only challenged that portion of supreme court's order that declared unenforceable that part of the agreement that afforded the parties the right to depose expert witnesses, and that declared defendants had waived their right to enforce the provision in any event.

The Second Department agreed that the provision violated New York State's unique public policy as expressed in CPLR 3101(d)(1)(i), which limits the disclosure required for an expert in a medical, dental, or podiatric malpractice action. In such an action, the statute states that a party responding to an expert disclosure request need not provide the name of the expert. This rule is based on, among other things, the legislature's concern that “medical experts might be discouraged from testifying by their colleagues.” *Thomas v. Alleyne*, 302 A.D.2d 36, 45, 752 N.Y.S.2d 362, 369 (2d Dep't 2002). The provision at issue in *Mercado* requiring the plaintiffs to make their expert available for a deposition, and to necessarily disclose the expert's identity, was held to “clearly obviate the intent of the Legislature to permit plaintiffs in medical malpractice actions to avoid disclosing the names of their experts until trial.” *Mercado*, 209 A.D.3d at 38, 174 N.Y.S.3d at 88.

The Second Department also agreed with supreme court's determination “that the defendants waived the provision of the Agreement which provided that each party had the right to depose the other parties' expert witnesses, when

they entered into the preliminary conference stipulation and order, which provides that expert disclosure shall be provided by the parties pursuant to CPLR 3101.” *Id.* at 40, 174 N.Y.S.3d at 89.

*Subdivision (e)*

**C3101:46. Party's Own Statement under Subdivision (e).**

**First Department Affirms Order Precluding Plaintiff from Introducing Defendant's Statement, Which Was Not Timely Disclosed**

As noted in the main Practice Commentary under this section, CPLR 3101(e) enables a party to obtain a copy of her own statement. In *Fowler v. Buffa*, 169 A.D.3d 546, 92 N.Y.S.3d 650 (1st Dep't 2019), supreme court precluded the plaintiff from introducing a disability insurance form alleged to contain a statement against interest of a defendant doctor. The First Department affirmed, concluding that “plaintiff's disclosure of the document less than two days prior to trial was an unfair surprise for which no reasonable excuse was proffered.” *Id.* at 546, 92 N.Y.S.3d at 650.

**C3101:47. Discovery of Insurance Policy.**

**CPLR 3101(f) Amended to Require Production of Existence and Contents of Insurance Policy**

Effective December 31, 2021, as part of the “Comprehensive Insurance Disclosure Act,” CPLR 3101(f) was dramatically amended to affirmatively require “any defendant, third-party defendant, or defendant on a cross-claim or counter-claim” to produce “proof of the existence and contents of any insurance agreement.” We assume the new provision also imposes these obligations on the plaintiff against whom a counterclaim is asserted, but that is not clearly stated in the statute.

The mandatory production must occur within 90 days of the answer, *see* CPLR 320; CPLR 3011; Siegel & Connors, *New York Practice* § 221 (6th ed. 2018), the answer to the third-party complaint or cross-claim, *see* CPLR 3011; Siegel & Connors, *New York Practice* §§ 163, 227, or the answer of an additional party defendant on a counterclaim, *see* CPLR 3019(d); Siegel & Connors, *New York Practice* § 227. The new subdivision requires that the production be made to all parties in the action. *See also* CPLR 2103(e) (requiring that each paper be served “on every other party who has appeared” in the action); Siegel & Connors, *New York Practice* § 203. A party serving a cross-claim would be wise to demand an answer under CPLR 3011, as the service of that answer will trigger the 90-day period in CPLR 3101(f) to provide the insurance disclosure. *See* Siegel & Connors, *New York Practice* § 227.

CPLR 3101(f)(1) now requires production of

proof of the existence and contents of any insurance agreement in the form of a copy of the insurance policy in place at the time of the loss or, if agreed to by such plaintiff or party in writing, in the form of a declaration page, under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment.

If a party agrees to accept a declaration page in lieu of an actual copy of any insurance policy, that party is still entitled to receive any other information required to be provided under CPLR 3101(f)(1). A party may also revoke the agreement to accept a declaration page at any time by serving a notice on a defendant of such revocation, who must then provide “the full copy of the insurance policy in place at the time of the loss.” CPLR 3101(f)(1).

It appears that much of the information required under CPLR 3101(f)(1) can be supplied by providing a “copy of the insurance polic[ies] in place at the time of the loss or the declaration page.” The list of all policies that

must be produced includes, but is not limited to, “all primary, excess and umbrella policies ... insofar as such documents relate to the claim being litigated.” CPLR 3101(f)(1)(i). If an insurance policy is provided, “a complete copy of any policy, contract or agreement under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action” must also be provided, along with indemnification agreements and other documents. CPLR 3101(f)(1)(ii). CPLR 3101(f)(3) carries over a provision from the former subdivision (f) by again clarifying that an application for insurance is not part of the contents of an “insurance agreement” that must be disclosed under CPLR 3101(f)(1). Another carryover from the prior subdivision is now contained in CPLR 3101(f)(4), which cautions that “[i]nformation concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial.”

The name and e-mail address of any assigned insurance adjuster must also be supplied. CPLR 3101(f)(1)(iii). Finally, “the total limits available under any policy, contract or agreement” that can be used to satisfy the judgment, and related information, must also be provided. CPLR 3101(f)(1)(iv). “Disclosure of policy limits under this section shall not constitute an admission that an alleged injury or damage is covered by the policy.” CPLR 3101(f)(3).

A key provision in the new subdivision requires any “defendant, third-party defendant, or defendant on a cross-claim or counter-claim” that was obligated to disclose information under CPLR 3101(f)(1) to “make reasonable efforts to ensure that the information remains accurate and complete.” CPLR 3101(f)(2). A party's duty to supplement disclosure that it has previously provided already exists under CPLR 3101(h), *see* Commentary C3101:49 (“Supplementing Prior Responses”), below; [Siegel & Connors, New York Practice § 352A](#), but CPLR 3101(f)(2) is far more specific. It requires updating information already provided “[1] at the filing of the note of issue, [2] when entering into any formal settlement negotiations conducted or supervised by the court, [3] at a voluntary mediation, and [4] when the case is called for trial, and [5] for sixty days after any settlement or entry of final judgment in the case inclusive of all appeals.” We count at least five junctures at which CPLR 3101(f)(2) mandates a party to supplement insurance information already provided.

In conjunction with the amendment to CPLR 3101(f), the Comprehensive Insurance Disclosure Act also added a new [CPLR 3122-b](#), entitled “Certification of insurance disclosure.” This statute works in tandem with CPLR 3101(f) and requires that any information produced under the new subdivision be accompanied by a certification from both the party and the party's attorney sworn in the form of an affidavit “stating that the information is accurate and complete, and that reasonable efforts have been undertaken, and in accordance with [CPLR 3101(f)(2)'s supplementation requirements] will be undertaken, to ensure that this information remains accurate and complete.” [CPLR 3122-b](#). The statute acknowledges that the certification can be in the form of an “affirmation where appropriate.” [CPLR 3122-b](#); *see* [CPLR 2106\(a\)](#); [Siegel & Connors, New York Practice § 205](#) (noting that affirmations “are the equivalent of affidavits without the need of a swearing ceremony or a notary's signature”).

While the new CPLR 3101(f) and [3122-b](#) certainly strengthen disclosure obligations pertaining to insurance agreements, neither statute prescribes a specific penalty for a violation. That issue will be left to the courts. Under the prior subdivision, courts visited disclosure sanctions under [CPLR 3126](#) against parties who willfully failed to comply with its provisions, and that power likely persists today. *See* Commentary C3101:47 (“Discovery of Insurance Policy”). If a party fails to supplement their insurance disclosures as is required under CPLR 3101(f)(2), the courts might look to the penalties that have been imposed for failure to properly amend or supplement disclosure responses as required under CPLR 3101(h). *See* [Siegel & Connors, New York Practice § 352A](#).

CPLR 3101(f)(5) states that the subdivision's insurance disclosure requirements do “not apply to actions brought to recover motor vehicle insurance personal injury protection benefits under article fifty-one of the insurance law or regulation sixty-eight of title eleven of the New York codes, rules and regulations.” We found the regulations governing “Claims for Personal Injury Protection Benefits” in 11 N.Y.C.R.R. Part 65, Subpart 65-3. These provisions govern “the settlement of claims [by various insurers] for first-party and additional first-party benefits

on account of injuries arising out of the use or operation of a motor vehicle, a motorcycle or an all-terrain vehicle.”  
11 N.Y.C.R.R. § 65-3.1.

The new CPLR 3101(f) and [CPLR 3122-b](#) took effect on December 31, 2021 and apply to all actions commenced on or after that date.

### *Subdivision (h)*

#### **C3101:49B Penalties and Remedies for Failure to Timely Supplement.**

#### **Second Department Affirms Order of Preclusion Against Plaintiff Who Violated Duty to Supplement Disclosure under CPLR 3101(h)**

In *Schleger v. Jurcsak*, 186 A.D.3d 771, 773, 128 N.Y.S.3d 238, 241 (2d Dep't 2020), an automobile accident case, plaintiff provided defendants with medical records and authorizations in 2012. The Second Department ruled that plaintiff had a duty under CPLR 3101(h) to supplement his prior disclosure to the defendants and reveal that he resumed treatment with his neurologist in 2013, as the records and authorizations he provided in 2012 were no longer correct and complete. Furthermore, the court concluded that the failure to disclose the resumption of treatment “materially misled the defendants as to the extent of the plaintiff’s treatment.” *Id.* at 773, 128 N.Y.S.3d at 241. Therefore, the court affirmed supreme court’s order precluding plaintiff’s neurologist from testifying at trial on the issue of damages regarding his treatment of the plaintiff after 2010 and barring the admission of the neurologist’s records regarding the plaintiff’s treatment from 2013 through 2015 into evidence.

#### **C3101:50A Disclosure of Materials on Social Media Sites.**

#### **Second Department Affirms Order Allowing Disclosure of All Relevant Social Media Activity by Plaintiff Up to Three Years Prior to Commencement of Action**

In *Gentile v. Ogden*, 208 A.D.3d 855, 174 N.Y.S.3d 112 (2d Dep't 2022), plaintiff commenced an action against defendants seeking to recover damages for personal injuries arising from a motor vehicle accident. The plaintiff alleged a serious injury under the no fault law claiming that “she sustained severe and permanent injuries to her neck, back, and right shoulder, and that her injuries prevented her from performing her usual and customary daily activities for not less than 90 of the first 180 days following the accident.” *Id.* at 856, 174 N.Y.S.3d at 113. Supreme court granted defendants’ motion under [CPLR 3124](#) and [CPLR 3126](#) to compel plaintiff to comply with their disclosure demands for, among other things, all relevant social media activity from all of her social media accounts from three years prior to the accident through the date of the motion.

In affirming the order, the Second Department cited to New York’s liberal disclosure rules embodied in CPLR 3101(a) and noted that they “do not condition a party’s receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information.” *Id.* at 856, 174 N.Y.S.3d at 114. The *Gentile* court also quoted liberally from the Court of Appeals’ landmark decision in *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157 (2018), discussed in the main Practice Commentary to this section, which instructed that

“[C]ourts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found. Second, balancing the potential utility of the information sought against any specific ‘privacy’ or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed.”

*Gentile*, 208 A.D.3d at 856-57, 174 N.Y.S.3d at 114 (citations omitted).

In affirming the order, the Second Department examined the plaintiff's claimed injuries and damages and concluded that the “defendants demonstrated that the plaintiff's social media accounts were reasonably likely to yield relevant evidence regarding her alleged injuries and loss of enjoyment of life.” *Id.* at 857, 174 N.Y.S.3d at 114; *see also Abedin v. Palominos Osorio*, 188 A.D.3d 764, 766-67, 136 N.Y.S.3d 92, 94 (2d Dep't 2020) (In granting defendant's CPLR 3124 motion to compel plaintiffs to provide authorizations for records from three social media accounts of the infant plaintiff, court concluded that “defendant demonstrated that records from the infant plaintiff's Facebook, Snapchat, and Instagram accounts were ‘reasonably likely to yield relevant evidence’ regarding the alleged emotional and mental trauma that the infant plaintiff suffered from as a result of the subject accident, which allegedly was, in part, evidenced by her social isolation and withdrawal.”).

## 2021

### C3101:22. The “Circumstances” Rule of CPLR 3101(a)(4).

#### Failure to Delineate “Circumstances or Reasons” Requiring Disclosure Leads to Quashing of Subpoena

As we note in the main Practice Commentary, the Court of Appeals has held that CPLR 3101(a)(4) requires a party serving a subpoena, which is necessary to compel disclosure from a nonparty, to “sufficiently state the ‘circumstances or reasons’ underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it) . . . .” *Kapon v. Koch*, 23 N.Y.3d 32, 34, 988 N.Y.S.2d 559, 562 (2014). Although the requirement is a relatively minimal one, there are still many reported cases in which it is unsatisfied.

For example, in *Gandham v. Gandham*, 170 A.D.3d 964, 96 N.Y.S.3d 612 (2d Dep't 2019), a divorce action, the defendant served subpoenas on a nonparty with whom the plaintiff allegedly conducted an adulterous relationship. The nonparty moved under CPLR 2304 to quash the subpoenas and supreme court granted the motion on the grounds that the subpoenas did not comply with CPLR 3101(a)(4) because they did not state the circumstances or reasons the evidence was needed, and that the nonparty demonstrated that the evidence sought was “utterly irrelevant” to the action. On appeal, the Second Department disagreed with supreme court's ruling that the testimony sought from the nonparty was utterly irrelevant, but nonetheless affirmed the order quashing the subpoenas because “defendant failed to provide the nonparty with the required explanation of the circumstances or reasons requiring disclosure either on the face of the subpoenas or in any accompanying material.” *Id.* at 966, 96 N.Y.S.3d at 614; *see also Capacity Grp. of NY, LLC v. Duni*, 186 A.D.3d 1482, 1483, 131 N.Y.S.3d 373, 375 (2d Dep't 2020) (“[T]he subpoenas seeking the testimony of numerous nonparties were defective, since the plaintiff failed to provide the nonparties with a sufficient explanation of the circumstances or reasons requiring disclosure either on the face of the subpoenas or in any accompanying material.”).

#### Third Department Acknowledges Appellate Division Split on Point and Rules that Financial Records of Doctors Performing CPLR 3121(a) Exams Are Subject to Disclosure

In *Loiselle v. Progressive Casualty Insurance Co.*, 190 A.D.3d 17, 135 N.Y.S.3d 500 (3d Dep't 2020), plaintiff-insured was in an accident with an uninsured driver and sued his insurer for payment under the supplemental uninsured motorist coverage in the policy it issued. Defendant served plaintiffs with CPLR 3101(d)(1)(i) expert witness disclosures for two doctors who had examined plaintiff at defendant's request. *See* CPLR 3121(a); *Siegel & Connors, New York Practice* § 363. Plaintiffs served a subpoena on a nonparty seeking 1099 forms provided to the two doctors for compensation they received from the defendant insurer during 2015, 2016 and 2017, and “[c]opies of all records relating to the performance by [doctor] of independent medical examinations performed for and/or on behalf of [defendant] for calendar years 2015, 2016 and 2017.” *Loiselle*, 190 A.D.3d at 19, 135 N.Y.S.3d at 501.

The *Loiselle* court observed that there is a split of authority among the other departments regarding whether certain similar financial records in the possession of a nonparty are subject to disclosure under CPLR 3101(a)(4), and that it posed an issue of first impression in the Third Department. The Fourth Department has held that payment and billing records for examinations performed by a nonparty physician on behalf of insurance companies are subject to disclosure to “assist [counsel] in preparing questions for cross-examination of [the physician] concerning his [or her] bias or interest.” *Porcha v. Binette*, 155 A.D.3d 1676, 1677, 63 N.Y.S.3d 793, 794 (4th Dep’t 2017). The plaintiffs in *Loiselle* contended that the records were relevant in their action for the very same reason.

In granting the defendant’s motion to quash the subpoena, the supreme court relied upon earlier decisions from the First and Second Departments holding that a plaintiff could not seek a nonparty physician’s financial records “simply for the purpose of gaining information to impeach the general credibility of [the physician].” *Pernice v. Devora*, 238 A.D.2d 558, 559, 657 N.Y.S.2d 70, 71 (2d Dep’t 1997); see *Fazio v. Fed. Express Corp.*, 272 A.D.2d 259, 260, 708 N.Y.S.2d 71, 72 (1st Dep’t 2000) (“The use of a judicial subpoena for the sole purpose of showing that an examining physician’s history of financial compensation indicates a defense-oriented predisposition--in other words, for the purpose of impeaching the witness’ general credibility--is improper.”).

The Third Department reversed that portion of the order granting the motion to quash and aligned itself with the Fourth Department’s position, concluding

the 1099 forms that plaintiffs seek would disclose the amount of compensation that [the examining physicians] received for performing evaluations on defendant’s behalf and, with questioning, may reveal a financial incentive that the physicians have in testifying. A financial incentive is a relevant consideration in “ascertain[ing] any possible bias or interest on the part of [the physicians]”

*Loiselle*, 190 A.D.3d at 20, 135 N.Y.S.3d at 502.

Given the liberal interpretation of the terms “material and necessary” in CPLR 3101(a) and the general ability of a party to test an adverse witness’s bias and interest, the court ruled that the financial records were subject to disclosure under CPLR 3101(a)(4). As to disclosure of the medical records relating to the physicians’ performance of CPLR 3121(a) examinations in 2015, 2016 and 2017, the Third Department ruled that plaintiff had not properly preserved this argument before supreme court and therefore declined to address it.

## 2020

### C3101:11A. International Disclosure.

#### **First Department Denies Plaintiff-Wife’s Request to Depose Defendant-Husband’s Brother in France**

We note in the main Practice Commentary that the First Department has applied a more stringent test when a party seeks disclosure from an international source, as compared with the liberal standard of relevance under CPLR 3101(a). See *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 32 A.D.3d 150, 156, 816 N.Y.S.2d 470, 475-76 (1st Dep’t 2006). In *Azria v. Azria*, 184 A.D.3d 419, 125 N.Y.S.3d 692 (1st Dep’t 2020), the plaintiff-wife moved for the issuance of letters rogatory under CPLR 3108 to depose the defendant-husband’s brother, who was residing in France. The court applied the standard set forth in *Richbell* and concluded that the plaintiff failed to demonstrate that the information she sought via the international deposition was “crucial to the resolution of a key issue in this litigation.” *Id.* at 419, 125 N.Y.S.3d at 693.

The plaintiff contended that two loans the husband received from a revocable trust, of which he and his brother were co-trustees, were made in violation of the terms of the trust. The court noted, however, that “the issue of whether the husband violated a trust instrument or breached his fiduciary duty in his role as a trustee is not relevant in this matrimonial proceeding.” *Id.* at 420, 125 N.Y.S.3d at 693. Furthermore, the plaintiff failed to show why she did not already possess the necessary information for the arguments she sought to make in the matrimonial action because the husband contended he already produced account statements from the trust for the relevant period and she received duplicates of such statements and updated records of account activity through a subpoena.

### **C3101:25 “Privileged Matter” under CPLR 3101(b).**

#### **Invoices for Legal Services May Contain Privileged Information**

In *Teran v. Ast*, 164 A.D.3d 1496, 84 N.Y.S.3d 504 (2d Dep’t 2018), the Second Department reversed supreme court’s order granting defendant’s motion to compel the production of various documents withheld from disclosure by a codefendant, and denying the codefendant’s motion for a protective order. The documents at issue included files maintained by the codefendant’s attorneys, unredacted copies of its attorneys’ bills, and the files maintained by its insurance carrier.

The Second Department noted that while CPLR 3101(a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action,” this dictate is tempered by the absolute immunity provisions in CPLR 3101(b) and (c) for privileged materials and an attorney’s work product, and by the qualified immunity provisions in CPLR 3101(d)(2) for materials prepared in anticipation of litigation. The *Teran* decision makes the point that invoices for legal services can contain material protected from disclosure under CPLR 3101(b), holding that it was improper for the supreme court to order the production of unredacted copies of these documents “because such disclosure would reveal factual investigation and legal work done by counsel, which is privileged material.” *Teran*, 164 A.D.3d at 1499, 84 N.Y.S.3d at 506. Therefore, the Second Department granted the codefendant’s motion for a protective order.

### **C3101:29A. Experts.**

#### **Paragraph 1, Subparagraph (i)**

#### **F) Miscellaneous Expert Disclosure Issues**

#### **Court Declares Agreement Between Doctor and Patient Limiting Patient’s Ability to Bring Medical Malpractice Actions and Call Expert Witnesses Void and Unenforceable**

In *Mercado v. Schwartz*, 63 Misc.3d 362, 92 N.Y.S.3d 582 (Sup. Ct., Suffolk County 2019), the court addressed the novel issue of whether an agreement between the parties signed before the cause of action accrued can limit the qualifications of experts that can be used in a future medical malpractice action. In *Mercado*, plaintiff patient and defendant doctor, who was board certified by the American Board of Medical Specialties in Obstetrics and Gynecology, signed an “Agreement as to Resolution of Concerns” prior to defendant performing surgery on plaintiff. In the agreement, plaintiff promised “not to initiate or advance, directly or indirectly, any meritless or frivolous claims of medical malpractice against the [defendant] Physician.” *Id.* at 369, 92 N.Y.S.3d at 588.

The agreement also contained several provisions pertaining to expert witnesses that could be used in any ensuing litigation, which read as follows:

[FIRST] Should I initiate or pursue *a meritorious medical malpractice claim against Physician* I agree to use as expert witnesses (with respect to issues concerning the standard care), only physicians who are board certified by the American Board of Medical Specialties in Obstetrics and Gynecology with a subspecialty certification in Gynecologic Oncology. Further, I agree that these physicians retained by me or on my behalf to be expert witnesses will be in good standing of the American Board of Obstetrics and Gynecology.

[SECOND] Each party agrees that his/her counsel shall have the right and be free to depose the other party's expert witness(es) at least 120 days before any schedule [sic] trial date.

[THIRD] Each party agrees that a conclusion by a specialty society affording due process to an expert will be treated as supporting or refuting evidence of a frivolous or meritless claim.

*Id.* at 369, 92 N.Y.S.3d at 588.

The plaintiff sued the defendant for medical malpractice and moved under CPLR 3001 for a declaration that the agreement was void and unenforceable. The court acknowledged that parties are generally permitted to “stipulate away statutory, and even constitutional rights,” but noted “that such deference is limited where ‘a question of public policy is involved.’” *Id.* at 369-70, 92 N.Y.S.3d at 588.

The court observed that the qualification of an expert witness is a determination within the sound discretion of the trial court and concluded that the agreement “effectively stripp[ed]” the court of this power. *Id.* at 372, 92 N.Y.S.3d at 590. For example,

application of the provision would mean that plaintiffs would be prevented from designating as experts physicians whose qualifications meet all the legal criteria for the giving of expert testimony “with respect to issues concerning the standard care [sic]” but whose lack of certification in an extraneous or irrelevant area of practice would contractually bar them from testifying. Worse, it could mean that the only available expert witnesses plaintiffs might be contractually permitted to call to testify on their behalf on those issues could be physicians who cannot give relevant and receivable expert testimony in this case because they lack the necessary training and experience to testify with respect to those matters that are relevant to the plaintiffs' claims.

*Id.* at 371-72, 92 N.Y.S.3d at 590.

The court also concluded that the agreement could infringe on the right of a party not to reveal the name of a witness in its expert disclosure in a medical malpractice action. *See* CPLR 3101(d)(1)(i) (“In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.”). The court found that the agreement's provision

requiring that the plaintiff's medical experts share precisely the medical specialty and subspecialty board certifications of the defendant doctor, serves both to narrow the pool of otherwise qualified medical experts who could be retained by plaintiffs and to increase the likelihood that any retained medical expert will be familiar with Dr. Schwartz or his close associates.

*Id.* at 374, 92 N.Y.S.3d at 591. This, in turn, could more easily allow the defendant doctor and his associates to discourage designated medical experts from testifying. In sum, the court ruled that the practical effect of the first provision of the agreement violated the State's public policy regarding the use of expert witnesses in litigation.

The *Mercado* court also described the preliminary conference stipulation and order, “so ordered” by the court, which stated that “[e]xpert witness disclosure shall be conducted pursuant to CPLR 3101.” *Id.* at 374, 92 N.Y.S.3d

at 592. Despite CPLR 3101(d)'s specific protocol for disclosure of expert witnesses in medical malpractice actions, the preliminary conference order did not reference the agreement between the parties and its alternate procedures for the use of expert witnesses. The court also emphasized that defendants did not seek to invoke the terms of the agreement until after the defendant doctor's deposition, which was conducted more than five months after the date of the preliminary conference order. The court ruled that:

Given the ample scope of the expert disclosure afforded by CPLR § 3101(d), as well as the safeguards it provides to the parties, even if the Agreement form were otherwise enforceable--and it is not, for the reasons stated supra and infra--it would be improvident at this juncture to alter the Preliminary Conference Stipulation and Order to replace its provision for expert disclosure with the second portion of the Agreement form.

*Id.* at 375, 92 N.Y.S.3d at 592.

Turning to the third provision in the agreement, the court ruled that it “is so vague and ambiguous as to render it unenforceable,” noting that “neither the Court nor the parties can reasonably ascertain how to interpret [it].” *Id.* at 375-77, 92 N.Y.S.3d at 592-94. Furthermore, the court concluded that the third provision “is unenforceable as violative of public policy” to the extent it was intended to override the procedures adopted by the legislature and the courts to address frivolous conduct in medical malpractice actions. *See* CPLR 3012-a (requiring a certificate of merit to accompany the complaint in medical, dental and podiatric malpractice actions); CPLR 8303-a (addressing frivolous pleading in personal injury and wrongful death actions); 22 N.Y.C.R.R. § 130-1.1 (addressing frivolous conduct in litigation); David D. Siegel & Patrick M. Connors, *New York Practice* § 414A (Thomson 6th ed. 2018) (“‘Frivolity’ Sanctions”).

Based on the above reasoning, the court granted plaintiff's motion for a declaration that the agreement is void and unenforceable.

One may wonder whether the defendant doctor could have secured the benefits of the agreement in an arbitral forum. If an agreement similar to that in *Mercado* contained a broad arbitration clause, there is caselaw to support the proposition that the clause would be enforceable. *See* *Friedman v. Hebrew Home for Aged at Riverdale*, 131 A.D.3d 421, 13 N.Y.S.3d 896 (1st Dep't 2015); *Siegel & Connors, New York Practice* § 607. If an arbitrator enforced the terms of the agreement and rendered an award, it would be exceedingly difficult to obtain vacatur of the award. *See* *Siegel & Connors, New York Practice* § 602.

2019

### **C3101:12 Disclosure for Use on a Motion.**

#### **Third Department Holds that Plaintiff Provided “Sufficient Start” Required to Warrant Further Disclosure to Establish Longarm Jurisdiction**

In the main Practice Commentary, we discuss the situation in which limited disclosure can be permitted to obtain information to oppose a CPLR 3211(a)(8) motion to dismiss for lack of personal jurisdiction. *See* CPLR 3211(d); *Siegel & Connors, New York Practice* § 257. In *Archer-Vail v. LHV Precast Inc.*, 168 A.D.3d 1257, 92 N.Y.S.3d 434 (3d Dep't 2019), the Third Department affirmed supreme court's order denying defendant's motion to dismiss based on lack of personal jurisdiction pending further disclosure on the issue. The court acknowledged that plaintiff bore the burden of proof on establishing personal jurisdiction, but noted that in opposing a motion to dismiss pursuant to CPLR 3211(a)(8), plaintiff did not have the burden of “making a prima facie showing of personal jurisdiction; rather, plaintiff need only demonstrate that it made a ‘sufficient start’ to warrant further discovery.” *Archer-Vail*, 168 A.D.3d at 1261, 92 N.Y.S.3d at 438-39.

Plaintiff was relying on CPLR 302(a)(3), a provision in New York's longarm statute that requires satisfying several elements to establish jurisdiction. See *Siegel & Connors, New York Practice* § 88 (discussing CPLR 302(a)(3)). Among other things, “[p]laintiff submitted evidence establishing that [defendant] maintained an interactive website, which marketed and made its products available to New York customers, provided for custom designs tailored to the needs of the purchaser and highlighted its prior sales to New York and other interstate customers.” *Archer-Vail*, 168 A.D.3d at 1261-62, 92 N.Y.S.3d at 439. Plaintiff also relied on affidavits submitted by defendant to establish that it derived substantial revenue from goods used or consumed in the state, see CPLR 302(a)(3)(i), or from interstate commerce, and that it should have reasonably expected its allegedly negligent acts to have consequences in this State. See CPLR 302(a)(3)(ii). Based on these submissions, the Third Department ruled that plaintiff made “the ‘sufficient start’ required to warrant further discovery on the issue of whether personal jurisdiction may be properly exercised over [defendant] under CPLR 302(a)(3).” *Archer-Vail*, 168 A.D.3d at 1261-62, 92 N.Y.S.3d at 439.

### C3101:29A Experts.

#### D) Failure to Comply with CPLR 3101(d)(1)(i) Demand

##### **Third Department Rules that Each Defendant in Multi-Defendant Action Is Entitled to Expert Disclosure Specific to Her**

In *Kanaly v. DeMartino*, 162 A.D.3d 142, 77 N.Y.S.3d 234 (3d Dep't 2018), plaintiff sued defendants for medical malpractice. The defendants argued that plaintiff's response to their expert disclosure demands did not include reasonable detail on the subject matter and substance of the facts and opinions of each expert as required by CPLR 3101(d)(1)(i) because the disclosure was essentially identical for each expert and as to each defendant.

The Third Department ruled that supreme court did not abuse its discretion in ordering plaintiff to supplement her expert disclosure by making it specific to each defendant. Plaintiff argued that defendants were precluded from raising this argument because supreme court had previously decided that the allegations in her second supplemental bill of particulars were adequate. The court noted that plaintiff appeared to have copied those same allegations directly into her expert disclosure. The Third Department ruled that supreme court's prior decision on the propriety of her second supplemental bill of particulars was not dispositive of the adequacy of the expert disclosure “because a bill of particulars serves a different purpose than an expert witness disclosure” and “plaintiff's ‘undifferentiated aggregation of the claimed negligent acts and omissions of all defendants’ did not serve the purpose of either a bill of particulars or an expert disclosure.” *Kanaly*, 162 A.D.3d at 147, 77 N.Y.S.3d at 238.

Furthermore, plaintiff's expert disclosure did not comply with CPLR 3101(d)(1)(i) because it did not contain reasonable detail concerning each expert's opinion. Instead, the expert disclosure alleged essentially the same acts of negligence as to each defendant, even though each allegation could not possibly apply to every defendant. Given these deficiencies, the Third Department observed:

The nature of the disclosure here “essentially tell[s] the defendants nothing about what they are supposed to be defending.” It is unfair to require one defendant to prepare to defend against allegations that plaintiff only intends to assert against the codefendants. Instead of a blended aggregation of claims, as plaintiff provided, each defendant was entitled to a disclosure specific to him, her or it. Thus, Supreme Court did not abuse its discretion by requiring plaintiff to revise her expert disclosure to differentiate and specify which allegations of negligence apply to each defendant, and to delete any alleged act of negligence that is not applicable to any particular defendant.

*Id.* at 147-48, 77 N.Y.S.3d at 238.

**I) Disclosure of Experts Used on a Motion for Summary Judgment****Court Considers Expert Reports Submitted in Opposition to Motion for Summary Judgment Despite Failure to Comply with Commercial Division Rules Governing Expert Disclosure**

In *Framan Mechanical, Inc. v. Dormitory Authority of State of New York*, 2019 WL 1747007 (Sup. Ct., Albany County 2019), a case that was assigned to the Commercial Division of the Supreme Court, defendant claimed that the parties opposing its motion for summary judgment were precluded from offering expert reports because they failed to provide expert disclosure in accordance with Rule 13(c) of the Rules of the Commercial Division of the Supreme Court. 22 N.Y.C.R.R. § 202.70(g), Com. Div. Rule 13(c). Rule 13(c) requires the parties to complete expert disclosure, “including the identification of experts, exchange of reports, and depositions of testifying experts,” within four months from the completion of fact discovery. *Id.* The rule also provides that “[e]xpert disclosure provided after these dates without good cause will be precluded from use at trial.” *Id.*

As we note in the main Practice Commentary under this subsection, CPLR 3212(b) was amended in 2015 by adding a new third sentence that states that “[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.” The *Framan* court concluded that Commercial Division Rule 13(c), which supplements CPLR 3101(d)(1)(i)'s expert disclosure provisions in the commercial division, “should be read in harmony with the statutory law enacted by the State Legislature” in CPLR 3212(b). *Framan Mech.*, 2019 WL 1747007, at \*7. Therefore, while the parties opposing defendant's summary judgment motion did not timely identify their experts under Commercial Division Rule 13(c), the court ruled that under CPLR 3212(b) it could not decline to consider any expert proof submitted in opposition to the defendant's summary judgment motion solely on that ground.

**Third Department Applies 2015 Amendment to CPLR 3212(b), Ruling That Supreme Court Properly Considered Expert Affidavit in Spite of Violation of Court Order and Local Rule Governing Timing of Expert Disclosure**

In *Washington v. Trustees of the M.E. Church of Livingston Manor*, 162 A.D.3d 1368, 79 N.Y.S.3d 720 (3d Dep't 2018), the Third Department applied the 2015 amendment to CPLR 3212(b), which prevents the court from declining to consider an expert affidavit on a motion for summary judgment solely because expert disclosure under CPLR 3101(d)(1)(i) “was not furnished prior to the submission of the affidavit.” The defendant argued that, notwithstanding the statute, supreme court erred in considering the plaintiff's expert affidavit because she not only violated a court order directing service of expert disclosure by a date certain, but also failed to comply with the Third Judicial District's Expert Disclosure Rule. That local rule requires service of expert disclosure, at the latest, within 60 days after the note of issue is filed. See *Siegel & Connors, New York Practice* § 348A, n. 20-21.

The Third Department observed that because the court order and the note of issue were not included in the record on appeal, it could not adequately review whether plaintiff complied with the order or local rule. Nonetheless, it noted that “Supreme Court was vested with broad discretion in addressing this expert disclosure issue, and we find no abuse of that discretion.” *Washington*, 162 A.D.3d at 1369, 79 N.Y.S.3d at 721.

**C3101:37 Burden of Proof on Issue of Immunity.****Second Department Holds That Defendant's Conclusory and Generalized Objections to Plaintiff's Document Demands Were Insufficient to Establish the Qualified Immunity Offered by CPLR 3101(d)(2)**

In the main Practice Commentary to this section, we note that the party opposing disclosure under CPLR 3101(d)(2) bears the burden of establishing that the statement is subject to the qualified immunity offered by this provision. We also suggest that as part of its burden, the resisting party should be required to produce a statement in compliance with CPLR 3122(b). See *Siegel & Connors, New York Practice § 362* (discussing requirements of privilege log under CPLR 3122(b)).

The burden of proof issue arose in *Peralta v. New York City Housing Authority*, 169 A.D.3d 1071, 95 N.Y.S.3d 119 (2d Dep't 2019), where plaintiffs sued defendant to recover for personal injuries sustained in a fire at an apartment building owned by defendant. Plaintiffs' CPLR 3120(1)(i) document demand sought “any origin and cause reports, engineering reports, investigation notes, witness statements, investigation reports, and photographs of the apartment in the possession of the defendant or its investigators.” *Peralta*, 169 A.D.3d at 1073, 95 N.Y.S.3d at 122. In response, defendant's attorney submitted an affidavit stating that “[a]ll of the investigation notes, witness statements, investigation reports and photographs that were taken of the fire apartment were taken under [his] direction and control, were prepared in anticipation of litigation and consist of privileged, attorney work product.” *Id.* In addition, defendant's property manager submitted an affidavit stating that “‘[t]he NYC Fire Department takes custody of the apartment when the fire occurs,’ that ‘[a]ny subsequent investigation work is performed at the direction of [the defendant's] attorneys,’ and that ‘[the defendant] did not perform any investigation regarding the fire that occurred ... that was separate from any investigation performed by [the defendant's] attorneys.’” *Id.*

The Second Department observed that the party asserting the protections of CPLR 3101(d)(2) must “‘identify[ ] the particular material with respect to which the privilege is asserted and *establish[ ] with specificity that the material was prepared exclusively in anticipation of litigation.*” *Id.* at 1074, 95 N.Y.S.3d at 122. The court held that “defendant's conclusory submissions [and generalized assertions] fell woefully short of meeting its burden of establishing with specificity that the materials sought ... were prepared exclusively in anticipation of litigation.” *Id.* at 1074, 95 N.Y.S.3d at 123. Neither the affidavit of defendant's attorney nor that of its property manager specifically identified any particular documents that were prepared in anticipation of litigation or “the authors, recipients and dates on which they were prepared and the impetus for their preparation.” *Id.* In that defendant did not meet its burden to establish that the information requested was protected under CPLR 3101(d)(2), the Second Department also concluded that the burden never shifted to the plaintiffs to establish that the qualified immunity offered by this provision should give way because plaintiffs had a substantial need for the materials and could not obtain them without undue hardship.

Although the Second Department did not cite to the procedure outlined in CPLR 3122(b) for compiling a privilege log, any party seeking to gain the qualified immunity offered by CPLR 3101(d)(2) and comply with the *Peralta* decision would do best by complying with CPLR 3122(b)'s dictates.

### **C3101:39 Immunity of Item Procured Through Disclosure Device.**

#### **First Department Rules that Notes of Plaintiff's IME Observer Are Protected as Material Prepared in Anticipation of Litigation Under CPLR 3101(d)(2)**

In the main Practice Commentary in this section, we note that reports resulting from the use of disclosure devices will often enjoy the status of material prepared in anticipation of litigation under CPLR 3101(d)(2). This is once again demonstrated in *Markel v. Pure Power Boot Camp, Inc.*, 171 A.D.3d 28, 96 N.Y.S.3d 187 (1st Dep't 2019), in which plaintiff commenced an action seeking damages for knee injuries that she allegedly sustained while participating in an exercise drill at defendants' boot camp style gym. Plaintiff appeared for a CPLR 3121(a) physical examination by an orthopedist designated by defendants, also known as an independent medical exam, or “IME.” Plaintiff's attorney hired an individual from “IME Watchdog,” an IME observer, to be present with plaintiff

while she was examined. See [CPLR 3121 Practice Commentaries, C3121:1](#) (“Physical and Mental Examinations, Generally”).

Six months later, defendants served a subpoena on the IME observer for the production of her notes, reports, memoranda, photographs, and “any other relevant material” in her possession. [Markel, 171 A.D.3d at 29, 96 N.Y.S.3d at 188](#). The First Department, in a case of first impression in that court, held that the materials were protected under CPLR 3101(d)(2) as materials prepared in anticipation of litigation and, therefore, the subpoena should have been quashed and plaintiff’s motion for a protective order granted.

The court opined that the notes would generally be considered relevant, or “material and necessary,” under CPLR 3101(a). Therefore, the plaintiff bore the burden of establishing that the notes were protected by one of the immunity provisions in CPLR 3101(b), CPLR 3101(c), or CPLR 3101(d)(2). See [Forman v. Henkin, 30 N.Y.3d 656, 661-62, 70 N.Y.S.3d 157, 162 \(2018\)](#); Commentary C3101:24 (“The Areas Excluded from Disclosure”); [Siegel & Connors, New York Practice § 348 \(January 2020 Supplement\)](#). The First Department concluded that the information contained in the observer’s notes and other materials were not protected by either the attorney-client privilege under CPLR 3101(b) or the attorney work product privilege in CPLR 3101(c). The observer’s materials were obviously not generated by the plaintiff’s attorney, a precondition to protection under CPLR 3101(c). See Commentary C3101:28 (“Scope of ‘Work Product’ under Subdivision (c)”). Furthermore, they did not contain confidential communications between a lawyer and client for legal advice, a precondition to protection under CPLR 3101(b). See Commentary C3101:25 (“‘Privileged Matter’ under CPLR 3101(b)”). Nonetheless, the court deemed the IME observer to be an agent of the plaintiff’s attorney and, therefore, ruled that the notes and materials constituted materials “prepared in anticipation of litigation or for trial” under the qualified immunity protection afforded by CPLR 3101(d)(2). This immunity can only be overcome if the party seeking the materials can demonstrate a substantial need for them and the inability, “without undue hardship to obtain the substantial equivalent of the materials by other means.” CPLR 3101(d)(2).

The First Department concluded that the defendants did not demonstrate a substantial need for the IME observer’s notes and materials or why they were “unable without undue hardship to obtain the substantial equivalent of the materials by other means.” CPLR 3101(d)(2). The court reasoned that the defendants’ doctor who conducted the [CPLR 3121\(a\)](#) examination could provide defendants with any information concerning what transpired at that event. “In general,” the court ruled that “under these circumstances, defendants’ access to their own doctor will seriously undermine any argument that there is a substantial need for the IME observer’s materials because the information contained therein is not otherwise available without undue hardship.” [Markel, 171 A.D.3d at 32, 96 N.Y.S.3d at 190](#).

The court stressed that an important consideration in its ruling was plaintiff’s representation that the IME observer will not be testifying at trial on plaintiff’s affirmative case. It left open the possibility that a different result might be appropriate if “the IME observer expected to be, or actually is, called as a witness at any time during the case.” *Id.*, [96 N.Y.S.3d at 190](#); see [Sheehan v. 30 Park Place Residential LLC, 171 A.D.3d 28, 96 N.Y.S.3d 187 \(Sup. Ct., New York County 2019\)](#) (denying plaintiff’s motion to quash subpoena duces tecum served on IME Watchdog Advocate because advocate was expected to testify at trial, presumably to rebut any inaccurate testimony “from defendants’ examining physicians”).

The *Markel* decision is also discussed in Michael J. Hutter, ‘Markel’ and the Discovery ‘Privileges’, N.Y.L.J., June 6, 2019, at 3, col. 1.

### **C3101:50A Disclosure of Materials on Social Media Sites.**

**First Department Permits Defendant's Data Mining Company to Access Plaintiff's Social Media Accounts**

In *Vasquez-Santos v. Mathew*, 168 A.D.3d 587, 92 N.Y.S.3d 243 (1st Dep't 2019), plaintiff was a semi-professional basketball player who alleged that he became disabled as a result of an automobile accident and could no longer play the sport. He was apparently confronted with pictures depicting him playing basketball that were posted on social media after the accident. He testified that the pictures were from games played before the accident, but the First Department ruled that defendant was entitled to disclosure to rebut plaintiff's contentions and defend against plaintiff's claims of injury.

Plaintiff obviously did not take many of the pictures himself, but the court found that to be of no significance. He was "tagged," thereby permitting him to access the pictures, and several others were sent to his phone. Defendant unsuccessfully moved before the supreme court for an order granting permission to her expert, a third-party data mining company, to access and data mine all laptops, smart phones, cameras, Facebook accounts, email accounts, WhatsApp, Twitter, and social media accounts used by plaintiff to obtain photographs of him engaging in physical activities. The First Department reversed supreme court and, citing to the Court of Appeals decision in *Forman* discussed in the main Practice Commentary to this section, granted defendant the requested access to plaintiff's accounts and devices. The court limited the permitted disclosure to only those items posted or sent after the accident that discussed or showed plaintiff engaging in basketball or other similar physical activities. *See also Doe v. Bronx Preparatory Charter Sch.*, 160 A.D.3d 591, 591, 76 N.Y.S.3d 126, 127-28 (1st Dep't 2018) ("Defendant's demands for access to social media accounts for five years prior to the incident, and to cell phone records for two years prior to the incident, were overbroad and not reasonably tailored to obtain discovery relevant to the issues in the case.").

**Defendants Precluded from Introducing Facebook Printouts  
Unless Person Who Procured Them Is Produced for a Deposition**

The decision in *Lantigua v. Goldstein*, 149 A.D.3d 1057, 53 N.Y.S.3d 163 (2d Dep't 2017), addressed a disclosure dispute in a medical malpractice action in which plaintiff was confronted at his deposition with printouts of 13 pages that allegedly were from his Facebook account. The printouts depicted a gentleman of many pursuits who "allegedly talked about going out to a bar, having a great workout, and crossing the Williamsburg Bridge three times." The plaintiff acknowledged that he had used a Facebook account, but denied that the printouts were from his account and denied making the statements.

The plaintiff then served disclosure requests seeking information about the individual who obtained the printouts and requesting a deposition of this witness. When responses were not forthcoming, plaintiff moved to, among other things, preclude the defendants from offering as evidence at trial the printouts of the Facebook pages.

The Second Department reversed the supreme court, ruling that the defendants should be precluded from offering as evidence at trial the printouts of Facebook pages that were marked at plaintiff's deposition unless those defendants produced the person who obtained the printouts for a deposition. The court emphasized that the plaintiff denied that the printouts were from his Facebook account, and he had no other means to disprove their authenticity.

**PRACTICE COMMENTARIES**

by Professor Patrick M. Connors

2018

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- C3101:50A. Disclosure of Materials on Social Media Sites.

***In General***

**C3101:1 Structure of Article 31.**

Litigators in New York State courts will generally attest that Article 31 of the CPLR is their major preparation tool. The disclosure article is the most important, if not the exclusive, means whereby a party ascertains the merits of an adversary's position. It also provides the major thoroughfare for obtaining information and evidence from parties and nonparties for use at trial. With such a mission, the structure of Article 31 should be well understood by the practitioner.

CPLR 3101(a) sounds the keynote for the entire article and has pervasive bearing on all of it. It establishes the broad scope of disclosure, allowing a party to obtain “all matter material and necessary in the prosecution or defense of an action.” CPLR 3101(a) also delineates various categories of parties and nonparties from whom the disclosure can be obtained.

The subsequent sections in Article 31 are devoted largely to supplying the practitioner with various devices to obtain the disclosure authorized in CPLR 3101(a). These range from the ordinary deposition, which permits the lawyer in advance of trial to elicit oral responses to specific questions, to the equally important discovery and production device (“discovery and inspection”), which enables the lawyer to secure documents and other “things” from those who possess them. Other sections of the article supply incidental instruction regarding the exploitation of the disclosure devices and the ultimate use of the fruits of disclosure at the trial or on a motion.

Most disclosure is obtained merely through the service of a notice on a party or a subpoena on a nonparty. Happily, the court is not normally involved in supervision or approval of disclosure, yet two common situations require judicial intervention. The first allows the party or person from whom disclosure is sought to request the court to “shield” it from the requested disclosure. Acknowledging that the unfettered use of the disclosure devices can in a given instance work to the undue detriment of a litigant with limited resources, or otherwise be used more for the purpose of harassment and delay than the legitimate ends of litigation, Article 31 supplies a device known as a “protective order” in [CPLR 3103](#). It affords the court wide discretion in preventing abusive resort to the disclosure devices and allows the court to suppress information improperly obtained. It has general application to all of Article 31, and so it, too, should be kept in mind by lawyers who want to familiarize themselves with the article's structure.

The second situation involving judicial intervention allows a party to, in effect, use certain sections of Article 31 as a “sword” to compel compliance with a disclosure demand. [CPLR 3124](#) and [3126](#) supply broad authority to the courts to order a recalcitrant person to provide the requested disclosure. [CPLR 3126](#) also grants broad discretion to the court to impose penalties on a party who refuses to obey an order for disclosure or willfully fails to disclose information that should have been produced.

The CPLR contemplates that disclosure will be sought during the pretrial period, that is, between commencement of the action and the moment it is ready for trial. When disclosure is sought outside these parameters, it usually requires a court order and a greater showing of need for the material. The Uniform Rules applicable in the particular court may contain a “certificate of readiness” requirement that mandates that all disclosure proceedings be concluded before the case is put on the calendar. This, in turn, means that the actual period of disclosure is well in advance of the trial (depending on calendar congestion in the particular court). As a practical matter, at least when the attorneys are diligent, disclosure is sought and completed during the months immediately following the joinder of issue in the action.

Practitioners must also take note of the rules and practices of the individual trial courts in their areas. The Uniform Rules applicable to the particular category of court must be consulted, and so must any individual rules or “instruction sheets” or other compilations of the court or of the individual judge who has the case. For example, the Rules of the Commercial Division of the Supreme Court contain a growing number of provisions that address disclosure issues. *See* David D. Siegel & Patrick M. Connors, *New York Practice* § 12A (6th ed. 2018). The discussion below concentrates on Article 31 of the CPLR, but reference is made to applicable Uniform Rules and court procedures, which on occasion provide more detail than the relevant CPLR provision, and sometimes even conflict with it.

### **C3101:2 Priorities in the Use of Disclosure Devices.**

There is no priority set forth in the CPLR, no sequence in which a party must use any one disclosure device before another. As long as the instructions contained in the provision supplying the particular device are followed, it may be employed without first resorting to another. Generally, there is no limit as to the number of disclosure devices one party may use against another, other than one the court may wish to impose by ad hoc protective order under [CPLR 3103\(a\)](#). Indeed, Article 31 does not even restrict the number of times a single disclosure device may be used against the same person, although attempting duplicative use without some special reason can easily invoke the protective order provision of [CPLR 3103\(a\)](#).

“A party is generally free to choose both the discovery devices it wishes to use and the order in which to use them.” *Edwards-Pitt v. Doe*, 294 A.D.2d 395, 396, 741 N.Y.S.2d 909 (2d Dep't 2002); see *Nimkoff v. Central Park Plaza Assoc., LLC*, 123 A.D.3d 679, 680, 997 N.Y.S.2d 698, 699 (2d Dep't 2014).

This freedom of choice is, of course, subject to judicial intervention if the process is abused (see [CPLR 3103](#), subd. [a]). The courts may direct the priority by which a party may use the disclosure devices, if it finds on the particular facts that expedition will result from the use of one device prior to another.

*Barouh Eaton Allen Corp. v. I.B.M. Corp.*, 76 A.D.2d 873, 874-875, 429 N.Y.S.2d 33, 35 (2d Dep't 1980).

The supreme court's discretion to govern the timing and use of disclosure devices may be somewhat limited by the Court of Appeals decision in *Tran v. New Rochelle Hosp.*, 99 N.Y.2d 383, 756 N.Y.S.2d 509 (2003). With regard to the specific disclosure device in [CPLR 3101\(i\)](#), providing for disclosure of films, photographs, videotapes, etc., the Court held that it requires full disclosure of any materials sought pursuant to it, with no limitation as to timing. There is an open question as to whether *Tran's* reasoning curbs the supreme court's discretion to place limits on the timing and use of other disclosure devices. See [Commentary C3101:50](#), below. It appears that the courts still have the power to limit or restrict the use of a disclosure device on grounds that justify the issuance of a protective order under [CPLR 3103\(a\)](#). The *Tran* case is discussed in further detail below. See [Commentary C3101:50](#), below.

Another device that can qualify as an exception to these rules is the written interrogatory, which is subject to the special rules set forth in [CPLR 3130](#). Generally speaking, [CPLR 3130\(1\)](#) requires that a party elect between using interrogatories and a bill of particulars. In an action based solely on negligence, it requires the party to elect between interrogatories and a deposition. Even there, however, the court is empowered to permit both. The *Barouh* case, a bitter commercial dispute between two large corporations, treated priorities as between interrogatories and oral depositions. A mass of interrogatories, some 32 pages, had been served by one of the parties. Although this type of disclosure demand is not uncommon in a federal action, the court struck the interrogatories in their entirety. They were found “patently burdensome, oppressive and improper and in such a case they should be vacated rather than pruned.” *Barouh*, 76 A.D.2d at 874, 429 N.Y.S.2d at 35; see [Commentary C3133:1](#).

*Barouh* has many lessons, but the primary one is that while a party will usually be allowed the option of determining the sequence in which the disclosure devices will be pursued, (1) the court can prescribe the sequence it deems appropriate on a given fact pattern, see *Le v. Putnam*, 240 A.D.2d 784, 785, 657 N.Y.S.2d 849, 850 (3d Dep't 1997); *Geffner v. Mercy Medical Center*, 83 A.D.3d 998, 922 N.Y.S.2d 470 (2d Dep't 2011), and (2) a party who determines the sequence for itself, but then manifests that it is more concerned with harassing the other side than informing itself, will find the court intervening with its own adjustments under its protective order powers. See *Wagner v. NFS Fin. Servs.*, 96 Misc.2d 134, 408 N.Y.S.2d 843 (Sup. Ct., New York Co. 1978).

The court can also make an ad hoc adjustment in priorities when discovery of a document of some kind is sought under [CPLR 3120](#), but there appears to be difficulty in identifying the document and determining who has possession of it. As a preliminary step, the court can compel the party seeking the document to take a given person's deposition, during which questions can be asked determining who possesses a particular item and the facts that will identify it. A subsequent, and far more informed, [CPLR 3120](#) demand can follow the deposition. See [Commentary C3120:4](#).

In any case in which the court finds on the particular facts that expediency will be served by the use of one disclosure device before another, it generally has the power to direct the sequence of their use. See *Edwards-Pitt*, 294 A.D.2d at 396, 741 N.Y.S.2d at 910; see also *Geffner*, 83 A.D.3d at 998, 922 N.Y.S.2d at 471.

### **C3101:3 Disclosability and Devices Distinct.**

CPLR 3101(a) provides for “full disclosure of all matter material and necessary in the prosecution or defense of an action ....” Regardless of the device used to secure the datum or thing, the basic question of whether it is subject to disclosure is governed by CPLR 3101(a) and not by the particular provision supplying the device to obtain the information. *See, e.g., Kavanagh v. Ogden Allied Maint. Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998) (holding that scope of CPLR 3101[a] concerning disclosure of medical reports is not restricted by narrower provisions for exchange of medical reports in [CPLR 3121](#)).

Lawyers, and sometimes even the courts, tend to let these things overlap. [CPLR 3120](#), for example, supplies the device whereby a party can request production of a document or other “thing” for inspection or copying. Lawyers who want to determine whether they are entitled to see the particular document or item may tend to look to [CPLR 3120](#) for instruction. The instruction is not there, but in CPLR 3101(a). Courts often cite only [CPLR 3120](#), or some other provision authorizing use of a disclosure device, in cases whose essential point is whether a given item is subject to disclosure. While the discoverability issue is governed entirely by CPLR 3101(a), the annotators frequently report the cases under 3120 rather than 3101(a). Lawyers seeking out precedents for the particular disclosure they want are thus put to the burden of researching case annotations not only under CPLR 3101(a), where they all belong, but under [CPLR 3120](#) as well. As far as these Practice Commentaries are concerned, however, any matter that relates essentially to whether or not a given paper or thing is subject to disclosure will be treated mainly under CPLR 3101(a). *See* Commentary C3120:2.

#### **C3101:4 The Purpose of Disclosure.**

“The purpose of disclosure ... is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits.” *Rios v. Donovan*, 21 A.D.2d 409, 411, 250 N.Y.S.2d 818, 820 (1st Dep’t 1964); *see Byork v. Carmer*, 109 A.D.2d 1087, 1088, 487 N.Y.S.2d 226, 228 (4th Dep’t 1985). The function of the disclosure devices is no longer limited, as it once was, to the perpetuation of testimony in those relatively infrequent instances when there is some danger that it will be lost before trial. Disclosure today is the standard means for preparing for the trial itself, notwithstanding that those against whom the disclosure is sought are alive and prospering.

Any fears that the disclosure article would be given a restrictive interpretation were dispelled by *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968), the leading Court of Appeals decision on disclosure, which quoted with approval the above words of the *Rios* decision. *See* Commentary C3101:5, below.

At early common law the pleadings, which numbered many more than the basic three allowed today (complaint, answer, and perhaps reply, *see* [CPLR 3011](#)), were supposed to sharpen and define the issues. Disclosure as we know it today played no role. With the CPLR, the role of the pleadings has been vastly reduced. CPLR Article 30 relieves pleadings of all technical pressures. *See* *Foley v. D’Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep’t 1964), and the Practice Commentaries on [CPLR 3013](#); *see also* *Siegel & Connors, New York Practice* §§ 211, 631 (discussing heightened pleading requirements in federal court). It may be said that the role of pretrial disclosure has expanded in inverse proportion to the diminished role of pleadings. This is one of the CPLR’s most significant contributions to current practice. When pleadings held full sway, each party was compelled to depend on the other side’s careful, counsel-drawn contentions. They had no chance before trial to examine their adversaries. They knew only what the other side wanted to put out and what outside investigation revealed. The CPLR and the caselaw interpreting it, which emphasize full disclosure, permit much more meaningful trial preparation by requiring each party to “tip their hand” well in advance of trial. This avoids surprise and tends to base the final result on the facts rather than on tactics. Parties can no longer hide behind the nice phraseology of their pleadings; they must step out in advance of trial and respond to the other side’s probing questions.

A party’s expansive right to disclosure recognized under the enactment of the CPLR in 1963 has been further extended during the last fifty years by the legislature and the courts. In 1993, the legislature substantially amended Article

31 to broaden the reach of the disclosure devices. CPLR 3101(a) was amended to confirm that disclosure was not limited to “evidence” that could be produced at trial, but to any “matter” that is relevant. *See* Commentary C3101:7, below. CPLR 3101(h) was added to require parties to amend or supplement a response previously given to a disclosure request. *See* Commentary C3101:49, below. That same year, CPLR 3101(i) was also added to require full disclosure of various films and tapes of the parties, among other things. *See* Commentary C3101:50, below. These amendments, and the courts' interpretation of them, demonstrate New York's commitment to ensuring that cases be decided on their merits after a full vetting of the facts.

The adversary system may still permit a card or two to remain close to the party's vest, but if that happens the fault is not the CPLR's. With limited exceptions, notably those of subdivisions (b), (c), and (d)(2), CPLR 3101 seeks to expose virtually the entire deck.

### *Subdivision (a)*

#### **C3101:5 The Criterion: “Material and Necessary.”**

CPLR 3101(a) sets forth the criterion for disclosure under the CPLR. It requires “full disclosure of all matter material and necessary in the prosecution or defense of an action....” The key words are “material and necessary.” In the leading case, *Allen*, the New York Court of Appeals interpreted the New York CPLR phrase “material and necessary” to mean nothing more or less than “relevant,” saying that the phrase must be “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” *Allen*, 21 N.Y.2d at 406, 288 N.Y.S.2d at 452; *see Forman v. Henkin*, 30 N.Y.3d 656, 661, 70 N.Y.S.3d 157, 162 (2018); *Andon v. 302-304 Mott St. Assoc.*, 94 N.Y.2d 740, 746, 709 N.Y.S.2d 873, 877 (2000).

Disclosure under the CPLR is, therefore, mandated if it is “relevant.” The word “material” implies something heavier than “relevant.” That which is material to the case would be relevant to it, though the converse would not necessarily hold. Nonetheless, “relevant” has been the meaning assigned to “material” by the Court of Appeals. As for the word “necessary,” the *Allen* case supports the proposition that information which is “relevant” to the litigation is also “necessary” to it. *See Kapon v. Koch*, 23 N.Y.3d 32, 38, 988 N.Y.S.2d 559, 564 (2014).

While the pretrial disclosure process may not ordinarily be used to obtain data relevant only to the enforcement of a judgment--the obvious premise being that such a judgment may never come about--it may sometimes be used to obtain data with which the court may have to deal at the conclusion of the trial. An interesting example here is the “collateral source” rule of CPLR 4545. Under the collateral source rule, payments from outside sources are not relevant until after the case is concluded and elements of the damages awarded are discernible. In addition, the facts with respect to the collateral source payments are for the court, rather than the jury, to determine. The courts have held, however, that “[p]retrial discovery is available so defendants can acquire information and documents that may later be used to support a motion for a collateral source hearing.” *Firmes v. Chase Manhattan Auto. Fin. Corp.*, 50 A.D.3d 18, 35, 852 N.Y.S.2d 148, 161 (2d Dep't 2008), *lv. denied* 11 N.Y.3d 705, 866 N.Y.S.2d 608; *see Siegel & Connors, New York Practice* §§ 348, 399. The matter is discussed in further detail under a subsequent heading. *See* Commentary C3101:18B, below.

Another example concerns punitive damages. In *Rupert v. Sellers*, 48 A.D.2d 265, 368 N.Y.S.2d 904 (4th Dep't 1975), the court ruled that in cases where plaintiff is seeking punitive damages, a split trial procedure should be used. The first part of the trial should conclude with a special verdict as to whether defendant was guilty of conduct entitling plaintiff to punitive damages, i.e., wanton and reckless, or malicious, conduct. *See NY PJI* 2:278 (2018). *Rupert* concluded that evidence of a defendant's wealth cannot be introduced at trial unless or until the jury returns a special verdict that plaintiff is entitled to punitive damages against the defendant. The *Rupert* court also held that plaintiff is

not entitled to disclosure of defendant's net worth until the jury returns a special verdict entitling plaintiff to punitive damages. This bifurcation procedure might delay the final disposition of a case, but the *Rupert* court found the delay warranted to protect defendants from discovery of their net worth in cases where plaintiffs have only alleged, but have not established, entitlement to punitive damages. The bifurcation procedure also results in judicial economy in cases where plaintiff cannot ultimately prove entitlement to punitive damages. Finally, the court noted that the limited disclosure to which a plaintiff is entitled concerning defendant's wealth in a case involving punitive damages should be conducted expeditiously, and in most cases the evidence should be available for presentation to the same jury that rendered the special verdict. The First and Third Departments have also endorsed a bifurcated procedure in cases involving punitive damages. See *Suozzi v. Parente*, 202 A.D.2d 94, 616 N.Y.S.2d 355 (1st Dep't 1994); *Varriale v. Saratoga Harness Racing, Inc.*, 76 A.D.2d 991, 429 N.Y.S.2d 302 (3d Dep't 1980).

### C3101:5A Appellate Review of Disclosure Orders.

The determination of whether the information sought satisfies CPLR 3101(a)'s broad criteria rests within the sound discretion of the trial court. *Andon v. 302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 709 N.Y.S.2d 873 (2000). The appellate division, when considering an appeal of an order related to disclosure, is vested with a corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse. *Id.*; see *Forman*, 30 N.Y.3d at 662 n.3, 70 N.Y.S.3d at 163 n.3. If the appellate division makes such a discretionary determination, the Court of Appeals' review is limited to determining whether the appellate division abused its discretion as a matter of law. *Id.*; *Sadek v. Wesley*, 27 N.Y.3d 982, 32 N.Y.S.3d 42 (2016); *Kavanagh*, 92 N.Y.2d at 954, 683 N.Y.S.2d at 157. The practical effect of these appellate principles is that the trial court's determination of a disclosure dispute will be upheld, provided it was within the court's broad discretion. See, e.g., *Forman*, 30 N.Y.3d at 662, 70 N.Y.S.3d at 163; *Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999) (concluding that trial court did not abuse its discretion in dismissing complaint for failure to answer interrogatories). Therefore, it is incumbent upon lawyers to make a complete and convincing argument before the trial court if the disclosure dispute is significant. With the bounds of discretion ranging far and wide, it is rare for a trial court's CPLR 3101(a) determination to be reversed as a matter of law. See Commentary C3126:8.

The *Andon* case demonstrates that the Court of Appeals is not bound by the appellate division's characterization of its own ruling, see *Siegel & Connors, New York Practice* § 528, and also provides some lessons on the scope of disclosure under CPLR 3101(a). The appellate division's certified question to the Court of Appeals stated that its decision was “made as a matter of law and not in the exercise of discretion.” *Andon*, 94 N.Y.2d at 745, 709 N.Y.S.2d at 816. The Court of Appeals determined, however, that the appellate division's CPLR 3101(a) determination reflected a discretionary balance of competing interests and that its order was based “on the law and the facts.” *Id.* Although a determination categorically barring the disclosure sought “as a matter of law” may have been ripe for a reversal, the discretionary determination was not. The Court affirmed the appellate division's order, noting that the court below did not abuse its discretion in determining that defendants were not entitled to compel plaintiff-mother to submit to an I.Q. test.

In *Andon*, plaintiffs sought damages resulting from alleged lead paint injuries to the infant plaintiff. The I.Q. test was sought by defendants to determine whether the infant's cognitive disabilities were genetic, rather than caused by ingestion of lead paint. Once again, the Court referenced the broad scope of CPLR 3101(a) and the liberal standards it set forth in *Allen*. Ultimately, however, the Court concluded that the appellate division did not abuse its discretion because the doctor's affidavit submitted in support of the disclosure request was insufficient to justify compelling the mother to take the I.Q. test. The expert's affidavit was conclusory and lacked the basis for reaching the conclusion that the I.Q. test was “extremely relevant,” thereby rendering the information sought “speculative.”

In sum, *Andon* turned on a lack of evidentiary support for an expert's opinion, rather than “a blanket rule prohibiting discovery of maternal IQ”. *Andon*, 94 N.Y.2d at 747, 709 N.Y.S.2d at 878. The Court reemphasized that every

disclosure request “must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure.” There are indications in the opinion that a disclosure request of this nature, if properly supported, would fall within CPLR 3101(a)'s broad scope. See *Chaudhary v. Gold*, 83 A.D.3d 477, 478, 921 N.Y.S.2d 219, 221 (1st Dep't 2011) (“Defendants have demonstrated that a neuropsychological examination is material and necessary in order to defend against plaintiff's claim that he has suffered head injuries with cognitive impairment”).

### C3101:6 The Federal Standard Compared.

In federal litigation, the gathering of information in advance of trial is labeled “discovery,” but there are many similarities to “disclosure” in the New York State courts. Rule 26(a)(1) of the Federal Rules of Civil Procedure contains several categories of required “initial disclosure” and Rule 26(b)(1) permits additional disclosure of anything “relevant” to a party's claim or defense and “proportional to the needs of the case.” The proportionality requirement was expressly emphasized in a 2015 amendment to Rule 26 and mandates consideration of “the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). The CPLR has no such proportionality requirement, but early in its life the Court of Appeals recognized that the use of any disclosure device should be reasonable in light of the effort and expense necessary to obtain the information. See *Allen*, 21 N.Y.2d at 406-407, 288 N.Y.S.2d at 452. Furthermore, an express proportionality requirement is probably not necessary given the availability of a protective order under CPLR 3103(a). See Commentary C3101:2, above; Commentary C3101:11, below.

The Federal Rule specifically provides that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b)(1). In this respect, it is similar to the disclosure standard that has evolved in New York State courts under CPLR 3101(a). See Commentary C3101:7 (“Rejection of the ‘Evidence-in-Chief’ Rule”).

In the *Allen* case the court referred to the federal standard, but did not adopt it outright for application under New York's CPLR. *Allen*, 21 N.Y.2d at 407, 288 N.Y.S.2d at 453. In retrospect, that was a wise decision. While comparisons between the CPLR and the Federal Rules of Civil Procedure are often helpful, tethering the standards for disclosure under the CPLR to those applicable to discovery under the Federal Rules can lead to confusion. When the New York courts borrow heavily from the federal discovery rules, as has happened in actions involving disclosure of electronically stored information, and substantial changes are made to the relevant Federal Rules of Civil Procedure, it can leave the New York bench and bar in the lurch. For example, in *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 553, 26 N.Y.S.3d 218 (2015), the Court of Appeals made only a passing reference to CPLR 3126 and instead relied heavily on federal law when it outlined the penalties to be imposed on a party who fails to satisfy its preservation obligations in a New York State action. Unfortunately, the *Pegasus* decision was handed down exactly two weeks after an important amendment to the Federal Rules of Civil Procedure relating to spoliation went into effect. See *Siegel & Connors, New York Practice* § 367 (discussing *Pegasus* decision and new Federal Rule 37(e), entitled “Failure to Preserve Electronically Stored Information”).

It is worth noting that New York State courts are generally far less patient with voluminous disclosure demands and disclosure disputes than the federal courts. Federal district courts often have magistrates who supervise disclosure and resolve disputes prior to trial of the matter before the assigned judge. In New York State actions, it is normally the assigned judge who hears disclosure disputes. Given the calendar congestion faced by many state court judges, they are not generally receptive to these disputes. See, e.g., *Sgambellone v. Wheatley*, 165 Misc.2d 954, 957-59, 630 N.Y.S.2d 835, 838-39 (Sup. Ct., Schenectady Co. 1995); see also *Siegel & Connors, New York Practice* § 353 (discussing “good faith” affirmation requirement on motions relating to disclosure or a bill of particulars).

### C3101:7 Rejection of the “Evidence-in-Chief” Rule.

During the first thirty years of the CPLR's reign, the phrase that constituted the New York disclosure criterion was “evidence material and necessary.” A 1993 amendment changed it to “matter material and necessary.” This would have been a significant change, but for the fact that the New York State courts beat the legislature to it by a couple of decades. Led by the Court of Appeals' decision in *Allen*, the courts made a practical translation of the phrase “evidence material and necessary.” They magically transmuted the standard into something better described as “relevant information,” and by so doing adopted, in effect, the standard that had been in place in the federal courts under [Rule 26](#). See [Fed. R. Civ. P. 26\(b\)\(1\)](#) (“[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable”); Commentaries C3101:5 and 6, above.

The use of the word “evidence” in the old statute would always have suggested that only that which itself qualifies as admissible evidence is discoverable; that discovery could not embrace matter which is not itself evidence, even though calculated to lead to the discovery of admissible evidence. This was known as the “evidence-in-chief” rule, and was rejected early on by the New York courts. See *West v. Aetna Casualty and Surety Co.*, 49 Misc. 2d 28, 266 N.Y.S.2d 600 (Sup. Ct., Onondaga Co. 1965), *mod. and aff'd* 28 A.D.2d 745, 280 N.Y.S.2d 795 (3d Dep't 1967).

The legislature's 1993 repeal of the word “evidence,” and its substitution of “matter,” is a statutory verbalization only. The courts had been sustaining the disclosure of mere “matter” for years, as long as it was relevant.

### C3101:8 “Fishing Expedition.”

It is often said that the disclosure devices may not be used by a party merely to conduct a “fishing expedition,” i.e., merely to see what beneficial things might be inadvertently discovered from the other side. Lip service is still occasionally paid to that shibboleth. See, e.g., *McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524, 1525, 910 N.Y.S.2d 614, 615 (4th Dep't 2010). If the contention is thrown up as a defense against reasonable disclosure, however, it usually is not successful. When the seeking party is within the criterion of CPLR 3101(a) and beyond the immunities of (b), (c), and (d)(2), and if nothing unusual can be shown to invoke the court's protective order powers under [CPLR 3103\(a\)](#), as with a showing that the disclosure devices are being used for harassment or delay, the party is entitled to the disclosure and the quest for information can continue. See *Forman*, 30 N.Y.3d at 665, 70 N.Y.S.3d at 165 (observing that “there is no need for a specialized or heightened factual predicate to avoid improper ‘fishing expeditions’ ” when seeking relevant information from a social media account).

Whatever we may conclude theoretically as to whether disclosure can be used to go “fishing,” candid trial lawyers will admit that they often uncover surprises through the use of Article 31's tools. In fact, there is almost always something in the other side's position that a party does not know and wants to find out. If it is relevant, that party is clearly entitled to discover it by asking any questions reasonably calculated to elicit data “bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” *Allen*, 21 N.Y.2d at 406, 288 N.Y.S.2d at 452.

As noted by the Court of Appeals when addressing the propriety of defendant's disclosure request from plaintiff's social media account:

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence.

*Forman*, 30 N.Y.3d at 664, 70 N.Y.S.3d at 164.

Perhaps the phrase “fishing expedition” should now be redefined under the CPLR. If the data elicited is within the broad scope of CPLR 3101(a) as construed in the *Allen* case and its progeny, the excursion should be called a “relevant inquiry.” That would leave the “fishing expedition” to describe the overly broad inquiry that goes even beyond that extended compass. For such transgressions, the remedy is not always a categorical cancellation of the disclosure request, but rather a protective order under CPLR 3103(a) aimed only at those matters that are clearly beyond the compass. *Forman*, 30 N.Y.3d at 665, 70 N.Y.S.3d at 165 (noting that party may seek protective order to avoid disclosing materials on a social media site that “contain sensitive or embarrassing materials of marginal relevance.”). This appears to be the way the phrase “fishing expedition” was used in an early CPLR case. See *In re Welsh's Estate*, 24 A.D.2d 986, 265 N.Y.S.2d 198 (2d Dep't 1965).

#### **C3101:9 Burden of Proof Irrelevant.**

A bill of particulars can only be demanded from one who has the burden of proof on the matter sought to be particularized. CPLR 3041; see *Northway Eng'g v. Felix Indus.*, 77 N.Y.2d 332, 567 N.Y.S.2d 634 (1991). Upon demand, plaintiff must particularize the claim while the defendant must particularize a counterclaim or affirmative defense. The bill of particulars, however it may serve to disclose more detail of a party's posture, is merely an extension of the pleadings, not a disclosure device. See *Siegel & Connors, New York Practice* § 238. The lawyer should not confuse it with the disclosure devices or the rules applicable to them. See *Leeponis v. Garcy Corp.*, 61 A.D.2d 1040, 403 N.Y.S.2d 285 (2d Dep't 1978) (although request may be improper in demand for bill of particulars, CPLR 3131 provides that scope of interrogatories is governed by liberal disclosure requirement in CPLR 3101[a]).

CPLR 3101(a) requires disclosure “regardless of the burden of proof.” A defendant whose answer consists only of denials, for example, and is therefore not required to serve a bill of particulars, is nonetheless required to submit in full to pretrial disclosure. Each party is entitled to know what the other side contends on each issue, regardless of who must ultimately prove the matter.

Conversely, where a party has provided a bill of particulars on a particular matter, disclosure on the matter should not necessarily be foreclosed. In fact, information provided in a bill of particulars can often warrant disclosure on the matter. See *McGlone v. Port Auth. of New York & New Jersey*, 90 A.D.3d 479, 480, 934 N.Y.S.2d 161 (1st Dep't 2011) (plaintiff, who averred in his bill of particulars that his alleged injuries “aggravated or exacerbated underlying conditions that were asymptomatic before the accident,” voluntarily placed his physical condition in issue, thereby permitting defendants to pursue disclosure on whether the alleged injuries were attributable to other accidents). As noted above, the bill of particulars serves different tasks from the disclosure devices and is often not a substitute for the information that can be obtained in disclosure. See *Northway Eng'g*, 77 N.Y.2d at 335-36, 567 N.Y.S.2d at 636-37. In a particular case, if the matters sought through disclosure are entirely duplicative of those contained in a bill of particulars, the court can limit the disclosure request with a protective order. See CPLR 3103(a).

#### **C3101:10 Disclosure in Special Proceedings.**

A special proceeding allows a party to obtain a full judgment with the speed of a motion. It can only be brought, however, when a statute specifically authorizes it. CPLR 103(b). The specific procedures that differentiate it from an action are contained in Article 4 of the CPLR. See *Siegel & Connors, New York Practice*, §§ 546-556.

The speed unique to a special proceeding would be derailed if full disclosure was allowed prior to the return date. CPLR 408 recognizes, however, that some disclosure may be necessary in a special proceeding. It allows a party to

use any of the disclosure devices, but only upon a court order. The courts have been somewhat stingy in this realm, requiring a party to a special proceeding to “demonstrate ‘ample need’ for discovery regarding a claim or defense.” *Free Park Assoc. v. Cepeda*, 55 Misc.3d 460, 465, 44 N.Y.S.3d 895, 898-99 (Dist. Ct., Nassau Co. 2017) (noting that “[c]ourts have allowed discovery in a summary proceeding involving allegations of non-primary residence, succession rights, or periods of co-residency,” the court found that the standard was met and ordered disclosure).

In *Matter of Suit-Kote Corp. v. Rivera*, 137 A.D.3d 1361, 1365, 26 N.Y.S.3d 642, 645 (3d Dep't 2016), *lv. denied* 27 N.Y.3d 1054, 33 N.Y.S.3d 874 (2016), the court weighed the following factors in determining whether a party to a special proceeding was entitled to disclosure under CPLR 408: (1) did the party seeking disclosure establish that the requested information was material and necessary, (2) was the disclosure request carefully tailored to obtain the necessary information, and (3) whether undue delay would result from the request. *See also Matter of Bramble v. New York City Dept. of Educ.*, 125 A.D.3d 856, 857, 4 N.Y.S.3d 238, 240 (2d Dep't 2015) (in a special proceeding, the court “must balance the needs of the party seeking discovery against such opposing interests as expediency and confidentiality”).

Based on the above caselaw, it appears that the party seeking disclosure in a special proceeding must establish something more than the mere relevance standard set forth in CPLR 3101(a), as most recently interpreted by the Court of Appeals in *Kapon v. Koch*, 23 N.Y.3d 32, 988 N.Y.S.2d 559 (2014); *see Matter of Aylward v. Assessor, City of Buffalo*, 125 A.D.3d 1344, 1345, 3 N.Y.S.3d 818, 819-20 (4th Dep't 2015) (“in order for ‘respondents to establish their entitlement to conduct ... interior inspection[s] of the petitioner[s]’ home[s] for purposes of appraisal, in the absence of the petitioner[s]’ consent, ... respondents bore the burden of demonstrating that [each] “particular inspection [was] reasonable” ’ ... and “that interior inspections were necessary to prepare their defense” ’ ”).

The CPLR 3123 notice to admit does not require a court order in a special proceeding, but the time periods for service and compliance have been altered. CPLR 408.

A special proceeding can set a return date for a hearing on the merits with as little as 8 days' notice. CPLR 403(b). The minimum 8-day period can be shortened if the proceeding is commenced by order to show cause. CPLR 403(d); *see Siegel & Connors, New York Practice* § 553. Therefore, even if warranted, there is little opportunity for disclosure pursuant to the normal method of notice so common in an action. *See, e.g., CPLR 3107* (requiring 20 days' notice for oral deposition). If disclosure should prove necessary in a special proceeding and is ordered by the court, it will usually require a postponement of the return day. If the parties can agree to disclosure in advance, they can adjourn the return day by stipulation submitted to the assigned judge. *See 22 N.Y.C.R.R. § 202.8(e)(1)*. If they ultimately disagree, the party claiming the need for disclosure should request it and justify it in its papers, which the court can then consider on the return day.

CPLR 409(a) contains a parallel to the discovery and inspection device in CPLR 3120, and does not require a court order. It provides that where papers “necessary to the consideration of the questions involved” are in the possession of an adverse party, “they shall be produced by such party at the hearing on notice served with the petition.” CPLR 409(a).

In the surrogate's court, the procedures whereby an estate is administered are a series of special proceedings. SCPA 203. Without a special provision, CPLR 408 would be thought to govern surrogate's proceedings and require a court order for all disclosure. To make disclosure in the surrogate's court available by mere notice as it is in the supreme court, CPLR 408 was amended in 1964 to provide that surrogate's court disclosure is governed directly by CPLR Article 31.

### C3101:11 Disclosure in Various Courts.

Article 31 applies directly in the supreme, county, and surrogate's courts. See [Siegel & Connors, New York Practice § 343](#).

Each of the lower courts has its own court act. These are four in number and are known as the "Uniform" Court Acts. They include the New York City Civil, Uniform District, Uniform City, and Uniform Justice Court Acts. Each of them has a section 1101, which deals with disclosure. The section in each instance adopts Article 31 of the CPLR in full, merely setting forth certain additional requirements regarding the geographical area within which disclosure papers can be served. For example, in the case of the city and justice courts, whose process is constitutionally limited to the county in which the court sits or an adjoining county ([N.Y. Const. art. VI, § 1, subd. c](#)), extraterritorial disclosure is conducted by the means that would be used in a supreme court action to secure disclosure from out of State. Section 1101 of those two Court Acts so states.

Thus, the disclosure article of the CPLR, with the minor adjustments emanating from section 1101 in each of the four Uniform Acts, is applicable in all of the State's courts of ordinary civil jurisdiction and in the surrogate's court. See [In re Eshagian](#), 48 Misc.3d 920, 15 N.Y.S.3d 560 (Sur. Ct., Queens Co. 2015) (CPLR Article 31, and the discovery and inspection tools in [CPLR 3120\(1\)](#), apply in discovery proceeding under [SCPA 2103](#)). Disclosure is also available in the family court, see [Fam. Ct. Act § 165, CPLR 101](#), with the court keeping tight reins on its use. See, e.g., [Matter of John H.](#), 56 A.D.3d 1024, 1025-26, 868 N.Y.S.2d 790, 792 (3d Dep't 2008); [Carlos L. v. Sandy C.](#), 51 Misc.3d 506, 508, 25 N.Y.S.3d 822, 825 (Fam. Ct., Queens Co. 2016) (noting that "courts have been justifiably reluctant to authorize disclosure in family offense and other Family Court proceedings").

The use of disclosure in the court of claims, where it is available with certain restrictions, and its use against the State when the State is a party in other courts, is discussed in the Commentary on [CPLR 3102](#). See Commentary C3102:10; [Siegel & Connors, New York Practice § 352](#).

Early in the life of the CPLR, the Court of Appeals recognized that the use of any disclosure device should be reasonable in light of the effort and expense necessary to obtain the information. See [Allen](#), 21 N.Y.2d at 406-407, 288 N.Y.S.2d at 452. As the stakes in a particular case decrease, so does the efficiency of the use of the disclosure devices, which consume time, money, and effort. The protective order provision of [CPLR 3103\(a\)](#) is applicable in all of the courts and the tendency to use it should increase as the stakes of the litigation decrease. Otherwise, a wealthy litigant could take undue advantage of a poorer one, sometimes to the extent of putting the latter to effort and expense greater than the total worth of the case. See Commentary C3103:6. In the four Uniform Acts, the protective order provision is given particularly broad scope, being available to curtail even the use of the bill of particulars. For disclosure under the four Uniform Acts generally, see the Commentaries on [CCA 1101](#), McKinney's Book 29A, Part 3, and on [UJCA 1101](#), McKinney's Book 29A, Part 2.

### **C3101:11A International Disclosure.**

The generous scope of disclosure in New York State actions is generally far broader than that embraced by the law of most foreign lands. What happens when disclosure is sought outside the United States for use in a New York State court action? In [Richbell Info. Services, Inc. v. Jupiter Partners, L.P.](#), 32 A.D.3d 150, 816 N.Y.S.2d 470 (1st Dep't 2006), the court issued an extensive opinion addressing the standards to be applied in a New York State action involving international disclosure. In [Richbell](#), plaintiff commenced an action in New York State while a citizen of the United Kingdom, but then moved to Malaysia. The court dismissed plaintiff's individual claims, but he remained in the case solely as a counterclaim defendant. After the defendants/counterclaim plaintiffs sought his deposition, the plaintiff invoked the secrecy provisions of the Malaysia Offshore Companies Act 1990 in response to many basic questions. The scope of the secrecy provisions in this Act is broad and the First Department concluded that it barred most of the requested disclosure.

The court listed several factors that should be considered in all cases involving international disclosure, i.e., when the information sought is outside the United States. The factors are borrowed from section 442 of the Restatement (Third) of Foreign Relations Law and include, among others, the importance of the requested information to the litigation, the degree of specificity of the request, the availability of alternative means for securing the information and whether compliance with the request would undermine important interests of the state where the information is located. Conflicting foreign statutes, such as the Act, must also be considered.

The court first examined New York's own standards for disclosure in CPLR 3101(a). It noted that the parties are only entitled to information that is relevant, regardless of any conflicting foreign law. The First Department concluded that even under New York's broad standards for disclosure, a substantial portion of the information sought was not relevant. As to the information that was deemed relevant, the court appeared to apply a more rigorous standard, observing that “a number of courts as well as the Restatement have said that a more stringent test should apply in international discovery than in purely domestic discovery.” *Richbell*, 32 A.D.3d at 156, 816 N.Y.S.2d at 475-76; see *Punwaney v. Punwaney*, 2016 WL 3455937 (Sup. Ct., New York Co. 2016). The court also afforded comity to the secrecy provisions of the Act, precluding several deposition questions that would likely fall within CPLR 3101(a)'s broad standards.

Ultimately, the court ordered plaintiff to answer only two out of the more than one dozen questions sought to be posed. Furthermore, given plaintiff's location in Southeastern Asia, he was permitted to answer the questions in writing. Cf. CPLR 3108 (permitting deposition on written questions outside New York); Commentary C3108:2 (“Written Questions to Nonresident Party”). This is consistent with the court's broad authority to alter the venue provisions for depositions in CPLR 3110. See Commentary C3110:6 (“Change of Disclosure Venue”); C3110:7 (“Venue Problems Involving Nonresident Parties”).

It is important to note that the application of international standards for obtaining disclosure is a discretionary matter. If an action is based in New York State, we can assume jurisdiction over the parties exists. Certain actions, even though they may involve nonresidents, will have a closer connection to New York State and warrant application of CPLR 3101(a)'s broad standards, even as to information located outside the United States. This is particularly the case if the information sought is within the possession of a party to the action. In those circumstances, the court has the power to impose penalties upon a party who has refused to provide the necessary disclosure, even if the information is located outside the United States.

Any party seeking international disclosure must also review the provisions for obtaining letters rogatory in CPLR 3108, particularly when the disclosure is sought from a nonparty. See Commentary C3108:6 (“Letters Rogatory”).

### **C3101:12 Disclosure for Use on a Motion.**

CPLR 3101(a) provides for disclosure “necessary in the prosecution or defense of an action.” A motion is part of an action and disclosure sought for use merely on a motion is just as “necessary” and available as is disclosure for the trial itself. Disclosure should ordinarily be broad enough to cover all matters relevant to the action, not just those relevant to the motion. Absent some special circumstance, a disclosure procedure undertaken for use on a motion should not be so narrow in scope as to require further disclosure by the same device for use at the trial. One special situation that comes to mind, in which the scope of the disclosure might be reasonably limited, is where it is sought on a mere question of jurisdiction. See *Doe v. McCormack*, 100 A.D.3d 684, 684-85, 953 N.Y.S.2d 666, 666-67 (2d Dep't 2012); *Cronin v. New England Storage Warehouse Co.*, 54 Misc.2d 1088, 284 N.Y.S.2d 59 (Sup. Ct., Richmond Co. 1967) (noting change in this regard from prior law).

Two of the most significant motions in civil practice each presuppose that disclosure may be available for use on the motion. See CPLR 3211(d) (allowing disclosure in conjunction with certain pre-answer motions to dismiss); CPLR

3212(f) (allowing disclosure in conjunction with certain summary judgment motions); *see also* Siegel & Connors, *New York Practice* §§ 93, 257 (discussing a court's limited jurisdiction to permit disclosure to determine if the court has jurisdiction over an action).

There have been an increasing number of cases in which a defendant's activity and advertising via the Internet have been used in an attempt to establish jurisdiction in New York. This trend has continued in the wake of the Court of Appeals decision in *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71, 818 N.Y.S.2d 164, 167 (2006), *cert. den.*, 127 S.Ct. 832, 166 L.Ed.2d 665, which held that “long-arm jurisdiction [lies] over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions ....” Although the defendant in *Deutsche Bank* never set foot in New York, it availed itself of the benefits of conducting business here “electronically,” thereby establishing sufficient contacts for New York to assert jurisdiction under CPLR 302(a)(1). This prong of the longarm statute allows a court to exercise jurisdiction “over any non-domiciliary ... who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state.” *See* Siegel & Connors, *New York Practice* §§ 86-86A.

In *Vandermark v. Jotomo Corp.*, 42 A.D.3d 931, 839 N.Y.S.2d 670 (4th Dep't 2007), an employee of defendant Mr. Rooter performed work at plaintiff's house, allegedly causing injury to plaintiff's son. Plaintiff also sued the franchisee, Mr. Rooter Corporation (“MRC”), a Texas corporation. The supreme court granted MRC's pre-answer motion to dismiss under CPLR 3211(a)(8) based on lack of personal jurisdiction. The Fourth Department reversed, holding that plaintiff was entitled to an immediate trial on the issue of personal jurisdiction pursuant to CPLR 3211(c). *See* Siegel & Connors, *New York Practice* § 93 (discussing jurisdictional hearings); § 271 (discussing immediate trial of an issue of fact arising on a CPLR 3211 motion).

Plaintiff submitted evidence establishing that MRC maintained a website to conduct business transactions on behalf of itself and Mr. Rooter, its local franchise, as it was obligated to do under a contract. The Fourth Department concluded that there was a question of fact as to whether MRC's creation and maintenance of a website amounted to a transaction of business in New York, thereby providing a basis for longarm jurisdiction under CPLR 302(a)(1). The court referenced the “ ‘spectrum of cases involving a defendant's use of the internet,’ ” and stated that the jurisdictional issue will “turn[ ] on whether the Web site has significant commercial elements, which typically are found to constitute the transaction of business.” *Vandermark*, 42 A.D.3d at 932, 839 N.Y.S.2d at 671 (*quoting Citigroup Inc. v. City Holding Co.*, 97 F.Supp.2d 549, 565 [S.D.N.Y. 2000] [identifying three groups of cases involving different levels of activity on a defendant's Web site]); *see Best Van Lines v. Walker*, 490 F.3d 239, 251-52 (2d Cir. 2007) (discussing levels of Internet activity that support a finding of jurisdiction). In addition, the plaintiff will be required to establish a “substantial relationship” between the Web site activity and its causes of action. *See Johnson v. Ward*, 4 N.Y.3d 516, 519, 797 N.Y.S.2d 33, 34-35 (2005).

The prospect of limited disclosure on the jurisdictional issue was not discussed in *Vandermark*, but should be allowed in conjunction with the immediate trial that was ordered by the Fourth Department, as disclosure in New York can proceed without a court order. *See TechSource Intern., Inc. v. McCue Corp.*, 2007 WL 2390709 (Sup. Ct., Queens Co. 2007) (in response to defendant's motion to dismiss, the court concluded that “plaintiff has made a sufficient start toward showing jurisdiction under CPLR 301 to warrant allowing limited discovery as to the facts that relate to such jurisdiction”); *see also Best Van Lines*, 490 F.3d at 255 (in case alleging jurisdiction based on Internet activity, Second Circuit held that district court did not abuse its discretion in declining to permit jurisdictional discovery because plaintiff had not made out prima facie case for jurisdiction); *Flamel Techs. v. Soula*, 2007 WL 2415850 (Sup. Ct., New York Co. 2007) (plaintiff had not made a “sufficient start” to establishing that defendant had requisite minimum contacts with New York or purposefully engaged in business transactions within the state to justify further disclosure on the jurisdictional issues).

The Supreme Court's 2014 decision in *Daimler AG v. Bauman*, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014), severely limited the doctrine of general jurisdiction by essentially declaring the “doing business test” unconstitutional. See *Siegel & Connors, New York Practice* § 82. Yet, limited disclosure of a defendant's Internet activity may be appropriate in actions asserting longarm jurisdiction under CPLR 302(a)(3). This prong of the longarm statute requires plaintiff to establish that the cause of action arose from defendant's tortious act outside the state and caused injury in the state. In addition, plaintiffs attempting to establish jurisdiction on this ground need to demonstrate that defendant

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce ....

A defendant's activity over the Internet will be highly relevant in establishing prongs (i) and (ii) of CPLR 302(a)(3). The advertising on a defendant's website, and any activity conducted through the site, will often establish, for example, whether it is regularly soliciting business in New York or deriving substantial revenue from goods used here. CPLR 302(a)(3)(i).

The same information will also be pertinent to whether defendant “expects or should reasonably expect” the act to have consequences in New York. CPLR 302(a)(3)(ii). In *Boris v. Bock Water Heaters, Inc.*, 3 Misc.3d 835, 775 N.Y.S.2d 452 (Sup. Ct., Suffolk Co. 2004), the court found that CPLR 302(a)(3)(ii) was satisfied as to a Wisconsin manufacturer because it used its Internet site to reach the New York market. As to the co-defendant, a component part manufacturer based in Delaware, the court concluded that plaintiffs had submitted sufficient facts to establish that it had engaged in activities which made it at least foreseeable that its products would be marketed and found in New York, thereby possibly subjecting it to personal jurisdiction. Where, as in *Boris* and the cases discussed above, a defendant moves to dismiss on jurisdictional grounds before disclosure is complete, the Court of Appeals has held that “[t]he opposing party need only demonstrate that facts ‘may exist’ whereby to defeat the motion.” *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 466, 354 N.Y.S.2d 905, 907-08 (1974); see *Siegel & Connors, New York Practice* § 93. Therefore, the court held that plaintiff was entitled to discovery on the issue of personal jurisdiction over the Delaware co-defendant and granted leave to the co-defendant to renew its motion to dismiss upon the completion of disclosure.

In a case similar to *Boris*, limited disclosure will likely proceed and plaintiff will frequently seek disclosure of electronic information pertaining to defendant's activity on the Internet in an attempt to establish that it should reasonably have expected that its defective product would produce consequences in New York and that it derives substantial revenue from interstate or international commerce. See CPLR 302(a)(3)(ii). New York's CPLR has no specific provision for disclosure of electronic information, but the courts have construed CPLR 3120 to require production of relevant electronic data. See Commentary C3120:2A; *Siegel & Connors, New York Practice* § 362.

A deposition transcript can be used on a motion, so far as admissible under the rules of evidence. CPLR 3117(a); see Commentary C3117:1. The same rule should apply to all of the disclosure devices. If the information is relevant to the particular motion, the device used, which concerns mechanics only, is of little import. The use must still adhere to the rules of evidence. See, e.g. Commentary C3131:1 (noting certain limitations on use of interrogatory responses).

### C3101:13 Disclosure Among Various Parties.

Disclosure is clearly available between opposing parties on an issue. P can have it against D and D against P. A third-party plaintiff can have it against the third-party defendant and vice versa. But can a defendant have disclosure against a co-defendant when there is no cross-claim between them? Can the third-party defendant have it against the plaintiff (and vice versa), or against a co-defendant (and vice versa) even if there is no direct claim between these parties?

The broad answer to all of these questions today is yes. The Court of Appeals has concluded that, “in preparing for the trial, each defendant now has full discovery against his codefendant whether or not there is a claim between them.” *Schwartz v. Public Adm'r of Bronx Co.*, 24 N.Y.2d 65, 71-72, 298 N.Y.S.2d 955, 960 (1969). The Second Department had earlier held to the contrary, but subsequently abandoned this view. *See Lombardo v. Pecora*, 23 A.D.2d 460, 262 N.Y.S.2d 201 (2d Dep't 1965). There is also statutory authorization for disclosure by a third-party defendant, who “shall have the rights of a party adverse to the other parties in the action ....” CPLR 1008; *see Siegel & Connors, New York Practice* § 163.

Many are the routes whereby persons may be made parties. They can be initially joined as defendants. They can be impleaded in a third-party action or joined as additional parties on a counterclaim or cross-claim. CPLR 1007 (third-party practice); CPLR 3019(d). Parties can be added by leave of court, by stipulation or by prompt action of one of the parties. CPLR 1003; *see Siegel & Connors, New York Practice* §§ 65, 138. A stranger to the litigation can also take the initiative to be joined as a party through a motion to intervene. *See, e.g., CPLR 1012, 1013*. The connection between parties may be tenuous; indeed there may be no connection at all. If in a given situation X seeks disclosure of Y and Y can demonstrate that there is nothing whatsoever that X can gain from such disclosure other than inconvenience and expense to Y, the court can bar the disclosure. It will do so with a protective order pursuant to CPLR 3103(a) under the facts of the particular case, rather than through any generic exclusion mandated by a rigid rule of law.

In rare circumstances, a party is even entitled to take her own deposition. A party notices her own deposition when she is apprehensive that she will not be able to testify at the trial for reasons of health or otherwise and wants to perpetuate the testimony through a transcript that can be used at the trial under CPLR 3117(a)(3). *See* Commentary C3101:19, below. The party would, of course, have to provide notice of the self-deposition to all other parties and satisfy the criteria in CPLR 3117 to ultimately use the deposition at trial.

Deposing an infant may sometimes present problems. If the infant is of tender age, the court should order a preliminary examination to determine competency. *See Muscoreil v. Pool Mart, Inc.*, 107 A.D.2d 1025, 1026, 486 N.Y.S.2d 518 (4th Dep't 1985). If the infant's pretrial deposition is necessary for the adverse party's preparation, as where the infant is the sole source of any key fact in issue, the assigned judge can pass on the infant's competency to depose. The motion that can raise such an issue may be made under CPLR 3103(a), 3124 or 3126. *See also* CPLR 3113(b); CPLR 3115(d). In certain circumstances, an objection to the competency of a witness can be raised at trial. *See* CPLR 3115(d); Commentary C3115:4. If some person other than the infant is available to depose, and that person has equal knowledge of the facts, pretrial examination can be limited to that person and the infant can be excused from deposing with the infant's competence to testify at the trial being deferred to the trial judge. *See, e.g., Mull v. Streaker*, 60 Misc.2d 222, 302 N.Y.S.2d 667 (Sup. Ct., Monroe Co. 1969) (requiring infant's mother, who witnessed occurrence, to submit to deposition).

In consolidated and jointly tried actions, *see* CPLR 602(a), free disclosure is also permissible among all the parties to all the actions, subject to the court's supervisory protective order powers under CPLR 3103(a). Joint trial is sometimes preferred to consolidation because it involves less paperwork and is therefore cheaper and less complicated than consolidation. In joint trials, the actions retain their separate identities for all purposes and are merely tried at the same time, usually before the same jury. *See Siegel & Connors, New York Practice* § 127. Notwithstanding that in joint trials the cases retain individual identities, full and free disclosure complying with the criterion in CPLR 3101(a) may be had between and among all of the parties. *See Hawkins v. Genesee Hosp.*, 86 A.D.2d 971, 448 N.Y.S.2d 288 (4th Dep't 1982) (dictum); *Rudolph v. Bowling Corp. of Plainview*, 67 Misc.2d 463, 324 N.Y.S.2d 448 (Sup. Ct., Nassau Co. 1971).

Cases that have been consolidated or ordered for a joint trial involve a common question of law or fact. CPLR 602(a). Therefore, it is likely that a fact or issue in one case will be relevant in the companion case, thereby satisfying CPLR 3101(a)'s broad criteria for disclosure.

**C3101:14 Restricted Disclosure in Certain Actions.**

In setting forth the criteria for disclosure, CPLR 3101(a) does not make any exception for any category of action. Disclosure is prima facie available to the same degree in all of them. *But see* Commentary C3130:3-4 (noting restrictions on use of interrogatories in certain actions). Under pre-CPLR law, where the standard of “material and necessary” was virtually the same as the current standard in CPLR 3101(a), the cases created a few exceptions. The decision in *Nomako v. Ashton*, 20 A.D.2d 331, 247 N.Y.S.2d 230 (1st Dep’t 1964), indicated early in the life of the CPLR that some of these exceptions are still to apply. *See* Siegel & Connors, *New York Practice* § 344. They are discussed in the ensuing Commentaries.

Defamation actions, which were once exempt, are now bound by the general disclosure rules. *See* *Rivera v. NYP Holdings Inc.*, 63 A.D.3d 469, 469-70, 881 N.Y.S.2d 60, 61-62 (1st Dep’t 2009).

Disclosure in a proceeding to review a tax assessment of real property was treated in *Blooming Grove Prop. Inc. v. Board of Assessors*, 34 A.D.2d 953, 312 N.Y.S.2d 85 (2d Dep’t 1970). The court stated that as a general principle the assessors act in a kind of “judicial” capacity and that they cannot be examined before trial “as to their mental processes and formulae used in arriving at their determinations.” *Id.* at 953, 312 N.Y.S.2d at 86. The fairness and reasonableness of their conclusion is the only relevant factor on review. The court observed that numerous proceedings are brought annually to test assessments and that permitting the deposing of the assessors in each case would “severely impede” the performance of their duties. *Id.* at 953, 312 N.Y.S.2d at 87. Interrogatories were allowed, however, concerning the equalization rate and whether it was applied uniformly to all town properties.

Observing that “[a]ppellate determinations in other departments have also evinced a more favorable attitude toward liberalization of disclosure in paternity proceedings,” the Second Department decided “to discard the rule which requires a showing of special circumstances before a pretrial examination of the petitioner will be ordered in a paternity proceeding.” *Maureen E. O’H. v. Nicholas C.*, 65 A.D.2d 491, 492-93, 411 N.Y.S.2d 658, 659-60 (2d Dep’t 1978). The court traced the origin of the “special circumstances” requirement to the status of the old children’s court, which has been replaced with the family court. More to the point, the court acknowledged that there is likely to be just as much need for pretrial preparation in a paternity suit as in any other.

**C3101:15 Matrimonial Actions.**

Sensitive that the free use of pretrial disclosure can destroy whatever small chance of conciliation that might still exist between the spouses, prior law restricted the use of disclosure in matrimonial actions. Citing the “possibility of abuse,” caselaw perpetuated the exception, indicating that in the matrimonial action pretrial examination is not to be allowed unless some special reason is shown, with the burden on the seeking party to establish the reason. *See, e.g.,* *Nomako*, 20 A.D.2d at 333, 247 N.Y.S.2d at 233. Since the purpose of this restriction was to prevent the pretrial aspects of our adversary system from exacerbating the marital relationship, developments in the late 1960’s pointed to a lifting of the restriction. An extensive 1967 overhaul of New York’s Domestic Relations Law broadly expanded the grounds for divorce in New York. More relevant here is that the 1967 legislation established an elaborate “conciliation” procedure designed to afford the spouses some marriage counseling in an effort to reconcile them before the action went forward. Before that, the legislature’s hope for reconciliation was expressed in the rule that a matrimonial judgment did not become final immediately, going first through an “interlocutory” stage. Then even the conciliation procedure was abandoned in 1973, which, at least for disclosure purposes, appeared to divest the matrimonial action of much of its major procedural uniqueness. That repeal was a further reason for the evolving view that a matrimonial action should not be subject to special disclosure requirements.

Nonetheless, in 2010 the Court of Appeals weighed in on the subject and essentially reaffirmed the New York rule that “liberal discovery on issues of marital fault ... should not ordinarily be permitted.” *Howard S. v. Lillian S.*, 14 N.Y.3d 431, 437, 902 N.Y.S.2d 17, 20 (2010). The facts and allegations in *Howard S.* could have provided the basis for an episode of “Desperate Housewives.” The wife had one child from a previous relationship, who was later adopted by the husband. Three other children were born during the course of the marriage, but the youngest child was the product of an extramarital affair between the wife and another. The husband, unaware of his wife's infidelity until the youngest child was over three years old, raised the child as his own.

The husband commenced a divorce action, alleging grounds of cruel and inhuman treatment and adultery, coupled with a cause of action for fraud seeking compensatory and punitive damages from the wife, who also counterclaimed for divorce. The husband alleged that the wife fraudulently represented that she had been faithful to him and “that he continued to participate in the marriage in reliance upon those representations to his financial detriment.” He sought to recover damages under the fraud claim based upon costs he incurred due to the wife's “failure to disclose her adultery--specifically, the amounts he expended in support of the youngest child, profits from marital investments that he would have deferred and fees for the collaborative law process.” The husband also sought equitable distribution of the marital property, arguing that the bulk of the property should be awarded to him due to the wife's “egregious fault.”

The parties ultimately stipulated to a divorce on the ground of constructive abandonment. The wife moved to dismiss or sever the fraud cause of action and the husband cross-moved for disclosure relating to the fraud claim and on the issue of the wife's egregious fault for purposes of equitable distribution. The courts below denied the husband's cross-motion for “liberal discovery,” finding that the wife's acts did not rise to the level of “egregious fault,” thereby precluding consideration of that conduct for purposes of equitable distribution.

The Court of Appeals noted that it has “rejected the notion that marital fault is a ‘just and proper’ factor for consideration [in determining equitable distribution], [e]xcept in egregious cases which shock the conscience of the court’.” The Court concluded that the husband's divorce claim was essentially one for adultery, which did not rise to the level of “egregious conduct,” and that the fraud cause of action was based entirely upon the wife's alleged adultery and on the husband's “reliance upon the denial of that behavior.”

Despite New York's general policy in favor of liberal disclosure, the Court ruled that the husband could not obtain disclosure for what was “essentially an allegation of marital fault.” In sum, the Court noted that “liberal discovery on issues of marital fault ... should not ordinarily be permitted, though there may be exceptions in rare circumstances.” The facts in *Howard S.* did not fit within any of the exceptions.

The Court rejected a case-by-case approach towards discovery in matrimonial actions and opted for a blanket rule. While acknowledging the availability of [CPLR 3103](#), which authorizes the issuance of protective orders on a case-by-case basis, the Court concluded that there could be “significant potential for abuse and harassment as a result of such discovery, as well as the possibility that parties will be induced to enter into disadvantageous settlements rather than litigate these types of intensely personal issues.” *Id.* at 437, 902 N.Y.S.2d at 21.

The Court did not specifically address whether disclosure of information pertaining to the adultery would be permitted in prosecuting the fraud claim, which was not before the Court. Disclosure of information pertaining to the fraud claim in *Howard S.*, separate and apart from the equitable distribution claim, should be allowed and would likely delve into the scope of the adultery. Any rule prohibiting broad disclosure on issues of marital fault should not be allowed to impede disclosure pertaining to other claims properly joined with the matrimonial claim. *See Berger v. Berger*, 49 A.D.2d 755, 372 N.Y.S.2d 709 (2d Dep't 1975). In a situation like *Howard S.*, however, the court may choose to stay disclosure on the fraud claim until the equitable distribution claim is resolved. Otherwise, a party might be able to obtain disclosure through the fraud door that is not available through the matrimonial door.

The holding in *Howard S.* does not appear to alter the rule allowing liberal disclosure of the finances of the parties in a divorce action. See [Uniform Rule 202.16](#) (applicable in all actions in which statements of net worth are required by [Domestic Relations Law § 236](#)); *Kooper v. Kooper*, 74 A.D.3d 6, 901 N.Y.S.2d 312 (2d Dep't 2010) (“the entire financial history of the marriage is open for examination” and “[b]road pretrial disclosure enabling both spouses to obtain necessary information regarding the value and nature of the marital assets is deemed critical.”); Commentary, C3101:22, below. An extensive treatment of disclosure in matrimonial actions, highlighting the distinctions between issues of fault and finances, appears in Justice Alan D. Scheinkman's Practice Commentaries on [section 236\(B\) of McKinney's Domestic Relations Law](#), notably in the Commentaries starting at C236B:19.

Is a party entitled to disclosure on the issue of custody? Few issues resolved by our courts, if any, are more important than those pertaining to custody, yet there is caselaw in the Second Department holding that a party is not entitled to disclosure in this realm. See, e.g., *Ginsberg v. Ginsberg*, 104 A.D.2d 482, 483-84, 479 N.Y.S.2d 233, 235 (2d Dep't 1984) (“the demand for a bill of particulars, insofar as it seeks disclosure on the merits of this action, including the question of child custody, must be vacated”); *Dominick R. v. Jean R.*, 2005 WL 1252573 (Fam. Ct., Kings Co. 2005) (in custody proceeding brought pursuant to Family Court Act, petitioner's papers did “not demonstrate ‘unusual circumstances’ to depart from the rule prohibiting discovery in custody matters.”). The issue of custody was not before the Court of Appeals in *Howard S.*, but with the majority's implicit adoption of the rule in the First and Second Department essentially prohibiting disclosure on issues of marital fault, it may be difficult to persuade a court that requests for disclosure in a custody battle should somehow receive different treatment.

#### **C3101:16 Shareholders' Derivative Actions.**

The recognition of the so-called “strike suit” during the twentieth century allowed a small shareholder to maintain a derivative action against corporate directorship and, by the threat of litigious harassment and inconvenience, compel it to make a handsome settlement. This problem resulted in the rule that in derivative actions, pretrial examination is not to be allowed unless the plaintiff supplies evidentiary support to sustain allegations of wrongdoing. *Nomako*, 20 A.D.2d at 333-334, 247 N.Y.S.2d at 233. The rule persists in more recent cases. See, e.g., *Resnick v. Karmax Camp Corp.*, 112 A.D.2d 206, 491 N.Y.S.2d 988 (2d Dep't 1985); *Condren v. Slater*, 85 A.D.2d 507, 444 N.Y.S.2d 454 (1st Dep't 1981); *Kenney v. Immelt*, 2013 WL 5976625 (Sup. Ct., New York Co. 2013). Plaintiffs usually satisfy this burden by submitting affidavits in response to a defendant's motion for a protective order under [CPLR 3103\(a\)](#) after the plaintiff has noticed depositions of agents of the corporation.

This rule presumably works only in favor of defendants in derivative actions. Since it is designed to relieve the defendants from the burden of pretrial proceedings until at least prima facie merit to the action is shown, there would seem to be no policy objection to the defendants taking the plaintiff's deposition. The defendants may in fact be seeking such disclosure for use on a summary judgment motion based on [CPLR 3211\(a\)\(7\)](#), which would be consistent with the motive that created this exclusionary rule in the first place.

#### **C3101:17 Other Representative Actions.**

The *Nomako* case, first discussed in the Practice Commentary to C3101:14 above, applied its statement about restrictive disclosure in stockholders' derivative actions to “other representative actions” as well, specifically noting that taxpayers' actions may fall into this category. The only extra obligation the plaintiffs bear in these cases is a showing of “a prima facie case on the merits by evidentiary allegations.” *Nomako*, 20 A.D.2d at 334, 247 N.Y.S.2d at 233. The court warned against “generalizations,” however, indicating a receptiveness to removing any of these actions from the excepted category whenever current conditions warrant it.

In representative actions involving taxpayers, shareholders, or any other large class, as in a regular class action under Article 9 of the CPLR, it is not unreasonable to exact a showing of prima facie merit of the claim from plaintiffs as a condition precedent to invoking the massive procedural aid afforded by class action status. In the class action proper, the court is empowered to make all needful procedural directions. CPLR 907; see *Siegel & Connors, New York Practice* § 147. This power, in addition to the ability to issue a protective order under CPLR 3103 and other statutes injecting the courts heavily into the class action supervisory process, see CPLR 901, 902, would back any judicial effort to assure that the class's claim has prima facie merit before the disclosure devices are invoked. See *Rodriguez v. Metro. Cable Commc'ns*, 79 A.D.3d 841, 842, 913 N.Y.S.2d 292, 294 (2d Dep't 2010) (recognizing “plaintiff's need to conduct preclass certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901(a) may be satisfied”).

### C3101:18 Accounting Actions.

*Nomako* also lists the accounting action for special treatment. *Nomako*, 20 A.D.2d at 334, 247 N.Y.S.2d at 233. There seems to be little justification for such an exception. Often a plaintiff with a monetary right against a defendant chooses the accounting action as a remedy because the plaintiff lacks sufficient information about the amount due to ground an ordinary law action. Accounting is an equitable remedy. In an accounting action, the liability issue is tried first, the court enters an interlocutory judgment if liability is found, and makes the defendant account for the damages. The remedy requires a showing of a fiduciary relationship between the plaintiff and the defendant, see *Kaminsky v. Kahn*, 20 N.Y.2d 573, 582, 285 N.Y.S.2d 833, 838 (1967), and the evidence relative to damages is often in the exclusive possession of the defendant.

If the listing of the accounting action in the *Nomako* case as an exception to the general disclosure requirements merely means that disclosure relative to damages should abide the finding of liability contained in an interlocutory judgment, it is reasonable. Damages may not be relevant until then. Cf. *Rupert v. Sellers*, 48 A.D.2d 265, 368 N.Y.S.2d 904 (4th Dep't 1975) (financial information of defendant not relevant until finding has been made that punitive damages should be awarded). Information reflecting on the existence of the fiduciary relationship or the breach of trust that grounds liability, however, should surely be an open subject for pretrial disclosure. Indeed, the fact that a fiduciary relationship is alleged should make the courts more, rather than less, receptive to disclosure.

### C3101:18A Disclosure of Settlements and High-Low Agreements.

Parties frequently settle actions and then attempt to seal the settlement from the outside world by making the terms confidential. There are many reasons for taking this route, including the problem of collateral estoppel. As a general rule, New York will give a consent judgment collateral estoppel effect. See *Siegel & Connors, New York Practice* § 451.

Non-settling parties in the same action in which the settlement occurred and parties to future actions will often attempt to obtain the contents of a prior settlement through disclosure. The law in New York State is not clear in this regard, with results varying widely in individual cases.

An accord among a number of plaintiffs whereby each agreed not to settle its case against the defendants without the approval of a majority of the others is not disclosable to the defendant. So held the Third Department in *Allegritti-Freeman v. Baltis*, 205 A.D.2d 859, 613 N.Y.S.2d 449 (3d Dep't 1994), reasoning that the agreement is not relevant to the issues in the case and, therefore, falls beyond the realm of “material and necessary” in CPLR 3101(a). *Id.* The plaintiffs in *Allegritti-Freeman*, homeowners in a real estate development, sought damages from the developer and its principals. Many sued together, but their cases were separated with a severance. Afterwards, their counsel--retained in common--drew the agreement. When the defendants learned about the agreement during an examination before

trial, they sought its production. The appellate division affirmed supreme court's order granting plaintiff's motion for a protective order.

Defendant also argued that such an agreement violated public policy by discouraging the resolution of lawsuits. The court rejected the argument, at least in respect of the agreement at bar, which was made during the pretrial stage of the action. All the plaintiffs did here, said the court, was “pool their resources for litigation purposes,” which they had the right to do. *Allegretti-Freeman*, 205 A.D.2d at 860-61, 613 N.Y.S.2d at 451.

In *Hulse v. A.B. Dick Co.*, 162 Misc.2d 263, 616 N.Y.S.2d 424 (Sup. Ct., New York Co. 1994), *aff'd* 222 A.D.2d 381, 635 N.Y.S.2d 641 (1st Dep't 1995), the First Department held that IBM and other defendants in repetitive stress injury (RSI) litigation were not entitled to disclosure of the terms of the confidential settlements the plaintiffs made with several other defendants in the action. An express condition of the settlements was that each party would keep confidential the terms of the agreements, including the consideration paid by defendants. The non-settling defendants claimed they were entitled to the data because the settlements were in essence “collateral source” payments, which are applied to reduce a defendant's liability under CPLR 4545. See Commentary C3101:18B, below. The court rejected the argument, holding that settlements with other tortfeasors do not qualify as “collateral source” payments, which are payments from sources altogether independent of the tortfeasors. “Payment of proceeds by a settling tortfeasor is a *direct* payment, as opposed to a collateral source payment.” *Id.* at 265, 616 N.Y.S.2d at 426.

Questions arise about how section 15-108 of the General Obligations Law figures in this debate. Section 15-108 is the statute that governs in cases in which some, but not all, tortfeasors have settled with the plaintiff. It provides for deductions from a verdict that a plaintiff obtains against a non-settling tortfeasor to account for settlements the plaintiff has made with other tortfeasors. See *Siegel & Connors, New York Practice* § 176. One of the possible deductions is the amount of the settlements. The non-settling defendants in *Hulse* argued that disclosure of the settlement agreements were “material and necessary” on two grounds: (1) to recalculate their maximum exposure in the event a verdict is taken against them; and (2) to assist them in determining whether they should settle rather than continue to defend. The court concluded that these arguments amounted to “trial strategy” and that “defendants' ‘need’ to obtain the settlement information arises not out of materiality or necessity but, rather, desirability.” *Hulse*, 162 Misc. 2d at 265, 616 N.Y.S.2d at 426. The court also rejected the non-settling defendants' claim that the settlements were relevant for purposes of impeaching plaintiffs and the settling codefendants, labeling it “speculative in the extreme.” *Id.* at 267, 616 N.Y.S.2d at 427. In sum, the court found that “the compelling need for privacy articulated by the plaintiffs outweighs the reasons stated by defendants for discovery of the settlement agreements.” *Id.* at 268, 616 N.Y.S.2d at 428. The First Department affirmed *Hulse*, essentially for the reasons stated by the supreme court. *Hulse*, 222 A.D.2d 381, 635 N.Y.S.2d 641-42.

The First Department ordered disclosure of a co-defendant's confidential settlement agreement in *Masterwear Corp. v. Bernard*, 298 A.D.2d 249, 750 N.Y.S.2d 5 (1st Dep't 2002). In *Masterwear*, plaintiff corporation brought an action to recover allegedly excessive compensation paid to its former executives. The non-settling defendant sought disclosure of the confidential settlement agreement between plaintiff and the settling co-defendant. The court found that the non-settling defendant had “a strong interest in disclosure” because the damages sought against him included recoupment of improper payments allegedly made to the settling defendant. In addition, it was “undisputed” that the settlement agreement contained admissions by the settling co-defendant. These factors brought the disclosure request within the “material and necessary” standard of CPLR 3101(a). See Commentary C3101:5, above. Plaintiff apparently argued that the non-settling defendant's request could be satisfied by allowing him to seek disclosure at trial to aid in cross-examination of the settling defendant. The court rejected this argument and remanded the matter back to supreme court for an in camera inspection to resolve any lingering doubts as to relevance. To satisfy the settling parties' concerns regarding confidentiality, the court observed that a CPLR 3103(a) protective order could, among other things, limit the disclosure of the settlement to the non-settling defendant and his attorney.

On remand, however, the supreme court denied the non-settling defendant's motion to compel disclosure of the agreement. *Masterwear* returned to the First Department, which clarified that the term “settlement agreement” in its prior order was intended to refer to all of the “confidential documents” sought by the non-settling defendant, including affidavits. *Masterwear Corp. v. Bernard*, 3 A.D.3d 305, 307-08, 771 N.Y.S.2d 72, 75-76 (1st Dep't 2004). Remanding the case again, the First Department observed that “[t]o the extent that the court's previous in camera review was of the settlement agreement only, then a further in camera review of all the related documents should be conducted with the proviso that irrelevant financial documents be shielded.” *Id.* at 308, 771 N.Y.S.2d at 76.

In *NYP Holdings, Inc. v. McClier Corp.*, 2007 WL 519272 (Sup. Ct., New York Co. 2007), defendant/third-party plaintiff settled the claims in the main action and sought indemnification from the third-party defendants. The third-party defendants sought discovery of, among other things, documents created in connection with the settlement of the main action. The court's discussion began with [CPLR 4547](#), which addresses the admissibility at trial of compromises and offers to compromise. Although this statute is somewhat pertinent to a disclosure request, it is important to note that disclosure under CPLR Article 31 is not limited to information that is admissible at trial. New York State courts have long allowed disclosure of all “matter material and necessary” to the prosecution or defense of the action. Therefore, disclosure can embrace information that is not itself admissible, but is calculated to lead to the disclosure of admissible evidence. See [Commentary C3101:7](#), above.

Defendant/third-party plaintiff sought to distinguish the First Department's decision in *Masterwear*, which required disclosure of any relevant portions of a settlement agreement and all other relevant “confidential documents,” including affidavits. In *NYP Holdings*, the defendant/third-party plaintiff had already turned over the settlement agreement and argued that its confidentiality agreement with the plaintiff precluded any further discovery relating to the settlement negotiations.

The court noted that to obtain reimbursement for the settlement of the main action, the third-party plaintiff is required to demonstrate “that in the absence of the settlement it would have been liable, that there was no good defense to liability and that the amount paid was reasonable.” *NYP Holdings*, 2007 WL 519272 at \*3. Therefore, the third-party defendants were entitled to disclosure of documents created in connection with the settlement of the main action.

The First Department's thoughtful decision in *Mahoney v. Turner Const. Co.*, 61 A.D.3d 101, 872 N.Y.S.2d 433 (1st Dep't 2009), is a further attempt to clarify this murky area and “offer guidance to the trial courts in dealing with requests by nonsettling parties for disclosure of settlement agreements.” In *Mahoney*, plaintiff suffered injuries at a construction site and sued the owner, general contractor and several subcontractors. After the court awarded plaintiff partial summary judgment on liability, plaintiff entered into a stipulation of discontinuance with the owner and general contractor, who were represented by the same counsel, and filed it with the Bronx County Clerk. See [CPLR 2104](#). While the stipulation stated that the plaintiff, owner and general contractor had settled the matter as between them, none of the terms of the settlement were provided.

In response to notices to admit and demands to produce documents served by the subcontractors, the owner and general contractor acknowledged that plaintiff had agreed to release them, but refused to provide any further details of the settlement. The subcontractors then moved to compel production of a copy of the settlement agreement or a sworn statement setting out its terms. In support of the motion, the subcontractors maintained that the content of the settlement agreement was “material and relevant to the issues pending between plaintiff and the [subcontractors]” and voiced their concern that plaintiff and the settling defendants were “improperly colluding.” The latter contention was no doubt raised because, despite the settlement, it was undisputed that the owner and general contractor planned to stay on and participate in the trial. The subcontractors also argued that the content of the settlement agreement was relevant under [General Obligations Law section 15-108\(a\)](#), discussed above, which allows a non-settling party to possibly deduct the amount paid by any settling tortfeasor, or the amount stipulated in a release, from any verdict.

The owner and general contractor opposed the motion, arguing that the settlement agreement contained a confidentiality provision. Nonetheless, they stated that they were willing to submit a copy of the settlement agreement for in camera review by the trial court. If, however, the trial court deemed it necessary to disclose any of the terms of the agreement, the settling defendants contended that counsel for the defendant subcontractors and their clients should be asked to execute a confidentiality agreement.

Despite this concession, the agreement was never provided to the court for in camera inspection. The court granted the motion to the extent of directing the owner and subcontractor to disclose the amount of the settlement, but refused the subcontractors' request for a copy of a settlement agreement or a sworn statement reciting its terms.

The First Department reversed, noting that “[t]he touchstone for determining whether information is discoverable in an action is whether [it] is ‘material and necessary’ ” and unanimously concluded that “disclosure of the terms of a settlement agreement by a settling party to a nonsettling party may be appropriate, despite the presence of a confidentiality clause in the agreement, where the terms of the agreement are ‘material and necessary’ to the nonsettling party’s case.” *Mahoney*, 61 A.D.3d at 104, 872 N.Y.S.2d at 436. Acknowledging that there may be instances in which a settlement agreement has no bearing on the issues remaining in the case, the court cited to its prior caselaw which observed that any doubt as to the relevance of a settlement agreement “may be resolved by an in camera inspection” of the settlement agreement. If it is deemed to be relevant, the interest of the settling parties in confidentiality “may be protected by an order limiting the disclosure of the settlement agreement to [the non-settling defendants] and [their] counsel or by such other manner as Supreme Court directs.” See *Masterwear*, 298 A.D.2d at 250, 750 N.Y.S.2d at 6.

The appellate division remanded the matter to supreme court for an in camera inspection of the settlement agreement and a new determination of the defendant subcontractors' motion. The court acknowledged that “[s]trong public policy considerations favor settlements, which avoid costly litigation and preserve scarce judicial resources.” However, “[t]hese public policy concerns can be accommodated short of denying a non-settling defendant information that is material and relevant to its case. The court can allow disclosure [of a settlement agreement] while protecting the confidential nature of the settlement agreement through a CPLR 3103[a] protective order.”

It is important to note that the determination of whether to order disclosure of a settlement agreement that is relevant to a non-settling party should not be governed by the two traditional exceptions to disclosure in CPLR 3101. CPLR 3101(b) grants an absolute immunity from disclosure to information that is “privileged.” See Commentary, C3101:25, below. CPLR 3101(d)(2) provides a qualified immunity to material “prepared in anticipation of litigation or for trial.” See Commentary, C3101:29, below. A settlement agreement does not fall under either category.

A party seeking to prevent or limit disclosure of such an agreement must seek relief under CPLR 3103(a). This provision grants the court far more discretion in reaching a determination than the exemptions to disclosure in CPLR 3101(b) and (d)(2). As noted by the First Department, the supreme court:

“[i]n exercising its discretion regarding whether and to what degree a protective order under CPLR 3103 should issue, ... must strike a balance by weighing the [ ] [parties'] conflicting interests in light of the facts of the particular case before it” (*Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 461, 470 N.Y.S.2d 122, 458 N.E.2d 363 [1983]). Thus, the court may direct the disclosure of those portions of the agreement that it finds are “material and necessary,” while shielding from disclosure those portions of it that are not, and “limiting the disclosure of the settlement agreement to [the nonsettling defendants] and [their] counsel or by such other manner as Supreme Court directs” (*Masterwear Corp.*, 298 A.D.2d at 250-251, 750 N.Y.S.2d 5).

*Mahoney*, 61 A.D.3d at 106, 872 N.Y.S.2d at 437.

The First Department's decision in *Mahoney*, and the standard of relevance required for disclosure under CPLR 3101, was interpreted very narrowly in *Henderson v. Stryker Corporation*, 2009 WL 994794 (Sup. Ct., New York Co. 2009). After plaintiff settled with a doctor and his professional corporation in this multi-party medical malpractice and wrongful death action, the non-settling defendants sought disclosure of “the terms, nature, and amounts of all settlements,” citing *Mahoney* in support of their demands. Plaintiff resisted, arguing that the settlement agreements were confidential.

In addressing the defendants' motion to compel production of the terms of the settlement agreements, the supreme court distinguished *Mahoney* because the non-settling defendants in *Henderson* did not assert that the settling defendants planned to participate in the trial. Furthermore, in opposition to the motion, plaintiff asserted that the parties settled for a sum certain, that there was no high-low agreement, and that they did not intend to call the settling defendant as a witness at trial.

The court rejected defendants' contention that the terms of the settlement were relevant to the defense of the action due to the set-off provisions of [General Obligations Law section 15-108](#). The court relied on *Hulse*, 222 A.D.2d 381, 635 N.Y.S.2d 641, a memorandum decision in which the non-settling defendants argued that disclosure of the settlement agreements at issue were “material and necessary” on two grounds: (1) to recalculate their maximum exposure in the event a verdict is taken against them; and (2) to assist them in determining whether they should settle rather than continue to defend. The First Department concluded that the terms of the settlements at issue “would be useful to defendants in assessing their maximum exposure [under [General Obligations Law section 15-108](#)], and thus whether they too should settle,” but nonetheless refused to order the disclosure. The *Hulse* court concluded “that such strategizing has no bearing on the underlying issues of fault and damages.” The *Henderson* court similarly concluded that the defendants could not articulate “a cogent reason, other than trial strategy,” to support their request for disclosure of the settlement terms and, therefore, denied the motion.

The disclosure of confidential settlement agreements is a thorny issue. It is difficult to reconcile the First Department's narrow application of CPLR 3101(a)'s relevance standard in *Hulse* with its decisions several years later in *Masterwear* and *Mahoney*. As noted by the Court of Appeals, CPLR Article 31 allows disclosure of “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452 (1968); see *Andon ex rel Andon v. 302-304 Mott Street Associates*, 94 N.Y.2d 740, 746, 709 N.Y.S.2d 873, 877 (2000). The decisions in *Mahoney* and *Masterwear* reach a sounder result by allowing the non-settling defendant at least some limited disclosure of the settlement documents, which fall within the broad net of CPLR 3101(a)'s relevance standard. [General Obligations Law section 15-108](#), by its own terms, makes such settlements relevant at trial. While the decisions in *Hulse* and *Henderson* classify the requests under the umbrella of “trial strategy,” a substantial amount of information is sought through disclosure for purposes of formulating trial strategy. The central inquiry in resolving these disclosure requests should focus on relevance. As emphasized by the First Department in *Masterwear*, the non-settling defendants should not have to wait until trial to obtain this information, which is material to the preparation of their case.

A settlement is not only relevant for ascertaining possible exposure at trial, but for purposes of impeachment. As recognized in *Masterwear*, the non-settling defendants should not have to wait until trial to obtain this information, which is also material to the preparation of their case. Cf. Commentary C3101:5, above (noting that while [CPLR 4545](#) collateral source payments from outside sources are not relevant until after the verdict, courts have allowed pretrial disclosure pertaining to such payments).

Strong public policy considerations favor settlements, which avoid costly litigation and preserve scarce judicial resources. See, e.g., *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 604 N.Y.S.2d 900 (1993); *In re New York City Asbestos Litig.*, 153 A.D.3d 461, 470, 62 N.Y.S.3d 309, 315-16 (1st Dep't 2017). These public policy concerns can be accommodated short of denying a non-settling defendant information that is material and relevant to

its case. The court can allow disclosure while protecting the confidential nature of the settlement agreement through a [CPLR 3103\(a\)](#) protective order. See *Masterwear*, *supra*. In any event, a party who has invoked the judicial process to resolve a dispute should not be able to dictate, with full authority, whether the terms of the resolution of that dispute can be disclosed.

### **CPLR 2104's Requirement That “Terms” of Stipulation of Settlement Be Filed**

Settlement agreements will normally be recorded in some form to ensure that they are enforceable under [CPLR 2104](#). This provision, which has been strictly interpreted by the Court of Appeals, requires that stipulations be made in open court, in a writing signed by the party to be bound, or reduced to an order and entered. See *Bonnette v. Long Island College Hosp.*, 3 N.Y.3d 281, 785 N.Y.S.2d 738 (2004) (undisputed oral settlement was never sufficiently reduced to writing and, therefore, was unenforceable); see *Siegel & Connors*, *New York Practice* § 204.

While a 2003 amendment to [CPLR 2104](#) might have had a substantial impact in this area, it has received limited attention in the decisions. The amendment states that the “terms” of any stipulation of settlement “shall be filed by the defendant with the county clerk.” The filing of the stipulation triggers the payment of a fee, and the collection of the fee was undoubtedly an overriding legislative intent for the amendment. Nonetheless, the filing requirement in [CPLR 2104](#) can present problems to settling parties desiring to maintain confidentiality. Lawyers will attempt to keep the “terms” of their client's settlements to a bare minimum, while other parties to the action, and even the press, will argue that [CPLR 2104](#) requires more. See *Mahoney v. Turner Const. Co.*, 61 A.D.3d 101, 107 n.2, 872 N.Y.S.2d 433, 437 n.2 (1st Dep't 2009) (“[w]hat the statute may require with respect to the disclosure of the terms of a stipulation of settlement is not clear”).

### **Court of Appeals Requires Disclosure of High-Low Agreements**

High-low agreements, in which two parties agree to confine any ultimate liability to a predetermined range, have been frequently used both inside and outside the context of litigation, such as in arbitration. These agreements share some common characteristics with settlement agreements and typically provide a level of comfort for the parties, but often present problems for attorneys and judges because there are very few specific rules governing their use. In *In re Eighth Judicial District Asbestos Litigation*, 8 N.Y.3d 717, 840 N.Y.S.2d 546 (2007), the Court of Appeals addressed the issue of whether a high-low agreement between the plaintiff and a defendant had to be disclosed to other parties in the action prior to the trial.

In *Asbestos Litigation*, plaintiff entered into a high-low agreement with one of two remaining defendants. The agreement was disclosed to the court, but not to the other defendant. With a high at \$185,000 and a low at \$155,000, the defendant to the agreement essentially had a maximum of \$30,000 at risk during the trial.

The Court noted that cases containing high-low agreements frequently go to verdict because a defendant's liability is normally keyed to the determinations of the jury. This may not present problems in a two-party trial, but where there are multiple defendants the Court expressed its agreement with numerous authorities and concluded that “a high-low agreement between a plaintiff and fewer than all defendants has the potential of prejudicing the rights of the nonagreeing defendant if all parties are not apprised of the agreement's existence.” *Asbestos Litigation*, 8 N.Y.3d at 721, 840 N.Y.S.2d at 549. These types of “secretive agreements may result in prejudice to the nonagreeing defendant at trial, distort the true adversarial nature of the litigation process, and cast a cloud over the judicial system.” *Id.*

The high-low agreement in *Asbestos Litigation* provided an incentive for the plaintiff to attempt to convince the jury that the non-settling defendant bore the lion's share of the fault. While this sort of motivation is not uncommon in a multi-defendant action, the Court concluded that the non-settling defendant was “entitled to disclosure of the

existence of the high-low agreement so it knew the true posture of the case.” *Asbestos Litigation*, 8 N.Y.3d at 722, 840 N.Y.S.2d at 549.

The failure to disclose the agreement resulted in prejudice to the non-settling defendant and required a new trial on both liability and damages. If the agreement had been disclosed, the defendant who was not a party to it could have sought various procedural and evidentiary rulings from the trial court regarding the admissibility and effect of the agreement. The Court established a clear rule to ensure fairness in future trials, holding:

whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action which requires the agreeing defendant to remain a party to the litigation, the parties must disclose the existence of that agreement and its terms to the court and the nonagreeing defendant(s).

*Id.* at 722-23, 840 N.Y.S.2d at 550. Determinations as to the effect of the agreement at trial, including whether it should be disclosed to the jury, “are matters that lie within the sound discretion of the trial court.”

The opinion in *Asbestos Litigation* does not state whether the non-settling defendant formally sought disclosure of any settlements between the parties. While the law concerning disclosure of settlement agreements is not well-settled in New York State, the *Asbestos Litigation* decision makes clear that the existence of a high-low agreement involving one of several defendants must be disclosed to the Court and all other parties to the litigation, even in the absence of a request.

The Court's opinion in *Asbestos Litigation*, though limited to the disclosure of high-low agreements, appears to support the proposition that settlement agreements are relevant to the prosecution or defense of an action. *See* CPLR 3101(a). The Court's decision should also prompt re-examination of the First Department's 1995 decision in *Hulse*, discussed above.

Almost simultaneously with the Court's decision in *Asbestos Litigation*, an important amendment to [General Obligations Law section 15-108](#) took effect on July 4, 2007. As discussed above, [section 15-108](#) is the provision governing the effect of a settlement in multiparty litigation. The amendment adds a new subdivision (d) which provides, among other things, that [section 15-108](#) will only apply to a settlement that “completely or substantially terminates” the dispute between the plaintiff and the defendant. The Sponsors Memo states that the new amendment “effectively exclude[s] ‘high-low’ agreements” from the statute's application, which “constitutes a change” from existing law. Sponsors Memo, S3739, c. 70 (2007). *See Baca v. HRH Const. Corp.*, 200 A.D.2d 538, 607 N.Y.S.2d 21 (1st Dep't 1994) (high-low agreement between plaintiffs and defendant was “release” within the meaning of [Gen. Oblig. L. section 15-108](#), barring any claim for contribution), *lv. den.* 84 N.Y.2d 807, 621 N.Y.S.2d 516. If this interpretation holds sway, a defendant entering into a high-low agreement will still be able to seek contribution and may be found liable for contribution. [Gen. Oblig. § 15-108\(b\), \(c\)](#). Paradoxically, one month before the Governor signed the proposed amendment into law, the Second Department concluded that certain high-low agreements are settlements, and therefore trigger the requirements of [CPLR 5003-a](#) before they can be enforced. *Cunha v. Shapiro*, 42 A.D.3d 95, 837 N.Y.S.2d 160 (2d Dep't 2007); *see also Flores v. 731 Southern Blvd. LLC*, 154 A.D.3d 518, 519, 63 N.Y.S.3d 319, 321 (1st Dep't 2017) (“A high-low settlement between parties is a conditional settlement, triggered only when there is a proper verdict.”).

Based on these developments, there is a distinct possibility that a high-low agreement may be deemed a settlement for purposes of [CPLR 5003-a](#), but not for purposes of [General Obligations Law section 15-108](#). This type of contradiction will not come as a shock to avid fans of New York practice, who have observed similar polarities in other procedural areas. These issues will likely be tackled by the courts in the near future because of the frequency of settlements in multiparty actions and the significant impact they can have on non-settlers.

**C3101:18B Disclosure of Collateral Source Information.**

Under the “collateral source” rule embodied in [CPLR 4545](#), payments from outside sources are not relevant until after the case is concluded and elements of the damages awarded are discernible. In addition, the facts with respect to the collateral source payments are for the court, rather than the jury, to determine. The courts have held, however, that “[p]retrial discovery is available so defendants can acquire information and documents that may later be used to support a motion for a collateral source hearing.” *Firmes v. Chase Manhattan Auto. Fin. Corp.*, 50 A.D.3d 18, 35, 852 N.Y.S.2d 148, 161 (2d Dep’t 2008), *lv. denied* 11 N.Y.3d 705, 866 N.Y.S.2d 608; *see Stolorski v. 234 E. 178th St. LLC*, 89 A.D.3d 549, 933 N.Y.S.2d 232 (1st Dep’t 2011); *Fleming v. Bernauer*, 138 Misc.2d 267, 524 N.Y.S.2d 143 (Sup. Ct., Oswego Co. 1987); *see Siegel & Connors, New York Practice* §§ 348, 399.

Postponing disclosure of collateral source information until after the verdict can impede settlement prospects. Furthermore, since the data should in any event be ready for the parties to present to the court when the verdict comes in, not letting the disclosure to proceed within the normal pretrial disclosure period will only cause delay at the conclusion of the action if the plaintiff prevails.

In *Firmes*, the court observed that “the most common discovery mechanism, of course, is the demand for collateral source information ... served by many defense practitioners with their clients’ answers.” *Firmes*, 50 A.D.3d at 35, 852 N.Y.S.2d at 162. A demand for a bill of particulars would also be an appropriate vehicle for obtaining information on collateral sources. *McKenzie v. St. Elizabeth Hosp.*, 81 A.D.2d 1003, 1004, 440 N.Y.S.2d 109, 110 (4th Dep’t 1981); *Lewis v. MTA Bus Co.*, 2016 WL 1228569 (Sup. Ct., New York Co. 2016); *see Siegel & Connors, New York Practice* § 238.

**C3101:18C Disclosure of Immigration Status of Party.**

The immigration debate, which has played out on center stage in our national politics for well over a decade, has also had relevance in New York civil practice. In *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 812 N.Y.S.2d 416 (2006), plaintiffs were illegal immigrants who sued under [Labor Law sections 240\(1\) and 241\(6\)](#) for injuries sustained while working at a construction site. Addressing the primary substantive law issue, the Court of Appeals held that an undocumented alien should not be precluded from recovering lost wages, including future lost wages. The Court concluded that the Federal Immigration Reform and Control Act of 1986 (“IRCA”) does not bar the application of New York’s Labor Law, which is designed to promote safety for all workers in the State and to help ensure a recovery if they are injured on the job.

In the companion cases that were the subject of *Balbuena*, the plaintiffs admitted they were in the country illegally and had no authority to work here. Moreover, there was no evidence in the record that plaintiffs tendered false documentation. On the issue of plaintiffs’ future lost earnings, the Court held that the jury may “consider immigration status as one factor in its determination of the damages, if any, warranted under the Labor Law.” The Court stated:

[a]n undocumented alien plaintiff could, for example, introduce proof that he had subsequently received or was in the process of obtaining the authorization documents required by IRCA and, consequently, would likely be authorized to obtain future employment in the United States. Conversely, a defendant in a Labor Law action could, for example, allege that a future wage award is not appropriate because work authorization has not been sought or approval was sought but denied. In other words, a jury’s analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case.

*Balbuena*, 6 N.Y.3d at 362, 812 N.Y.S.2d at 429.

Following immediately on the heels of *Balbuena*, several trial courts were met with applications for disclosure of information pertaining to the plaintiff's immigration status. In *Barahona v. Trustees of Columbia Univ.*, 11 Misc.3d 1035, 816 N.Y.S.2d 851 (Sup. Ct., Kings Co. 2006), plaintiff sued and, as in *Balbuena*, alleged violations of Labor Law sections 200, 240(1) and 241(6) for injuries sustained at a construction site. Defendants' discovery notice asked plaintiff to produce records pertaining to his immigration status, including applications for green card/work permit status and citizenship status. Defendants contended that these immigration records were relevant because plaintiff's immigration status directly affected plaintiff's claim for future lost earnings.

When plaintiff refused to produce the records, defendants moved pursuant to CPLR 3122, 3124 and 3126 to compel production of the information, to preclude plaintiff from offering certain evidence, or to strike plaintiff's complaint for failure to comply with the discovery demand. See CPLR 3126(2), (3); Siegel & Connors, *New York Practice* § 367. Quoting from *Balbuena*, the court noted that in considering what amount to award a plaintiff for future lost earnings, a jury may "consider immigration status as one factor in its determination of the damages, if any, warranted under the Labor Law." In addition, the court concluded that "[p]laintiff put his immigration status at issue when he sought damages for future lost earnings." Furthermore, in calculating the amount of future lost earnings, a jury may consider the likelihood that a plaintiff will remain in this country. Therefore, the defendant was entitled to

all applications for green card/work permit status and citizenship status; a duly executed authorization addressed to the Immigration and Naturalization Service, permitting the release of all documents pertaining to the plaintiff's immigration status, including but not limited to all applications for green card/work permit status and citizenship status; and a duly executed IRS form authorization with photo identification permitting the release of plaintiff's W-2 tax information from 1999 through 2005.

*Barahona*, 11 Misc.3d at 1036, 816 N.Y.S.2d at 852.

As noted above, there was no evidence in *Balbuena* that plaintiffs tendered any false documentation with their employment application. *Balbuena* acknowledged, however, that an undocumented alien who obtained employment by submitting false documentation to her employer could be precluded from recovering damages for lost wages. *Balbuena*, 6 N.Y.3d at 362-63, 812 N.Y.S.2d at 429-30. The defendant raising this issue will typically not be the employer, due to the workers' compensation defense that prevents a direct suit against the employer. The records of plaintiff's employer, who may be a third-party defendant in the action--see *Workers' Compensation Law section 11*--will nonetheless be relevant to this defense, as will Immigration records housed in a governmental agency, such as the Bureau of United States Citizenship and Immigration Services ("USCIS"), the successor to Immigration and Naturalization Services. See *Cocque v. Wildflower Estates Developers, Inc.*, 31 A.D.3d 484, 818 N.Y.S.2d 546 (2d Dep't 2006) (affirming denial of defendants' motion for summary judgment seeking dismissal of that portion of complaint pertaining to recovery for lost wages where defendants failed to establish the absence of triable issue of fact as to whether plaintiff submitted false documentation to her employer). USCIS's website, www.uscis.gov, provides information for obtaining any relevant Immigration documents pursuant to a Freedom of Information/Privacy Act ("FOIA") request.

*Ochs v. Trust*, 2006 WL 1372948 (Sup. Ct., Richmond Co. 2006) was an automobile accident case involving a plaintiff who was apparently a non-documented alien. Plaintiff moved for a protective order to vacate a Notice to Admit that he is "currently a non-documented alien whose country of origin is Sri Lanka." The defendants cross-moved to preclude plaintiff from testifying at trial about alleged lost earnings and to compel plaintiff to appear for a further deposition as to his immigration status and to produce citizenship documentation. The court reasoned that, under *Balbuena*, a "plaintiff's recovery is not limited to what she or he might have earned in his or her country of origin." Therefore, the court vacated the Notice to Admit and denied defendants' cross-motions.

Although it did not involve a construction site accident, it is difficult to square the holding in *Ochs* with the language in *Balbuena*. The Court of Appeals concluded that a jury could consider immigration status as a relevant factor in its determination of damages. Speaking in broad terms, the *Balbuena* Court observed that “a jury’s analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person” and that the determination must be based on “all of the relevant facts and circumstances presented in the case.” Whether a plaintiff could remain in the United States and presumably avail himself of a higher wage appears to be highly relevant to determining a future damages award. In certain cases, a plaintiff’s recovery for future damages could be limited to the wages that she could earn in her country of origin, especially if she is required to return there under any pertinent immigration laws. See NY PJI 2:290 (“Damages--Personal Injury--Loss of Earnings--In General”); NY PJI 2:320 (“Damages--Actions for Wrongful Death and Conscious Pain and Suffering”).

### **C3101:18D Disclosure of Cellular/Smart Phone Records.**

Cell phones and smart phones have become appendages to many human bodies, and their use can be highly relevant in personal injury actions, especially automobile accident cases. In *Detraglia v. Grant*, 68 A.D.3d 1307, 890 N.Y.S.2d 696 (3d Dep’t 2009), plaintiff demanded that defendants produce billing records pertaining to the date of the accident between 12:00 P.M. and 4:00 P.M. for all three of defendant employee’s cellular telephones and the wireless aircard for his company-issued laptop computer. Defendant was apparently a tech-savvy multitasker and all of the devices were in his vehicle at the time of the accident. He testified at his deposition, however, that he was not using any of them when the accident occurred. Plaintiff also sought to depose defendant employer’s information technology employee concerning the whereabouts of these devices and its policies relating to storage and retention of technology records and equipment.

Defendants refused to comply with these demands and plaintiff moved to compel disclosure. The supreme court partially granted the motion by requiring defendants to produce the records for the three cellular telephones and wireless aircard for the date of the accident between 1:00 P.M. and 3:30 P.M., and to produce defendant’s employee for a deposition.

The Third Department recited a familiar refrain, noting that while “disclosure is limited to information that is material and necessary to the prosecution or defense of an action, the discovery statutes are liberally construed and trial courts are ‘afforded broad discretion in managing disclosure.’ ” The court observed that the record on appeal contained information indicating that defendant may have been distracted immediately prior to the accident. There was also conflicting evidence concerning his possible use of the laptop in his vehicle. Defendant testified at his deposition that the laptop was in a bag, either behind his seat or in the passenger seat, that he never used it while driving, and that while driving he never left it strapped to the computer desk bolted to the vehicle. A tow truck driver who arrived at the scene submitted an affidavit stating that he saw the laptop on the vehicle’s computer desk, with the screen flipped up and turned on, indicating recent use.

The court concluded that “[t]his conflicting evidence raised questions as to whether [the defendant] used any technological devices while driving, rendering the records relevant to the question of his negligence.” Therefore, it affirmed the order of supreme court requiring production of the records. It noted, however, that “[d]isclosure of the records should be limited to a narrow time frame surrounding the accident, namely 2:30 P.M. to 3:30 P.M.” In addition, the *Detraglia* court directed that the records should initially be provided for the supreme court to review in camera. The trial court could then provide the parties “only relevant information redacted to protect defendants’ privacy interests.”

After the accident, defendant employee’s telephones and laptop were upgraded for newer models and the original devices were returned to the defendant employer. The Third Department noted that the originals “possibly contained

information concerning whether they were in use at the time of the accident.” Therefore, it also held that supreme court properly ordered the deposition of defendant employer's information technology employee.

The Fourth Department has taken a similar approach to *Detraglia* in *Neuman v. Frank*, 82 A.D.3d 1642, 919 N.Y.S.2d 644 (4th Dep't 2011), but this action involved legal malpractice rather than an automobile accident. In *Neuman*, the Fourth Department concluded that the trial court erred in ordering defendant lawyer to disclose his unredacted cellular telephone records for a three-year period, without first submitting those records to the court for an in camera review to allow the court to determine which cellular calls were relevant to the plaintiff's action. In camera review was also deemed necessary to protect the confidentiality of defendant lawyer's other clients. The matter was remitted to supreme court to conduct the in camera review prior to ordering disclosure of any relevant records.

The *Detraglia* court cited to *Morano v. Slattery Skanska, Inc.*, 18 Misc.3d 464, 846 N.Y.S.2d 881 (Sup. Ct., Queens Co. 2007), to support its conclusion. The *Morano* decision is an extensive discussion of several issues that can arise when a party seeks to obtain cell phone records in disclosure, and is recommended reading for any lawyer faced with the problem. With regard to obtaining the information from third parties, the *Morano* court noted that,

in accordance with case law, a *subpoena duces tecum* should not be used in lieu of discovery. The better practice, where the defendants indicate that they are not in possession of any of the demanded telephone records, is for the plaintiff to seek compliance, pursuant to CPLR 3124, by requesting authorizations from defendant ... for such records, without resorting to the extraneous procedure of serving a *subpoena duces tecum* upon a nonparty.

*Morano*, 18 Misc.3d at 473, 846 N.Y.S.2d at 887. In *Morano*, the court noted that this would have allowed defendant to challenge plaintiff's disclosure request for the authorizations by seeking a protective order pursuant to CPLR 3103, rather than necessitating a motion to quash the subpoena.

As for the relevance standard embodied in CPLR 3101(a), the *Morano* court determined:

that the mere fact that a defendant was in the possession of a cell phone at the time of an accident, without any witness testimony as to it being used at that time, would not entitle the plaintiff to said defendant's cell phone records, since such a discovery request would amount to nothing more than a fishing expedition.

*Morano*, 18 Misc.3d at 475, 846 N.Y.S.2d at 888

That is essentially the same test applied by the Third Department in *Detraglia*. *Detraglia*, 68 A.D.3d at 1308, 890 N.Y.S.2d at 698. In *Morano*, the key proof on this issue was provided by the plaintiff who submitted an affidavit indicating that he observed defendant “with an object in her hand held to her head” immediately before the accident. This opened the door for “limited disclosure, obtained via in camera review [that] would protect privacy, while revealing any calls made or received within the estimated time zone in close proximity to the accident.” See *Reina-Hudson v. Michael & Sons Nurseries, Inc.*, 2010 WL 3392838 (Sup. Ct., Westchester Co. 2010) (holding, after in camera review, that “discovery of plaintiff's cellular telephone records will not be directed as there is no evidence that the cellular telephone was being used at the time of the motor vehicle accident”).

We wonder if the standard for relevance applied in *Detraglia* and *Morano* might be overly restrictive. For example, if an accident occurred late at night or was unwitnessed, it will likely be difficult to obtain any proof that a driver was using an electronic device at the time. It might be a better practice to require in camera submission of records pertaining to all electronic devices, limited to the date and time of the accident, in all cases where there is a dispute on the issue. The court can then determine whether the records must be provided.

**C3101:19 “Party” vs. “Nonparty.”**

For disclosure purposes, a party is distinguished from a nonparty, usually referred to as a “witness.” CPLR 3101(a) (1) and (2) allow full disclosure of relevant information against a party, a party's agent, or a person who previously possessed a cause of action or defense asserted in the action. For disclosure against the nonparty, somewhat more stringent requirements are imposed on the party seeking disclosure. *See* CPLR 3101(a)(3-4). As discussed below, these requirements were significantly diminished by the Court of Appeals 2014 decision in *Kapon v. Koch*, 23 N.Y.3d 32, 38, 988 N.Y.S.2d 559, 564 (2014). *See* Commentary C3101:22, below.

CPLR 3101(a)(1) also characterizes as a “party” those persons who are in a party's control. If the party is a corporation, for example, each of its officers, directors, and employees would also be deemed a “party” for disclosure purposes. One of the practical effects of this categorization lies in the fact that any additional requirements for disclosure against a witness under paragraphs (3) or (4) of CPLR 3101(a) do not apply to a party. The same is true of all employees and agents of a party, whether the party is a corporate one or a natural person. The fact that a person is in the control of a party enables the law to impose upon that party the responsibility of seeing to it that such person submits to disclosure. Failing to do that subjects the party to the serious civil sanctions of [CPLR 3126](#). *See* Commentary C3126:2.

Since the party's “control” of the person against whom disclosure is sought is the key factor under CPLR 3101(a) (1), these agents and employees qualify as the “party” only when they are in the party's employ or control at the time the disclosure is sought. *McCormick v. Mars Assocs., Inc.*, 25 A.D.2d 433, 265 N.Y.S.2d 1004 (2d Dep't 1966); *see Burch v. Galgano*, 2007 WL 4442442, \*3 (Sup. Ct., New York Co. 2007). Former employees and agents are not within such control, for which reason they are indifferent to whether the party faces any consequences for non-disclosure. Therefore, they do not fall within CPLR 3101(a)(1). *See also* [CPLR 3117\(a\)\(2\)](#) (allowing use of deposition of employee or agent against employer provided relationship existed “at the time the testimony was given”). If disclosure is sought against such former agents or employees, the additional requirements of paragraphs (3) or (4) of subdivision (a) must be met. In addition, former employees must be served with a subpoena to be subject to disclosure. [CPLR 3106\(b\)](#); *see* Commentary C3106:3.

When disclosure was sought against a corporate party prior to 1984, the corporation generally had the initial option of whom to assign to make the disclosure. It was assumed that the corporation would dispatch someone with knowledge of the facts. Experience showed that this was not always the case, however. If the corporation sent someone who could not testify to the facts, while someone else on the corporate roster did have the requisite knowledge, the adverse party had to take some remedial step to secure that person's deposition. Normally, a motion had to be made under [CPLR 3124](#) to compel the corporation to produce a knowledgeable person. A 1984 amendment designed to improve this situation added a subdivision (d) to [CPLR 3106](#), which addresses the subject. Whether it effects any significant cure is debatable. *See* Commentary C3106:7.

It has been held that for purposes of disclosure, an unincorporated association should be treated the same as a corporation. *Smith v. Robilotto*, 27 A.D.2d 684, 685, 276 N.Y.S.2d 323, 325 (3d Dep't 1967).

While the deposition of one party is usually sought by another, a party may cause her own deposition to be taken. *Lapensky v. Gordon*, 41 Misc.2d 958, 246 N.Y.S.2d 442 (Sup. Ct., Kings Co. 1964). A party generally does this when she wishes to perpetuate her own testimony for use at the trial in the event she does not survive it. *Id.* [CPLR 3107](#) does not appear to limit such self-deposition taking to perpetuation instances, but since a party cannot make general use of his own deposition at the trial unless certain specific factors are present, there is little incentive for a party to notice her own deposition unless there is a perpetuation motive. *See* [CPLR 3117\(a\)\(3\)](#); Commentary C3117:3.

A party may obtain disclosure against another party on the same side, as defendant against co-defendant. *See* Commentary, C3101:13, above. Disclosure has even been permitted between plaintiffs. *See, e.g., Rosado v. Valvo*,

58 Misc.2d 944, 297 N.Y.S.2d 230 (Sup. Ct., Kings Co. 1969) (noting that CPLR 3101[a] “contains no express requirement of adverse parties,” court allowed deposition of one plaintiff by another where possible hostility existed between them).

Suppose that a guardian is suing on behalf of an infant or an incapacitated person. As far as the availability of disclosure is concerned, it is idle to waste time and thought on who is technically the “party” in such a case. If the infant is the party, disclosure should still be freely available against the guardian if he has any knowledge bearing on the case. In these circumstances, the guardian would likely be deemed an “agent” under CPLR 3101(a)(1). Even assuming the guardian is not a party, but a nonparty witness, the very fact that the guardian represents the infant party should satisfy the relevance criteria now required under CPLR 3101(a)(4) and uphold such disclosure. *See* Commentary C3101:22, below. The only additional requirements, if such person is technically a nonparty rather than party, is that he be summoned to make disclosure by service of a subpoena, CPLR 3106(b), and tendered the requisite fees. *See* CPLR 8001. The fees are taxable as disbursements should the one seeking the disclosure ultimately prevail on the merits. CPLR 8301(a)(1).

#### **C3101:20 Assignors under 3101(a)(2).**

The plaintiff may possess the cause of action by reason of an assignment. Similarly, the defendant may face the claim by having succeeded to the liabilities of another. In either instance, the assignor of the claim or the person or entity originally incurring the liability qualifies as a “party,” and disclosure can therefore be had against that person without the additional burdens imposed by CPLR 3101(a)(3) or (4). This applies not merely to the immediate assignor or, as under prior law, to the original owner of the claim or defense. Under the statutory language in CPLR 3101(a)(2), it applies to the original owner and every mesne assignee (or assumer) along the way.

Under CPLR 3101(a)(1), the person under the control of a party by employment or agency qualifies as a “party” for disclosure purposes, and that person's omission to disclose upon due notice or order can result in the imposition of a civil sanction against the party under CPLR 3126. *See* Commentary C3126:2. The theory is that since such person is under the control of the party, responsibility for making that person disclose can be imputed to the party. That is not true of the former owner of a claim or defense under CPLR 3101(a)(2). If the agreement of assignment or assumption imposes no obligation on the person who originally possessed the cause of action or defense to cooperate in a possible litigation, such person can default on the disclosure. The default will generally not be visited on the ultimate party, who therefore cannot be punished under CPLR 3126 absent some clear showing of control by the party or collusion. *See MIA Acupuncture, P.C. v. Mercury Ins. Co.*, 26 Misc.3d 39, 894 N.Y.S.2d 321 (App. Term, 2d Dep't 2009). A coercive threat to cooperate with disclosure can be supplied with a subpoena, disobedience of which may result in a contempt of court. CPLR 3106(b), 2308; *see* Siegel & Connors, *New York Practice* § 385. A subpoena need not be served on a person who qualifies under paragraph (1) as a present agent or employee, but it must be served on one who is within CPLR 3101(a)(2).

In sum, CPLR 3101(a)(2) permits disclosure to be had against the former owner of a claim or defense in the action without the need of satisfying the extra requirements of CPLR 3101(a)(3) or (4). The party seeking disclosure under these circumstances must serve a subpoena, however, and not simply a mere notice. *See, e.g.*, CPLR 3106(b), 3120(1); Commentary C3120:12.

#### **C3101:21 The Special “Witness” Requirements for Disclosure.**

For a party, or someone under a party's present control, the only showing that need be made to justify disclosure, if it is contested, is that the information sought is “material and necessary,” that is “relevant.” *See* Commentary C3101:5,

above. That requirement, liberally construed in the landmark *Allen* decision, also obtains for disclosure against a nonparty witness, but with the additional requirement that either paragraph (3) or (4) of 3101(a) be satisfied.

Paragraph (3) is self-explanatory. A showing of any one of its grounds, along with the preliminary requirement of relevance in CPLR 3101(a), satisfies. To be consistent with *Allen's* broad interpretation of a party's right to disclosure, any reasonable doubt as to whether a paragraph (3) requirement is satisfied, after all the parties have offered their proof on the issue, should be resolved in favor of allowing the disclosure if the information sought is relevant. It would be inconsistent with the *Allen* decision's liberal-construction edict of CPLR 3101(a) for the court to become embroiled in technical arguments on the requirements of CPLR 3101(a)(3). Thus, for example, if there is some doubt as to whether a nonparty witness lives more than 100 miles from the place of trial, the court should not be too patient with an effort, by the one resisting disclosure, to show that a witness possessing relevant information resides 99.7 miles from the courthouse "as the crow flies."

A corporation that is not a party to the action may sometimes be sought as a witness. This is permitted, but the disclosure against a corporate witness as such is available only through its present employees, directors, officers or agents. If disclosure is sought of a nonparty individual who was formerly employed or otherwise in the control of the nonparty corporation, it must be sought against that nonparty individually, and the requirements of paragraph (3) or (4) individually satisfied. See Commentary C3101:19, above.

A party seeking disclosure of something in the possession of a federal officer or agency runs into special problems. An endeavor to coerce disclosure, such as with a New York State court subpoena or court order, is often unavailing. A hat-in-hand approach can sometimes work better. A suggested alternative appears in *Goldsmith v. Hotel Park Sheraton, Inc.*, 54 Misc.2d 294, 282 N.Y.S.2d 414 (N.Y. City Civ. Ct. 1967), where one party was directed to furnish the other with an authorization to inspect its customs declaration. If the particular federal agency permits inspection of a document or record upon permission of a person concerned with it, and such person is a party to the litigation, that person can be directed to furnish the necessary authorization. If the particular item sought is a matter of public record, the party should be able to inspect it without court aid.

The segment of CPLR 3101(a)(3) concerned specifically with physicians, dentists and podiatrists is the result of a 1979 amendment. The of-right deposition, even when sought by the patient-party, is authorized only with respect to one "who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness." CPLR 3101(a)(3). Focusing our treatment here on the statute's application to physicians, it permits the deposing of a physician as a matter of right when the elements of the statute are met. If they are, the physician's deposition is permissible on that basis alone, i.e., no other showing from among the rest of the paragraph 3 list is needed. See *Calvao v. St. John's Riverside Hosp.*, 261 A.D.2d 350, 689 N.Y.S.2d 185 (2d Dep't 1999). Conversely, if a nonparty physician happens to fall within one of the other categories in CPLR 3101(a)(3) or within CPLR 3101(a)(4), the deposition is authorized without resort to that segment of CPLR 3101(a)(3) that is specific to physicians. See *Roeck v. Columbia-Greene Medical Center*, 248 A.D.2d 921, 670 N.Y.S.2d 269 (3d Dep't 1998) (defendant could take deposition of plaintiff's doctor, who resided more than 100 miles from place of trial).

This language in CPLR 3101(a)(3) only authorizes the deposing of a party's own physician. So, for example, the defendant may not obtain the plaintiff's physician's deposition under this provision, although the obtaining of a treating physician's deposition may be possible under some other part of CPLR 3101(a)(3), or under CPLR 3101(a)(4). See *Roeck, supra*; *Villano v. Conde Nast Publications, Inc.*, 46 A.D.2d 118, 361 N.Y.S.2d 351 (1st Dep't 1974); Siegel & Connors, *New York Practice*, § 345. This is all subject to the court's power to issue a protective order under CPLR 3103(a), and the broad judicial discretion that resides there.

The deposition of a "person authorized to practice medicine" resulting from this of-right provision relating specifically to physicians, or from the satisfaction of one of the other requirements of paragraph (3), or the requirements of

paragraph (4), is admissible in evidence at the trial under CPLR 3117(a)(4) without the usual requirement of a preliminary foundation. See Commentary C3117:8A.

In *Provenzano v. 181 South Franklin Associates Inc.*, 2009 WL 1504724 (Sup. Ct., Nassau Co. 2009), the court ruled that a party seeking to depose her own physician must comply with Uniform Rule 202.17, which governs the exchange of medical reports in personal injury and wrongful death actions and supplements the provisions in CPLR Article 31. See *Siegel & Connors, New York Practice* § 363. The party must provide her physician's report in advance of the deposition, or forfeit the right to introduce the testimony at trial pursuant to CPLR 3117(a)(4). See Commentary C3121:8 (“Exchange of Reports”) (discussing *Provenzano* decision in further detail).

After the Court of Appeals 2014 decision in *Kapon v. Koch*, 23 N.Y.3d 32, 38, 988 N.Y.S.2d 559, 564 (2014), which reached an expansive reading of CPLR 3101(a)(4) to allow disclosure of any relevant information from a nonparty, CPLR 3101(a)(3) has diminished in its importance. That landmark decision is discussed in the section immediately below.

### **C3101:22 The “Circumstances” Rule of CPLR 3101(a)(4).**

The party who seeks disclosure of a nonparty witness and cannot satisfy anything on the list contained in CPLR 3101(a)(3) may turn to paragraph (4). This is a catch-all provision permitting disclosure against a nonparty of any relevant information upon notice stating the “circumstances or reasons such disclosure is sought or required.” CPLR 3101(a)(4). The quoted language was inserted in a 1984 amendment. Before that, the requirement had been a showing of some “special circumstance” to warrant the disclosure. Since the amendment dispensed with the “special” requirement, it should have required less of a showing, but many courts continued to impose what, in effect, was a “special circumstances” standard under CPLR 3101(a)(4).

The view that CPLR 3101(a)(4) should be deemed satisfied so as to authorize the deposing of a nonparty witness whenever there is a showing that the deposition is needed in order for the party seeking it to prepare fully for trial gained broad support even before the 1984 amendment. See, e.g., *Kenford Co., Inc. v. Erie Co.*, 41 A.D.2d 586, 587, 340 N.Y.S.2d 300, 301-02 (4th Dep't 1977). *Kenford* indicated that paragraph (4) should be deemed satisfied merely upon a showing that the seeking attorney “needs such witness's pretrial deposition in order to prepare fully for the trial.” *Kenford Co.*, 41 A.D.2d at 586, 340 N.Y.S.2d at 302.

A post-amendment decision from the First Department, *Slabakis v. Drizin*, 107 A.D.2d 45, 485 N.Y.S.2d 270 (1st Dep't 1985), acknowledged the liberal trend of the “special circumstances” rule and pronounced that it should continue under the 1984 amendment of CPLR 3101(a)(4). The Second Department held to a more restrictive view of the statute in *Dioguardi v. St. John's Riverside Hosp.*, 144 A.D.2d 333, 533 N.Y.S.2d 915 (2d Dep't 1988), concluding that the amendment did not go as far as its advocates had hoped. The fact that there is a requirement of stating “circumstances or reasons” for seeking disclosure from a nonparty witness suggested to the *Dioguardi* panel that the mere “relevancy” standard that suffices for disclosure from a party does not suffice as against a nonparty witness. “More than mere relevance and materiality is necessary to warrant disclosure from a nonparty,” says the court. *Id.* at 334-35, 533 N.Y.S.2d at 916. Some special additional factor must still be shown, such as “the information sought ... cannot be obtained from other sources.” *Id.* at 334, 533 N.Y.S.2d at 916; see *Bostrom v. William Penn Life Ins. Co.*, 285 A.D.2d 482, 727 N.Y.S.2d 160 (2d Dep't 2001). That position continued to hold sway in the Second Department through the beginning of the twenty-first century, meaning that disclosure that could be obtained from a nonparty in an action venued in New York County would often be denied in an action commenced across the Brooklyn Bridge in Kings County. The Third Department adhered to the Second Department's view. See, e.g., *Matter of John H.*, 56 A.D.3d 1024, 1026, 868 N.Y.S.2d 790, 792 (3d Dep't 2008).

The conflicting interpretations of CPLR 3101(a)(4) lingered for almost three decades before the Court of Appeals finally resolved the issue in *Kapon v. Koch*, 23 N.Y.3d 32, 38, 988 N.Y.S.2d 559, 564 (2014), concluding that CPLR 3101(a)(4) “imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source [i.e., ‘special circumstances’]. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.”

In *Kapon*, a party to a California action sought disclosure for use in that action by serving a subpoena on nonparty petitioners in New York pursuant to CPLR 3119, the “Uniform Interstate Depositions and Discovery Act.” This handy statute, adopted in 2011, allows a party in an action pending in another United States jurisdiction to obtain disclosure in New York State without the need for a court order. See Commentary C3119:2. CPLR 3119(e) provides that “[a]n application to the court for a protective order or to ... quash ... a subpoena issued under this section must comply with the rules or statutes of this state and be submitted to the court in the county in which discovery is to be conducted.” Therefore, when the nonparty petitioners moved under CPLR 2304 to quash the subpoenas, the special proceeding generated disputes on several issues of New York law, including the standard for obtaining disclosure from a nonparty.

The Court of Appeals held that CPLR 3101(a)(4) requires a party serving a subpoena, which is necessary to compel disclosure from a nonparty, to “sufficiently state the ‘circumstances or reasons’ underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it) ....” *Kapon*, 23 N.Y.3d at 34, 988 N.Y.S.2d at 562. The Court reasoned that “[b]ecause a nonparty is likely to be less cognizant of the issues in pending litigation than a party, section 3101(a)(4)’s notice provision mandates that the nonparty is apprised of the ‘circumstances or reasons’ as to why the party seeks or requires the disclosure.” The subpoenaing party’s notice obligation under CPLR 3101(a)(4) was described as a “minimal” one, and was “never intended by the legislature to shift the burden of proof on a motion to quash from a nonparty to the subpoenaing party, but, rather, was meant to apprise a stranger to the litigation the ‘circumstances or reasons’ why the requested disclosure was sought or required.” *Id.* at 39, 988 N.Y.S.2d at 565. For a discussion of the corresponding burdens of proof on a motion to quash a subpoena under CPLR 2304, see Commentary C2304:1 (“Motion to Quash”).

Applying this standard in *Kapon*, the Court concluded that the subpoenas at issue satisfied CPLR 3101(a)(4)’s notice requirement. *Kapon*, 23 N.Y.3d at 39, 988 N.Y.S.2d at 565. In addition to including the date, time and location of the depositions of the nonparties, see CPLR 3107, the subpoenas also affixed copies of the amended complaint detailing the relationship between the deponents and the defendant in the action for which the disclosure was sought. *Id.* The Court cautioned that a pleading might not always provide the notice required under CPLR 3101(a)(4) and, conversely, that attaching the pleadings of the action in which disclosure is sought to the subpoena is not the only manner in which the subpoenaing party can comply with the statute. *Id.* n.3. The notice provided in the subpoena in *Kapon* did, however, “serve[ ] the function intended by the legislature: it gave petitioners sufficient information to challenge the subpoenas on a motion to quash.” *Id.*

As in *Kapon*, motions to quash under CPLR 2304 are often accompanied by motions for a protective order under CPLR 3103(a). See also, *McDaid v. Semegran*, 2007 WL 1746877 (Sup. Ct., Nassau Co. 2007) (“Plaintiffs seek a protective order pursuant to CPLR 3103 relieving the non-parties from responding to the subpoenas duces tecum and/or an order pursuant to CPLR 2304 quashing them.”). The latter provision permits “any person from whom or about whom discovery is sought,” i.e., a nonparty, to move for “a protective order denying, limiting, conditioning or regulating the use of any disclosure device.” CPLR 3103(a). The standards outlined in *Kapon* should also govern motions for a CPLR 3103(a) protective order, yet under that subsection a court may exercise its discretion and set limitations or conditions on the disclosure of relevant information. See Commentary C3103:1.

The *Kapon* decision will undoubtedly allow for relatively expansive disclosure from nonparties in all four judicial departments. Most good things come at a cost, however, and in this regard it must be noted that the somewhat broad

standard of disclosure authorized by *Kapon* is tempered by CPLR 3122(d), which provides that “[t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.”

There have been some interesting decisions applying *Kapon* that highlight the procedure for disclosure from a nonparty and demonstrate just how significantly the law has changed in this area. For example, in *Ferolito v. Arizona Beverages USA, LLC*, 119 A.D.3d 642, 990 N.Y.S.2d 218 (2d Dep’t 2014), plaintiff/petitioner brought a hybrid action seeking, among other things, the dissolution of several limited liability companies and the judicial dissolution of a corporation, which was converted to a valuation proceeding. The supreme court ordered nonparty Morgan Stanley to comply with the disclosure demands in a subpoena duces tecum served by plaintiff.

After setting forth the standards outlined in *Kapon*, the Second Department held that the subpoena sufficiently detailed the relationship between Morgan Stanley and the parties, and provided Morgan Stanley with ample information to mount a challenge to it. Once plaintiff “met that minimal obligation,” the Second Department noted that under *Kapon* “the burden shifted to Morgan Stanley to establish that the requested documents were either ‘utterly irrelevant’ to the action, or that the ‘futility of the process to uncover anything legitimate is inevitable or obvious.’ ” *Ferolito*, 119 A.D.3d at 643, 990 N.Y.S.2d at 220. Morgan Stanley did not meet that burden because the documents sought were highly relevant to the valuation of the subject corporation, which was central to the underlying proceedings. *Id.* In addition, Morgan Stanley did not dispute that it possessed the documents. *Id.*

Morgan Stanley did, however, demonstrate that a portion of the discovery demands contained in the subpoena sought documents that contained trade secrets. *Id.* The task of establishing this, the court stressed, was a “minimal initial burden.” *Id.* at 644, 990 N.Y.S.2d at 220. Therefore, plaintiff was required to show that the “information [sought was] ‘indispensable to the ascertainment of truth and [could] not be acquired in any other way.’ ” *Id.*; see also *Mann v. Cooper Tire Co.*, 33 A.D.3d 24, 30-31, 816 N.Y.S.2d 45, 52 (1st Dep’t 2006), *lv. denied*, 7 N.Y.3d 718, 827 N.Y.S.2d 688; Commentary C3101:45A (“Disclosure of Trade Secrets”). In that plaintiff failed to meet that burden, the Second Department modified the supreme court’s order and granted nonparty Morgan Stanley’s motion to quash the subpoena to the extent it sought documents containing trade secrets.

Many of the decisions applying the special circumstances standard to deny disclosure sought from a nonparty involved treating physicians. See, e.g., *Doe v. Karpf*, 36 A.D.3d 652, 826 N.Y.S.2d 584 (2d Dep’t 2007) (holding in brief decision and order that defendant failed to demonstrate special circumstances warranting disclosure sought from nonparty treating physicians, and citing to four cases from the Second Department denying a defendant’s request to depose the plaintiff’s treating physician); *Dioguardi*, 144 A.D.2d at 334-35, 533 N.Y.S.2d at 916 (denying disclosure from a nonparty doctor because plaintiff had failed to show that the information sought was not available from other sources). The Court of Appeals decision in *Kapon* may now clear the way for such nonparty disclosure, which can be very significant in a personal injury action. The opinion in *Bianchi v. Galster Mgmt. Corp.*, 131 A.D.3d 558, 15 N.Y.S.3d 189 (2d Dep’t 2015) makes the point.

In *Bianchi*, plaintiff’s medical records contained notations indicating her physician’s skepticism about plaintiff’s claims as to the cause of her injuries. The defendants served a subpoena on the nonparty physician seeking to depose her in connection with plaintiff’s alleged injuries. Plaintiff moved to quash the subpoena, and the Second Department applied the framework set forth in the *Kapon* decision to affirm the denial of the motion. The *Bianchi* court concluded that defendants satisfied the notice requirement in CPLR 3101(a)(4) by including with the subpoena a document entitled “Authorization to Permit the Interview of Treating Physician by Defense Counsel,” which stated “the circumstances or reasons” requiring the deposition. In that the defendants met this “minimal obligation, the burden shifted to the plaintiff to establish that the deposition testimony sought was irrelevant to this action, which she failed to do.” In addition, the court noted, defendants established that the physician possessed information that was relevant to the defense of the action.

A nonparty witness is theoretically protected from expense and inconvenience by the requirement that witness and mileage fees be tendered with the subpoena used to compel disclosure. [CPLR 2303\(a\)](#), [3106\(b\)](#), [8001](#). If this nominal compensation is insufficient (and it surely is, based merely on the price of gas), the court may make further provision in behalf of the witness under [CPLR 3103](#). If it is a discovery and inspection that is sought against the nonparty witness under [CPLR 3120](#), as opposed to a mere deposition, “[t]he reasonable production expenses ... shall be defrayed by the party seeking discovery.” [CPLR 3122\(d\)](#); *see* Commentary C3122:4. The party seeking disclosure from a nonparty should consider voluntarily paying all of the witness's actual expenses, including any costs of transportation and lodging, as well as reimbursement for any earnings the witness loses in order to give testimony. *See Siegel & Connors, New York Practice* § 382.

### **C3101:23 Procedure for Disclosure Against Nonparty.**

Before its amendment in 1984, paragraph (4) of subdivision (a) required that “the court on motion” determine that “special circumstances” existed before a nonparty disclosure could proceed. Nevertheless, most courts concluded that a court order was not needed in advance. Courts frequently made the “special circumstances” determination, when called upon, after the notice seeking disclosure was served. The amendment struck the “on motion” language in [CPLR 3101\(a\)\(4\)](#) and substituted instead the requirement that the party seeking the deposition serve a “notice.”

The “notice,” in fact, must be a subpoena when disclosure is sought from a nonparty. *See* [CPLR 3106\(b\)](#), [3120\(1\)](#). The subpoena must be served personally on the nonparty under [CPLR 308](#), with the requisite subpoena fees. [CPLR 2303\(a\)](#); *see* [Siegel & Connors, New York Practice](#) § 383. As discussed in the section immediately above, in *Kapon* the Court of Appeals held that [CPLR 3101\(a\)\(4\)](#) requires a party serving a subpoena to “sufficiently state the ‘circumstances or reasons’ underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it)....” *Kapon*, 23 N.Y.3d at 34, 988 N.Y.S.2d at 562. The subpoena must also be served on the other parties, advising of the disclosure. *See* [CPLR 2103\(e\)](#); [Siegel & Connors, New York Practice](#) § 203. This allows other parties to object to the disclosure when the conditions in [CPLR 3101\(a\)\(3\)](#) or (4) are not met.

[CPLR 2303\(a\)](#) may also be relevant when seeking disclosure from a nonparty. It states that a subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons and “[a]ny person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day's witness fee.” In the case of a subpoena duces tecum, [CPLR 2303\(a\)](#) requires that a copy shall also be served “on each party who has appeared in the [action] so that it is received by such parties promptly after service on the witness and before the production of books, papers or other things.” [CPLR 3120\(3\)](#) requires that the subpoena duces tecum be served on all other parties “at the same time” it is served on the nonparty.

Service of the subpoena duces tecum on all other parties can be accomplished by regular mail. [CPLR 2103\(b\)\(2\)](#); [CPLR 2303\(a\)](#); *see* [Siegel & Connors, New York Practice](#) § 202. Given [CPLR 3120\(3\)](#)'s requirement that the subpoena duces tecum be served on other parties “at the same time” it is served on the nonparty, the mailing should take place promptly after personal service on the nonparty. Service on the same day might not be practical or possible in all circumstances. The service on the other parties should be sufficient if made promptly to provide sufficient time to object before the disclosure is obtained. *See* [Siegel's Practice Review](#), No. 142, p. 3 (Nov. 2003).

[CPLR 3107](#), in effect, mandates that a subpoena requiring attendance be served on all other parties at least twenty days prior to the deposition. Through a back door approach, [CPLR 3117\(a\)\(3\)](#) also effectively requires such service. It allows use of the deposition of a nonparty at trial only against any party “who was present or represented at the taking of the deposition or who had the notice required under these rules.” [CPLR 3117\(a\)\(3\)](#).

If the other side or the witness has an objection to the disclosure, it can be raised in a response to the disclosure request or in a motion for a protective order. *See* [CPLR 3122\(a\)](#), [3106\(b\)](#). The procedure provided by various provisions in

the CPLR is for the lawyer seeking a nonparty witness's deposition to merely have a subpoena served on the witness, advising the other parties of the scheduled disclosure with notices served under [CPLR 3107](#). It is then the obligation of the witness or an adverse party to bring to the court's attention the fact that the extra requirements of [CPLR 3101\(a\)\(3\)](#) or [\(4\)](#) have not been satisfied. This can be done either with a motion to quash the subpoena or for a protective order under [CPLR 3103\(a\)](#). See [CPLR 3106\(b\)](#).

If discovery and inspection is sought from a nonparty, the 2003 amendments to the CPLR provide that a subpoena is served on the nonparty, with a copy served on all other parties to the action. See [CPLR 3120\(1\), \(3\)](#); Commentary C3120:12. If the nonparty objects to the disclosure, she “shall serve a response which shall state with reasonable particularity the reasons for each objection.” [CPLR 3122\(a\)](#). This new statutory scheme places the burden on the nonparty to delineate any specific reasons why the requirements in [CPLR 3101\(a\)\(3\)](#) and [\(4\)](#) are not satisfied. See *Velez v. Hunts Point Multi-Service Ctr., Inc.*, 29 A.D.3d 104, 811 N.Y.S.2d 5 (1st Dep't 2006). If the nonparty fails to object to these notice requirements and the disclosure goes forward, the objection is waived. *Id.* at 111-12, 811 N.Y.S.2d at 10. A party to the action could also raise the objection by way of a motion for a protective order under [CPLR 3103](#), which would stay the disclosure. [CPLR 3103\(b\)](#). The party seeking disclosure may then move for an order under [CPLR 3124](#) or [2308](#) to compel the disclosure.

In *Velez*, even though the subpoena served on the nonparty failed to articulate the reasons disclosure was sought, the First Department denied motion to quash because the party's opposition papers articulated the need for the discovery sought. *Velez*, 29 A.D.3d at 111, 811 N.Y.S.2d at 10-11; see *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 1290, 842 N.Y.S.2d 646, 647 (4th Dep't 2007) (in affirming the denial of the motion to quash the subpoena, the court observed that even if the subpoena and accompanying notice did not advise the nonparty mediator of the “ ‘circumstances or reasons such disclosure [was] sought or required,’ ” the defendant wife's response to the motion provided the requisite information), *aff'd* 10 N.Y.3d 923, 862 N.Y.S.2d 456 (2008); Commentary C3120:12.

### **C3101:23A Interplay of Article 31 with Freedom of Information Law.**

The Freedom of Information Law (FOIL), overhauled in 1977 and now consisting of [sections 84](#) through [90](#) of the [Public Officers Law](#), has the function of encouraging open government. To that end it permits disclosure of governmental records at the behest of a member of the public, which can overlap the function of Article 31 of the CPLR when a governmental agency happens to be a party to an action. When that does occur, and it appears that the side opposing the governmental party would be entitled under FOIL to a disclosure that would not be required under the provisions of Article 31, may FOIL be resorted to? The Court of Appeals gave that question an unequivocal yes. *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 476 N.Y.S.2d 69 (1984).

Refusing to follow the rationale that had become prevalent through caselaw in the lower courts, the Court acknowledged that CPLR disclosure is “plainly more restrictive” than FOIL disclosure, but concluded that a litigant involved in an action with a government agency is just as entitled to FOIL disclosure as a disinterested member of the public. The litigant is not restricted to CPLR disclosure.

The plaintiff in *Farbman* was a contractor doing plumbing work for defendant, a city hospital corporation. Plaintiff sought defendant's records relating to the project in a FOIL request. The Court formulated the question in the case thus: “When, as here, a government agency is involved in litigation, is its adversary, for purposes of access to the agency's records, a litigant governed by Article 31, or a member of the public under FOIL?” *Id.* at 80-81, 476 N.Y.S.2d at 71. The Court held that “FOIL's mandate of open disclosure requires that an agency's public records remain as available to its litigation adversary as to any other person.” *Id.* at 81, 476 N.Y.S.2d at 71.

Subdivision (a) of FOIL's exemption statute, [Public Officer's Law section 87\(2\)](#), allows a public agency to deny disclosure if the records are “specifically exempted from disclosure by ... statute.” Are the exemption categories of

the CPLR--contained in subdivisions (b), (c), or (d)(2) of CPLR 3101, on privileged matter, attorney's work product, or material prepared for litigation respectively--to be deemed "specifically exempted" categories under this FOIL exemption? The Court, finding that the *Farbman* case did not offer occasion to consider that question, left it open.

FOIL also has a number of its own exempt categories. *Farbman* holds that an agency claiming an exemption has the burden "to articulate particularized and specific justification" and to establish that "the material requested falls squarely within the ambit of [the] statutory exemptions." *Id.*, at 83, 476 N.Y.S.2d at 73. If the agency does not establish that the records fall under an exemption as a matter of law, the court should conduct an *in camera* inspection of the documents as to which an exemption was claimed.

The mere fact that disclosure is available through some other disclosure device, such as CPLR article 31 or CPL article 240, does not preclude one from obtaining the documents through FOIL. *Moore v. Santucci*, 151 A.D.2d 677, 543 N.Y.S.2d 103 (2d Dep't 1989). As noted in *Farbman*, "no provision of FOIL bars simultaneous use of both statutes." *M. Farbman & Sons, Inc.*, 62 N.Y.2d at 81, 476 N.Y.S.2d at 72.

The road to FOIL disclosure is not as smooth and direct as Article 31's. The FOIL applicant must first apply to the particular agency's records access officer and, if that doesn't work, to its appeals officer. If satisfaction can't be had within the agency, an Article 78 proceeding is required. That's the path *Farbman* took into the court system. These FOIL procedures apply even if it is an adverse party in litigation seeking the material. The CPLR procedures are not available in pursuit of FOIL disclosure. *See Moussa v. State*, 91 A.D.2d 863, 458 N.Y.S.2d 377 (4th Dep't 1982); *see also Castle House Dev., Inc. v. City of New York Police Dep't*, 2009 WL 2163603, \*5 (Sup. Ct., New York Co. 2009) ("there is nothing in FOIL which speaks to the need to put anyone else on notice of the request, as a party would have to do when subpoenaing documents pursuant to the CPLR").

It is not altogether clear after *Farbman*, but the requirement to follow FOIL's procedures, cumbersome though it may be, would appear to remain the requirement when it is FOIL disclosure that is relied on. This may pose a dilemma for a litigant seeking to rely on FOIL, who had best use it early, or at least early enough in relation to the litigation to be able to make use of its produce there.

Under *Farbman*, FOIL holds special benefits for adversaries of a public agency in litigation. The public agency litigant is put at the distinct disadvantage of having to offer its adversary two routes into its records, while having only one path--CPLR Article 31--going the other way. That's the price of open government, the Court of Appeals responded in *Farbman*. *See Siegel & Connors, New York Practice § 348.*

Timely FOIL requests can serve as a valuable disclosure tool in litigation involving public and quasi-public entities. Caselaw developments on the FOIL front are, therefore, relevant to the treatment of CPLR 3101, the CPLR's main statement on what is and is not disclosable in litigation. An important development along this line is the Court of Appeals' decision in *Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of State Univ. of N.Y.*, 92 N.Y.2d 357, 681 N.Y.S.2d 205 (1998), addressing the disclosure of records that have to be maintained by state agencies under federal law.

In *Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 513 N.Y.S.2d 367 (1987), the Court of Appeals held that even a "private" document not dealing with a governmental function, but nevertheless kept among the records of a government agency, is subject to disclosure under New York's FOIL. *Capital Newspapers* required the disclosure of a former Albany mayor's personal papers in the possession of the city. In the *Citizens* case, the Court applied the same rule to records kept by a state agency pursuant to federal law. The result in *Citizens* is that a Health Science Center that is part of the State University of New York is required under FOIL to disclose the certifications it keeps on file containing data about animals it uses for research purposes, and the names and addresses of the animals' former owners.

*Citizens* also addressed whether the SUNY lab where the records were maintained was an “agency” within the meaning of [Public Officers Law section 86\(3\)](#). The appellate division had held that the lab was not an “agency” within the meaning of FOIL when it was maintaining the subject records because that was a federal, rather than state, mandate. That has to do with the purpose of the records, answered the Court of Appeals, while noting that its “precedents expressly reject any rationale for denying disclosure based upon the function or purpose for which an agency’s documents are generated or held.” *Citizens*, 92 N.Y.2d at 361, 681 N.Y.S.2d at 207. SUNY, which was previously held to be an “agency” under FOIL, *Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 639 N.Y.S.2d 990 (1995), was holding the certifications at its lab in connection with the research it conducted pursuant to its statutory mission, a governmental function.

Having determined that the certifications sought were maintained by an “agency,” the only thing that could insulate these records from FOIL disclosure would be a showing that one of FOIL’s exemptions applied. No such showing was made.

### **C3101:24 The Areas Excluded from Disclosure.**

CPLR 3101(a), with the aid of the Court of Appeals’ *Allen* case, *see* Commentary C3101:5, above, sets forth wide frontiers within which disclosure can be sought. It thus establishes a basic rule of broad disclosure.

Major portions of the next three subdivisions of CPLR 3101 then go on to carve out exceptions for privileged material, CPLR 3101(b), work product, CPLR 3101(c), and material prepared in anticipation of litigation, 3101(d)(2). The exclusions contained in CPLR 3101 (b) and (c) have raised relatively few issues. The major battleground for disputes has been in CPLR 3101(d)(2), which has a massive body of caselaw. These provisions are discussed separately in the ensuing Commentaries.

As an aid to perspective, and without too technical a dependence on burden-of-proof rules, an issue of disclosure should be approached in the following manner. If the item falls under the broad “material and necessary” sweep of CPLR 3101(a), especially since the *Allen* case in effect construes the phrase merely to mean “relevant,” there should be a tentative presumption that the information is subject to disclosure. This presumption should be deemed rebutted only upon a showing that one of the exclusionary provisions contained in the three subdivisions noted above is applicable. If none of the three subdivisions is applicable, any relevant information sought should be disclosed unless the court can be convinced otherwise through a [CPLR 3103\(a\)](#) protective order. *See Forman*, 30 N.Y.3d at 665, 70 N.Y.S.3d at 165 (noting that a party may seek protective order to avoid disclosing materials on a social media site that “contain sensitive or embarrassing materials of marginal relevance ....”).

### ***Subdivision (b)***

#### **C3101:25 “Privileged Matter” under CPLR 3101(b).**

CPLR 3101(b) exempts from disclosure, upon objection of any person entitled to assert it, all “privileged matter.” The disclosure article does not attempt to define what constitutes privileged matter. CPLR 3101(b) merely invokes the ordinary rules of evidence applicable at the trial. Anything that would be privileged from introduction into evidence at the trial is also to be deemed privileged from pretrial disclosure.

The scope and content of the “privilege” is resolved by the statutory and decisional law of evidence. The most significant “privileges” found in New York’s law of evidence come from Article 45 of the CPLR. *See, e.g.*, [CPLR 4501](#) (self-incrimination, implementing constitutional requirements); 4502 (spousal privilege); 4503 (attorney-client); 4504 (doctor-patient); 4505 (clergyman-penitent), etc. Article 45 is not preemptive. Any evidentiary exemption

that fits broadly under the “privileged” category, whether it emanates from CPLR Article 45 or any other law (or the Constitution itself), is within CPLR 3101(b). *See* Commentary C3101:25A, below (discussing public interest privilege).

Resolutions of incidental procedural problems about the assertion of the privilege came early in the life of the CPLR. Since the claim of privilege need not necessarily affect all of the questions to be asked on a proposed examination, the examination itself may be scheduled with the right reserved to the deponent to assert any claim of privilege applicable to any question asked. *Flanigen v. Mullen and Gunn, Inc.*, 45 Misc.2d 944, 258 N.Y.S.2d 609 (Sup. Ct., Erie Co. 1965); *see* 22 N.Y.C.R.R. § 221.2(a) (permitting lawyer to direct opponent not to answer question posed at deposition where the answer would violate “a privilege or right of confidentiality”); *Siegel & Connors, New York Practice* § 356; *see also White v. Martins*, 100 A.D.2d 805, 474 N.Y.S.2d 733, 734 (1st Dep’t 1984) (“It was improper to direct prospectively that all questions to be asked [at deposition] in the future be answered, reserving objections for the trial court, without knowing what those questions may be.”). At the examination, a relevant paper containing a privileged communication may be withheld by the deponent. *Falk v. Kalt*, 44 Misc.2d 172, 253 N.Y.S.2d 188 (Sup. Ct., Suffolk Co. 1964). If it appears that the examination would be futile in its entirety because the questions sought to be asked elicit matters that would all fall into the privileged sphere, the examination itself can be denied. *Osserman v. Osserman*, 92 A.D.2d 932, 460 N.Y.S.2d 355 (2d Dep’t 1983); *DiFrancesco v. DiFrancesco*, 47 Misc. 2d 632, 262 N.Y.S.2d 831 (Sup. Ct., Kings Co. 1965).

The immunity conferred on privileged communications by CPLR 3101(b) is absolute, in contrast to that conferred on materials “prepared in anticipation of litigation” by subdivision (d)(2), which is conditional.

An extensive discourse on the attorney-client privilege, an exclusionary rule of evidence law, is beyond the scope of this work. Several treatises provide an authoritative summary for New York lawyers on the scope of the attorney-client privilege. *See, e.g., Barker and Alexander, Evidence in New York State and Federal Courts*, §§ 5:3 to 5:17 (2d ed. West 2011); Farrell, *Prince, Richardson on Evidence*, §§ 5-101 to 5-214 (11th ed. 1995). Some important caselaw pertaining to the assertion of the privilege in the context of disclosure is, however, discussed below.

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016), the Court of Appeals addressed the absolute immunity offered by CPLR 3101(b) for any information protected by the attorney-client privilege. In *Ambac*, the discovery dispute centered on whether defendant Bank of America was required to produce approximately 400 documents that were withheld on attorney-client privilege grounds. The documents contained communications between Bank of America and codefendant Countrywide that transpired while they were contemplating a merger. The privilege log claimed that the documents were immune from disclosure by the attorney-client privilege because they pertained to various legal issues the two companies needed to resolve together to successfully complete the merger closing. *See* Commentary C3122:3. Plaintiff made a motion to compel production of the documents under CPLR 3124, arguing that Bank of America waived the privilege by sharing the information with Countrywide before the merger.

The Court of Appeals noted that the social utility of the attorney client privilege “is in ‘[o]bvious tension’ with the policy of this State favoring liberal discovery” and, therefore, “must be narrowly construed.” *Ambac Assurance Corp.*, 27 N.Y.3d at 624, 36 N.Y.S.3d at 842. The Court quoted from its prior opinion in *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 593-594, 542 N.Y.S.2d 508(1989), which provides a procedural blueprint for attorneys asserting the privilege in disclosure. The Court again held:

The party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client ‘for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,’ that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived.

*Ambac Assurance Corp.*, 27 N.Y.3d at 624, 36 N.Y.S.3d at 843.

In response to plaintiff's argument of waiver, Bank of America contended that it communicated with counsel for Countrywide under the common interest doctrine, which constitutes an exception to the waiver of the attorney-client privilege. That doctrine generally allows two or more clients who have retained separate counsel to represent them "to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest." *Id.* at 625, 36 N.Y.S.3d at 843. The common interest doctrine has been applied by New York courts for over twenty years, but only in situations when the attorney-client communications took place while the clients faced "pending or reasonably anticipated litigation." *Id.* at 627, 36 N.Y.S.3d at 845.

In *Ambac*, the documents withheld from disclosure contained communications shared in anticipation of a merger. While Bank of America and Countrywide certainly had a common legal interest in successfully completing the merger, they did not reasonably anticipate litigation at the time of the communications. The Court rejected Bank of America's argument that the common interest doctrine should be expanded to include communications made in furtherance of "any common legal interest" and adhered to the litigation requirement. Therefore, the documents were required to be disclosed.

Several decisions present an interesting application of the doctor-patient privilege. There are occasions in which a plaintiff is injured in a health care facility, either through medical malpractice or ordinary negligence, and desires to examine witnesses to the event. Although the plaintiff generally waives the doctor-patient privilege by commencing an action for personal injuries, other patients who witnessed the event are still entitled to its protections. In these situations, the defendant has more than one motive to vigorously assert the privilege on behalf of the witness.

In *Gunn v. Sound Shore Medical Center of Westchester*, 5 A.D.3d 435, 772 N.Y.S.2d 714 (2d Dep't 2004), plaintiff alleged she was injured at defendant's cardiac rehabilitation center when a treadmill was lowered onto her foot. Plaintiff sought disclosure of the names and addresses of the patients who were present at the time of the occurrence. A party to an action is generally entitled to require another party to produce the names and addresses of the witnesses to an event. *See* Commentary C3101:41, below. Apparently relying on this principle, the supreme court ordered the defendant to disclose the names of the patients in its sign-in logbook.

The Second Department recognized that, "[a]s a general rule," disclosure of the identity of a nonparty patient who may have witnessed a negligent act does not violate the nonparty's doctor-patient privilege. *Gunn*, 5 A.D.3d at 436-37, 772 N.Y.S.2d at 715. In addition, the disclosure demand "was not a request to discover [a nonparty's] medical information per se." *Id.* The practical effect of the proposed disclosure, however, was to reveal that these witnesses were being treated for cardiac-related conditions. The doctor-patient privilege cannot tolerate this, held the Second Department, especially given the "modern-day legislative trend ... to protect a medical patient's privacy." *See Kneisel v. QPH, Inc.*, 124 A.D.3d 729, 730, 2 N.Y.S.3d 195 (2d Dep't 2015).

The defendant in *Gunn* did not specifically assert that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") prohibited disclosure of the information at issue and the court declined to reach the issue. HIPAA's legislative intent is, however, a basis for the court's holding. *But see Fleigelman v. Stamford Health System, Inc.*, 2005 WL 1273887 (Conn. Super. Ct., 2005) (declining to follow *Gunn*, court holds that simply because identity of patients is confidential under HIPAA "does not mean that the information is protected from discovery under all circumstances.") If HIPAA is interposed as a basis for refusing similar requests in the future, the courts will need to determine if HIPAA's many exceptions will allow release of the "protected health information." *See* 45 C.F.R. 164.512(e) (detailing the instances where a covered entity may release protected health information in the course of a judicial or administrative proceeding).

*Gunn* was distinguished in *Rogers v. NYU Hospitals Center*, 8 Misc.3d 730, 795 N.Y.S.2d 438 (Sup.Ct., New York Co. 2005), a negligence action in which plaintiff sought the name of her roommate at the defendant hospital on the date of the accident. In *Rogers*, the witness was a patient at defendant's "general rehabilitation center," which provided a broad range of services, and revealing her name would not necessarily disclose the specific nature of her treatment. Therefore, the court held that HIPAA would not preclude the disclosure.

### C3101:25A "Public Interest Privilege."

The interplay of CPLR Article 31 and FOIL was discussed in Commentary C3101:23A, above. Footnote one in *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113, 359 N.Y.S.2d 1 (1974), stated that FOIL does not abolish the common law privilege for official information, a nebulous category presumably subsumed at least in some measure by FOIL's qualifications and exceptions. Does this category have a life of its own? The *Cirale* footnote seemed to be injected only incidentally. Little was heard of the matter from the Court of Appeals afterwards. The Court returned to the subject of a "public interest" privilege in its decision in *In re World Trade Center Bombing Litigation*, 93 N.Y.2d 1, 686 N.Y.S.2d 743 (1999), which arose out of the 1993 bombing of the World Trade Center.

Under CPLR 3101(b), "privileged" matter is absolutely immune from disclosure in civil litigation. The categories of privileged matter are mainly statutory or constitutional. See Commentary C3101:25, above. The genesis of the common law privilege for official information, which purports to bar disclosure of materials when the disclosure could harm the "public interest," is not well known. Citing and relying on the casual footnote in *Cirale*, the Court invoked this "privilege" again in the consolidated cases brought by those injured in the first World Trade Center terrorist bombing in 1993. The Court held that whether the privilege applies must be determined by balancing the needs of the plaintiffs against the needs of the public interest, remitting the case for an application of that test after rejecting the appellate division ruling that the privilege was inapplicable as a matter of law.

The Port Authority, as the owner of the property, was the defendant in *World Trade Center*. The Court was easily satisfied that the Port Authority performs "an essential governmental function" so as to be able to invoke the "public interest" privilege, but it was at pains to determine the scope of the privilege. In 1984, long before the destruction of the World Trade Center seemed fathomable, the authority created an "Office of Special Planning" to consider the Trade Center's exposure to terrorism. The reports of that office were a main part of what the plaintiffs were seeking in the *World Trade Center* case. The plaintiffs argued that the documents were not privileged at all and were, therefore, disclosable in full. The defendant argued that the public interest privilege not only applied, but that it applied to insulate the documents entirely. Rejecting both sides' arguments, the Court opted for an in camera test by the lower courts to balance the competing interests of the parties in determining whether the privilege applied to bar disclosure. See *World Trade Center Bombing Litigation*, 263 A.D.2d 417, 693 N.Y.S.2d 586 (1st Dep't 1999) (decision on remand); see also *Zheng v. Bermeo*, 114 A.D.3d 743, 745, 980 N.Y.S.2d 541, 543 (2d Dep't 2014) (remitting matter to supreme court for an in camera review of documents allegedly protected by public interest privilege).

The appellate division had agreed with the plaintiffs, holding that the defendant's obligations as owner of the buildings are not distinguishable from those of any private landlord. Rejecting this, the Court of Appeals pointed to the absoluteness of the "privilege" category. The difficulty with that proposition, of course, is that *whether* the privilege applies is made to depend by the opinion on a balancing of the interests of both sides. In that equation, there seems to be a contradiction--a kind of cart-before-the-horse problem.

The common understanding of the law of privilege is that it doesn't depend in any measure on the other side's need for the data or document. As the Court stated in the *World Trade Center* case, "if a privilege applies, the documents simply need not be produced." *World Trade Center Litigation*, 93 N.Y.2d at 12, 686 N.Y.S.2d at 749. If they do have to be produced, therefore, then they are obviously not "privileged." That's the way CPLR 3101(b) has it. It imposes

its immunity absolutely, in contrast to CPLR 3101(d)(2), the statute that immunizes materials prepared for litigation but immunizes them only conditionally. *See Siegel & Connors, New York Practice §§ 346-348.*

While we are on the subject, what about the Empire State Building or Chrysler Building, or any of the other privately owned skyscrapers comprising the New York City skyline? Can one visualize making any of them surrender security reports that the World Trade Center owners would be allowed to withhold, especially after the ultimate destruction of the World Trade Center in 2001? The results should be identical in these situations for reasons of the “public interest,” without injecting any kind of complicated “privilege” jurisprudence. Tossing about the word “privilege” evinces an unawareness of the absolute exclusion a “privilege” generates under CPLR 3101(b). If there's a “privilege,” there's nothing to balance, which makes it conceptually peculiar to use a “balancing” test to determine whether there's a “privilege” in the first place.

In any case involving a building frequented by the public, whether its owner is a public entity or private person, a disclosure request to obtain security reports whose revelation in the course of a lawsuit could compromise public safety can be rejected by the court with nothing more than a snap of a finger: the making of a protective order under CPLR 3103(a). The ubiquitous and omnipotent CPLR 3103(a) authorizes this without any need to resolve or even mention a “privilege.” Had CPLR 3103 been invoked here--whether on motion of a party or on the court's own motion, which is also permissible under CPLR 3103(a)--this whole trip down the garden path of “privilege” could have been avoided.

The *World Trade Center* case dealt with an application of the common law privilege for official information in the context of a disclosure request made pursuant to CPLR Article 31. CPLR 3103(a) clearly applies in these circumstances, allowing the court to limit, condition or regulate the use of the material, even if it is deemed relevant under CPLR 3101(a). If the materials are first obtained through FOIL and subsequently used during pending litigation for improper purposes, such as harassment and delay, *Farbman* generally recognizes that the courts have the means to prevent such abuse. *M. Farbman*, 62 N.Y.2d at 82, 476 N.Y.S.2d at 72. CPLR 3103, 3124 and 3126 do not, by their terms, speak to these problems. Rather, these provisions relate to disclosure obtained under Article 31. Part 130-1 of the Uniform Rules would, however, provide some authority to sanction a party attempting to improperly use materials obtained through FOIL in litigation. *See* 22 N.Y.C.R.R. § 130-1.1(c)(2); *Siegel & Connors, New York Practice § 414A.*

What about the converse of *Farbman*: the situation in which materials protected from disclosure under one of the exemptions contained in FOIL are obtainable pursuant to CPLR Article 31? *Matter of Schwartz*, 130 Misc.2d 786, 497 N.Y.S.2d 834 (Sup. Ct., Nassau Co. 1986), holds that the public's interest in confidentiality, the protection of which is FOIL's aim, must be weighed against the relevancy and need of the materials in the pending litigation, which is a CPLR concern. *Matter of Schwartz* recommends that “[a] balancing test should be applied to determine whether the government's interest in nondisclosure outweighs the petitioners' interest in disclosure....” *Id.* at 789, 497 N.Y.S.2d at 837. In *Mosey v. Co. of Erie*, 148 A.D.3d 1572, 1575-76, 50 N.Y.S.3d 641, 645 (4th Dep't 2017), the court refused to afford the “deliberative process privilege,” also known as the “inter-agency or intra-agency materials” exemption under Public Officers Law § 87(2)(g), status under CPLR 3101(b) when the request for disclosure was made under CPLR Article 31.

### **C3101:25B Privilege for Mediation Proceedings.**

There have been several cases in which a party has sought disclosure of information pertaining to a mediation session and the New York courts have struggled with these requests. In *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007), *aff'd* 10 N.Y.3d 923, 862 N.Y.S.2d 456 (2008), the parties participated in mediation that concluded with the signing of a separation agreement. In the subsequent action for divorce, the nonparty mediator was served with a subpoena by the defendant wife seeking his deposition and any records he possessed relating to the mediation process. The defendant wife was seeking to establish the circumstances surrounding the execution of her separation agreement to provide the court with a complete record to determine whether the terms of the agreement

“were fair and reasonable at the time of the making of the agreement.” [Dom. Rel. Law § 236\(B\)\(3\)](#). The supreme court denied the mediator's motion to quash the subpoena.

The Fourth Department affirmed, noting that even if the subpoena and accompanying notice did not advise the nonparty mediator of the “ ‘circumstances or reasons such disclosure [was] sought or required,’ ” the defendant wife's response to the motion provided the requisite information. *Id.* at 1290, [842 N.Y.S.2d at 647](#); see Commentary C3101:23, above. The appellate division also rejected the mediator's contention that the trial court abused its discretion in refusing to enforce the confidentiality agreement entered into by the parties as part of the mediation process, apparently because the wife no longer desired confidentiality. Additionally, the court refused to apply the confidentiality provisions in the Uniform Mediation Act as a matter of public policy, noting that New York has not adopted the Act.

New Jersey has adopted the Act, which defines “mediation” and a “mediation communication” covered under the act and contains a privilege provision with several exceptions. [N.J. Stat. Ann. § 2A:23c-4 \(West 2008\)](#). It provides: “A mediation communication is privileged ... and shall not be subject to discovery or admissible in evidence in a proceeding ....” *Id.*

After the Fourth Department granted leave on a certified question, the Court of Appeals affirmed, noting that the plaintiff husband executed a signed waiver releasing the mediator from maintaining mediation confidentiality. [Hauzinger](#), [10 N.Y.3d at 924](#), [862 N.Y.S.2d at 457](#). In that the defendant wife was seeking disclosure of matters pertaining to the mediation, she too was deemed to have waived mediation confidentiality. Furthermore, the mediation agreement provided that if both parties consent, the mediator may communicate with an attorney for either party and release documents to third parties.

The mediator also claimed that a “qualified privilege” existed under CPLR 3101(b) to maintain mediation confidentiality. The Court found this argument to be without merit because the privilege was waived under the facts of the case. Furthermore, the Court expressly noted that it was “not address[ing] what, if any, mediation confidentiality privilege exists under CPLR 3101(b).” *Id.* at 924, [862 N.Y.S.2d at 457](#).

It is unfortunate that the two appellate decisions in *Hauzinger* are so brief and provide little guidance on the important issue of whether communications with a mediator are absolutely privileged, entitled to a qualified privilege, or protected as settlement negotiations. See [CPLR 4547](#) “Compromise and offers to compromise” (providing that the settlement of a disputed claim or an offer to settle the claim is generally inadmissible). This question will require judicial or legislative resolution at a later date.

It is interesting to contrast the decisions in *Hauzinger*, a matrimonial action in which the spouses were not represented by counsel during the mediation, with *NYP Holdings, Inc.*, a commercial dispute. See Commentary, C3101:18A, above. The *NYP Holdings* opinion stated that “[i]t is the policy of this court, and specifically of the Commercial Division to maintain the confidentiality of submissions and statements made during mediation proceedings.” [NYP Holdings](#), [2007 WL 519272 at \\*4](#); see Commercial Division Rules and Procedures of the Alternative Dispute Resolution Program, Supreme Court, New York County, Rule 8, (“Confidentiality of Mediation and Neutral Evaluation”) (revised March 8, 2018). This policy is designed to encourage the parties to be completely open in the mediation proceeding without fear that any communications to the mediator will be introduced later at trial. [NYP Holdings](#), [2007 WL 519272 at \\*4-5](#). Therefore, the court refused to direct disclosure, or even production for in camera review, of documents created in connection with mediation.

Similarly, in *Lynbrook Glass & Architectural Metals, Corp. v. Elite Associates, Inc.*, [238 A.D.2d 319](#), [656 N.Y.S.2d 291 \(2d Dep't 1997\)](#), the Second Department affirmed an order denying disclosure of a report prepared in connection with a mediation agreement. In finding the report protected from disclosure, the court observed that “[a]s part of their

attempt to settle this matter, the parties to the mediation agreed that the report and other similar reports, prepared expressly for the mediation, were to be kept confidential.” See also Tolchinsky and Wertheim, *'Hauzinger' Calls Into Doubt Confidentiality Agreements*, N.Y.L.J., Nov. 13, 2007, at p. 3, col. 1 (“Apart from what appears to be an aberrant result in *Hauzinger*, courts uniformly uphold mediated settlement agreements, enforcing the public policy interest of maintaining the integrity of negotiated contracts.”).

More recently, in *City of Newburgh, N.Y. v. Hauser*, 126 A.D.3d 926, 3 N.Y.S.3d 616 (2d Dep't 2015), plaintiff sued defendants for breach of contract and professional malpractice. The defendants sought to compel the plaintiff to produce documents submitted in a private mediation proceeding between the plaintiff and a nonparty. The court concluded that “the subject documents are material and relevant to the defense of this action” and affirmed an order compelling their production. The court also rejected plaintiff’s contention that CPLR 4547 (“Compromise and offers to compromise”) bars disclosure of the subject documents, “as that statute is concerned with the admissibility of evidence, and does not limit the discoverability of evidence.” See Commentary C3101:7 (“Rejection of the ‘Evidence-in-Chief’ Rule”), above.

It is difficult to reconcile the above caselaw, which makes it difficult for parties to decide the consequences of participating in mediation. If the courts or legislature ultimately decide to afford a qualified protection to communications in a mediation proceeding, CPLR 3101(b) would not likely be the appropriate place to house it. The immunity conferred on privileged communications by CPLR 3101(b) is absolute, in contrast to that conferred on materials “prepared in anticipation of litigation” by subdivision (d)(2), which is conditional. See Practice Commentary C3101:25.

### *Subdivision (c)*

#### **C3101:26 History of Subdivisions (c) and (d).**

Subdivision (c) of CPLR 3101 confers immunity on the “work product of an attorney.” Subdivision (d), as originally formulated, conferred immunity on “material prepared for litigation.” It still does, but with the phraseology changed by a 1985 amendment to “materials ... prepared in anticipation of litigation.” CPLR 3101(d)(2). The two categories, “work product” and “litigation materials,” are separate in the CPLR and there is an important difference between them: the work product immunity under subdivision (c) is absolute while the immunity for litigation materials under subdivision (d)(2) is only conditional. Upon satisfaction of the conditions stated in subdivision (d)(2), the litigation materials may be ordered disclosed by the court. No such discretion exists for an attorney’s work product under subdivision (c).

If the Advisory Committee’s intention had been effectuated here, there would not have been separate subdivisions (c) and (d). There would have been a single subdivision covering both categories and the immunity as to both would have been only a conditional one. See 1st Rep. Leg. Doc. No. 6(b), p. 119 (1957). Such a merged provision would have codified for application in New York practice the rule adopted by the U.S. Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947).

While the New York lawyer may find some valuable insights in a careful reading of the federal *Hickman* case—even its terminology was adopted in the 1985 amendment—the case has diminished significance in New York practice today because the legislature rejected the proposal to codify a key part of the *Hickman* case. *Hickman* did not distinguish between the two categories, but applied its limited immunity to both. New York separated the two into subdivisions (c) and (d) of CPLR 3101. More significantly, New York accorded the (c) category, the “work product” of an attorney, an absolute immunity.

Since *Hickman* does not pronounce a rule of constitutional law applicable in state courts, but merely construes and applies the Federal Rules of Civil Procedure for application in the federal courts, the holding is not binding on the New York courts. *Hickman* is persuasive in the New York State courts only to the extent it is consistent with the CPLR and with the New York courts' construction of it. See the New York Judicial Conference's 1966 Report, 148 at 151-158.

For better or worse, “work product” on the one hand and “litigation materials” on the other are not the same in New York. Considering that the immunity conferred on an attorney's work product is an absolute one, disclosure under the CPLR could have become quite restricted if the courts had given subdivision (c) broad scope. Thankfully, they did not, and subdivision (c) has not had a significant role to play in disclosure in New York State courts.

### **C3101:27 “Privilege” of (b) and “Work Product” of (c) Compared.**

The separation of attorney work product in subdivision (c) from the broader category of litigation materials in subdivision (d)(2), and the assignment to the work product of a separate and absolute immunity, was unfortunate. It was the ill-advised meddling of legislative committees, to which the Advisory Committee had handed over its drafts. The change first appeared in the 5th Report (Leg. Doc. No. 15, p. 444[1961]), which was prepared after the committee's labors had terminated.

The misfortune is that the separation carves out an absolute immunity for a category of items that do not require it. It was apparently felt that the party who could gain access to the work product of the other's attorney would be securing data that has been made privileged. But that overlooked that the attorney-client privilege is taken cognizance of in full by CPLR 3101(b), which absolutely exempts from disclosure all privileged matter. Confidential communications between an attorney and client are under that category, see [CPLR 4503](#), and are thus afforded absolute immunity by subdivision (b) without needing any help from subdivision (c). Since the legislature did make the more expansive category of litigation materials a separate one in subdivision (d)(2), and gave it only a conditional immunity, it evinced its intention to make it possible for the court to expose the litigation materials at least where the conditions imposed by (d)(2) are fulfilled.

There is a reasonably fine line between subdivisions (b) (privileged matter) and (d)(2) (litigation materials). The attorney's work product in subdivision (c) is astride that line. If anything that qualifies as an attorney's genuine work product contains a confidential communication from or to the client, as it often does, it falls (or at least the privileged part of it does) on the subdivision (b) side of the line and enjoys absolute immunity, with no need of any assistance from subdivision (c). If it does not contain such a communication, it merits no absolute immunity and should fall on the subdivision (d)(2) side of the line, where a conditional immunity protects it. There, at least, the court has some discretion to direct disclosure if the reasonable conditions of (d)(2) are met. If the two sides squeeze up against their dividing line so closely, there is no significant room for subdivision (c).

If a physician or member of the clergy has “work product” relevant to a pending litigation, but involving no privileged communication, the item is not immune from disclosure. There is no more reason for giving a lawyer's work product such an immunity when it contains nothing of a privileged nature. Yet that is precisely what subdivision (c) does. See the New York Jud. Conf. Rep. 154-158 (1966). Fortunately, the courts have assigned narrow scope to subdivision (c). See *Competitive Enterprise Institute v. Attorney General of New York*, 161 A.D.3d 1283, 1286, 76 N.Y.S.3d 640, 643-44 (3d Dep't 2018) (“Because of the absolute nature of the privilege, the attorney work product doctrine is ‘narrowly applied to materials prepared by an attorney, acting as an attorney, which contain his or her analysis and trial strategy’.”).

### **C3101:28 Scope of “Work Product” under Subdivision (c).**

Had the courts been so disposed, the attorney's work product in CPLR 3101(c) could have been construed as embracing an almost limitless variety of things. The U.S. Supreme Court in *Hickman*, see Commentary C3101:26, above, used the phrase to embrace such items as “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, ...” etc. *Hickman*, 329 U.S. at 511, 67 S.Ct. at 393; see N.Y. Jud. Conf. Rep. 153 (1966). Under the construction it has received, CPLR 3101(c) does not do much more than protect those things, which might get immunity from subdivision (b) without help from (c). In this respect subdivision (c) was rendered even more starkly superfluous when similar language to that quoted from *Hickman* was added to subdivision (d)(2) in 1985, further protecting those items from disclosure.

“Work product” is a broad phrase, and an expansive approach to it can easily lead to absurd results. What could be more the “work product” of an attorney than a deed, mortgage, contract, will, etc.? The documents that an attorney produces comprise an unending list. Can it reasonably be urged that subdivision (c) seeks to exclude from disclosure a relevant deed or contract because a lawyer prepared it? No case has so held and, if sanity prevails, no case will. Sanity in this instance has been retained by denying to the phrase “work product” its most logical meaning.

The courts are apparently well aware of the ludicrous potential that lurks in a literal application of CPLR 3101(c), for which reason there is no suggestion in the cases that the most significant aspect of a lawyer's “work product”—the documents they so often draw—fall under subdivision (c). When an item not within the outright privilege of subdivision (b) appears, and it can arguably be fitted under (c), the courts have tended consistently to assign it to subdivision (d)(2) instead, thereby giving it at best only a conditional immunity. See *People v. Kozlowski*, 11 N.Y.3d 223, 245, 869 N.Y.S.2d 848, 862 (2008). Perhaps the healthiest omen of all is this: despite the fact that the cases on the exclusionary provisions of CPLR 3101 are massive in number, there are precious few that have assigned a disputed item to subdivision (c). Additionally, some that put a case into the (c) category were really doing no more than recognizing privileged communications that subdivision (b) protects. In *Wickham v. Socony Mobil Oil Co.*, 45 Misc.2d 311, 312, 256 N.Y.S.2d 342, 344 (Sup. Ct., Albany Co. 1965), for example, the court concluded that “[r]eports of an attorney to his client as to the progress of pending litigation or advice and opinions rendered to a client who is on the brink of litigation should clearly be considered ‘work product of an attorney’ and thus within the protection afforded by CPLR 3101(c).” Few would dispute that point, but is it not also true that subdivision (b) and the immunity it provides to privileged matter would embrace such things, making subdivision (c) superfluous?

Many things an attorney undertakes to do cannot qualify even colorably as an immunized “work product” under subdivision (c). If the particular item prepared by an attorney is something that a lay person could have done, it is not immune. See *Kozlowski*, 11 N.Y.3d at 245, 869 N.Y.S.2d at 862 (“the mere fact that a narrative witness statement is transcribed by an attorney is not sufficient to render the statement ‘work product.’”). To qualify as a work product under (c), it must be shown that the item was prepared by the attorney as an attorney, as was noted early in the life of the CPLR. See, e.g., *Brunswick Corp. v. Aetna Casualty and Surety Co.*, 49 Misc.2d 1018, 269 N.Y.S.2d 30 (Sup. Ct., Erie Co. 1966), *mod* and *aff'd* 27 A.D.2d 182, 278 N.Y.S.2d 459 (4th Dep't 1967); see also *Competitive Enterprise Institute*, 161 A.D.3d at 1286, 76 N.Y.S.3d at 643-44. That is, it must be something peculiar to the lawyer's trade and talent. The defendant's lawyer may have undertaken a factual investigation and drawn up a report of it. If a lay person could have done the same thing, the report does not enjoy the immunity of (c) merely because the lawyer drew it instead. See *Geffner v. Mercy Med. Ctr.*, 125 A.D.3d 802, 4 N.Y.S.3d 283 (2d Dep't 2015).

The practical conclusion to which these factors give rise is this: the party resisting disclosure with the claim of a “work product” immunity under subdivision (c) had best recognize that the phrase has not been given a literal or broad interpretation. An attempt should be made, therefore, to establish that the information sought also falls under CPLR 3101(b)'s immunity for privileged information or 3101(d)(2)'s qualified immunity for material prepared in anticipation of litigation. If the matter is not privileged under (b), it is unlikely to qualify as a work product under (c) and will therefore get the absolute immunity of neither. The best the resisting party can hope for in that case is to

bring the item under subdivision (d)(2) as one prepared for litigation, in which event it will enjoy only a conditional immunity, superseded if the conditions are fulfilled.

### *Subdivision (d)*

#### **C3101:29 Litigation Material under Subdivision (d), Generally.**

CPLR 3101(d) has two discreet parts. A 1985 amendment introduced the extensive “experts” provisions in CPLR 3101(d)(1), which is a subject requiring separate and detailed treatment. *See* Commentary C3101:29A, below. The expert provisions in CPLR 3101(d)(1) have been expanded several times since 1985. A second paragraph, CPLR 3101(d)(2), addresses disclosure of “materials” prepared in anticipation of litigation.

Of the several exclusionary provisions of CPLR 3101, it is 3101(d)(2) that generates the greatest quantity of caselaw. It started out as a relatively short subdivision, with two small numbered paragraphs offering immunity to expert opinions in paragraph 1 and litigation reports and other writings in paragraph 2. But unlike subdivisions (b) and (c), the subdivision (d) immunity was and remains only a conditional one. Upon a showing that the seeking party has “substantial need” of the materials and has been “unable without undue hardship” to duplicate them, the court can order the material disclosed. The quoted language comes from paragraph 2 of subdivision (d) as recast in 1985.

In speaking of only one category of “material prepared for litigation” early in the life of the CPLR, the court in *Gugliuzza v. Gugliuzza*, 45 Misc.2d 868, 257 N.Y.S.2d 693 (Sup. Ct., Monroe Co. 1965), said that there is such a “plethora of opinions rendered by the lower courts on this subject” that “the citation of these authorities would serve no useful purpose and the attempt to distinguish or reconcile them would be an exercise in utter futility.” If that is so of but a part of this subdivision (d)(2) catalog, it must a fortiori apply to the whole of it. We sound that note here to stress the sui generis nature of most subdivision (d)(2) inquiries. There are a few general guideposts, however, which will be noted below.

Although disclosure may be sought by any of a number of Article 31 devices, the device most often used when an issue arises under CPLR 3101(d)(2) is the discovery and production notice or subpoena of [CPLR 3120](#). That provision is the one used to secure an inspection of a paper, and since the “material” being sought when a CPLR 3101(d)(2) question arises has generally been reduced to paper, it is more often than not the [CPLR 3120](#) mechanism that raises the issue. For that reason, the practitioner would do well to check the McKinney's annotations under both CPLR 3101(d)(2) and [CPLR 3120](#) when seeking a precedent for the item involved in the particular case.

[CPLR 3120](#) is not limited to paper, of course. It is usable to bring on discovery of any tangible “things” and there are indeed a number of cases containing CPLR 3101(d)(2) questions in which tangibles other than paper are sought. *See* Commentary C3120:2.

Because there is so much caselaw on both paragraphs in subdivision (d), it will be helpful to centralize a discussion of the background from which the 1985 overhaul of the statute emerged. We set forth that discussion here.

#### **Background of 1985 Overhaul of Subdivision (d)**

The extensive 1985 amendment of subdivision (d) was part of a medical malpractice package. *See* Chapter 294, Laws of 1985. It included 25 sections (only a few concerning the CPLR), and made important changes in the field of medical and dental malpractice litigation. The overhaul of subdivision (d), although part of a medical malpractice bill, also has broad application to general litigation. Only in a few instances has it something specific to say about medical and dental malpractice cases.

Its placement in the malpractice package instead of in a separate bill is a coincidence. It is basically (but not identically) the draft of the Advisory Committee on Civil Practice, done up by that Committee as part of a general disclosure revamping. That revamping was submitted to the legislature at several earlier sessions, but was not adopted. It was submitted again in 1985 and was again not adopted. But the subdivision (d) change had special relevance to the medical malpractice action, and so it was plucked from its position in the Advisory Committee's general bill, adjusted by the hands frantically working to get a malpractice bill out, and incorporated into the malpractice bill. We may therefore say that the subdivision (d) overhaul became law only because it was swept up in the momentum of the malpractice package. In the face of a threatened physicians' slowdown based on objections to soaring malpractice insurance rates in the 1980's, no further delay could be tolerated and CPLR 3101(d) was hastily adopted.

The Advisory Committee on Civil Practice forwards an annual report to the Chief Administrator of the Courts. The "1985 Report of the Advisory Committee on Civil Practice" ("1985 Report"), includes the Committee's whole disclosure package. The subdivision (d) change is at pages 25-27 of the 1985 Report and the Committee's comment appears at pages 47-50. The 1985 Report is a helpful resource for interpreting CPLR 3101(d)'s language.

Subdivision (d), as it emerged in 1985, is entitled "[t]rial preparation" and contains two paragraphs. Paragraph 1 addresses expert disclosure and includes a general requirement about identifying expert witnesses, upon demand, before trial. Paragraph 2 addresses "[m]aterials," and while in large measure it uses the language of its counterpart in [Rule 26\(b\)\(3\) of the Federal Rules of Civil Procedure](#), it is not all that different from the general "material prepared for litigation" standards that the bar grew accustomed to--and which produced such voluminous caselaw--under the original subdivision (d).

The treatment of some fundamental categories of materials, such as the freely disclosable "ordinary course of business" materials discussed in Commentary C3101:33, below, was unchanged by the 1985 amendment. Hence a document or thing prepared in the "ordinary course of business," i.e., not prepared exclusively for litigation, is subject to disclosure. Indeed, CPLR 3101(g), addressing accident reports in particular and specifically authorizing their disclosure when they are prepared in "the regular course of business operations or practices," has remained an important part of CPLR 3101.

Perhaps the loudest note to sound in this general address to the current version of CPLR 3101(d) is that its overall intention was to expand disclosure, not contract it. In the course of consulting pre-1985 caselaw on subdivision (d), there should arise at least a presumption that any disclosure that was previously allowed, and any document previously discoverable, continues to be. A prior-versus-present subdivision (d) analysis should therefore be most useful when a previously undisclosed item is examined, and the inquiry should be whether it has become disclosable under the current subdivision (d). An inquiry looking the other way, such as whether a previously disclosable item has become insulated by the new subdivision, should be much less frequent.

All of this, of course, refers to paragraph 2 of subdivision (d), which treats "materials." Paragraph 1 is concerned with expert disclosure, including the pretrial identification of expert witnesses and the furnishing of summaries of their expected testimony. CPLR 3101(d)(1) has generated a substantial body of law in its own right, which is discussed separately below.

### ***Subdivision (d), Paragraph (1)***

#### **C3101:29A Experts.**

When experts are called to testify in a particular case, the stakes are usually high and the case may rise or fall based on the presence and quality of expert testimony. As the legislative history to CPLR 3101(d)(1) notes, "the testimony of expert witnesses is often the single most important element of proof in medical malpractice and other personal

injury actions ....” 1985 McKinney's Session Law News of NY, at A725. When the stakes in a case are high enough to justify the expense of hiring an expert, parties will frequently litigate all issues in the case in an attempt to gain an advantage. There are also many cases in which parties attempt to delay or avoid the significant expense of hiring an expert and, therefore, cannot provide timely disclosure under CPLR 3101(d)(1)(i). These two points help to explain the legion of decisions interpreting virtually every aspect of CPLR 3101(d)(1).

It is truly unfortunate that the caselaw interpreting CPLR 3101(d)(1)(i) is in such shambles. Almost every decision interpreting the statute, including a healthy number of opinions from the appellate division, cannot be reconciled with some other opinion applying CPLR 3101(d)(1)(i) to a similar set of facts. This substantial body of caselaw, interpreting one of CPLR Article 31's most important provisions, suffers from “Corpus Juris Secundum (CJS) Syndrome.” There is a case to support virtually every position imaginable. This condition is exacerbated by the fact that the New York Court of Appeals has not issued a substantial opinion interpreting the expert disclosure statute.

The discussion below will separately discuss the three subparagraphs in CPLR 3101(d)(1), with further breakdown within each subparagraph.

### Paragraph 1, Subparagraph (i)

CPLR 3101(d)(1)(i) requires each party, “[u]pon request,” to identify each person it “expects to call as an expert witness at trial ....” The requirement derives from what is currently [subdivision \(a\)\(2\) of Rule 26 of the Federal Rules of Civil Procedure](#). It also has a background in federal Advisory Committee notes and caselaw. These notes can be found, as annotations, following Rule 26 in the 28 U.S.C.A. volume covering [Federal Rules 26-37](#) and on Westlaw.

#### A) Procedure For Making “Request”

The procedure for eliciting the expert data is a “request.” This should be taken to mean a mere notice served on all parties, a common method of eliciting disclosure generally under Article 31 when the parties can't arrange things by mutual agreement, i.e., by stipulation. *See* [CPLR 3102\(b\)](#). The notice should request all of the relevant particulars contained in the first sentence in CPLR 3101(d)(1)(i).

The courts have acknowledged that there is no special form prescribed for eliciting the expert data under CPLR 3101(d)(1)(i), yet some decisions have concluded that the “request” can be inserted as an additional item in a demand for a bill of particulars. *Bellen v. Baghei-Rad*, 148 A.D.2d 827, 538 N.Y.S.2d 663 (3d Dep't 1989); *Salander v. Central General Hospital*, 130 Misc.2d 311, 496 N.Y.S.2d 638 (Sup. Ct., Nassau Co. 1985). The Second Department has apparently taken the contrary position because the bill of particulars is not a disclosure device through which evidentiary material can be obtained. *See* *Coleman v. Richards*, 138 A.D.2d 556, 526 N.Y.S.2d 138 (2d Dep't 1988); *see also* *Galtman v. Edelman*, 134 Misc.2d 599, 511 N.Y.S.2d 1011 (Sup. Ct., Kings Co. 1987) (although defendant is entitled to disclosure, he cannot seek evidentiary matter in demand for bill of particulars). This problem can be avoided if, as noted above, the request is made in a separate notice served in addition to the bill of particulars.

The request for expert disclosure should be made during the normal period for pretrial disclosure, prior to the filing of the certificate of readiness and note of issue. *See* [Commentary C3102:3](#). In *Aversa v. Taubes*, 194 A.D.2d 580, 598 N.Y.S.2d 801 (2d Dep't 1993), plaintiffs' CPLR 3101(d)(1)(i) request was served one year after they filed the note of issue, and two months after the case appeared on the trial calendar. The court denied the request because plaintiffs failed to establish special or unusual circumstances.

Many courts, through individual rules, may prescribe the time within which expert disclosure must be performed. The lawyer should ascertain if there are any individual rules governing expert disclosure in the particular court in

which the action is pending. *See* Third Jud. Dist. Rules, Expert Disclosure Rule, <https://www.nycourts.gov/courts/3jd/JudgesRules/3JD-Judges%20Rules.shtml#expertdisclosure>.

### **B) Time to Respond to CPLR 3101 (d)(1)(i) Request**

There is no stated time for responding to a request under CPLR 3101(d)(1)(i), but 20 days would seem reasonable. *See, e.g.,* CPLR 3107 (20 days' notice required for oral deposition); CPLR 3122(a) (requiring response to CPLR 3120 or 3121 demand within 20 days); CPLR 3123(a) (requiring response to notice to admit within 20 days); CPLR 3133(a) (requiring answers to interrogatories within 20 days of service); *compare* Fed. R. Civ. P. 26(a)(2)(D) (requiring parties to disclose their experts “at the times and in the sequence that the court orders,” or within certain time frames absent a stipulation or a court order). There has been powerful resistance to any proposed measure to add a specific response time to CPLR 3101(d)(1)(i), and the vacuum has wreaked havoc in an important area of the law. Notices served under 3101(d)(1)(i) that contain a request for a response within a reasonable period of time should be answered within that period, and the court should lend assistance in assuring that a reasonable request is honored, even if the response is that an expert has not yet been retained.

As noted above, parties frequently postpone the hiring of an expert because of the significant expense involved. There is no time requirement for the retention of an expert in CPLR 3101(d)(1)(i), but one may be imposed by a preliminary conference order or individual court rule. *See* 22 N.Y.C.R.R. § 202.12(c)(2) (“matters to be considered at the preliminary conference shall include ... establishment of a timetable for the completion of all disclosure proceedings”); Expert Disclosure Rule, Third Jud. Dist. Rules, <https://www.nycourts.gov/courts/3jd/JudgesRules/3JD-Judges%20Rules.shtml> (last visited June 3, 2018); 22 N.Y.C.R.R. § 202.70(g), Com. Div. Rule 13(c) (requiring that expert disclosure “be completed no later than four months after the completion of fact discovery”). If an expert has not yet been retained at the time of the CPLR 3101(d)(1)(i) request, the recipient should simply state that fact and provide the disclosure “promptly” after any retention. *See Salander*, 130 Misc.2d at 315, 496 N.Y.S.2d at 641-642; *see also* 1985 Report, at 49. This comports as closely as possible with the scheme in CPLR Article 31, which requires a response to be amended or supplemented “promptly upon the party's thereafter obtaining information that the response ... though correct and complete when made, no longer is correct and complete....” CPLR 3101(h); *see* 1985 Report, at 49; *see also* Commentary C3101:49, below.

Some earlier decisions expressed a wariness of efforts by the party receiving the request to evade it with dilatory tactics and required the recipient to supplement the response even before CPLR 3101(h) was enacted in 1993. These cases held that the CPLR 3101(d)(1)(i) request acts as a continuing one, so that the recipient lacking the data when the request is first received is under a duty to furnish the data to the requesting party--without awaiting a further request--as soon as a decision about an expert is made and the data is available. *See, e.g., Salander*, 130 Misc.2d at 316, 496 N.Y.S.2d at 642; *Dunn v. Medina Memorial Hosp.*, 131 Misc.2d 971, 974, 502 N.Y.S.2d 633, 635-36 (Sup. Ct., Erie Co. 1986). The rulings in these cases have been reinforced by the adoption of CPLR 3101(h) in 1993. In *Schmitt v. Oneonta City School District*, 151 A.D.3d 1254, 1255, 55 N.Y.S.3d 834, 836 (3d Dep't 2017), the court observed that while a CPLR 3101(d)(1)(i) expert disclosure demand “is a continuing request, with no set time period for its compliance, where a party hires an expert in advance of trial and then fails to comply [with] or supplement an expert disclosure demand, preclusion may be appropriate if there is prejudice and a willful failure to disclose.”

The *Dunn* decision incidentally notes that there is no requirement that a party retain an expert before depositions are taken. Such a sequence can be imposed by a judge in a given case, if deemed appropriate on the facts, through invocation of general protective order powers under CPLR 3103(a) or in a scheduling order. *See* 22 N.Y.C.R.R. § 202.12(b), (c); Siegel & Connors, *New York Practice* § 77D.

### **C) Witnesses Subject to CPLR 3101(d)(1)(i)'s Requirements**

The disclosure requirements in CPLR 3101(d)(1)(i) apply only to experts who will testify at trial, and not to fact witnesses. See *Sheppard v. Blitman/Atlas Building Corp.*, 288 A.D.2d 33, 734 N.Y.S.2d 1 (1st Dep't 2001). In certain instances, a fact witness can wear two hats and may also provide expert testimony. The plaintiff's treating physician, for example, may testify as both a fact witness and an expert on such matters as causation. Surprisingly, many courts have held that CPLR 3101(d)(1)(i) does not apply to a treating physician who provides expert testimony at trial. See *Hamer v. City of New York*, 106 A.D.3d 504, 509, 965 N.Y.S.2d 99, 104 (1st Dep't 2013); *Jing Xue Jiang v. Dollar Rent a Car, Inc.*, 91 A.D.3d 603, 604, 938 N.Y.S.2d 90, 92 (2d Dep't 2012) (“A treating physician may give expert opinion testimony and may do so without prior notice pursuant to CPLR 3101(d).”); *Andrew v. Hurh*, 34 A.D.3d 1331, 824 N.Y.S.2d 546, 547 (4th Dep't 2006), *lv. denied* 8 N.Y.3d 808, 834 N.Y.S.2d 89 (2007). The lone outlier in this area is the Third Department, which has correctly concluded that a treating physician that will be called at trial to provide expert testimony is subject to the expert disclosure rules in CPLR 3101(d)(1)(i). See *Schmitt*, 151 A.D.3d at 1255, 55 N.Y.S.3d at 836 (“[u]nlike the First, Second and Fourth Departments, this Court interprets CPLR 3101(d)(1)(i) as ‘requir[ing] disclosure of any medical professional, even a treating physician or nurse, who is expected to give expert testimony.’ ”); see also *Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095, 1099, 69 N.Y.S.3d 410, 414 (3d Dep't 2018).

The rule in the First, Second, and Fourth Departments regarding expert disclosure of treating physicians does not appear to comport with the purpose of CPLR 3101(d)(1)(i), which is to provide the party seeking disclosure with notice of the subject matter of expert testimony and an opportunity to rebut it at trial. See *Salander*, 130 Misc.2d at 315, 496 N.Y.S.2d at 641-42. As noted in the legislative memorandum accompanying the bill that enacted CPLR 3101(d)(1)(i), “[s]ince the testimony of expert witnesses is often the single most important element of proof in medical malpractice and other personal injury actions, sharing information concerning these opinions encourages prompt settlement by providing both parties an accurate measure of the strength of their adversaries' case.” *Id.*

Some decisions note that the rationale for not requiring expert disclosure from a treating doctor is that notice of the treating doctor's likely testimony is provided by the physician's reports exchanged pursuant to CPLR 3121 and Uniform Rule 202.17. See *Hamer*, 106 A.D.3d at 509, 965 N.Y.S.2d at 104; *Rosati v. Brigham Park Co-Op. Apartments, SEC No.2, Inc.*, 2012 WL 4748396 (Sup. Ct., Kings Co. 2012). In *Overeem v. Neuhoff*, 254 A.D.2d 398, 679 N.Y.S.2d 74 (2d Dep't 1998), for example, the plaintiff had exchanged the treating doctor's medical reports pursuant to 22 N.Y.C.R.R. section 202.17, but the reports contained no opinion regarding causation. See Commentary C3121:8. Therefore, the reports provided defendant notice of the injuries about which testimony would be offered at trial, but no detail on the subject matter of the proposed expert testimony and the grounds for the opinion. The result in *Overeem* falls far short of achieving the legislature's purpose in enacting CPLR 3101(d)(1)(i). The First Department has nonetheless expressly held that a treating physician “[can] testify as to the cause of the injuries even though he expressed no opinion as to causation in the previously exchanged report.” *Finger v. Brande*, 306 A.D.2d 104, 104, 762 N.Y.S.2d 50, 51 (1st Dep't. 2003); see *Hamer*, 106 A.D.3d 509, 965 N.Y.S.2d at 104.

Fact witnesses who will also provide expert testimony should be subject to the requirements of CPLR 3101(d)(1)(i), at least to the extent of their expert testimony. Nevertheless, a defendant in a personal injury action in the First, Second and Fourth Departments should assume that the plaintiff's treating physician will provide expert testimony and prepare for it. Plaintiffs must also beware. The rule in these three departments led to a perverse result in *Andrew*, when plaintiff's own treating physician was permitted to provide expert testimony for the defendant without any disclosure under CPLR 3101(d)(1)(i)! *Andrew*, 34 A.D.3d at 1331, 824 N.Y.S.2d at 547.

A somewhat unique issue regarding expert disclosure arose in *Coakley v. Parkway Hosp.*, 103 A.D.3d 680, 959 N.Y.S.2d 722, 723 (2d Dep't 2013), where the medical examiner who performed the autopsy and prepared the autopsy report found 1500 cubic centimeters of liquid blood and clot in the decedent's abdominal cavity, and stated in the report that the hemorrhage was “concentrated at the level of the hepatic flexure (comment: probable dehiscence [loosening] of ligature).” During the trial, the court redacted the statement in the medical examiner's autopsy report

that there was “probable dehiscence of ligature.” *Coakley*, 103 A.D.3d at 681, 959 N.Y.S.2d at 724. At plaintiff’s request, the examiner was permitted to testify at trial, but was precluded from mentioning her redacted comment regarding causation.

In granting a new trial, the Second Department ruled that the medical examiner’s opinion relating to the decedent’s “probable dehiscence of ligature” was improperly excluded from evidence and was admissible. “Further, since the medical examiner was not retained as a party’s expert witness, her opinion was not subject to the requirements for disclosure set forth in CPLR 3101(d)(1).... Rather, the medical examiner was a nonparty witness pursuant CPLR 3101(a)[4].” *Coakley*, 103 A.D.3d at 681, 959 N.Y.S.2d at 724.

It is interesting to note that in *Coakley*, the medical examiner’s report would not be subject to the exchange requirements in [CPLR 3121](#) and [Uniform Rule 202.17](#). Although experts are not normally subject to a deposition in New York State court actions, *see* CPLR 3101(d)(1)(iii) (discussed above), the medical examiner in *Coakley*, who was not an expert, might be subject to a deposition under the rules that apply to disclosure from a nonparty in CPLR 3101(a)(4).

#### **D) Failure to Comply With CPLR 3101(d)(1)(i) Demand**

The caselaw discussing the remedy for a failure to comply with a CPLR 3101(d)(1)(i) disclosure request is a mess. As noted above, this substantial body of decisions suffers from “Corpus Juris Secundum (CJS) Syndrome.” There is a case to support virtually every proposition imaginable. The caselaw is even more difficult to analyze because the courts fail to distinguish between the three most common categories of problems arising under CPLR 3101(d)(1)(i): (1) where there has been no appropriate notice to a valid expert disclosure request because the expert was retained an insufficient period of time before trial, (2) where there has been no response, despite the fact that an expert was retained well in advance of trial, and (3) where there has been a response, but it is deficient.

The discussion below will attempt to summarize the application of the statute and the caselaw in this area but, as previously noted, the results are *sui generis*. The lack of legislative guideposts has translated into a lack of uniform application of CPLR 3101(d)(1)(i). In addition, what little legislative guidance that has been provided is frequently ignored by the courts. Many decisions also omit significant facts from their determination, making analysis somewhat more difficult.

#### **1) Failure to Provide Appropriate Notice Because Expert Is Retained an Insufficient Period of Time Before Trial**

Several common problems arise with expert disclosure. A problem addressed specifically in CPLR 3101(d)(1)(i) occurs where a party “retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof ....” If the party can show “good cause” for the late retention, the expert’s testimony shall not be precluded “solely” for failure to meet CPLR 3101(d)(1)(i)’s disclosure requirements. The court, upon motion of any party made before or at trial, or on its own initiative, may make “whatever order may be just.” This language strongly suggests, among other things, that preclusion is an appropriate remedy for noncompliance with the expert disclosure statute, as it is for noncompliance with most disclosure provisions. *See, e.g.*, [CPLR 3126\(2\)](#); [Siegel & Connors, New York Practice § 367](#). Furthermore, the statute contemplates that a party who has neglected to provide the required expert disclosure must demonstrate “good cause” for the failure.

The statutory language appears to require that an explanation be offered to the court by the proponent of the expert testimony if this problem comes before it in any form, but the caselaw has not always required it. Many cases discussed below appear to require the party seeking the disclosure, rather than the party who has failed to respond, to establish

reasons why the expert should not be allowed to testify despite late notice. For example, the Second Department has repeatedly held that:

CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party.

*Rowan v. Cross Cty. Ski & Skate, Inc.*, 42 A.D.3d 563, 564, 840 N.Y.S.2d 414, 415 (2d Dep't 2007); *Hernandez-Vega v. Zwanger-Pesiri Radiology Grp.*, 39 A.D.3d 710, 710-11, 833 N.Y.S.2d 627, 629 (2d Dep't 2007).

In *Rowan*, defendants served a response to a CPLR 3101(d)(1)(i) demand just two weeks before the trial was scheduled to commence. The belated disclosure included the report of an expert who opined, among other things, that the alleged failure of defendants could not have caused the plaintiff's injury. Rather than seeking an adjournment of the trial, plaintiff made a motion in limine to preclude the defendants' expert from testifying at trial. The court denied the motion and the jury ultimately agreed with the expert that the defendants' alleged negligence could not have caused the plaintiff's injury. The Second Department affirmed, again concluding that “the record does not support a conclusion that the defendants' delay in retaining their expert or in serving their expert information was intentional or willful.” *Rowan*, 42 A.D.3d at 564, 840 N.Y.S.2d at 415. The court also determined that the expert disclosure “was not made on the eve of trial since the plaintiff had two weeks within which to review the material prior to the date when the trial was scheduled to begin.” *Id.* Finally, “any potential prejudice to the plaintiffs could have been eliminated by an adjournment of the trial.” *Id.*

The reasoning in *Rowan* and many similar decisions is troublesome. These decisions continue to place the burden on the party seeking expert disclosure to demonstrate that the delayed response was “intentional or willful” and that it caused prejudice. Placing this sort of burden on the party serving the request is at odds with the language in CPLR 3101(d)(1)(i). The statute places the burden on the party serving the delayed disclosure to demonstrate “good cause” for “retain[ing] an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof.”

In *Conroe v. Barmore-Sellstrom, Inc.*, 12 A.D.3d 1121, 785 N.Y.S.2d 629 (4th Dep't 2004), defendant appealed from a judgment entered following a “summary jury trial” conducted pursuant to special rules in the Eighth Judicial District. The Fourth Department reversed the supreme court and granted defendant's motion to set aside the damages portion of the verdict, finding that supreme court “erred in admitting into evidence certain documents that set forth expert opinion but that were not disclosed by plaintiff to defendant until one day before trial.” *Id.* at 1123, 785 N.Y.S.2d at 630. The documents included two physician reports that were prepared less than a week before trial.

The *Conroe* court concluded that “the rules for summary jury trials do not alter the parties' rights or obligations of pretrial disclosure.” *Id.* Therefore, the supreme court improperly admitted the expert materials because plaintiff did not establish “good cause” for soliciting the physicians' reports four days prior to trial and for failing to disclose the videotape and transcript until the “literal eve of trial.” *Id.*; see CPLR 3101(d)(1)(i). In addition, the expert materials set forth claims of injuries not specified in either the bill of particulars or the medical records and reports previously submitted to the defendant. This “significant and impermissible change of the theory of plaintiff's case” materially prejudiced defendant. *Id.*

It's not easy to square the holding in *Conroe*, which faithfully applied the statutory language in CPLR 3101(d)(1)(i), with other Fourth Department decisions discussed more fully below. The decisions in *Ruzycki v. Baker*, 9 A.D.3d 854, 780 N.Y.S.2d 253 (4th Dep't 2004) and *Marchione v. Greenky*, 5 A.D.3d 1044, 773 N.Y.S.2d 657 (4th Dep't 2004), required evidence of an intentional or willful failure to disclose, coupled with prejudice to the opposing party, before preclusion was ordered based on a failure under CPLR 3101(d)(1)(i). The court in *Conroe* found that the delayed

disclosure significantly prejudiced the defendant, but did not address whether it was intentional or willful. Rather, the *Conroe* court properly examined whether there was “good cause” for soliciting the expert opinions such a short time before trial. *See also* *Lidge v. Niagara Falls Mem’l Med. Ctr.*, 17 A.D.3d 1033, 794 N.Y.S.2d 190 (4th Dep’t 2005) (holding that supreme court properly precluded testimony from plaintiffs’ expert that exceeded scope of expert disclosure based solely on fact that defendant established prejudice).

The phrase “good cause” is no stranger to New York Practice and is contained in many provisions in the CPLR and the Uniform Rules. *See, e.g.*, CPLR 306-b (requiring “good cause” to extend 120-day period for service); CPLR 2004 (requiring demonstration of “good cause” to extend time fixed by any statute, rule or order); CPLR 3212(a) (requiring service of summary judgment motions within certain time frames, unless movant can establish “good cause”); Uniform Rule 202.48(a), (b) (requiring that where an order is to be settled or submitted, it must be presented for signature within 60 days, unless there is “good cause” for the delayed submission); *see also* Patrick M. Connors, *CPLR 3212(a)’s Timing Requirements for Summary Judgment Motions*, 71 Brook. L. Rev. 1529, 1557-58 (2006) (discussing distinctions in elements establishing “good cause” under CPLR 2004 and those establishing “good cause” under CPLR 3212(a)). The courts have imposed a rigorous interpretation of “good cause” on parties who have failed to satisfy various time frames. This trend can be traced to the Court of Appeals’ decision in *Brill v. City of New York*, 2 N.Y.3d 648, 652, 781 N.Y.S.2d 261, 264 (2004), holding that “ ‘good cause’ in CPLR 3212(a) requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy.” *See also* *Miceli v. State Farm Mut. Auto Ins. Co.*, 3 N.Y.3d 725, 726, 786 N.Y.S.2d 379, 380 (2004) (repeating pronouncement in *Brill* that “statutory time frames--like court-ordered time frames--are not options, they are requirements, to be taken seriously by the parties”) (internal citation omitted).

*Tronolone v. Praxair, Inc.*, 39 A.D.3d 1146, 833 N.Y.S.2d 816 (4th Dep’t 2007), is a case that likely supports a finding of “good cause” under CPLR 3101(d)(1)(i). In *Tronolone*, the supreme court granted plaintiff’s motion for partial summary judgment on liability and denied defendant’s cross motion dismissing the complaint. One week prior to the start of the trial on damages, the appellate division modified the supreme court’s order by denying plaintiff’s motion. Defendant’s motion to adjourn the trial was denied and defendant had “only days in which to prepare for a trial on both liability and damages.” *Tronolone*, 39 A.D.3d at 1146-47, 833 N.Y.S.2d at 817. The defendant failed to submit an expert disclosure response under CPLR 3101(d)(1)(i) and the supreme court precluded defendant’s expert from testifying. At the close of testimony, the court granted plaintiff’s motion for a directed verdict on liability.

The Fourth Department reversed, concluding that the supreme court abused its discretion in precluding defendant’s liability expert. The court applied the standards in its prior opinions on the subject, and held that “there is no evidence of an intentional or willful failure to disclose by defendant, nor did plaintiff establish that he was prejudiced by defendant’s failure to comply with CPLR 3101(d).” *Tronolone*, 39 A.D.3d at 1147, 833 N.Y.S.2d at 817.

As noted in the above discussion of *Rowan*, the language of CPLR 3101(d)(1)(i) places the burden on the party serving the delayed disclosure to demonstrate “good cause.” *Tronolone* improperly placed the burden on the party seeking the disclosure to demonstrate an intentional or willful failure to disclose and prejudice. In any event, there was apparently a satisfactory explanation for the delayed disclosure in *Tronolone* because the decision on appeal was handed down one week prior to the trial. It was only at this juncture that defendant needed a liability expert for the trial. A finding of “good cause” for a delayed summary judgment motion was made under similar circumstances in *Trump Village Section 3, Inc. v. New York Housing Finance Agency*, 307 A.D.2d 891, 893-94, 764 N.Y.S.2d 17, 20 (1st Dep’t 2003), *lv. den.* 1 N.Y.3d 504, 775 N.Y.S.2d 780. In *Trump*, the First Department excused a belated motion for summary judgment under CPLR 3212(a) made on renewal, which was premised on a subsequent appellate determination in the case that could not have been timely raised in the original moving papers. *Id.*

Although CPLR 3101(d)(1)(i) does not contain a specific time frame for serving a response, the inquiry for measuring whether there was “appropriate notice” of expert disclosure should not focus solely on the scheduled trial date, as in *Rowan* and numerous other cases. Rather, in determining proper compliance with CPLR 3101(d)(1)(i), the court should also ascertain whether the response came within a reasonable time after the service of the demand. In only the rarest of cases should a disclosure two weeks before a scheduled trial date be deemed appropriate. These eleventh hour disclosures raise the same concerns emphasized by the Court of Appeals in *Brill*, which noted that delays in moving for summary judgment “left inadequate time for reply or proper court consideration, and prejudiced litigants who had already devoted substantial resources to readying themselves for trial.” *Brill*, 2 N.Y.3d at 651, 781 N.Y.S.2d at 263-64.

The decision in *Rowan* and similar decisions also appears to countenance the adjournment of a trial in cases where a party has provided delayed disclosure. Although an adjournment may be appropriate in those situations where a party has shown “good cause” for retaining an expert an insufficient period of time before the trial to give proper notice, the burden should be on the proponent of the delayed expert disclosure to obtain it. Furthermore, given the Court of Appeals concerns regarding the “disrupt[ion of] trial calendars” and “the goals of orderliness and efficiency in state court practice,” trial adjournments should not be freely granted. See *Brill*, 2 N.Y.3d at 650, 781 N.Y.S.2d at 263.

As demonstrated above, if an expert is retained an insufficient amount of time before trial, the whole matter is dropped in the court's lap with scant legislative guidance. The only requirement is that the party seeking to call the expert establish “good cause” for the late retention. If the proponent establishes “good cause,” the heavily implicit invitation here is that the court will let the expert testify, but with some kind of condition or adjustment to recognize that the other party was not made aware of who the adversary's expert was early in the game, or that an expert would be called at all, as CPLR 3101(d)(1)(i) ideally contemplates. A party who has not had sufficient opportunity to rebut an opponent's expert may need some judicial indulgence now as a result.

If a party has good cause for retaining an expert an insufficient period of time before trial to give appropriate notice, the court has broad discretion to cure the problem. If the trial is at hand, the party seeking disclosure might be afforded a chance to check into the now-identified expert's credentials and to prepare some rebuttal material or obtain rebuttal experts. This can prove very burdensome and costly to the parties and the court, which will likely have to adjourn the trial under these circumstances. That the needs of the individual case are to govern, and that the discretion of the court is to be extensive on this point, is obvious from the leave-it-all-to-the-court deference that CPLR 3101(d)(1)(i) manifests.

Can the court exclude the expert's testimony altogether, even if a party can show good cause for the late retention? It can't, says CPLR 3101(d)(1)(i), “solely on grounds of noncompliance with this paragraph.” The court can, however, exclude the testimony if there is an absence of good cause, such as where the late retention was willful and deliberately calculated to throw the other party off balance. Although it may be difficult to establish that an opponent has deliberately hired an expert at the last minute to create an ambush, it may not be necessary. It is the proponent of the expert testimony who should have the burden of establishing good cause in the first instance. If the proponent cannot meet this burden, serious consideration should be given to precluding the expert testimony without requiring any proof of intent from the adversary. See *Lissak v. Cerabona*, 10 A.D.3d 308, 781 N.Y.S.2d 337 (1st Dep't 2004) (defendant precluded from offering expert because he failed to demonstrate “good cause” for service of expert disclosure mere days before trial, particularly when new disclosure amounted to material alteration of theory of defense). The fact that a party was attempting to avoid the expense of hiring an expert until the eve of trial, possibly in the hope of settling the matter, should not be sufficient to demonstrate “good cause.”

While the court cannot exclude the expert's testimony altogether based “solely on grounds of noncompliance” with CPLR 3101(d)(1)(i) if the party propounding the expert can show “good cause” for the late retention, the court can exclude an expert's testimony if there has been a failure to comply with a court order. In *Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095, 69 N.Y.S.3d 410 (3d Dep't 2018), for example, the Third Department affirmed an order granting

defendant's motion for summary judgment dismissing the complaint based, in part, on plaintiff's failure to provide timely expert disclosure pursuant to a scheduling order requiring that the parties exchange expert disclosure by a date certain. *See* CPLR 3126 (authorizing sanctions for a failure to disclose); *Siegel & Connors, New York Practice* § 367.

If a court precludes a party from offering expert testimony based on a failure to comply with CPLR 3101(d)(1)(i), it can lead to a dismissal of a cause of action or an entire complaint. In medical malpractice actions, for example, expert testimony is generally required to establish a prima facie case. *See, e.g., Koehler v. Schwartz*, 48 N.Y.2d 807, 424 N.Y.S.2d 119 (1979); *see also* NY PJI 2:150 (Comment to medical malpractice charge). If the plaintiff is precluded from offering expert testimony in such an action based on a failure to provide expert disclosure, the entire action can be dismissed. *See, e.g., Bauernfeind v. Albany Med. Ctr. Hosp.*, 195 A.D.2d 819, 600 N.Y.S.2d 516 (3d Dep't 1993); *Lasek v. Nachtigall*, 189 A.D.2d 749, 592 N.Y.S.2d 420 (2d Dep't 1993); *but see Mulligan v. N.Y. Cornell Med. Ctr.*, 304 A.D.2d 492, 759 N.Y.S.2d 54. (1st Dep't 2003) (finding that the fact that no CPLR 3101[d][1][i] expert response has been exchanged is not basis for dismissal).

As CPLR 3101(d)(1)(i) expressly recognizes, the court can resort to the imposition of a sanction of some kind--short of excluding the testimony--where a party has hired an expert an insufficient period of time before trial to provide appropriate notice. This can include an attorney's fee assessed against the wrongdoer for the extra time, inconvenience, or expense consequently incurred by the other side. The imposition of attorneys' fees is a familiar method of punishing wrongful conduct in litigation generally, and, indeed, the "whatever order may be just" powers conferred explicitly on the court by subparagraph (1)(i) would seem to offer a clearer base for the sanction than it has been found to have in other contexts. An award of attorneys' fees may also be independently authorized under Part 130 of the Uniform Rules, assuming the conduct is frivolous. *See* 22 N.Y.C.R.R. Part 130; *Siegel & Connors, New York Practice* § 414A; *see also Aversa v. Taubs*, 194 A.D.2d 580, 598 N.Y.S.2d 801 (2d Dep't 1993) (conditional order of preclusion of expert unless plaintiffs' attorney paid \$7,500 to defendant's lawyers).

## 2) Failure to Provide Notice Where Expert Has Been Retained a Sufficient Amount of Time Before Trial

As caselaw in the next subsection demonstrates, confusion under CPLR 3101(d)(1)(i) is compounded by the fact that the courts have failed to separately categorize and treat this second, and seemingly frequent, problem arising under the statute: the failure to disclose an expert who has been retained a sufficient period of time before the commencement of trial. The courts should not be so forgiving to a party who has failed to comply with a reasonable CPLR 3101(d)(1)(i) expert disclosure demand after having retained the expert. The legislature, having noted that a party establishing "good cause" should not be precluded from offering an expert who was retained shortly before trial, can be deemed to have impliedly determined that preclusion may be an appropriate result in other circumstances.

The prior discussion notes that if a party cannot show "good cause" for having failed to retain an expert a sufficient time prior to trial, a strong case can be made for preclusion. Similarly, if a party hires an expert a sufficient period of time prior to trial and then fails to comply with an expert disclosure demand, preclusion may be appropriate under the circumstances.

There is some caselaw indicating that the courts treat a complete failure to disclose in the same fashion as a deficient response. In *Marchione*, 5 A.D.3d 1044, 773 N.Y.S.2d 657, plaintiff failed to comply with a demand for expert disclosure. Citing the First Department's decision in *St. Hilaire v. White*, 305 A.D.2d 209, 759 N.Y.S.2d 74 (1st Dep't 2003), the Fourth Department held that "[p]reclusion for failure to comply with CPLR 3101(d) is improper 'unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party.'" In *Marchione*, there was no evidence of a willful or intentional failure to disclose by plaintiff and defendants did not show they were prejudiced by plaintiff's delay in complying with CPLR 3101(d)(1)(i). Similarly, in *Ruzycki*, 9 A.D.3d 834, 780 N.Y.S.2d 253, defendant did not respond to plaintiff's demand for expert disclosure until the middle of trial. Plaintiffs were, however, provided with the expert's independent medical exam report 18 months prior to trial. The

court concluded that the report provided plaintiff with sufficient notice of the expert's proposed testimony such that plaintiffs could not claim either surprise or prejudice.

*Marchione* and *Ruzycki* do not sufficiently adhere to the CPLR 3101(d)(1)(i)'s express language or purpose. It is a rare situation indeed where a party can prove that an adversary has “intentionally” or “willfully” failed to comply with a disclosure request other than by establishing that the demand was ignored. If a similar burden was imposed in other contexts within Article 31, pretrial disclosure would lose much of its significance. Virtually everything could come in at trial regardless of whether it was disclosed or not. It is also hard to imagine that a party receiving expert disclosure only at trial, or on the eve of trial, is not prejudiced in some significant manner. It is often difficult to adequately prepare to confront expert testimony under those circumstances, especially where the testimony may be the linchpin of the case. The statute requiring disclosure in advance of trial and its legislative history recognize this.

In *Ruzycki*, the court found no prejudice because the party moving to preclude was in possession of an independent medical exam (“IME”) report. There is no indication that the report contained all of the requirements of CPLR 3101(d)(1)(i). Rather, indications are to the contrary because the expert did not express an opinion on causation in his report. It is hard to imagine why plaintiffs were not significantly prejudiced by the expert's testimony on causation when they were first placed on notice of the basis of the opinion during the middle of the trial.

The Third Department properly placed the burden to establish “good cause” under CPLR 3101(d)(1)(i) squarely on a defaulting plaintiff, who did not “provide any excuse, much less good cause, for the nondisclosure” of its experts until six months after the filing of the note of issue. *Tienken v. Benedictine Hosp.*, 110 A.D.3d 1389, 974 N.Y.S.2d 166 (3d Dep't 2013). Therefore, the *Tienken* court held that the supreme court did not abuse its discretion in precluding plaintiff's expert testimony and granting defendants' motion for summary judgment. *See also Newark v. Pimentel*, 117 A.D.3d 581, 986 N.Y.S.2d 89 (1st Dep't 2014) (holding supreme court did not improvidently exercise its discretion in precluding defendant's two proposed expert witnesses in the absence of any “good cause” shown by defendant for the failure to disclose these witnesses until the second day of the damages trial); *Cramer v. Spada*, 203 A.D.2d 739, 740, 610 N.Y.S.2d 662, 663 (3d Dep't 1994) (“issuance of a preclusion order was not an abuse of discretion because, although plaintiff had an opportunity to do so, he failed to show that he did not intentionally withhold disclosure or provide any good cause for not serving his notice until the eve of trial”) (citations omitted), *lv. denied* 84 N.Y.2d 809, 621 N.Y.S.2d 519 (1994).

The *Tienken* case was governed by the Third Judicial District's Expert Disclosure Rule, which provides, in pertinent part:

A party ... shall serve its response to an expert demand ... on or before the filing of the Note of Issue.... Any opposing party shall serve its answering response pursuant to CPLR 3101(d) within 60 days after the filing of the Note of Issue. Any amended or supplemental expert disclosure shall be allowed only with the permission of the [c]ourt. Unless the [c]ourt directs otherwise, a party who fails to comply with this rule is precluded from offering the testimony and opinions of the expert for whom a timely response has not been given.

2014 Third Jud. Dist. Rules, Expert Disclosure Rule. The Third Department did not mention this rule in its decision in *Tienken*, but lawyers practicing before courts in the Third Judicial District must be aware of it, and the fact that it is housed in a relatively obscure place. *See Expert Disclosure Rule*, Third Jud. Dist. Rules, <https://www.nycourts.gov/courts/3jd/JudgesRules/3JD-Judges%20Rules.shtml> (last visited June 3, 2018).

If no response to a CPLR 3101(d)(1)(i) request is forwarded and the trial date is approaching, the party serving the request would be better off if she attempted to follow up the initial request, even though it is not required under the statute. If no response has been tendered by the time of trial, a party making a motion to preclude will have a much stronger argument if she can show she attempted to resolve the matter in advance of the trial and prior to

seeking judicial intervention. *See* 22 N.Y.C.R.R. § 202.7(a), (c) (requiring affirmation that counsel has conferred with opponent in good faith to resolve disclosure issues); Siegel & Connors, *New York Practice* § 353. A party's failure to respond to a second demand should be sufficient to establish “intentional” or “willful” behavior. In any event, where there has been a total failure to respond to a request for expert disclosure, the burden to establish good cause for the introduction of the testimony should fall on the party planning to call the expert, not the opponent.

### 3) Deficient CPLR 3101(d)(1)(i) Response

The third type of problem arising under CPLR 3101(d)(1)(i) occurs when a party provides expert disclosure, but it is deficient. In *St. Hilaire*, 305 A.D.2d at 210, 759 N.Y.S.2d at 75, defendant failed to provide the “substance” of an expert's testimony in accordance with CPLR 3101(d)(1)(i). The expert, a neurologist, had examined plaintiff on defendant's behalf. The First Department held that the trial court properly allowed the testimony of the expert because: (1) the nondisclosure was unintentional, (2) defendant did alert plaintiff early on of her intent to call a neurologist as an expert at trial, (3) the court offered plaintiff an adjournment, (4) defendant was directed to bear the cost of any rebuttal witness that plaintiff might wish to call, and (5) it did “not otherwise appear” that plaintiff was prejudiced by the late disclosure. *See Neel v. Mount Sinai Hosp.*, 196 Misc.2d 343, 762 N.Y.S.2d 224 (App. Term, 1st Dep't 2003) (applying *St. Hilaire* factors, court allows testimony of expert despite failure to disclose “substance of his testimony” in accordance with CPLR 3101 [d(1)(i)]).

These First Department cases appear to address situations where there was a timely response to an expert disclosure request, but it was deficient as to the substance of the testimony. Presumably, the responses in *St. Hilaire* and *Neel* failed to “disclose in reasonable detail the subject matter on which each expert [was] expected to testify” and/or “the substance of the facts and opinions on which each expert [was] expected to testify.” CPLR 3101(d)(1)(i). In these circumstances, the recipient of the disclosure presumably had ample opportunity to request the missing material prior to trial or to move to compel a more complete response. *See* CPLR 3124, 3126. A party who plans to move for relief due to an insufficient response to an expert disclosure request should also confer with counsel for the party on whom the request was served. *See* 22 N.Y.C.R.R. § 202.7(a), (c) (requiring affirmation on motion pertaining to disclosure that counsel has conferred with opponent in good faith to resolve outstanding issues); Siegel & Connors, *New York Practice* § 353. The Third Department emphasized these points in *Gross v. Sandow*, 5 A.D.3d 901, 773 N.Y.S.2d 171 (3d Dep't 2004), where responses to expert disclosure were provided over a year prior to trial. The court refused to preclude the expert's testimony in response to a motion made on the eve of the trial.

The Court of Appeals first address to CPLR 3101(d)(1)(i) came in a memorandum decision, *Rivera v. Montefiore Medical Center*, 28 N.Y.3d 999, 41 N.Y.S.3d 454 (2016). The Court held that supreme court did not “abuse[ ] its discretion as a matter of law in denying as untimely plaintiff's motion to preclude the testimony of defendant's expert on the grounds that the CPLR 3101(d) disclosure statement was deficient.” *Id.* at 1000, 41 N.Y.S.3d at 454. The Court reasoned that:

Assuming defendant's disclosure was deficient, such deficiency was readily apparent; the disclosure identified “causation” as a subject matter but did not provide any indication of a theory or basis for the expert's opinion. This is not analogous to a situation in which a party's disclosure was misleading or the trial testimony was inconsistent with the disclosure. Rather, the issue here was insufficiency.... The lower courts were entitled to determine, based on the facts and circumstances of this particular case, that the time to challenge the statement's content had passed because the basis of the objection was readily apparent from the face of the disclosure statement and could have been raised--and potentially cured--before trial.

*Id.* at 1002, 41 N.Y.S.3d at 456. These decisions above, and many others, demonstrate that where a party plans to object to the adequacy of an expert disclosure response, it should do so well in advance of trial. *See, e.g., Qian v. Dugan*, 256 A.D.2d 782, 783, 681 N.Y.S.2d 408, 409 (3d Dep't 1998).

In *Schmitt*, 151 A.D.3d 1254, 55 N.Y.S.3d 834, defendant first learned that plaintiffs intended to use the treating doctor as an expert at the doctor's deposition. The court rejected plaintiffs' argument that the transcript of the doctor's videotaped testimony could serve as a substitute for the required CPLR 3101(d)(1)(i) disclosure. As for the appropriate remedy, the court determined that there was no indication that the disclosure violation was willful and, therefore, preclusion was not appropriate. The court ruled that if plaintiffs wanted to use the treating doctor "as an expert witness (or as both a fact witness and as an expert witness), they must--within 30 days of the date of this Court's decision--tender an expert disclosure that satisfies all of the requirements of CPLR 3101(d)(1)(i) and--within 60 days of the date of this Court's decision--produce [the doctor] (at their expense) for the purpose of being deposed as an expert." *Id.* at 1256-57, 55 N.Y.S.3d at 837.

In *Boyer v. Kamthan*, 130 A.D.3d 1176, 13 N.Y.S.3d 653 (3d Dep't 2015), the Third Department noted that in light of "the somewhat-murky theories of liability, plaintiff did not prove that [defendant] acted willfully, deliberately or contumaciously in omitting from its expert disclosure its intent to call an expert who would testify about the [plaintiff's] theory" of liability based on an allegedly erroneous interpretation of plaintiff's CT scan. Therefore, the drastic remedy of preclusion of the expert under CPLR 3126(2) was not warranted. The decisions relied upon by the Third Department to support this latter conclusion all involved situations in which a party failed to produce documents under CPLR 3120, rather than a failure to provide proper expert disclosure under CPLR 3101(d)(1)(i). See *BDS Copy Inks, Inc. v. Int'l Paper*, 123 A.D.3d 1255, 1256-57, 999 N.Y.S.2d 234, 236 (3d Dep't 2014); *Abselet v. Satra Realty, LLC*, 85 A.D.3d 1406, 1407-08, 926 N.Y.S.2d 178, 180-81 (3d Dep't 2011); *Armstrong v. Armstrong*, 72 A.D.3d 1409, 1410-11, 900 N.Y.S.2d 476, 479-80 (3d Dep't 2010). In situations in which there has been a failure to comply with the disclosure obligations in CPLR 3101(d)(1)(i), it will often be difficult for the opposing party to establish that the defaulting party "acted willfully, deliberately or contumaciously."

Does the *Boyer* decision lay down a new heightened standard to be imposed when a party fails to comply with CPLR 3101(d)(1)(i)? If there is noncompliance, should the burden on a motion to preclude be on the movant? Or was the Third Department simply trying to address this particular case, where plaintiff's complaint and bill of particulars contained "somewhat-murky theories of liability"?

In sum, under the current state of the law, sound practice for any party demanding expert disclosure is to follow through on the demand, making sure that the opponent not only responds within a reasonable time, but also with adequate data. The longer the time that passes without a response, the better a party's chance to succeed on a preclusion motion. But the absence of a response for a prolonged time should not lead one to assume too much. The view of decisions like *Rivera*, *Gross* and *Qian* is that the one who served the expert demand is under an obligation to broach the issues of timeliness and adequacy before the trial. A party who does not do that can't assume that it can raise the issue at the trial if and when the opponent tries to call an expert.

A pretrial motion should not always be necessary, however. Communication between the parties, for example, that makes it entirely clear that the plaintiff does not intend to call an expert witness on a given issue, or does not intend to call an expert at all, should enable the defendant to proceed to trial on that assumption. But circumstances can cancel that assumption, too.

If expert disclosure is inadequate and the expert's testimony is indispensable to the whole case, the opponent should clean the matter up before trial with a formal preclusion motion for the obvious reason that the granting of the motion can make a trial unnecessary. If the issue is one on which expert testimony would merely help, on the other hand, but is not indispensable, a trial would presumably be necessary whether the party calls the expert or not. In that instance, the pretrial confirmation, such as in correspondence, that the party does not intend to call an expert on the issue should make a pretrial preclusion motion unnecessary.

In this last scenario, the defendant should be allowed to move to preclude at the trial proper if and when the plaintiff tries to call an expert in violation of an express understanding the plaintiff gave the defendant before the trial, and without any showing that the defendant moved for such a preclusion order before the trial. To insist on such a showing in that situation would generate a preclusion motion whose granting would not even serve to spare a trial.

#### **E) Retrial After CPLR 3101(d)(1)(i) Failure**

An interesting problem arises where a retrial is ordered after a party has been precluded from offering testimony due to a failure to comply with CPLR 3101(d)(1)(i). In *Noble v. Cole*, 267 A.D.2d 702, 699 N.Y.S.2d 527 (3d Dep't 1999), plaintiff failed to properly respond to a request for expert disclosure under the statute and was barred from calling an expert. Prior to the retrial of the case, plaintiff tried to cure the defect by providing the required disclosure. The court held that the expert testimony was barred at the retrial because the prior order precluding it was now law of the case.

A somewhat analogous situation arose in *Hesse v. Rockland County Legislature*, 18 A.D.3d 614, 795 N.Y.S.2d 339 (2d Dep't 2005), where the defendant successfully moved for summary judgment dismissing the complaint following a mistrial. The Second Department reversed and reinstated the complaint, holding that the motion was not timely under CPLR 3212(a)'s 120-day deadline. CPLR 3212(a) and 3101(d)(1)(i) are designed to serve somewhat different purposes. See Siegel's Practice Review, No. 161, p. 2 (May 2005). *Hesse* supports the underlying rationale in *Noble*, however, in that it denies a party the ability to cure a timeliness defect that existed prior to the retrial. Put another way, a retrial does not provide the parties with a “do-over” on all fronts.

Distinguishing *Noble* and like cases, or perhaps just disagreeing with them, the supreme court in Nassau County takes a different view in *Hothan v. Metropolitan Suburban Bus Authority*, 2002 WL 35634885 (Sup. Ct., Nassau Co. 2002); See *D Is Allowed on Retrial to Use MD Expert That D was Barred from Using at Earlier Trial*, 135 Siegel's Practice Review 4 (May 2003). The barring of the expert at the first trial was for noncompliance with the other side's expert disclosure demand. The case went to verdict. The plaintiff protested the damages findings as inadequate. On appeal, a retrial was ordered on the issue of damages only. The defendant was allowed to call an expert barred from use at the earlier trial.

*Hothan* concluded that the law of the case doctrine was inapplicable in these circumstances because the order of preclusion was a “discretionary evidentiary ruling” made by the judge at the earlier trial and could not bind the discretion of the judge at the second trial. *Hothan* notes that the ruling made at the earlier trial was the product of “entirely different circumstances.” The element of surprise was a major factor in the court's determination, as that is what prompted the earlier opinion to prohibit the expert's testimony. With interim proceedings producing a new trial, the other side had full notice of the intent to use the expert and the element of surprise was taken out of the picture.

#### **F) Miscellaneous Expert Disclosure Issues**

If a party fails to make a proper request for expert disclosure under CPLR 3101(d)(1)(i), there is no obligation upon the opponent to provide the expert's identity or the subject of the testimony prior to trial. *Collins v. Greater N.Y. Sav. Bank*, 194 A.D.2d 514, 598 N.Y.S.2d 544 (2d Dep't 1993).

The calendar system used in New York in mid-1985, when the expert disclosure provision became law, was the so-called “master calendar” system that does not assign a case to one judge at the outset. Remedying delayed expert identification and disclosure under CPLR 3101(d)(1)(i) posed monitoring problems under this system. The judge to whom an application was made for a remedy at trial, not necessarily having sat on any other part of the case, had to become familiar with the facts and had more difficulty achieving a proper perspective on the matter than a judge who had been on the case from the outset.

The Individual Assignment System (IAS) adopted at the beginning of 1986 alleviated a good part of that problem. See *Siegel & Connors, New York Practice § 77A*. Under the IAS, a case is assigned to but a single judge as soon as it comes into court. The entire disclosure process, including any schedule for expert disclosure, is more closely supervised under the IAS system. See 22 N.Y.C.R.R. § 202.12(b); *Siegel & Connors, New York Practice § 77D* (“The Preliminary Conference”). The IAS system has not prevented dilatory conduct, but tends to discourage it.

The monitoring problem persists, however, in some counties where there is a “dual track system of assignment.” Under the dual track system of assignment, a case is assigned to one judge for all pretrial proceedings and then transferred to another judge for the trial. See 22 N.Y.C.R.R. § 202.3(c)(6). This system is very similar to the “trial assignment part” or “TAP” system, in which trial ready cases are assigned to a calendar judge who, after unsuccessfully attempting to settle the case, transfers it to a judge for trial. The cases demonstrate that a substantial number of CPLR 3101(d)(1)(i) issues come to a head at trial. In counties where there is a dual track system or TAP part, a judge entertaining such a motion at trial will have to become familiar with the pretrial history of the case.

### **G) Medical, Dental or Podiatric Malpractice Experts**

The last sentence of CPLR 3101(d)(1)(i) carves out a special exception for “medical, dental or podiatric” malpractice actions. In such actions, a party responding to an expert disclosure request may omit the names of medical, dental or podiatric experts, “but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.” This last sentence has generated its own body of caselaw, primarily addressing situations where the other information required under 3101(d)(1)(i) can be “Googled,” i.e., entered into an Internet search engine to produce the identity of the expert.

The legislative purpose in allowing a party to withhold the identity of a medical, dental or podiatric malpractice expert “was apparently based on a ‘concern that medical experts might be discouraged from testifying by their colleagues.’” *Thomas v. Alleyne*, 302 A.D.2d 36, 45, 752 N.Y.S.2d 362, 369 (2d Dep’t 2002); see 1985 Report, at 49. Recognizing that this pressure is easier to apply when the expert’s identity is revealed at an early stage of the case, the legislature deemed it appropriate for the expert to be identified only at the time of trial. CPLR 3101(d)(1)(i) still requires, however, the party receiving the demand “to disclose all other information concerning such experts” required under the statute with respect to facts, opinions, qualifications, summary, etc.

The person to be called as an expert in a medical malpractice action need not actually be licensed to practice medicine in order for CPLR 3101(d)(1)(i)’s exception to apply and permit the withholding of the expert’s name. *Silber v. Plainville Orthopedics*, 176 Misc.2d 870, 674 N.Y.S.2d 587 (Sup. Ct., Nassau Co. 1998). In *Silber*, the expert had an M.D. degree as well as a Ph.D in anatomy, and was a teacher at a medical school. These credentials were certainly sufficient to qualify their holder as an expert and, therefore, to invoke the provision that permits the concealment of the expert’s name. Implicit in the court’s holding was that the peer pressure whose deterrence motivates the exception could be brought to bear against this expert who, while not a licensed practitioner, would still be sensitive of his standing among his colleagues.

In *Jasopersaud v. Tao Gyoun Rho*, 169 A.D.2d 184, 572 N.Y.S.2d 700 (2d Dep’t 1991), the Second Department departed from a literal construction of the last sentence in CPLR 3101(d)(1)(i) and directed disclosure of some, but not all, of the qualifications of plaintiff’s expert. The court justified its departure from the statutory language by stating that a proper exercise of discretion called for the exemption from disclosure of data that would, “under the circumstances ... tend to reveal the identity of the plaintiff’s expert.” *Id.* at 188, 572 N.Y.S.2d at 703.

*Jasopersaud* was a leading case on this subject until the Second Department reconsidered it in its 2002 *Thomas* decision. The *Thomas* decision “abandon[s]” the approach taken in *Jasopersaud* “as being both unworkable and inconsistent with the terms of the governing statute ....” *Thomas*, 302 A.D.2d at 37, 752 N.Y.S.2d at 364. The Second

Department now holds that parties in medical, dental and podiatric malpractice actions are presumptively entitled to a statement of a malpractice expert's qualifications in "reasonable detail" as required by CPLR 3101(d)(1)(i), even if it will lead to the expert's identification. A party may avoid compliance with this obligation only upon production of proof sufficient to sustain findings (a) that there is a reasonable probability that such compliance would lead to the disclosure of the actual identity of their expert or experts, and (b) that there is a reasonable probability that such disclosure would cause such expert or experts to be subjected to "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." *Id.* at 47, 752 N.Y.S.2d at 370.

The last portion of the above quote originates in CPLR 3103(a), which allows the court to deny or limit disclosure in these circumstances. The result under *Jasopersaud* can still be reached under *Thomas*, but there is seemingly a higher burden to be carried by the party resisting disclosure.

Shortly before *Thomas*, the Fourth Department addressed the proliferation of sophisticated search engines and their effect on disclosure of expert witnesses. *Thompson v. Swiantek*, 291 A.D.2d 884, 736 N.Y.S.2d 819 (4th Dep't 2002). Contrary to the express language of CPLR 3101(d)(1)(i), and citing the Second Department's opinion in *Jasopersaud*, the court permitted plaintiff to disclose only that plaintiff's expert was a board-certified urologist, the state in which he was licensed to practice, and the state in which he taught. The court refused to require more disclosure because "additional information would 'effectively lead to disclosure of the expert's identity.'" *Id.* at 885, 736 N.Y.S.2d at 820. One wonders, however, if a refined search based solely on the information disclosed in *Thompson* could sufficiently limit the list of possible experts and thereby lead to identification.

Detailing the split of authority in the Second and Fourth Departments, and noting that the First Department has not recently had occasion to address the specific issue, a Bronx County Supreme Court decision sided with the Second Department's approach in *Thomas*. *Muniz v. Our Lady of Mercy Medical Center*, 2003 WL 21436132 (Sup. Ct., Bronx Co. 2003). Although computer technology has greatly enhanced a party's ability to ascertain the identity of an adversary's malpractice expert, *Muniz* counters with the observation that there is an increased willingness of experts to come forward and testify in medical, dental and podiatric malpractice cases. Therefore, the justifications for courts reading a limitation into the last sentence in CPLR 3101(d)(1)(i) are no longer so compelling. Applying the test set out in *Thomas*, the court concludes that plaintiff failed to make any showing that the proposed disclosure would lead to revealing the expert's identity. Even if the expert's identity could be ascertained, plaintiff made no showing that the expert "would probably be pressured or harassed."

In *Pizzi v. Muccia*, 127 A.D.2d 338, 340, 515 N.Y.S.2d 341, 343 (3d Dep't 1987), the Third Department held that "in an appropriate case, a court could strike a request for qualifications when it is demonstrated that the expert's identity would thereby be revealed." Three decades later in *Kanaly v. DeMartino*, 162 A.D.3d 142, \_\_\_ N.Y.S.3d \_\_\_, 2018 WL 2725756 (3d Dep't 2018), the court reassessed the standards outlined in *Pizzi* and acknowledged that they are "not only impractical, but contrary to the statutory language and 'the salutary policy of encouraging full pretrial disclosure so as to advance the fundamental purpose of litigation, which is to ascertain the truth.'" Therefore, the *Kanaly* court adopted the Second Department's rule in *Thomas* that "parties in medical malpractice cases 'will ordinarily be entitled to full disclosure of the qualifications of [an opponent's] expert, [except for the expert's name,] notwithstanding that such disclosure may permit such expert's identification.'" A party may, however, "obtain a protective order under CPLR 3103(a) by making a factual showing that there exists a reasonable probability, 'under the special circumstances of a particular case, that a prospective expert medical witness would be subjected to intimidation or threats if his or her name were revealed before trial.'" "

New York State has now endured almost four decades of litigation on the scope of expert disclosure in medical, dental and podiatric malpractice actions. It has not been a gratifying experience. The legislative history supporting the exception contained in the last sentence of CPLR 3101(d)(1)(i) is sparse. Problems of peer pressure may arise in individual malpractice actions, causing an expert to be discouraged from testifying. *See*, Siegel's Practice Review,

No. 148, p. 4 (Apr. 2004). However, CPLR 3101(d)(1)(i)'s blanket exception, covering all medical, dental, podiatric malpractice actions, has resulted in a practice where the tail is wagging the dog. New York is apparently the only state prohibiting pretrial disclosure of the name of an expert witness and, given the immediacy of other matters before our legislature, we are likely to remain alone. See *Thomas*, 302 A.D.2d at 43, 752 N.Y.S.2d at 368.

Assuming CPLR 3101(d)(1)(i) is here to stay in its current form, courts should be very hesitant to expand the limitations on disclosure contained in its last sentence. The general aim of CPLR 3101(d)(1)(i) is to promote a prompt settlement by providing a party with an accurate measure of an opponent's case and to discourage a party from asserting unsupported claims or defenses. E.g., *Esquilin v. Brooklyn Hosp. Center*, 190 Misc.2d 753, 739 N.Y.S.2d 230 (Sup. Ct., Kings Co. 2002). Limiting disclosure of the qualifications of an expert hinders the goal of the statute because it prevents a party from adequately evaluating the strength of the expert. *Id.* Moreover, limiting disclosure in these circumstances is contrary to the express language of the statute. Although the last sentence of CPLR 3101(d)(1)(i) allows a party to omit the name of an expert, it requires disclosure of “all other information concerning such experts otherwise required by this paragraph.” Any exception to CPLR 3101(a)'s theme of broad disclosure, such as the one contained in the last sentence to CPLR 3101(d)(1)(i), should be narrowly construed.

Moreover, CPLR 3103(a) stands at the ready to cure the problem specifically addressed by CPLR 3101(d)(1)(i)'s exception. If the court believes an expert witness will be pressured in a particular case, it can limit or regulate the disclosure in a manner tailored to the needs of the particular case. The last sentence of CPLR 3101(d)(1)(i) is, in fact, superfluous. It has wreaked havoc due in substantial measure to the mandatory nature of its application, regardless of the particular facts and circumstances in the case. As *Thomas* and many other cases have recognized, not all medical, dental or podiatric malpractice experts are subject to annoyance, peer pressure or other prejudice. If such problems exist in a particular case, CPLR 3103 (a) is available to address them. Criminal penalties also exist to punish a party who has tampered with or intimidated a witness. See *Penal Law* §§ 215.10-215.17.

*Thomas* expressly stated that it was leaving open the question of the decision's retroactivity. *Satkin v. McConnell*, 195 Misc.2d 420, 759 N.Y.S.2d 302 (Sup. Ct., Orange Co. 2003) applied *Thomas* in a pending case and granted a defendant's motion to compel expert disclosure not permitted under the holding of the prior law expressed in *Jasopersaud*. We're sure to see more litigation on this front in any department that might change its existing rule, which occurred in the Third Department in 2018.

As demonstrated above, the last sentence in CPLR 3101(d)(1)(i) has spawned a legion of caselaw on many fronts. What about the situation in which a party moves for summary judgment in a medical malpractice action and the response requires an affidavit from a medical expert? Can a party attempt to flush out an adversary and obtain the identity of the expert through this route? The courts have concluded that a party opposing a motion for summary judgment in a medical malpractice action can serve an affidavit from a medical expert with the identity redacted. See, e.g., *McCarty v. Community Hosp. of Glen Cove*, 203 A.D.2d 432, 433, 610 N.Y.S.2d 588, 589 (2d Dep't 1994). This approach is deemed to be “consistent with the philosophy underlying CPLR 3101(d)(1)(i), while permitting [an opponent on a motion for summary judgment] to meet his or her burden of demonstrating the existence of triable issues of fact.” *Id.* Furthermore, to guard against the use of such a motion just to flush out the identity of an adversary's expert, the court can inspect the affidavit in camera and direct redactions accordingly. See *Siegel & Connors, New York Practice* § 348A.

What if the party in an offensive posture moving for summary judgment in a medical malpractice action attempts to submit an affidavit of a medical expert with the identity redacted, claiming the procedure is impliedly endorsed under CPLR 3101(d)(1)(i)'s final sentence? That's what occurred in *Rivera v. Albany Medical Center*, 119 A.D.3d 1135, 1136, 990 N.Y.S.2d 310, 312 (3d Dep't 2014), but the Third Department ruled that “[b]ecause defendants were the movants for summary judgment, their submission of an anonymous expert affidavit was incompetent evidence not proper for consideration upon the motion.” In affirming the denial of the motion, the Third Department cited to

several decisions from the Second Department reaching the same conclusion and noted that “the Legislature has shown no broad intention of protecting experts from accountability at the point where their opinions are employed for the purpose of judicially resolving a case or a cause of action.” *Id.* Furthermore, the court stressed that requiring a movant to reveal an expert's identity in these circumstances “allow[s] a nonmovant to meaningfully pursue information such as whether that expert has ever espoused a contradictory opinion, whether the individual is actually a recognized expert and whether that individual has been discredited in the relevant field prior to any possible resolution of the case on the motion.” *Id.* at 1137, 990 N.Y.S.2d at 312.

In *Maher v. Palazzolo*, 2009 WL 2005231 (Sup. Ct., Nassau Co. 2009), a dental malpractice action, the defendant made a motion to compel plaintiff to produce authorizations to speak ex parte with the plaintiff's subsequent treating dentist pursuant to the Court of Appeals holding in *Arons v. Jutkowitz*, 9 N.Y.3d 393, 850 N.Y.S.2d 345 (2007). See *Siegel & Connors, New York Practice* § 363. The plaintiff refused to provide an authorization on the ground that she designated the subsequent treating dentist as her expert pursuant to the provisions of CPLR 3101(d)(1)(i). The plaintiff did, however, provide the defendant with redacted copies of the subsequent treating dentist's narrative report and office records. See 22 N.Y.C.R.R. § 202.17 (requiring that copies of the medical reports of those medical providers who have examined the party to be forwarded to all other parties); see also Commentary C3121:8 (“Exchange of Reports”) (discussing caselaw interpreting Uniform Rule 202.17). Plaintiff claimed that because the subsequent treating dentist would be called as an expert, the last sentence in CPLR 3101(d)(1)(i) justified the redaction of the expert's name and the refusal to provide the authorization for an ex parte interview.

Noting that “the determination to designate the plaintiff's subsequent treating dentist as the plaintiff's expert is a determination that in the first instance lies with the plaintiff,” the court concluded that the *Arons* opinion mandated that plaintiff provide an authorization, which necessarily required revelation of the expert's identity. The supreme court reasoned that:

the clear holding of *Arons* ... is the availability of non-party treating physicians for interview and any limitation on the availability of such a subsequent treating physician or dentist such as a designation of same as an expert would vitiate the clear direction as to availability set forth by the Court of Appeals.

As noted above, many decisions have held that CPLR 3101(d)(1)(i) does not apply to a treating physician who provides expert testimony at trial. See, e.g., *Hamer*, 106 A.D.3d at 509, 965 N.Y.S.2d at 104; *Andrew*, 34 A.D.3d at 1331, 824 N.Y.S.2d at 547; “(C) Witnesses Subject to CPLR 3101(d)(1)(i)'s Requirements,” above. If plaintiff relied on this caselaw and did not reveal the subsequent treating dentist through expert disclosure, it is likely that the dentist's name would appear on records sought through disclosure under CPLR 3120(1)(i), CPLR 3121(a), and/or Uniform Rule 202.17. In these circumstances, courts have permitted parties to produce the treating physician's reports with the author's name redacted so that the physician will not be subjected to direct or indirect pressure from colleagues to refrain from testifying as an expert. *Ryan v. Michelsen*, 241 A.D.2d 434, 660 N.Y.S.2d 435 (1st Dep't 1997) (“[A] plaintiff is permitted to withhold the name of his expert witness under CPLR 3101(d)(1)(i), notwithstanding the fact that the same physician was also the author of the clearly discoverable examining physician's report.”); *Wagner v. Kingston Hosp.*, 182 A.D.2d 616, 582 N.Y.S.2d 214 (2d Dep't 1992) (same). The *Maher* court notes, however, that these cases were decided before the Court of Appeals decision in *Arons*.

It is doubtful that a party would ever be justified in completely refusing to reveal the identity of a treating physician, provided the physician rendered treatment relevant to the physical condition in controversy in the lawsuit. A party should not be able to completely cut off what the *Arons* court designated as “avenues of informal discovery of information” by simply designating the subsequent treating dentist as an expert.

If a treating physician will provide expert testimony, we wonder if the holding in *Arons* and the legislative goals served by the last sentence in CPLR 3101(d)(1)(i) cannot be simultaneously and faithfully served by requiring the party to

provide an authorization closer in time to the actual trial date. The specific time period within which the authorization must be provided can be adjusted based on the needs of the case. See CPLR 3103(a) (“The court may at any time on its own initiative, or on motion of any party or of any person from whom ... discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device.”). This procedure would assist in preventing medical experts from being discouraged from testifying by their colleagues, the primary aim of the redaction permitted by CPLR 3101(d)(1)(i), while still allowing the adverse party an opportunity to conduct the ex parte interview authorized by the Court of Appeals in *Arons*. Cf. *Carrasquillo v. Rosencrans*, 208 A.D.2d 488, 617 N.Y.S.2d 51 (2d Dep’t 1994) (holding that supreme court properly considered affidavit of plaintiff’s expert, whose name was redacted, in denying defendants’ motion for summary judgment; “this procedure ... is wholly consistent with the logic underlying CPLR 3101(d)(1)(i)”).

In *Maher* and like cases, there will most probably be disputed issues as to the manner in which the ex parte interview is to be conducted, including the permissible areas of inquiry. For example, is defendant permitted to inquire about matters within the scope of the expert testimony, or is the interview limited to subjects pertaining to the subsequent treatment? See Commentary C3121:7 (“Hospital Records Authorization”, “B) Ability to Conduct an Ex Parte Interview of an Adverse Party’s Treating Physician Who Will Also Act as the Adverse Party’s Expert”) (discussing *Sommer v. Pierre*, 2008 WL 2164256 (Sup. Ct., N.Y. Co. 2008), which held that the ex parte interview was permitted, but the lawyer could only interview the physician in regard to his treatment of defendant, and could not question him in his capacity as an expert). While the *Arons* decision provided some direction in this thorny area, the opinion in *Maher* demonstrates just how many open questions remain.

Doctors, dentists and podiatrists frequently appear as experts in actions other than for medical, dental or podiatric malpractice. The rationale for exempting the identity of a medical expert in a medical malpractice action does not apply in an action for physical therapy malpractice. *Censki v. Madison Ave Physical Therapy*, 190 Misc.2d 547, 740 N.Y.S.2d 573 (Sup. Ct., New York Co. 2002). In any event, the exception contained in the last sentence of CPLR 3101(d)(1)(i) only applies in actions for medical, dental or podiatric malpractice.

Actions for medical, dental or podiatric malpractice may contain additional claims against codefendants that do not arise from medical malpractice. For example, in *Travis v. Wormer*, 136 A.D.2d 933, 524 N.Y.S.2d 903 (4th Dep’t 1988), plaintiff asserted a cause of action for medical malpractice against doctors and a hospital and a cause of action for strict products liability and breach of warranty against a drug manufacturer. The court held that the exception contained in the last sentence of CPLR 3101(d)(1)(i) was inapplicable to plaintiff’s claim against the drug manufacturer and required plaintiff to divulge the identity of the medical expert “only” to the drug manufacturer. See CPLR 2103(e) (requiring that each paper served on any party “be served on every other party who has appeared, *except as otherwise may be provided by court order*”) (emphasis added). The result in *Travis* is a sound one. See also *Salva v. Blum*, 277 A.D.2d 985, 986, 716 N.Y.S.2d 527, 528 (4th Dep’t 2000) (disclosure of expert’s identity required in action against drug manufacturer). Difficulties presented in applying the exception contained in CPLR 3101(d)(1)(i) to cases involving multiple parties and multiple claims can be resolved by invoking CPLR 3103(a)’s powers. The court can accomplish the goals of CPLR 3101(d)(1)(i) and allow for expert disclosure while “limiting, conditioning or regulating” its use. CPLR 3103(a).

## H) Expert Disclosure Rule Doesn’t Mandate Disclosure of Expert’s Report

Whatever other source there may be in the CPLR for compelling the disclosure of the report of an expert, there is no such automatic requirement in CPLR 3101(d)(1)(i). The general requirement of this provision is that, upon request, each party must identify any expert it intends to call at trial and furnish a statement of the expert’s qualifications, the subject matter to be addressed, the facts used as a base, the opinion reached, and the grounds for it. The actual report of the expert is not on CPLR 3101(d)(1)(i)’s list, and the court in *In re Love Canal Actions*, 161 A.D.2d 1169, 555

N.Y.S.2d 519 (4th Dep't 1990), holds that it is not subject to disclosure. See *Barrowman v. Niagara Mohawk Power Corporation*, 252 A.D.2d 946, 675 N.Y.S.2d 734, 736 (4th Dept 1998).

Perhaps the report can be ordered disclosed if special circumstances are shown under paragraph (1)(iii), or even under paragraph (1)(i) itself if there has been an unexcused delay in retaining an expert or an outright failure to comply with an expert disclosure request. See, e.g., CPLR 3101(d)(1)(i) (allowing court to “make whatever order may be just”). But as far as the core formulation of paragraph (1)(i) is concerned, the report itself is not subject to disclosure. Alternatively, the report constitutes material prepared in anticipation of litigation and might also be obtained if the party seeking disclosure has a substantial need for it and is unable, without undue hardship, to obtain its substantial equivalent by other means. CPLR 3101(d)(2); see, *Bailey v. Owens*, 2004 WL 895972 (Sup. Ct., N.Y. Co. 2004).

Even if a case is made out under paragraph 2 of CPLR 3101(d) for the discovery of an expert's report, as where the conditions of that provision have been met, the general rule is that the report must be shown to have been prepared for the present litigation and not some previous one. It has been held, for example, that if P wants from D a copy of an expert's report prepared for D in an earlier litigation with different plaintiffs, and those plaintiffs stipulated with D in that action to the confidentiality of the report, D is entitled to have that agreement respected in the second action and P is not entitled to a copy of the report. *Chemical Bank v. Arthur Andersen & Co.*, 143 Misc.2d 823, 541 N.Y.S.2d 327 (Sup. Ct., New York Co. 1989). The *Chemical Bank* court says that disclosure in that situation would undermine “the strong policy in favor of promoting and enforcing stipulations of settlement.” *Id.* at 828, 541 N.Y.S.2d at 330.

Rule 13(c) in the Commercial Division provides for expert disclosure in commercial cases similar to that available in federal actions, including the production of an expert report and the deposition of the expert, unless otherwise ordered by the court or stipulated by the parties. 22 N.Y.C.R.R. § 202.70(g), Com. Div. Rule 13(c).

The provisions in CPLR 3101(d)(1) generally govern the disclosure of reports by expert witnesses. The reports of treating and examining physicians can be obtained by resort to CPLR 3121(b) and 22 N.Y.C.R.R. § 202.17. See Commentary C3121:8.

### **I) Disclosure of Experts Used on a Motion for Summary Judgment**

Although CPLR 3101(d)(1)(i) only requires a party, “[u]pon request,” to identify each person it “expects to call as an expert witness at trial,” there was a reign of terror from approximately 2008 through 2015 during which the First and Second Departments frequently refused to consider the affidavits of experts submitted on a motion for summary judgment when the offering party failed to provide “timely” disclosure of the expert under CPLR 3101(d)(1)(i). See, e.g., *Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dep't 2008); *Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520, 947 N.Y.S.2d 15 (1st Dep't 2012). This often resulted in a lack of sufficient proof to oppose a motion for summary judgment and the ultimate dismissal of a party's claims, but the decisions were inconsistent and unpredictable. See Patrick M. Connors, *Case Law on CPLR 3101 (d) (1) (I), Expert Disclosure, Is in Shambles*, N.Y.L.J., Jan. 20, 2009, at 241.

The preclusion approach in the summary judgment context was often draconian, especially given that New York courts had a long history of leniently forgiving delayed expert disclosure when the expert was to testify at trial. See, e.g., *St. Hilaire*, 305 A.D.2d at 210, 759 N.Y.S.2d at 75; “3) Deficient CPLR 3101(d)(1)(i) Response,” above. If an expert disclosed at the eleventh hour was often permitted to testify at trial, it was eminently sensible to conclude that the court should have a similar power to consider an affidavit submitted by an undisclosed expert on a motion for summary judgment. In *Rivers v. Birnbaum*, 102 A.D.3d 26, 953 N.Y.S.2d 232 (2d Dep't 2012), the Second Department acknowledged that some of its caselaw in this realm had not been consistently interpreted, and attempted to clarify its rule regarding a court's consideration of an undisclosed expert's affidavit on a motion for summary judgment.

Nonetheless, the decision in *Rivers* left much to the trial court's discretion and inconsistent decisions and needless dismissals persisted.

To address the problem, CPLR 3212(b) was amended in 2015 by adding a new third sentence that states that “[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.”

In *Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095, 69 N.Y.S.3d 410 (3d Dep't 2018), the Third Department affirmed an order granting defendant's motion for summary judgment dismissing the complaint based, in part, on plaintiff's failure to provide timely expert disclosure. After issue was joined and years of ongoing discovery, the supreme court issued a scheduling order requiring that the parties exchange expert disclosure by May 1, 2015, and that dispositive motions be filed by August 1, 2015, and set a trial date in November 2015. Defendant complied with the order by timely serving expert disclosure on plaintiffs' counsel, but plaintiffs failed to do so.

Defendant moved for summary judgment in July 2015 based upon, among other grounds, plaintiffs' complete lack of expert disclosure and failure to submit any expert proof that plaintiff's injuries and damages were caused by defendant's actions. Defendant contended that plaintiffs should be precluded from presenting any expert proof. See CPLR 3126 (authorizing sanctions for a failure to disclose); *Siegel & Connors, New York Practice § 367*. While plaintiff submitted several expert affidavits in response to defendant's motion, the supreme court refused to consider them because of plaintiff's failure to comply with the expert disclosure deadlines in the scheduling order.

The Third Department emphasized that plaintiffs failed to comply with the deadlines in the scheduling order and first identified their experts, and submitted their affidavits in opposition to defendant's summary judgment motion, over one year after the deadline for expert disclosure. Plaintiffs did not request an extension “or provide a viable excuse or good cause for failing to comply over this protracted period, and the numerous adjournments were granted at their request with the express condition that the court-ordered discovery and disclosure schedule was not being extended.” *Colucci*, 157 A.D.3d at 1099, 69 N.Y.S.3d at 413. In that the supreme court did not abuse its discretion in precluding plaintiffs from submitting the expert affidavits in opposition to the motion for summary judgment, the Third Department affirmed the order granting defendant summary judgment.

The *Colucci* court did not cite to the 2015 amendment to CPLR 3212(b), but one might wonder if the decision can be reconciled with it given that the Third Department affirmed supreme court's order refusing to consider the plaintiffs' expert affidavits on a motion for summary judgment based on the failure to provide expert disclosure. We think it can. The court did not refuse to consider the expert affidavits solely because of a failure to comply with CPLR 3101(d)(1)(i)'s expert disclosure rule, which does not contain any time frame for a response. Rather, the court affirmed supreme court's order due to the failure to comply with the specific court ordered disclosure deadlines in the scheduling order for over a year.

### **Paragraph 1, Subparagraph (ii)**

CPLR 3101 (d)(1)(ii), enacted in 1988, authorizes a kind of trade-off. It allows a party to offer to name and submit to deposition any person she will call as an expert in a medical, dental or podiatric malpractice action. If all parties accept the offer within twenty days, each party must produce any expert witness for an oral deposition. On its face, CPLR 3101(d)(1)(ii) applies to any expert witness in medical, dental or podiatric malpractice actions, and not simply medical experts.

While the provision in the last sentence of subparagraph (i) permitting withholding of the name of the medical expert in the medical malpractice categories applies to both sides, its purpose is to protect the plaintiff from the peer pressure

that could presumably be brought to bear against the plaintiff's expert by friends and professional associates of the defendant if the expert is identified early enough. A party seeking to invoke CPLR 3101(d)(1)(ii) would obviously believe that the benefits of disclosure outweigh any possible peer pressure.

All parties must accept the offer to invoke the benefits of CPLR 3101(d)(1)(ii). If any party balks, the provision is not applicable. The expert may also have something to say about deposing. Many doctors are aware that the cross-examination they face at the trial is likely to be a good deal more probing, and unpleasant, when the inquisitor has been armed with the expert's deposition.

The lack of caselaw under CPLR 3101(d)(1)(ii) indicates that it is not often used successfully. If all parties do submit their experts to oral deposition, which of course allows more flexibility in scheduling than testimony at the trial permits, the prospects of a settlement will be enhanced. But unless a settlement materializes, all of the deponents will face the more effective cross-examination that the deposition will allow, a factor that may impel some of the experts to offer to submit to a deposition, but then try to back away from testifying at the trial. The tactical considerations that go into the making of a CPLR 3101(d)(1)(ii) offer, in other words, and into the decision to accept it, are many and delicate.

### **Paragraph 1, Subparagraph (iii)**

CPLR 3101(d)(1)(iii), enacted in 1985, addresses “[f]urther disclosure concerning the expected testimony of any expert.” “Further” disclosure requires a court order under subparagraph (iii), but further to what? What disclosure is authorized in the first place? It is important to note that subparagraph (i) enumerates the disclosure that it allows, and that a deposition of the expert or an expert report is not on the list. Hence subparagraph (i) is not authority for deposing the expert or to obtain disclosure of the expert's report. *See* Commentary C3101:29A (“Experts, H) Expert Disclosure Rule Doesn't Mandate Disclosure of Expert's Report”), above.

“[S]pecial circumstances” are not defined, but the phrase has a whole history behind it. It evolved when the same language was part of CPLR 3101(a)(4), the well-known provision requiring some additional element in addition to “relevancy” before a nonparty witness could be deposed. *See* Commentary C3101:22, above. The “special circumstances” requirement was part of subdivision (a)(4) from the CPLR's 1963 outset until 1984. It was eliminated in 1984. It has now come back to do a job under CPLR 3101(d)(1)(iii).

The phrase can look to its subdivision (a)(4) predecessor's history and caselaw for guidance. The theme that will emerge from that consultation is that the construction should be relatively liberal so as to advance the aims of disclosure, but it may in this instance have to be tempered somewhat to recognize what may fairly be considered special problems met in deposing experts. Their time costs money and medical experts have especially important work to do, suggesting that public policy obviously doesn't want their time wasted. Hence, the “special circumstances” requirement is rarely established in reported decisions. If “special circumstances” are established, the court can order further disclosure, but can restrict its scope. In addition, the court can make provisions concerning fees and expenses “as the court may deem appropriate.” The court may allow further disclosure, such as a deposition, but require the parties seeking the relief to pay the expert's fees.

If a party cannot show “special circumstances” to obtain further disclosure, there is another avenue to the information. CPLR 3101(a)(3) allows a party, without a court order, to obtain full disclosure, including a deposition, from a doctor, dentist or podiatrist who has provided the “care or diagnosis to the party.” *See* Commentary C3101:21, above. CPLR 3101(d)(1)(iii) notes that if a party invokes this provision and deposes its “treating or retained expert,” any other party is entitled to full disclosure from that expert without a court order. The language is unclear here, but it is assumed that a “treating expert” is one who has treated the party and will provide expert testimony. As noted above, this witness

often wears two hats, acting as both a fact and expert witness. If a party takes the deposition of a doctor who provided treatment, but will not testify as an expert witness, CPLR 3101(d)(1)(iii) does not appear to apply.

It has been held that whenever the physical evidence on which one party's expert has based a report is lost, a special circumstance exists as a matter of law under CPLR 3101(d)(1)(iii) justifying disclosure from the expert of at least the facts on which the expert's opinions are based, if not of the opinions themselves. *Rosario v. General Motors Corp.*, 148 A.D.2d 108, 543 N.Y.S.2d 974 (1st Dep't 1989). The court concluded that while the mere unavailability of such physical evidence may not have been an automatic basis for disclosure from the expert under prior law, it has become such a basis under the present statute. The court qualifies this, however, by holding that an outright deposition may not be necessary in every case; that there is leeway for the trial court to see whether mere interrogatories might do. The idea is to keep the expert's opinions insulated from preliminary probing while permitting the expert's knowledge of the facts to be extracted. On the facts of *Rosario*, the court found a deposition appropriate. *See also Mutual Ass'n Administrators, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2014 WL 6799669, \*3 (Sup. Ct., Suffolk Co. 2014) (“[W]here there has been no showing that the physical evidence inspected by the defendant's experts ... was lost, destroyed, or otherwise rendered unavailable to the plaintiff prior to the time that the plaintiff had the incentive to have its own experts inspect the evidence, we find that the deposition of the defendant's experts is unwarranted ....”).

It was held long before *Rosario* that, under proper circumstances, an adversary's experts can be deposed solely as to the facts. In *Kraus v. Ford Motor Co.*, 38 A.D.2d 680, 327 N.Y.S.2d 263 (4th Dep't 1971), for example, the plaintiff's intestate was killed in a car, parts of which were alleged to be defective. These were sent on behalf of the plaintiff's side to X for testing. X tested them and now defendant wanted to depose X. The examination was allowed to inquire into which parts had been turned over to X and whether X altered them in any way, etc. These were held to be matters of fact (as opposed to opinion) and under the circumstances were held appropriate for disclosure.

## Paragraph 2

CPLR 3101(d)(2) departs from the specific “experts” category, which paragraph 1 addresses, and focuses on “materials.” It speaks to materials generally, not being limited to those relating only to experts, but makes itself “subject” to paragraph 1 so that nothing in 2 is to be construed to undo anything in 1. Though couched in different terms, and adopting at several points the terminology of the counterpart federal provision, *Federal Rule of Civil Procedure 26(b)(3)*, CPLR 3101(d)(2) is in many ways the same as its predecessor in the pre-1985 CPLR 3101(d), well known as the provision on “material prepared for litigation.” That was in fact the subdivision's previous caption. It spawned a great body of caselaw and the new paragraph 2 did not generate any dramatic changes from prior law.

The opening sentence in CPLR 3101(d)(2) is modeled on the first sentence of *Federal Rule 26(b)(3)*. It protects from disclosure materials prepared “in anticipation of litigation or for trial,” unless it's shown that the seeking party has “substantial need” of the materials in order to prepare the case and can't “without undue hardship” obtain such materials or their “substantial equivalent ... by other means.” While the federal caselaw interpreting *Rule 26* will not precisely track the caselaw on the New York “material prepared for litigation” provision as it existed up to 1985, the gist of the latter's requirement, as refined by caselaw that kept in mind the liberal construction edict of *CPLR 104*, was essentially the same.

The central theme was that if the materials were relevant to the case and not obtainable from other sources, the requirement was met, the qualified immunity of subdivision (d) was lifted, and the items held subject to disclosure. More specifically, the old subdivision (d) two-part standard from which the theme emerged was (1) present inability to obtain the materials and (2) the consequent “injustice” or “hardship” that would result from withholding them. Number (2) appeared to get a free ride if (1) was satisfied.

The federal standard is also in two parts. The first part of the federal standard is essentially the same as that contained in the CPLR, and places the burden on the party to show a “substantial need for the materials to prepare its case ....” [Fed. R. Civ. P. 26\(b\)\(3\)\(A\)\(ii\)](#). The other federal requirement then mandates the party to establish that it “cannot, without undue hardship, obtain ... [the] substantial equivalent [of the materials] by other means.” *Id.* Cracking the conditional immunity offered by both provisions usually comes down to the same thing. If a party has a “substantial need” for relevant materials and can’t duplicate them, withholding them will usually produce “injustice” or “hardship.” In that light, the standards remain the same. If anything, the federal language currently residing in CPLR 3101(d)(2) is more liberal than the language that existed prior to 1985.

The second sentence of CPLR 3101(d)(2) states that if the court does order the disclosure, satisfied that the requirements of the first sentence have been met, it must take care to protect against the revelation of “mental impressions, conclusions, opinions or legal theories” of a lawyer “or other representative of a party concerning the litigation.” That comes almost verbatim from Federal [Rule 26\(b\)\(3\)\(B\)](#), which lifted the language from [Hickman v. Taylor](#), 329 U.S. 495, 67 S. Ct. 385 (1947), the U.S. Supreme Court’s landmark decision on federal work product.

It is important to keep in mind the fundamental construction New York courts afforded the prior version of CPLR 3101(d)(2), and adhered to throughout. This was the courts’ insistence that before an item would be deemed embraced by the provision at all, it had to be shown to have been prepared exclusively for litigation. *See, e.g., Dikun v. New York Cent. R.R.*, 58 Misc.2d 439, 295 N.Y.S.2d 830 (Sup.Ct., Jefferson Co. 1968), *aff’d* 31 A.D.2d 719, 297 N.Y.S.2d 711 (4th Dep’t). Mixed motives behind its preparation, in other words, as will be noted more fully in ensuing Commentaries, took the item out of this category altogether and subjected it to unfettered disclosure. That construction should abide with equal force under the “anticipation of litigation” language of the current subdivision (d)(2). *See Geffner*, 125 A.D.3d at 803, 4 N.Y.S.3d at 284 (plaintiff failed “to meet her burden of establishing, with specificity, that the [audio recording of an interview she conducted with the defendant] was prepared ‘exclusively in anticipation of litigation’ ”); *see also Bombard v. Amica Mut. Ins. Co.*, 11 A.D.3d 647, 648, 783 N.Y.S.2d 85, 86 (2d Dep’t 2004) (“The party asserting the privilege provided by CPLR 3101(d)(2)] bears the burden of demonstrating that the material it seeks to withhold is immune from discovery by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation.”) (citation omitted).

Since the second sentence of paragraph 2 begins with the phrase “[i]n ordering discovery,” it is obvious that the paragraph contemplates a motion procedure to iron out these disclosure problems. *See, e.g., CPLR 3103, 3124*. Although it might be stating the obvious, it bears mention that nothing is stopping the parties from working everything out by stipulation, *see CPLR 2104*, or the court from disposing of the matter in something like an order made at a preliminary conference without awaiting a motion. *See 22 N.Y.C.R.R. § 202.12(d)*. If the matter is brought before the court, the party seeking relief must demonstrate she attempted in good faith to resolve the matter prior to seeking judicial intervention. *See 22 N.Y.C.R.R. § 202.7(a), (c)* (requiring affirmation that counsel has conferred with opponent in good faith to resolve disclosure issues); [Siegel & Connors, New York Practice § 353](#).

CPLR 3101(d)(2), which has produced a large body of caselaw, is broken down into separate topics in the ensuing Commentaries.

### **C3101:30 Sui Generis Determination.**

The presence of a mass of cases construing and applying CPLR 3101(d)(2) to particular items does not mean that there are no general guideposts. There are a number of helpful indicia coming from the cases, which are discussed in the Commentaries that follow. Whether or not a given item being sought in a given case is a litigation item protected by subdivision (d)(2) is still, in large part, a sui generis determination. The facts relative to the item being sought and the circumstances under which it was secured or prepared must be examined, often on conflicting contentions

between the parties. The disclosure of the item must then abide a judicial determination--if the parties can't resolve it on their own--of whether this particular item was prepared for litigation.

There are two categories of items, however, to which the courts have applied an almost universal standard, so that an item falling into either of them has its treatment for subdivision (d)(2) purposes reasonably well settled. These are (1) the file of a liability insurer in an accident case and (2) the materials prepared by, or for, a party in the ordinary course of operating its business. In the case of accident reports, which are frequently sought in litigation, an overlap occurs with the second category and CPLR 3101(g), as will be investigated in Commentary C3101:33, below.

The first category--the liability insurer's file--has been held to fall under (d)(2) and to get the conditional immunity. The second, the ordinary-course-of-business item, has been held to be beyond (d)(2) and gets no immunity at all. Treatment of these categories follows.

### C3101:31 The Liability Insurer's File.

In the leading case of *Kandel v. Tocher*, 22 A.D.2d 513, 515, 256 N.Y.S.2d 898, 900 (1st Dep't 1965), Justice (later Chief Judge) Breitel pronounced for a unanimous court that since the very purpose of liability insurance is "the defense and settlement of claims," this kind of insurance "is simply litigation insurance." Therefore, just about everything the insurer and its employees do with respect to securing accident reports and related documents is "in contemplation and in preparation for eventual litigation." *Id.* The court therefore accorded immunity to the statements and reports secured by the insurer, through attorneys or lay persons, under subdivision (d). *But see* CPLR 3101(e) (enabling party to obtain copy of her own statement); *see also* Commentary C3101:46, below. The fact that the insurer has not assigned an attorney to the case, or that an action has not yet been commenced, is irrelevant.

A month earlier, the Second Department had held along the same lines in *Finegold v. Lewis*, 22 A.D.2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965). By the end of the year, the Third Department had favorably cited the *Kandel* case, *Parker v. N.Y. Tel. Co.*, 24 A.D.2d 1067, 265 N.Y.S.2d 740 (3d Dep't 1965), and the Fourth Department followed in *Mosier v. Van Der Horst Research Corp.*, 25 A.D.2d 938, 270 N.Y.S.2d 3 (4th Dep't 1966). The *Kandel-Finegold* rule thus became the law of the State and it accords the conditional immunity of CPLR 3101(d)(2) to the things the liability insurer has secured for its file.

To obtain such an item, a party must meet the conditions of (1) substantial need and (2) undue hardship required to obtain the substantial equivalent of the materials elsewhere. The materials in an insurer's file are presumptively prepared for trial. *See Dikun v. N.Y. Cent. R.R.*, 58 Misc. 2d 439, 295 N.Y.S.2d 830 (Sup. Ct., Jefferson Co. 1968) (*dicta*), *aff'd* 31 A.D.2d 719, 297 N.Y.S.2d 711 (4th Dep't).

#### C3101:32. *Kandel-Finegold* Rule Applied to an Insurer.

If the plaintiff is the insured and sues its own insurer, such as in a "bad faith" suit to collect for an "excess" verdict rendered against the insured after the insurer unreasonably failed to negotiate and settle the earlier personal injury action, CPLR 3101(d)(2)'s immunity does not apply. *Colbert v. Home Indemnity Co.*, 45 Misc.2d 1093, 259 N.Y.S.2d 36 (Sup. Ct., Monroe Co. 1965), *aff'd* 24 A.D.2d 1080, 265 N.Y.S.2d 893 (4th Dep't 1965); *see Diamond State Ins. Co. v. Utica First Ins. Co.*, 37 A.D.3d 160, 161-62, 829 N.Y.S.2d 465, 466-67 (1st Dep't 2007) ("an insurer may not use attorney-client, litigation or work product privileges to shield it from disclosing relevant information in an action predicated on bad faith"); *Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 137 A.D.2d 401, 402, 524 N.Y.S.2d 202, 203 (1st Dep't 1988) (primary insurer could not assert work product privilege to protect materials from discovery in a bad faith action commenced by excess insurer); *Mold Maintenance Service v. General Acc. Fire & Life Assur. Corp., Ltd.*, 56 A.D.2d 134, 392 N.Y.S.2d 104 (4th Dep't 1977); *Welch v. Globe Indemnity Co.*, 25 A.D.2d 70, 267 N.Y.S.2d 48 (3d Dep't 1966) (plaintiff insured sued companies that issued policies).

The *Kandel-Finegold* rule will apply to immunize the insurer's file accumulated in the insured's suit, but not in a prior and distinct one. *Bennett v. Troy Record Co.*, 25 A.D.2d 799, 269 N.Y.S.2d 213 (3d Dep't 1966); see *Kent v. Maryland Cas. Co.*, 25 A.D.2d 653, 268 N.Y.S.2d 461 (1st Dep't 1966) (granting motion to preclude plaintiff insured from deposing auditor hired by defendant insurer after alleged burglary but before suit was brought by insured). The *Kandel-Finegold* rule applies where the insurer represents the insured, not where it represents itself. *Collins v. Jamestown Mutual Ins. Co.*, 56 Misc.2d 964, 290 N.Y.S.2d 791 (Sup. Ct., Schoharie Co. 1968), modified on other grounds 32 A.D.2d 725, 300 N.Y.S.2d 391 (3d Dep't 1969).

### **C3101:33 Ordinary Course of Business Materials Not Immune.**

The same two cases that determined that the liability insurer's file should receive the conditional immunity in CPLR 3101(d)(2), *Kandel* and *Finegold*, see Commentary C3101:31, above, also contain major holdings declaring an important category of material to be beyond all of the exempt categories in CPLR 3101 and thus subject to full disclosure. This category embraces the ordinary-course-of-business item.

The reports and statements collected by a liability insurer are “not to be confused with the investigation, reports, and statements resulting from the regular internal operation of an enterprise. Such material serves many purposes in the conduct of the enterprise, including perhaps eventual use in any litigation which may ensue.” *Kandel*, 22 A.D.2d at 515-516, 256 N.Y.S.2d at 900. Such course-of-business materials are not exempt from disclosure, however, since their purposes “may be to prevent future accidents, discipline careless employees, or, generally, to increase the economy and efficiency of the operation.” *Id.*

Reports of an accident made by an employee to an employer, who is now a defendant in a law suit, are not an exempt category by themselves. These statements generally qualify as course-of-business items and, therefore, are open to disclosure. See *Zampatori v. United Parcel Serv.*, 94 A.D.2d 974, 975, 463 N.Y.S.2d 977, 978 (4th Dep't 1983); *Post v. Great Eastern Mgt. Corp.*, 52 A.D.2d 761, 382 N.Y.S.2d 779 (1st Dep't 1976) (statements of defendant's employees obtained by security company hired by defendant prior to plaintiff's suit for the purpose of disciplining careless employees and to improve the efficiency of defendant's business subject to disclosure); *Bloom v. N.Y.C. Trans. Auth.*, 20 A.D.2d 687, 246 N.Y.S.2d 414 (1st Dep't 1964) (allowing disclosure of accident reports that had not been made merely in preparation for trial).

What about statements collected by and reports made to a self-insured party? Such statements and reports would likely have the mixed motives that the *Kandel* case would assign to the non-exempt course-of-business category. If such a defendant can show that a given report or statement was secured solely with a litigation motive, however, it would presumably earn a conditional immunity under CPLR 3101(d)(2). See Commentary C3101:38, below. The 1980 enactment of subdivision (g), treated in Commentary C3101:48, below, may lead to a different conclusion if the item sought is an accident report.

### **C3101:34 Procedure to Determine Whether Item Immune.**

The contentions of the parties in affidavit form on a motion to compel disclosure will sometimes be insufficient to enable the court to determine whether the item sought is subject to disclosure or exempt. In such a case, it has been held that the court should direct the production of the items, presumably for in camera inspection, “so that it may be ascertained whether they were made in preparation for litigation.” *Haire v. L.I.R.R. Co.*, 29 A.D.2d 553, 285 N.Y.S.2d 717, 718 (2d Dep't 1967); see *James v. Metro North Commuter R.R.*, 166 A.D.2d 266, 268, 560 N.Y.S.2d 459, 461 (1st Dep't 1990).

It is also contemplated that an examination before trial be used before a discovery and inspection is sought in this kind of case. The examination can delve into the facts surrounding the giving of the statement or report and thereby produce the data necessary to determine whether it falls within CPLR 3101(d)(2). See *Lonigro v. B. & O.R.R. Co.*, 22 A.D.2d 918, 255 N.Y.S.2d 737 (2d Dep't 1964). The party noticing such an examination will doubtless try to use CPLR 3111 to compel the other side to produce the item sought as incidental to the deposition. If that side contends that the item is immune, it will refuse its production even for that incidental purpose. It will then usually take a motion by the party seeking disclosure to make the other side produce the item. See Commentary C3111:1. It is on that motion, which can be based on any of several provisions--CPLR 3103, 3124, 3126--that the court will determine the immunity question. A similar path is taken when a document is sought pursuant to CPLR 3120. As noted above, when deciding these motions, the court may seek production of the item for in camera review to ascertain the light its own contents may shed on the issue of immunity.

### **C3101:35 Routing Item Directly to Attorney to Invoke CPLR 3101(d)(2).**

Whether a given item is entitled to immunity under CPLR 3101(d)(2) or subject to disclosure because it was made in the ordinary course of business is often a close question. This has given rise to some imaginative efforts by resisting counsel to invoke CPLR 3101(d)(2) and secure immunity for the client's accident report. A vivid illustration of this is in *Weisgold v. Kiamesha Concord, Inc.*, 51 Misc.2d 456, 273 N.Y.S.2d 279 (Sup. Ct., Sullivan Co. 1966).

The defendant was a major resort hotel in the Catskills with its share of bad food, accidents and lawsuits. Counsel for the hotel was apparently trying to establish a systematic procedure whereby he could show that reports of accidents made by the hotel's employees were litigation material and immunized by CPLR 3101(d)(2). To that end the reports and statements did not go from the employee to the employer/hotel, but directly to counsel's office. Counsel contended that he set up this procedure because "litigation ... certainly ... follows..." The court held that notwithstanding this direct-routing procedure, the report is merely a course-of-business item and fully disclosable. Whatever the routing of the report, it surely served the internal business purposes of the party and the securing of the report was found to be a "routine practice."

A conflict on this point developed, however. In *O'Neill v. Manhattan & Bronx S.T. Op. Auth.*, 27 A.D.2d 185, 186, 277 N.Y.S.2d 771, 772 (1st Dep't 1967), the defendant's bus driver made out an accident report and sent it directly to the defendant's attorney. The court held the report to be litigation material under the current CPLR 3101(d)(2) and, therefore, immune. The court accepted what it termed the defendant's "undisputed proof" that the report was not made to any officer of the defendant "nor [wa]s it ever revealed or made available to any such person." *Id.*

The acceptance of this contention appears to be the crux of the *O'Neill* holding. The facts related to whether or not the defendant sees its employees' reports are in the exclusive knowledge of the defendant's side. There is slim chance for the plaintiff to refute them. Reduced to its plainest terms, however, the *O'Neill* result is predicated on something quite unique in the adversary system that is contrary to the rules of ethics: the lawyer's vow to conceal a relevant item from the client. See *New York Rules of Professional Conduct, Rule 1.4* ("Communication"). While the *O'Neill* result may perhaps be distinguished on the ground that the particular report was found sui generis to be a litigation item, the unusual predicate mentioned above is very much a part of the decision. The questionable basis for the decision is perhaps best illustrated by the fact that the lower court in *O'Neill*, 47 Misc.2d 765, 263 N.Y.S.2d 187 (Sup. Ct., Bronx Co. 1965), which the First Department overturned to reach the conclusions stated above, was favorably cited by a unanimous Fourth Department in *Brunswick Corp. v. Aetna Cas. & Sur. Co.*, 27 A.D.2d 182, 278 N.Y.S.2d 459 (4th Dep't 1967).

The Second Department was also faced with an imaginative attempt to secure the conditional immunity of CPLR 3101(d)(2). See *Carlo v. Queens Transit Corp.*, 76 A.D.2d 824, 428 N.Y.S.2d 298 (2d Dep't 1980). In *Carlo*, an accident report was "marked with a legend indicating that it had been prepared solely for litigation purposes, that it was

confidential and only for the use of the transit company's attorney.” *Id.* at 824, 428 N.Y.S.2d at 299. Plaintiffs moved to compel production of the accident report, arguing that the legend was a “mere device” to prevent its disclosure. The Second Department concluded that the defendant failed to satisfy its burden of proving that the report was entitled to immunity under CPLR 3101(d)(2) “by its mere recitation of the conclusory and self-serving” legend. *Id.* The trial court erred in granting a protective order without requiring defendant to present further and sufficient evidence to prove the “use and intended use” of the accident report. *Id.* at 825, 428 N.Y.S.2d at 299.

Direct routing of a document to an attorney, post-facto “adoption” of an accident report by an attorney, and/or mere labeling should not automatically invoke the immunity of subdivision (d)(2). See *All Weitz & Luxenberg Cases in Which Cleaver-Brooks, Inc.*, 2014 WL 7208656 (Sup. Ct., New York Co. 2014) (fact that defendant “routed the task of digitizing its in-house records to an outside law firm does not cloak those records with privileged immunity”), *aff’d sub nom. In re New York City Asbestos Litigation*, 133 A.D.3d 463, 20 N.Y.S.3d 27 (1st Dep’t 2015). To hold otherwise would empower a party to immunize all accident reports regardless of the motives that produced them. That would be a violation not only of subdivision (d)(2), but also of subdivision (g). See Commentary C3101:48, below. In this regard, it should be noted that CPLR 3101(g) was added to the CPLR after most of the caselaw on this point under subdivision (d)(2) had developed. If it is shown, however, that a particular statement or report was not secured in the ordinary operation of the party's business or through any route suspected of being an evasion of disclosure, but rather “after consultation with counsel and upon his advice,” it should get the subdivision (d)(2) immunity. *Albano v. Schwab Bros. Trucking Co.*, 27 A.D.2d 901, 278 N.Y.S.2d 780 (4th Dep’t 1967).

#### **C3101:36 Time Element as Relevant to Immunity.**

In discussing the question of immunity under what is now CPLR 3101(d)(2), the court in *Finegold*, 22 A.D.2d at 448, 256 N.Y.S.2d at 359, said that “the relative dates of the delivery of the statement and of the commencement of the action are immaterial.” *Finegold* was decided early in the life of the CPLR and the development of caselaw construing the disclosure article, and its quoted statement is perhaps too broad. While not controlling, the time of the securing of the report or statement does play a role in determining whether it falls under subdivision (d)(2) as litigation material, as subsequent appellate division decisions discussed below have held.

In *Bojanek v. Niagara Frontier Transit Sys., Inc.*, 25 A.D.2d 486, 266 N.Y.S.2d 846 (4th Dep’t 1966), the defendant bus carrier's driver made a report to it at the time of or shortly after the accident. This was held to be subject to disclosure as an ordinary-course-of-business item. The trial court's order also directed disclosure of “post-litigation statements.” In that regard, the order was found too broad and was accordingly modified.

What had apparently occurred in *Bojanek* is that the driver, after an action had been commenced, amended or added to his statement. These things were in effect held to be litigation material, evincing that the time of the statement or report does play a role in making an immunity determination under subdivision (d).

As noted above, the time factor alone cannot be controlling. If it were, there would be an unfortunate motive furnished to parties to postpone the taking of statements or reports until the eve of litigation, perhaps with instructions that the employee review the facts in his mind frequently so as not to forget them. But if the facts manifest that the giving of the statement or report or its later expansion are the clear result of the lawyer's request made with a direct eye toward litigation or its imminent prospect, the immunity of CPLR 3101(d)(2) is legitimately at hand.

The court must of course be circumspect here. Counsel may frequently be expected to try to open wide a door to immunity that CPLR 3101(d)(2) seeks to leave open only a crack.

In circumstances when an insurer is called upon to pay an alleged loss, the rule in the Second Department was that the key time in determining whether an investigation report made for it was entitled to the immunity was the moment the

insurer “had substantial bona fide reasons to investigate the legitimacy of the loss.” A report made after that qualified for the immunity; a report made before did not. In *Landmark Ins. Co. v. Beau Rivage Restaurant, Inc.*, 121 A.D.2d 98, 509 N.Y.S.2d 819 (2d Dep’t 1986), the court abandoned that test and adopted what it described as the “stricter” one used in the First and Fourth departments: the key moment is when the insurer “had reasonable grounds to reject the claim,” not merely to investigate it. See *Bombard*, 11 A.D.3d at 648-49, 783 N.Y.S.2d at 86-87. The court considered this shift to be “more in keeping with the policy of liberal disclosure under CPLR 3101(a).” See *Cascade Builders Corp. v. Rugar*, 154 A.D.3d 1152, 1155, 63 N.Y.S.3d 543, 546 (3d Dep’t 2017) (“reports which aid [insurer] in the process of deciding whether to pay or reject a claim are made in the regular course of its business”).

The burden of establishing the conditional immunity of CPLR 3101(d)(2) lies with the party resisting disclosure, which in *Landmark* was a fire insurer. If the insurer shows that the report was made only after it had uncovered facts on which it could reasonably reject the claim, it can rely on the protection of CPLR 3101(d)(2). Reports made before that time qualify as nothing more than usual course-of-business material.

On the *Landmark* facts, the court determined that the expert who made the report was retained to aid the insurer in reaching a decision about whether to reject the claim. This indicated that the insurer did not yet have reasonable grounds to reject the claim. The report, therefore, did not qualify as material prepared for litigation, did not get the immunity, and had to be disclosed. The *Landmark* court did, however, reject the insured’s argument that the critical moment for measuring whether material was prepared in anticipation of litigation should be the service of the notice of disclaimer. *Landmark*, 121 A.D.2d at 101-02, 509 N.Y.S.2d at 822-23.

### **C3101:37 Burden of Proof on Issue of Immunity.**

As noted at several points in the discussion above, when the usual sui generis investigation is under way to determine whether the item involved falls under subdivision (d)(2) as material prepared for litigation, the burden is on the party resisting the disclosure. See, e.g., *Mananghaya v. Bronx-Lebanon Hosp. Ctr.*, 147 A.D.3d 487, 489, 47 N.Y.S.3d 282, 284 (1st Dep’t 2017); *Ligoure v. City of New York*, 128 A.D.3d 1027, 1028, 9 N.Y.S.3d 678, 679 (2d Dep’t 2015); *Carlo*, 76 A.D.2d at 824, 428 N.Y.S.2d at 300. The problem here is “a subtle one of balancing needs” and burden of proof issues need not be injected too heavily, but insofar as any burden exists it is on the one resisting the disclosure. *Weisgold*, 51 Misc.2d at 459, 273 N.Y.S.2d at 284. *Weisgold* makes the important point that the burden must be lodged on the resister because that is the party who has “full and sole knowledge of the pertinent facts” on which any claimed immunity depends.

In discussing the absolute immunity offered by CPLR 3101(b), the Court of Appeals stated: “In light of the strong policy in favor of full disclosure unless the information sought is immunized, the burden of showing the appropriate immunity should be on the party asserting it.” *Koump v. Smith*, 25 N.Y.2d 287, 303 N.Y.S.2d 858 (1969); see *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624, 36 N.Y.S.3d 838, 842-43 (2016). Similarly, a party seeking the conditional immunity of CPLR 3101(d)(2) should carry the burden of proof.

As part of its burden, the party resisting disclosure of documents under CPLR 3101(d)(2) should also be required to produce a statement in compliance with CPLR 3122(b). See *Siegel & Connors, New York Practice* § 362 (discussing requirements of privilege log under CPLR 3122(b)). The reference to “privileged information” in CPLR 3122(b) is probably intended as a reference to all of the categories excluded from disclosure by CPLR 3101, including CPLR 3101(d)(2). In *Mananghaya*, 147 A.D.3d at 489, 47 N.Y.S.3d at 284, the court noted that a party asserting that certain documents were privileged under CPLR 3101(b) and protected as material prepared in anticipation under CPLR 3101(d)(2) failed to “indicate[ ] the nature of the documents withheld, the circumstances and timing of their preparation, or even the identity of the attorney allegedly involved in their preparation.” Therefore, the party was required to produce the relevant documents in “its investigative file concerning the accident—at least to the extent it include[d] documents predating the ... litigation.” *Id.* at 489, 47 N.Y.S.3d at 285.

Once it is established that the item falls under subdivision (d)(2) as litigation material, the party seeking the disclosure may nonetheless obtain it if it is shown that the stated conditions of the subdivision have been met (inability, without undue hardship, to obtain the equivalent of the materials elsewhere). The seeking party has the burden of proof on that score. *Lamite v. Emerson Elec. Co.-White Rodgers Div.*, 208 A.D.2d 1081, 1083, 617 N.Y.S.2d 924, 926 (3d Dep't 1994); *Ruggeiro v. Bd. of Ed.*, 49 Misc. 2d 532, 267 N.Y.S.2d 942 (Sup. Ct., Chautauqua Co. 1966).

### **C3101:38 Mixed Motives as Reflecting on Immunity.**

Since the applicability of subdivision (d)(2) is virtually always a *sui generis* question, the court must determine whether the particular item at issue was prepared for litigation. Must it be shown that the item was prepared solely for litigation, mostly for litigation, or just partly for litigation?

This brings us to the item that has been secured or prepared with mixed motives: internal business purposes as well as potential litigation. The seminal *Kandel* decision indicates that the item prepared with mixed motives does not partake of the subdivision (d)(2) immunity and is therefore subject to disclosure. *Kandel*, 22 A.D.2d at 516, 256 N.Y.S.2d at 900.

It is easy for a party involved in an accident to say, and near impossible for the other side to refute, that a statement or report was secured, at least in part, for use in potential litigation. Therefore, it would seem that the only workable rule is to require a party seeking the conditional immunity of subdivision (d)(2) to demonstrate that the item was prepared solely for litigation. See *Cascade Builders*, 154 A.D.3d at 1155, 63 N.Y.S.3d at 547; *Du Four v. Blaw-Knox Corp.*, 89 A.D.2d 900, 454 N.Y.S.2d 12 (2d Dep't 1982); *Matter of Weaver v. Waterville Knitting Mills*, 78 A.D.2d 574, 575, 432 N.Y.S.2d 419, 421 (4th Dep't 1980); *In re West*, 2012 WL 6723833 (Sur. Ct., New York Co. 2012). Any other approach would involve the court in unfortunate considerations of ratios of intent, put too much power into the hands of the one resisting disclosure, and generate frequent motions in virtually every case in which the item is not disclosed voluntarily.

In *Geffner*, 125 A.D.3d 802, 4 N.Y.S.3d 283, an action for medical malpractice and wrongful death, the supreme court ordered plaintiff to provide the defendants with copies of an audio recording of an interview she conducted with the defendant. The Second Department rejected plaintiff's argument that the recording was privileged under CPLR 3101(c). See Commentary C3101:28, above. Plaintiff also argued that the interview recording was entitled to protection as work product under CPLR 3101(d)(2). The court rejected this claim because plaintiff failed "to meet her burden of establishing, with specificity, that the recording was prepared 'exclusively in anticipation of litigation.'" See also *Bombard*, 11 A.D.3d at 648, 783 N.Y.S.2d at 86 ("The party asserting the privilege provided by CPLR 3101(d)[(2)] bears the burden of demonstrating that the material it seeks to withhold is immune from discovery by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation.") (citation omitted).

Although not discussed by the court in *Geffner*, the interview recording of defendant would also apparently be subject to disclosure under CPLR 3101(i), which provides for "full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a [party]" as defined by CPLR 3101(a)(1). While CPLR 3101(i)'s directive apparently overrides any protection afforded to work product under CPLR 3101(d)(2), it could not trump the absolute immunity afforded to a very narrow category of material under CPLR 3101(c).

### **C3101:39 Immunity of Item Procured Through Disclosure Device.**

If reports secured by a party prior to commencement of litigation can, as they often do, enjoy the status of material prepared in anticipation of litigation under subdivision (d)(2), reports resulting from the use of disclosure devices within a litigation will a fortiori do so. A simple example of this occurred in *Silberberg v. Hotpoint Div. of Gen. Elec. Co.*, 23 A.D.2d 754, 259 N.Y.S.2d 60 (1st Dep't 1965). There, P was injured while using a washing machine. D secured an order to inspect the machine and did so through an engineer who reported on his findings to D. The report was held to be material prepared for litigation under the equivalent of CPLR 3101(d)(2), and P was denied a copy of it.

It is tempting to conclude at this point that medical reports made during or in conjunction with a CPLR 3121(a) examination in a personal injury litigation secure similar immunity. They do not. A special provision in the CPLR governs them, CPLR 3121(b), and individual rules of court expand disclosure requirements in this area and make disclosure much more freely available notwithstanding the first-blush immunity that 3101(d)(2) would appear to confer. See Commentary C3121:4.

### **C3101:40 Unavailability and Undue Hardship under Subdivision (d)(2).**

A finding that a given item constitutes material prepared in anticipation of litigation under subdivision (d)(2) earns only a conditional immunity. If the party seeking disclosure of it can meet its burden of establishing the conditions stated in that subdivision, the court may order the item disclosed. See Commentary C3101:37, above.

The basic showing is that of “substantial need” of the item plus the inability of the seeking party to secure “the substantial equivalent of the materials” from other sources “without undue hardship.” CPLR 3101(d)(2). The undue hardship aspect usually gets a free ride if it is shown that the substantial equivalent of a relevant item is unavailable elsewhere. If it is relevant to the case and cannot be secured by the party from any other source, modern concepts of litigation dictate that its withholding would constitute undue hardship.

A prime illustration of such an item is the photograph taken of an accident scene at or shortly after the occurrence. The rule is that such photographs “normally ... should not be protected from disclosure because it is not possible to duplicate this evidence.” *Hayward v. Willard Mountain*, 48 Misc.2d 1032, 266 N.Y.S.2d 453 (Sup. Ct., Albany Co. 1966); see *Flowers v. Lyell Metal Co., Inc.*, 244 A.D.2d 948, 665 N.Y.S.2d 482 (4th Dep't 1997). Incidentally, photographs taken by nonparty witnesses, including police officials, have been held available for disclosure if not exempted by any special statute. *Fox v. City of New York*, 28 A.D.2d 20, 280 N.Y.S.2d 1001 (1st Dep't 1967).

There are other good illustrations in the cases where duplication of a relevant item was found to be impossible and disclosure allowed. In *Baczmaga v. Reynolds*, 44 Misc.2d 997, 255 N.Y.S.2d 582 (Sup. Ct., Niagara Co. 1965), plaintiff had the extreme misfortune of being killed when struck by a portable toilet. Defendant, third-party plaintiff, sought from the third-party defendant production of a report on the structure of the item and the materials used in its construction. The third-party defendant could not produce the item itself, which defendant needed to investigate to refute plaintiff's claims. The disclosure was allowed based on the fact that the report dealt with matters that could not be duplicated because the third-party defendant could not turn over the item. If the item is itself available, thus enabling another party to conduct its own tests and examination, the court can direct that party to make the item available for tests while conferring immunity on any report. See the discussion of the *Silberberg* case in Commentary C3101:39, above.

If there has been a test on a tangible item involved in an accident, a report of that test should be deemed immune from disclosure if the item itself is available to the other party for examination. That would usually enable the seeking party to obtain “the substantial equivalent,” i.e., its own report. CPLR 3101(d)(2). A roughly equivalent item on which to conduct tests may not be a satisfactory substitute because a difference between the two may be a material one. But if the duplicate is in all material respects the same, tests can be conducted on the duplicate and the report rendered to an adverse party on the original can retain its immunity. In one case the original item, a pair of pajamas, was consumed

by fire and the plaintiff obtained a duplicate to test. Oddly, the defendant manufacturer was itself unable to find a duplicate to examine. The manufacturer was for this reason allowed a production of the plaintiff's duplicate pajamas, but not of the report rendered for the plaintiff. The court did hold, however, that the plaintiff would have to furnish the report if it could no longer furnish the duplicate pajamas. *Sherman v. M. Lowenstein & Sons, Inc.*, 42 Misc.2d 770, 771, 248 N.Y.S.2d 1000, 1002 (Sup. Ct., Queens Co. 1964).

#### **C3101:41 Making Adversary Reveal Witnesses' Names.**

Under Article 31 of the CPLR, a party is not entitled to make an adversary furnish an outright list of the names of all witnesses the latter intends to call at trial. Cf. Fed. R. Civ. P. 26(a)(1)(A)(i) (requiring a party, “without awaiting a discovery request, [to] provide to the other parties ... the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.”). It is clear today, however, that each party is entitled to obtain from another the names of all witnesses known by that party, whether the witness was a participant in the event, an eyewitness to it, a witness with knowledge of any of the facts connected with it, a witness who can say whether the defendant had “notice” of a condition that caused an accident (as in a tort case), etc. See, e.g., *Bianco v. North Fork Bancorporation, Inc.*, 2012 WL 5199007 (Sup. Ct., New York Co. 2012) (court granted defendants' request for the names and addresses of plaintiff's parents and sister, who allegedly were witnesses to how plaintiff's injuries affected his financial and family life).

Under current caselaw, the identity of a witness can rarely be withheld. Even certain expert witnesses may have to be revealed to the other side in advance of trial. See, e.g., CPLR 3101(d)(1)(i); CPLR 3121(b); 22 N.Y.C.R.R. § 202.17. In the present Commentary, we exclude expert witnesses, character witnesses, and the like and concentrate on those who have some knowledge of the events at issue and the facts that led up to them.

The rule about revealing witnesses' names has quite a history, most of it concentrated on the early years of the CPLR. At one time, right up until the CPLR arrived on the scene in 1963, a lawyer's hand would instinctively cover the mouth of a client at a deposition if the other side asked any questions about witnesses. A rule began to evolve during the latter years of the old Civil Practice Act that one side would be entitled to demand of the other the names of those persons who directly witnessed the occurrence or transaction at issue. The first major pronouncement to indicate that such a rule would be applied under the CPLR was *Rios v. Donovan*, 21 A.D.2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964). In *Majchrzak v. Hagerty*, 49 Misc.2d 1027, 268 N.Y.S.2d 937 (Sup. Ct., Erie Co. 1966), the court observed that *Rios* did not hold that names of witnesses were subject to disclosure, but merely discussed the procedure to be followed in attempting to obtain such disclosure. The *Majchrzak* court ordered disclosure of the names of witnesses in any event, because their testimony was “material and necessary” to establish what occurred and the plaintiff was unable to obtain the names of witnesses through due diligence.

As the rule regarding disclosure of witnesses developed further, some unfortunate gloss attached to it. A distinction was made in some cases, for example, between the witness who in some way participated in the event, and the mere observer, with the name of the participant being subject to disclosure, but the observer's name immune. See, e.g., *Coleman v. Kirkey*, 53 Misc.2d 947, 279 N.Y.S.2d 803 (Sup. Ct., Monroe Co. 1967). The courts quickly realized that it was unsound to draw a distinction based on whether the witness participated or merely observed. A witness who was a passenger in one of the cars involved in an accident would clearly qualify as a “participant” under such a dichotomy, but would a witness who just telephoned for an ambulance? Is a witness a “participant” if she merely loosened the plaintiff's tie, brought him a glass of water, told someone else to get him a glass of water or loosen his tie, called a policeman or the plaintiff's family, or told someone else to do so?

Questions like these persisted and the distinction based on “participation” was not popular. *See, e.g., Rivera v. Stewart*, 51 Misc.2d 647, 273 N.Y.S.2d 644 (Sup. Ct., Monroe Co. 1966); *Hartley v. Ring*, 58 Misc.2d 618, 296 N.Y.S.2d 394 (Sup. Ct., Queens Co. 1969). The distinction appears to have been abandoned.

The *Hartley* case, however, which was approvingly cited by the Appellate Division in *Peretz v. Blekicky*, 31 A.D.2d 934, 298 N.Y.S.2d 805 (2d Dep’t 1969), carried the rule in a different direction. While rejecting the distinction between the participant and non-participant witness, *Hartley* distinguished between witnesses “observed by the party to be present at the scene” and those “whose presence is learned through investigation subsequent to the time of the occurrence.” *Hartley*, 58 Misc.2d at 623-24, 296 N.Y.S.2d at 399. The former would be subject to disclosure, but the latter would obtain the conditional immunity provided in CPLR 3101(d)(2).

This distinction also generated problems. Must it be counsel whose investigation reveals the names? If the party himself uncovers them, will the “litigation” criterion still apply? Must any particular time pass after the occurrence? In due course, therefore, it, too, was abandoned. *See, e.g., Zellman v. Metropolitan Transp. Auth.*, 40 A.D.2d 248, 339 N.Y.S.2d 255 (2d Dep’t 1973) (disclosure of witnesses’ names is required whether learned of at the scene of the occurrence or by investigation afterwards). In sum, witnesses’ names do not constitute material prepared “in anticipation of litigation” under CPLR 3101(d)(2), although their statements may.

At one time or another all four departments addressed the question of whether the name of a “notice” witness would have to be disclosed. As opposed to a person who was a firsthand eyewitness to an accident in a tort case, a “notice” witness is one who did not see the accident, but who could testify to the fact that the defendant had notice of the condition that caused it, or contributed to causing it. This proof is essential in many premises liability cases. By the early 1980’s, the First, Second, and Fourth departments had taken the position that the mere “notice” witness, like the eyewitness, is subject to disclosure. *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 425 N.Y.S.2d 619 (1st Dep’t 1980); *Zayas v. Morales*, 45 A.D.2d 610, 360 N.Y.S.2d 279 (2d Dep’t 1974); *O’Connor v. Larson*, 74 A.D.2d 734, 425 N.Y.S.2d 702 (4th Dep’t 1980).

The Third Department adhered for a time to the view that the identity of a “notice” witness “is the work product of the attorney or material prepared for litigation,” and hence immune from disclosure. *See, e.g., Hennessy v. Benerofe*, 63 A.D.2d 779, 404 N.Y.S.2d 756 (3d Dep’t 1978). In 1983 the court overruled *Hennessy* and joined the other three departments in requiring disclosure of the notice witness on demand. *Bombard v. County of Albany*, 94 A.D.2d 910, 463 N.Y.S.2d 633 (3d Dep’t 1983). The lead note in New York State Law Digest No. 243 (March, 1980) chronicles the events on this formerly controversial issue.

A party can also be required to reveal the “address of a witness whose identity it has learned in investigating a case but of whom the opposing party is ignorant.” *Slomczewski v. Ross*, 148 A.D.3d 1648, 1649, 50 N.Y.S.3d 722, 723 (4th Dep’t 2017); *see Savino v. Great Atlantic and Pacific Tea Co., Inc.*, 22 Misc.3d 792, 869 N.Y.S.2d 334 (Sup. Ct., Queens Co. 2008) (ordering defendant store to disclose complete list of names, addresses and telephone numbers of all store employees shown on video surveillance tapes). The Third Department had said in *Hennessy* that “[o]ne party should not be permitted to obtain results of the labor of the other party by simply serving a notice to discover.” *Hennessy*, 63 A.D.2d at 780, 404 N.Y.S.2d at 757. If there is indeed an expense incurred by the party who obtained the name of the witness, it would of course be within the court’s protective order powers under CPLR 3103(a) to require the party seeking the disclosure to pay a share of the expense. The expense should be well documented and substantial before a party pursues a motion on this front.

The significance of the witness disclosure rule is demonstrated in *Wolodkowitz v. Seewell Corp.*, 61 A.D.3d 676, 876 N.Y.S.2d 487 (2d Dep’t 2009), in which the plaintiff allegedly sustained injuries when she hit her head against an exterior glass wall of a Dunkin’ Donuts store leased by the defendant. Plaintiff claimed that there was no artificial lighting outside the store at the time of her accident, and that the glass wall appeared to be an open space. The plaintiff

demanded disclosure of, among other things, witnesses to “ ‘[t]he nature and duration of any alleged condition which allegedly caused’ the plaintiff’s accident.” A preliminary conference order required a response to plaintiff’s discovery demands within 30 days.

During the trial, over the plaintiff’s objection, the defendant was permitted to present testimony of an undisclosed witness regarding prior incident reports at the store, as well as the store’s structure and outdoor lighting conditions. The jury determined that the defendant was not negligent. The court subsequently denied plaintiff’s [CPLR 4404\(a\)](#) motion to set aside the verdict as contrary to the weight of the evidence and entered a judgment dismissing the complaint.

On appeal, the Second Department agreed that the verdict was not contrary to the weight of the evidence, but nonetheless ordered a new trial “under the circumstances” because the supreme court erred in allowing an undisclosed witness to testify for the defendant. The court also noted that the witness’s testimony should not be precluded at the new trial because the plaintiff could no longer claim either surprise or lack of opportunity to prepare a responsive defense. See *Perry v. Kone, Inc.*, 147 A.D.3d 1091, 1094, 49 N.Y.S.3d 696, 700 (2d Dep’t 2017) (although supreme court properly “preclude[d] the defendant from presenting the testimony of a witness whose identity the defendant failed to disclose until the first day of trial ..., there is no reason to preclude the witness’s testimony at the new trial as the plaintiff can no longer claim either surprise or lack of opportunity to prepare a responsive defense ....”).

Several decisions involving injuries sustained at health care facilities have discussed whether disclosure of a nonparty witness’ name violates the doctor-patient privilege. In certain circumstances, revealing the name of a witness who was a patient in a particular location will also reveal their medical status and, therefore, violate the doctor-patient privilege. See [Commentary C3101:25](#), above.

#### **C3101:42 Who Is Witness to the “Event Itself”?**

In addressing the disclosure of witnesses’ names, we are speaking of witnesses to the “event itself.” *Rios*, 21 A.D.2d at 414-15, 250 N.Y.S.2d at 823. As noted in the prior [Commentary](#), character witnesses, expert witnesses, and the like do not occupy us here. How far the “event itself” goes is also treated in some measure in the prior [Commentary](#). We elaborate on it here. Certainly the rule about disclosing witnesses’ names would include witnesses who were, to borrow a phrase from Howard Cosell’s lexicon, “right there,” *Newton v. Bd. of Ed.*, 52 Misc.2d 259, 275 N.Y.S.2d 494 (Sup. Ct., Suffolk Co. 1966), or “at the scene,” *Sanfilipo v. Baptist Temple, Inc.*, 52 Misc.2d 767, 276 N.Y.S.2d 936 (Sup. Ct., Monroe Co. 1967).

But what of the bartender or drinking companion who saw the party drunk fifteen minutes earlier? What of the witness around the corner or a few blocks away who did not see the accident, but saw one of the parties driving out of control or at high speed? The “event itself” can reasonably be regarded as embracing all of those who witnessed first hand, through any of their senses (sight, hearing, etc.), any element that reflects on a matter at issue. The “event” can in a given case be reflected on by many sources and should not be narrowed down to include, as in a tort case, only the witness standing on the corner watching the cars collide. In *Gallway v. Muintir, LLC*, 142 A.D.3d 948, 949, 38 N.Y.S.3d 28, 30 (2d Dep’t 2016), for example, the Second Department held that supreme court properly refused to consider the affidavit of plaintiff’s granddaughter, who was having dinner with the plaintiff in the defendant’s restaurant shortly before plaintiff tripped and fell on the sidewalk outside the restaurant. The court noted that “plaintiff failed to disclose the witness to the defendants as a notice witness and did not offer a valid excuse for that failure.” *Id.*

A broad view of the subject was taken in *Zayas v. Morales*, 45 A.D.2d 610, 360 N.Y.S.2d 279 (2d Dep’t 1974). The plaintiff was required to reveal the names of any witnesses he knew of who could reflect on the condition of a traffic light involved in the accident or on the question of who was notified of its condition. The court found no satisfactory ground for distinction between a witness to the accident itself and one who could reflect on some cause of it. As

noted in Commentary C3101:41, above, the New York courts appear to have reached virtual unanimity on rejecting such distinctions.

#### **C3101:43 Deposition to Precede Discovery of Witness's Name?**

Nothing in the CPLR requires any one disclosure device to be used before another, and so there is no rule that an oral deposition must be held before a notice to discover a witness's name may be served. *See* Commentary C3101:2, above. The court's powers are broad under Article 31, *see* [CPLR 3103](#), and in any given case the party who does not know whether there were any witnesses present at the scene should depose the other side, establish whether that side knows, and seek the disclosure either in the deposition or by notice or motion afterwards. *Rios*, 21 A.D.2d at 412, 250 N.Y.S.2d at 821. At a deposition, a party is entitled to disclosure of the names of any witnesses from the deponent. If not otherwise barred by the terms of [CPLR 3130\(1\)](#), an interrogatory may also be an ideal device whereby to ask for a witness's name. If the deponent withholds the names of witnesses at the deposition, which is often the case, a motion for an order to disclose under [CPLR 3124](#) or [3126](#), or a motion for a protective order under [CPLR 3103\(a\)](#), may result. *See* *Lauren v. Gollin*, 54 Misc.2d 512, 282 N.Y.S.2d 811 (Sup. Ct., Nassau Co. 1967).

#### **C3101:44 Time Limit on Attempt to Stop Disclosure.**

The disclosure of a witness's name, or of a statement or report secured by an adverse party, is often sought by a discovery notice under [CPLR 3120](#). Prior to the 1993 overhaul of Article 31, when disclosure was sought by a 3120 notice, the party resisting disclosure had only ten days in which to move for a protective order. The ten days began to run from the service of the discovery notice. [CPLR 3122](#) now requires the party resisting disclosure to serve objections within twenty days of service of the [CPLR 3120](#) notice. [CPLR 3122\(a\)\(1\)](#). The burden then falls on the party seeking disclosure to move to compel compliance with the [CPLR 3120](#) demand. *Id.*; *see* Commentary C3122:1.

Similarly, if the disclosure is sought in an interrogatory, the resisting party must serve objections within twenty days. [CPLR 3133\(a\)](#). The party who has served the interrogatories may then move to compel answers. *See* Commentary C3133:1.

#### **C3101:45 Appraisals in Condemnation and Assessment Cases.**

Without a special rule to govern appraisals in condemnation cases and tax assessment review proceedings, such appraisals would virtually always qualify as material prepared in anticipation of litigation and thereby secure an immunity from disclosure under [CPLR 3101\(d\)\(2\)](#). To avoid that, and to implement a special policy in such proceedings, a special statute was added to the CPLR in 1967 permitting the chief administrator to adopt disclosure rules in such cases. The statute is [CPLR 3140](#) and rules have been promulgated pursuant to it. *See* Commentary C3140:1, 2.

#### **C3101:45A. Disclosure of Trade Secrets.**

Although the scope of disclosure allowed by [CPLR 3101\(a\)](#) is generous, there are several exceptions. Most notable are privileged information, which is entitled to absolute immunity from disclosure, [CPLR 3101\(b\)](#); *see* Commentary C3101:25, and material prepared in anticipation of litigation, which is protected by a qualified immunity. [CPLR 3101\(d\)\(2\)](#); *see* Commentary C3101:30. There are additional categories of relevant information that do not fall comfortably under either of these two statutory classifications, but are nonetheless entitled to some limited protection. The Official Reports to the Legislature, which accompanied the proposed CPLR provisions, noted that while trade secrets are not protected as material prepared in anticipation of litigation under [CPLR 3101\(d\)\(2\)](#), such information

could be withheld on a motion for a protective order under [CPLR 3103](#). See Commentary C3103:4 (discussing illustrative protective orders, including one for trade secrets); Legislative Studies and Reports, Subd. (a), [CPLR 3103](#). The Advisory Committee, in providing illustrations of protective orders, used the example of one that mandated protection for trade secrets. Based on this legislative history, there can be little doubt that the drafters of the CPLR intended to provide some level of immunity to information that constitutes trade secrets.

The parties to litigation involving trade secrets will often enter into confidentiality agreements that provide for their protection. There are, however, many cases in which the courts are asked to monitor compliance with a confidentiality agreement or to resolve disputes regarding trade secrets in cases where the parties have not reached an agreement. In an important decision on the issue, *Mann v. Cooper Tire*, 33 A.D.3d 24, 816 N.Y.S.2d 45 (1st Dep't 2006), *lv. denied* 7 N.Y.3d 718, 827 N.Y.S.2d 688, the First Department was asked to declare that certain information allegedly protected as a trade secret was immune from disclosure.

In *Mann*, plaintiffs sued defendant Cooper Tire for negligence, products liability and breach of warranty, alleging that an automobile accident in which they were injured was caused by tread separation of a tire manufactured by defendant. The First Department noted that a review of the record “reveals instances where Cooper Tire has exhibited ‘wilful disobedience, bad faith and gross indifference to plaintiffs' rights' in the discovery process.” *Mann*, 33 A.D.3d at 29, 816 N.Y.S.2d at 51. In addition, First Department observed that “[c]ourts in different jurisdictions have found that Cooper Tire has committed numerous discovery violations, including improperly withholding documents; wilfully concealing evidence; wilfully concealing the existence of discoverable information; and destroying documents it knew or should have known would become material in litigation.” *Id.* at 29-30, 816 N.Y.S.2d at 51. Although these past transgressions took place outside New York, the court appeared to weigh them heavily in its analysis.

Plaintiffs sought disclosure of numerous items from defendant, including its tire formula and curing process. The supreme court held that these items constituted trade secrets and were not discoverable. On appeal, the First Department held that trade secrets are entitled to a qualified immunity similar to that reserved for material prepared in anticipation of litigation. See [CPLR 3101\(d\)\(2\)](#).

The court adopted a two-step analysis, holding that “when trade secrets are sought by an adverse party in litigation, the burden of establishing that the information sought is a trade secret lies with the disclosure objectant.” *Mann*, 33 A.D.3d at 30, 816 N.Y.S.2d at 52. If the objectant demonstrates that the information is a trade secret, “the party seeking disclosure must show that the information appears to be indispensable and cannot be acquired in any other way.” *Id.* at 30-31; 816 N.Y.S.2d at 52; see *Carecore Nat'l LLC v. New York State Ass'n of Med. Imaging Providers, Inc.*, 24 A.D.3d 488, 489, 808 N.Y.S.2d 238, 239 (2d Dep't 2005) (proponent must show that trade secrets are “indispensable to the ascertainment of truth and cannot be acquired in any other way”); *Curtis v. Complete Foam Insulation Corp.*, 116 A.D.2d 907, 909, 498 N.Y.S.2d 216, 217 (3d Dep't 1986) (party seeking disclosure of trade secrets must demonstrate that “information sought appears to be indispensable to the ascertainment of truth and cannot be acquired in any other way”).

As to the first step in the analysis, the court noted that the New York Court of Appeals has adopted the definition of trade secrets from section 757 of the Restatement of Torts, which includes “any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 407, 604 N.Y.S.2d 912, 917-18 (1993). In determining whether information constitutes a trade secret, this definition requires the court to consider several factors including: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.*; [Restatement of Torts § 757](#), cmt b.

The Court of Appeals has stressed that “a trade secret must first of all be secret,” and this determination is usually a question of fact. *Ashland Mgmt.*, 82 N.Y.2d at 407, 604 N.Y.S.2d at 918.

In *Mann*, the court concluded that the cost of developing the formula and ingredients, whether assessed in terms of time or money, was not dispositive in determining that the information was a trade secret. The court also rejected defendant's contention that the “formula is the ingredients” and concluded that a distinction could be made for trade secrets purposes between the formula and the ingredients thereof. Furthermore, there was nothing in the record to establish that defendant continued to use the eleven-year-old formula. On the central issue of whether the information was a secret, the court noted that information regarding the ingredients in the tire was available in a publication that tracks the components of various tires. In addition, one of defendant's chemists had testified to the ingredients used in making certain tires in another litigation without any demand of confidentiality.

The court stopped short of reaching a definitive conclusion on the first part of the trade secrets test by noting that even if defendant had established that the information was a trade secret, plaintiff had met its burden of establishing that “disclosure of the ingredients and alternative tire designs is indispensable to their products liability lawsuit.” *Mann*, 33 A.D.3d at 33, 816 N.Y.S.2d at 53. Plaintiffs convinced the court that, since they were alleging a design defect, obtaining information regarding the ingredients of the tire was indispensable to their case. In particular, plaintiffs needed the ingredients used in the tire to demonstrate to the jury that defendant could have used alternative designs and manufacturing methods. Therefore, the defendants were ordered to make disclosure regarding the ingredients of the tire and about alternative designs.

While requiring disclosure, the court did acknowledge the importance of protective orders and confidentiality agreements, which “are mandated for information which is ‘subject to abuse if widely disseminated.’ ” *Mann*, 33 A.D.3d at 36, 816 N.Y.S.2d at 56. The First Department agreed with a decision from the Third Department holding that protective orders should be limited to trade or business secrets and are required to be specific. *Id.*; see *Bristol, Litynski, Wojcik v. Town of Queensbury*, 166 A.D.2d 772, 773-74, 562 N.Y.S.2d 976, 977-78 (3d Dep't 1990). The First Department concluded that the supreme court's protective order was “draconian” in nature and impermissibly permitted defendant to unilaterally designate documents confidential. *Mann*, 33 A.D.3d at 36, 816 N.Y.S.2d at 56. The court listed several items that were not proper subjects for a protective order or a promise of confidentiality and noted that the existing confidentiality agreement was unacceptable in several other respects.

In *Ferolito*, 119 A.D.3d 642, 990 N.Y.S.2d 218, the supreme court ordered nonparty Morgan Stanley to comply with the disclosure demands in a subpoena duces tecum served by the plaintiff. The Second Department modified the order by granting Morgan Stanley's motion to quash the subpoena to the extent it sought documents containing trade secrets. The *Ferolito* decision also discusses the ability to obtain disclosure from a nonparty and is treated in further detail in Commentary C3101:22 (“The ‘Circumstances’ Rule of 3101(a)(4)”), above.

Inquiry at a deposition can also venture into information protected as a trade secret. Part 221 of the Uniform Rules for the Trial Courts, entitled “Uniform Rules for the Conduct of Depositions,” does not specifically allow objections to questions encompassing information that constitutes a trade secret. The rule does, however, allow an attorney to direct a witness not to answer a question “to preserve a ... right of confidentiality.” 22 N.Y.C.R.R. § 221.2(i); see Commentary C3115:10. Although the term “confidentially” is not defined in the Rule, this provision would presumably allow an attorney to direct a witness not to answer a question that required the revelation of trade secrets. If a lawyer directs a witness not to answer a question on this ground, she must provide “a succinct and clear statement of the basis therefor.” 22 N.Y.C.R.R. § 221.2. This will require the attorney defending the deposition to be familiar with the definition of a trade secret under New York law, as summarized above, and to succinctly state the grounds for the direction.

Consistent with the spirit of Part 221's goals, a party should not generally be allowed to direct a witness not to answer a question by broadly asserting that the information sought constitutes a trade secret. Rather, a lawyer directing a

witness not to answer should be required to articulate the grounds supporting the assertion. If the party conducting the deposition wants to challenge the objection, she can make a motion under [CPLR 3124](#) to compel the deponent to answer the question. *See* Commentaries C3124:3, C3124:4 (discussing this procedure and the “Let’s-Get-A-Ruling” system, in which a lawyer seeks a judge to rule on objections individually). Similarly, the deponent may move for a protective order. [CPLR 3103\(a\)](#). The court will then need to conduct the two-pronged inquiry outlined in *Mann* to ascertain if the deponent has established that the information sought is a trade secret and, if so, whether the party conducting the deposition has established that the information is “indispensable and cannot be acquired in any other way.” *Mann*, 33 A.D.3d at 30-31, 816 N.Y.S.2d at 52.

Part 221 is extensively discussed in the Practice Commentaries to [CPLR 3115](#). *See* Commentaries C3115:6-C3115:12.

### *Subdivision (e)*

#### **C3101:46 Party's Own Statement under Subdivision (e).**

CPLR 3101(e) enables a party to obtain a copy of her own statement. If the party gave a statement to the other side and did not keep a copy of it, this subdivision gives her an unconditional right to a copy.

When a party has been approached on behalf of the adverse party's lawyer, a related problem frequently arises under [Rule 4.2 of the New York Rules of Professional Conduct](#), entitled “Communication with Persons Represented by Counsel.” In *McHugh v. Fitzgerald*, 280 A.D.2d 771, 719 N.Y.S.2d 785 (3d Dep't 2001), the court held that plaintiff's firm did not violate the “no-contact” rule in [DR 7-104\(a\)\(1\)](#), Rule 4.2's predecessor, when it hired an investigator to obtain a signed affidavit from the defendant, who had not yet obtained representation. Conversely, in a case where the plaintiff had already retained counsel and the defendant's insurer approached the plaintiff directly and secured a statement from him, the statement was conditionally suppressed and the practice condemned. *Juskowitz v. Hahn*, 56 Misc.2d 647, 289 N.Y.S.2d 870 (1968) (relying on Canon 9 of Canons of Ethics before New York's adoption of [DR 7-104](#)).

No “special circumstances” or “substantial need” is required to obtain a party's own statement under CPLR 3101(e). The rule applies to corporate parties as well as individuals. *See, e.g., Joseph v. Angstrom Inc.*, 198 A.D.2d 863, 604 N.Y.S.2d 431 (4th Dep't 1993); *Briggs v. Spencerport Road Plaza*, 19 A.D.2d 943, 244 N.Y.S.2d 17 (4th Dep't 1963) (applying provision to enable corporate party to obtain from adverse party copy of statement furnished by corporation's employee). In *Marcano v. City of New York*, 264 A.D.2d 823, 695 N.Y.S.2d 597 (2d Dep't 1999), the court held that CPLR 3101(e) encompassed a party's grand jury testimony, which defendant city had obtained.

While a party is unconditionally entitled to a copy of his own statement under this subdivision, the statements of others obtained by the insurer in a negligence case are conditionally immunized by CPLR 3101(d)(2) under the *Kandel-Finegold* rule. *See* Commentary C3101:31, above. By extension, if the party's own statement refers to the statements of others and states that the party has read the other statements and agrees with them, the other statements are deemed part of the party's statement and the party is entitled to copies of them under CPLR 3101(e). *See Masone v. Paull*, 48 Misc.2d 939, 266 N.Y.S.2d 317 (Sup. Ct., Queens Co. 1965) (noting that the insurance investigator who took plaintiff's statement put defendant in this position by incorporating other statements “instead of repeating the facts anew”).

CPLR 3101(e) applies only to a statement given by the party. Attorneys will sometimes assume that it entitles them to statements given by a party's close relatives too. It does not. These statements may be sought under the general standards of CPLR 3101(a), if not barred by one of the exclusionary provisions of CPLR 3101 (b), (c), or (d)(2). *See, e.g., Baez v. Bd. of Ed.*, 60 Misc.2d 270, 303 N.Y.S.2d 5 (Sup. Ct., Westchester Co. 1969) (under CPLR 3101[a], court ordered production of statement by witness who was half-brother of infant plaintiff).

The word “statement” as used in CPLR 3101(e) has been given a broad definition and has been interpreted to include such things as photographs. In *Saccente v. Toterhi*, 35 A.D.2d 692, 314 N.Y.S.2d 593 (1st Dep’t 1970), the defendant’s insurer took pictures of the plaintiff before the plaintiff retained counsel to prosecute a tort action. Plaintiff had permitted the pictures and now, four years later, sought discovery of them. The court found the photographs the equivalent of “visual ... statements” and allowed the discovery under CPLR 3101(e).

Videotapes made of the plaintiff were similarly treated as “statements” under CPLR 3101(e). See, e.g., *Marte v. W.O. Hickok Mfg. Co., Inc.*, 154 A.D.2d 173, 552 N.Y.S.2d 297 (1st Dep’t 1990). Items such as tapes and photographs of a party are now independently subject to disclosure under CPLR 3101(i). See Commentary C3101:50, below.

It was held in *Zarate v. Mount Sinai Hosp.*, 142 Misc.2d 426, 537 N.Y.S.2d 107 (Sup. Ct., New York Co. 1989), that a deposition given by a party’s employee in an earlier action qualifies as a “statement” which that party is entitled to obtain under CPLR 3101(e) as a matter of right in the present action. Statements under subdivision (e) can be “oral, stenographic or written, signed or unsigned.” *Id.*; see *Theisen v. Sunnen*, 186 A.D.2d 81, 588 N.Y.S.2d 21 (1st Dep’t 1992).

Although a party is entitled to a copy of her own statement, courts have held that limitations on the timing and use of disclosure devices are left to the sound discretion of the trial court. See *Theisen*, 186 A.D.2d at 81, 588 N.Y.S.2d at 21; Commentary C3101:2, above. In *Le*, 240 A.D.2d 784, 657 N.Y.S.2d 849, defendant had obtained an audiotaped interview of third-party defendant. The third-party defendant sought a transcript of the interview in a CPLR 3120 notice. Defendant served a notice of deposition on third-party plaintiff and refused to turn over the transcript until the deposition was completed, apparently attempting to prevent third-party defendant from tailoring her testimony at the deposition to be in harmony with the interview. The supreme court granted defendant’s motion to compel third-party plaintiff to submit to a deposition, and directed defendant to produce the transcript of the interview only after the deposition. The Third Department concluded that the matter was within the sound discretion of the supreme court and that there was no abuse of discretion.

The transcript of the audiotaped interview of a party is also subject to disclosure under CPLR 3101(i). The Court of Appeals has held that CPLR 3101(i) requires full disclosure “with no limitation as to timing.” *Tran*, 99 N.Y.2d at 389-90, 756 N.Y.S.2d at 513; see Commentary C3101:50, below. Therefore, it appears that the Third Department’s holding in *Le*, recognizing the supreme court’s ability to limit the timing of disclosure, no longer survives as to material subject to CPLR 3101(i).

What if a party’s statement was not filmed, photographed or taped and, therefore, is not subject to disclosure under CPLR 3101(i)? There is an open question as to whether *Tran*’s reasoning curbs the supreme court’s discretion to place limits on the timing and use of other disclosure devices such as CPLR 3101(e). It appears that the courts still have the power to limit or restrict the use of a disclosure device on grounds that justify the issuance of a protective order under CPLR 3103(a). For further discussion of *Tran*, see the Commentary at C3101:50, below.

### *Subdivision (f)*

#### **C3101:47 Discovery of Insurance Policy.**

CPLR 3101(f) was added in 1975. It is a verbatim adoption of what is now [Rule 26\(a\)\(1\)\(A\)\(iv\) of the Federal Rules of Civil Procedure](#). Until the enactment of subdivision (f), the New York caselaw had been, for the most part, aligned against disclosure of the insurance policy. Under the statute, not only must the existence of the policy be revealed, but its contents as well. CPLR 3101(f) requires disclosure of all primary and excess insurance contracts that may cover the judgment. *Love v. Meisner*, 107 Misc.2d 1003, 436 N.Y.S.2d 189 (Sup. Ct., Schenectady Co. 1981); see *Bolton v. Weil, Gotshal & Manges LLP*, 2005 WL 5118189, at \*7 (Sup. Ct., New York Co. 2005). If, however, “the

policy would not be triggered by a judgment in the action, it need not be produced unless it is otherwise material and necessary to the prosecution of a cause of action or defense.” *In re 91st Street Crane Collapse Litigation*, 2011 WL 10782082, \*8 (Sup. Ct., New York Co. 2011).

The provision applies only to institutional insurers, i.e., those “carrying on an insurance business,” so that private self-insurers or contractual indemnitors and the like are not within it. Their agreements may become exposed to disclosure, however, by other avenues. Nor does the provision authorize any pre-judgment inquiry into any other assets the defendant/insured may have which might be relevant to the insured's ability to pay. A party's ability to pay must still abide a finding of liability and does not become relevant until after the trial. See *In re 91st Street Crane Collapse Litigation*, 2011 WL 10782082, at \*6.

The common law rule regarding the non-admissibility of evidence of insurance is preserved. Subdivision (f) states that the fact that the insurance agreement may be subject to disclosure under its terms does not render it “admissible in evidence at trial.” A primary motivation for this kind of disclosure provision, in fact, is to facilitate and encourage settlement, not to permit a fact-finder to reduce (or increase) one party's recovery because of another's limited (or extensive) resources. See *Rautine v. Preston*, 84 Misc.2d 156, 374 N.Y.S.2d 280 (Sup. Ct., Chemung Co. 1975).

Generally, any lawyer representing a party in litigation should make a request for the contents of any relevant insurance agreement under CPLR 3101(f). For example, in most instances, a lawyer representing a plaintiff in personal injury litigation cannot adequately advise the client regarding a settlement offer if the lawyer has not obtained full disclosure of possible insurance coverage. The vehicle for obtaining the insurance policy is normally a CPLR 3120(1)(i) notice or subpoena.

What penalty can be imposed if a party fails to comply with a legitimate demand under CPLR 3101(f)? In *Myra v. Barakat*, 2001 WL 36390601 (Sup. Ct., Kings Co. 2001), the defendant ignored multiple demands for disclosure of insurance policies, and “three court orders.” This resulted in a delay in the prosecution of the action for some two years. The court found the defendant's recalcitrance serious enough to invoke the CPLR's version of the death penalty. The court struck the defendant's pleadings under CPLR 3126(3), establishing the defendant's liability summarily, and set the case down for an inquest on damages. The court severed the claim as to other defendants in the case, but gave no indication that the inquest would be delayed to coincide with the date of the trial to take place as against the others.

In *Folgate v. Brookhaven Mem'l Hosp.*, 86 Misc.2d 191, 381 N.Y.S.2d 384 (Sup. Ct., Suffolk Co. 1976), the court held that disclosure under CPLR 3101(f) entitles the plaintiff to know even the number of claims brought against a defendant doctor during the applicable policy period on the ground that the maximum coverage under the policy would be affected and this, in turn, would affect plaintiff's rights by possibly exhausting insurance coverage in whole or in part. Apparently the policy in *Folgate* provided a maximum figure beyond which coverage would not lie during the period covered by the policy. See *Brandes v. North Shore Univ. Hosp.*, 1 A.D.3d 549, 550, 767 N.Y.S.2d 667 (2d Dep't 2003) (“[P]laintiff was entitled ... to obtain from the defendants a sworn statement disclosing the number of claims made against the hospital insurance policy that was in effect during the period of time when her husband was under their care, the amount of each claim, and the total amounts paid out against the policy ....”); *PCB Piezotronics, Inc. v. Change*, 179 A.D.2d 1089, 580 N.Y.S.2d 901, 901 (4th Dep't 1992) (“Discovery pursuant to CPLR 3101(f) is not limited to production of the insurance policy; a plaintiff is also entitled to discover those matters bearing upon the existence and scope of coverage ....”), *lv. granted*, 184 A.D.2d 1092, 586 N.Y.S.2d 779 (4th Dep't 1992), *appeal withdrawn*, 80 N.Y.2d 972, 591 N.Y.S.2d 141 (1992); *Kimbell v. Davis*, 81 A.D.2d 855, 856, 438 N.Y.S.2d 860 (2d Dep't 1981) (“Plaintiff is entitled ... to discover the number of claims against defendants during the applicable policy period, the amount sought in each such claim and the total of the sums paid out against the policies ....”).

In *Weiner v. Lenox Hill Hospital*, 164 Misc.2d 759, 625 N.Y.S.2d 818 (Sup. Ct. New York Co. 1995), *aff'd*, 224 A.D.2d 299, 638 N.Y.S.2d 909 (1st Dep't 1996), *aff'd on other grounds*, 88 N.Y.2d 784, 650 N.Y.S.2d 629, the court

rejected the reasoning in *Folgate* and held that CPLR 3101(f) does not authorize discovery of information pertaining to claims made under an insurance policy. The *Weiner* court reasoned that “[t]he language of the statute is unambiguous, enabling a plaintiff to discover the existence and contents of the insurance agreements[, but] ... does *not* allow a plaintiff to go beyond those parameters.” *Weiner*, 164 Misc.2d at 761, 625 N.Y.S.2d at 820.

In *Morris v. Clements*, 228 A.D.2d 990, 644 N.Y.S.2d 850, 851 (3d Dep't 1996), the supreme court denied plaintiff's demand for unredacted copies of defendants' medical malpractice insurance policies. The Third Department affirmed, concluding that “[d]efendants have satisfied the requirements of CPLR 3101(f) by submitting copies of their policies, with only the amount of premium payments redacted.” *Id.*

When a court directs the disclosure of a liability insurance policy, it is usually assumed that CPLR 3101(f) provides the support for such an order. *St. Paul Fire and Marine Ins. Co. v. Bernstein Mgmt. Corp.*, 158 Misc.2d 1047, 602 N.Y.S.2d 486 (N.Y. City Civ. Ct. 1993), shows that CPLR 3101(a), which sets forth the general disclosure standard, rather than subdivision (f), which is specifically addressed to an insurance policy, may be the provision in point that directs the disclosure. In *St. Paul*, plaintiff insurer paid its insured for water damage. Plaintiff then commenced a subrogation action against defendant, claiming it was defendant's negligence that caused the water damage. Defendant sought disclosure of the insurance policy issued by plaintiff to ascertain if plaintiff had the legal capacity to maintain the suit. The court held that CPLR 3101(f) was not germane under these facts, but that the policy was material and necessary to the preparation of defendant's case and subject to disclosure under the broad language in CPLR 3101(a). In addition, the disclosure could have been pursued from the insured. *See* CPLR 3101(a)(2), Commentary C3101:20, above.

In *Freidman v. Fayenson*, 2013 WL 6392248 (Sup. Ct., New York Co. 2013), *aff'd*, 138 A.D.3d 554, 30 N.Y.S.3d 58 (1st Dep't 2016), a multi-party action with several causes of action, a claim was asserted against a law firm that represented another party in the commencement and prosecution of an eviction proceeding that was allegedly brought in bad faith. A motion was made to compel the firm to produce its malpractice insurance policy pursuant to CPLR 3101(f). In that the subdivision's plain language permits a party to obtain a copy of another party's insurance policy “if the coverage provided under that policy ‘may’ be used to ‘satisfy part or all of a judgment which *may* be entered’ against the insured,” the *Freidman* court granted the motion to compel disclosure of the law firm's malpractice insurance policy. *Freidman*, 2013 WL 6392248, at \*2.

The court emphasized that there was no dispute that the firm had a malpractice insurance policy under which its insurer could, “at least in theory,” be called upon to pay all or part of any judgment against the firm in this action. *Id.* This was so despite the fact that the firm's client in the eviction matter, who was also a party to the action, purportedly agreed to indemnify the firm. The court noted that prior decisions have interpreted the reach of CPLR 3101(f) to require disclosure of insurance policies providing primary and excess coverage. *See, e.g., Bolton*, 2005 WL 5118189, at \*7. Therefore, in the event the firm was indemnified, the court observed that “any additional malpractice insurance would arguably qualify as ‘excess coverage,’ and as such, that policy would be properly discoverable.” *Freidman*, 2013 WL 6392248, at \*3.

The law firm also argued that it would not submit the claims asserted against it in this action to its liability insurer, but the court found that contention irrelevant. The court reasoned that if the policy is one under which the firm's malpractice insurer may be liable to satisfy a judgment entered against it, it is discoverable under CPLR 3101(f). In sum, “[t]he question is not whether the policy *will* be available; rather, that the policy *may* be available is sufficient” to invoke disclosure under the subdivision. *Id.*

### ***Subdivision (g)***

#### **C3101:48 Accident Reports.**

A 1980 amendment added CPLR 3101(g), supposedly as a codification of existing caselaw, but the point has been disputed. The “in addition to” clause at the opening of the subdivision should assure, in any event, that it will not be applied to contract any existing disclosure requirements, but only to expand them.

It is well settled that a report of an accident made in the ordinary course of a party's business does not automatically qualify as material prepared for litigation under CPLR 3101(d)(2). In order to obtain the (d)(2) immunity, the report must have litigation as its sole motive. *See* Commentary C3101:38, above. Accident reports can have a variety of motives, however, of which litigation is often just one. How do motivations fare in determining the disclosure of a report under CPLR 3101(g)? It was apparently the legislature's perception that some cases have taken perhaps too conservative a position and applied the “litigation” exclusion in CPLR 3101(d)(2) too readily. Subdivision (g) was probably intended to remedy that. If the report is a written one, and is made in the “regular course of business operations or practices” of any person or entity, subdivision (g) appears to mandate the report's disclosure regardless of the motives that prompted its preparation.

The subdivision does not mince words in this regard. It lists as a sole exception the report prepared “by a police or peace officer for a criminal investigation or prosecution.” If the accident report is prepared by a private person or company “in the regular course of business” of a person or entity, it is presumably subject to disclosure under the express terms of subdivision (g), even if it is prepared in anticipation of litigation. Should CPLR 3101(g) be given this upper hand in a conflict with subdivision (d)(2)?

The Second Department addressed that question shortly after CPLR 3101(g)'s enactment and ruled that it and the current CPLR 3101(d)(2) are “contradictory” with respect to accident reports prepared for litigation, and that, because subdivision (g) is more specifically addressed to accident reports than subdivision (d)(2) is, (g) should supersede (d)(2) to the extent of inconsistency. *Pataki v. Kiseda*, 80 A.D.2d 100, 437 N.Y.S.2d 692 (2d Dep't 1981). According to the Second Department, this means that not even an exclusive litigation motive will immunize an accident report. The *Pataki* court noted that “any written accident report, prepared in the regular course of business operations or practices, not for use in a criminal investigation or prosecution, is subject to full disclosure, notwithstanding that it was prepared exclusively for use in litigation.” *Id.* at 104-05, 437 N.Y.S.2d at 695. The *Pataki* decision was perceived in some quarters as not being consistently adhered to, even in the Second Department. *See, e.g., Ellis v. County of Broome*, 112 Misc.2d 19, 445 N.Y.S.2d 957 (Sup. Ct., Broome Co. 1981) (discussing Second Department caselaw).

In *Miranda v. Blair Tool & Mach. Corp.*, 114 A.D.2d 941, 495 N.Y.S.2d 208, 209 (2d Dep't 1985), the Second Department further explained its position in *Pataki*, noting that “[i]t is only when an accident report has not been made in the regular course of business that it may be conditionally exempt if it is made solely for purposes of litigation.” *Id.* at 942, 495 N.Y.S.2d at 209; *see Ruff v. Golub Corp.*, 128 Misc.2d 1047, 492 N.Y.S.2d 692 (Sup. Ct., Albany Co. 1985) (declining to address issue in *Pataki* because accident report was not entitled to immunity under CPLR 3101[d][2] because it was not prepared solely for litigation). The *Pataki* holding is still followed three decades later. *See Jacaruso v. Keyspan Energy Corp.*, 109 A.D.3d 585, 586, 971 N.Y.S.2d 14, 15 (2d Dep't 2013).

The *Pataki* decision was quickly distinguished in *Masters v. Hassenpflug*, 110 Misc.2d 998, 443 N.Y.S.2d 210 (Sup. Ct., Rensselaer Co. 1981), which held that a party's report of an accident to the party's own insurer remains immune from disclosure and that CPLR 3101(g) does not change this. *Masters* stressed that the *Pataki* case involved an employee-to-employer report and did not touch the insured-to-insurer report. *See* Commentary C3101:31, above. The Third Department also adhered to this view in *Gavigan v. Otis Elevator Co.*, 117 A.D.2d 941, 499 N.Y.S.2d 253 (3d Dep't 1986), which involved a report forwarded to an insurer solely for purposes of litigation. The court concluded that this report was entitled to conditional immunity under CPLR 3101(d)(2). More recently, however, the Third Department cited to CPLR 3101(g) and *Pataki* in *Hewitt v. Palmer Veterinary Clinic, PC*, 145 A.D.3d 1415, 45 N.Y.S.3d 605, 606 (3d Dep't 2016), where it ordered disclosure of an accident report in an insurer's file. The court held

that “[a]ccident reports that are prepared with ‘a mixed purpose and result at least in part from the internal operations of the defendant's business’ are not ... exempt from disclosure.” *Id.*

The Fourth Department, relying on CPLR 3101(g)'s legislative history, declined to follow *Pataki*. In *Harris v. Processed Wood, Inc. (P.W.I., Inc.)*, 89 A.D.2d 220, 222, 455 N.Y.S.2d 411, 413 (4th Dep't 1982), “the statement sought to be discovered was made directly to the defendants' insurance carrier and there [was] no indication that it was to be used for any purpose other than for the defense and settlement of claims made against the insured.” Concluding that the legislature's intent when adopting CPLR 3101(g) was to codify existing law, the court held that the statement was “not subject to disclosure for it falls within subdivision (d) as material prepared exclusively for litigation, and it is not a report under subdivision (g) ‘prepared in the regular course of business operations or practices’ of the defendant corporation.” *Id.* at 222-23, 455 N.Y.S.2d at 413.

The 1985 amendment to CPLR 3101(d)(2) supports the Fourth Department's position. Enacted after CPLR 3101(g) had been on the books for five years, it provides conditional immunity to a report prepared exclusively for litigation by a party for its insurer. *See* CPLR 3101(d)(2) (granting conditional immunity to materials prepared “in anticipation of litigation or for trial ... by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent”).

The steps that led to this state of conflict are a story in themselves, with the appellate division in department X reversing special term in X to agree with special term in department Y, only to see special term in Y overturned by an appellate division that agreed with what a special term had held in X. A chronicle of these events as they unfolded appears in the lead note in New York State Law Digest No. 279 (March, 1983) with a moral that continues: unless the Court of Appeals has resolved the matter, it is always wise to check on the status of the local departmental preference.

While subdivision (g) refers to written accident reports prepared in the course of the business operations of any “person, firm, corporation, association or other public or private entity,” it does not say that the person, firm, etc., has to be a party. Apparently, even if the preparer is not a party, but a nonparty witness, and the accident report otherwise falls under the requirements of subdivision (g), it would still have to be disclosed if it meets the general relevancy standard in CPLR 3101(a) and the conditions in CPLR 3101(a)(3) or (4).

### ***Subdivision (h)***

#### **C3101:49 Supplementing Prior Responses.**

CPLR 3101(h), added with the substantial amendments to Article 31 in 1993, introduced a supplementation requirement to New York practice. While the subdivision is modeled on the federal supplementation rule, [Rule 26\(e\) of the Federal Rules of Civil Procedure](#), it is not identical. Hence the practitioner versed in the federal practice may not assume a perfect parallel between the federal and New York provisions.

The substance of subdivision (h) was drawn from paragraph (2) of Federal [Rule 26\(e\)](#) as it existed at the time of the mid-1993 adoption of the New York state disclosure package. The federal provision put a party under the obligation to reveal any new information that came to the party's attention if the new information indicated that a prior response made by that party was either incorrect when made or, while correct when made, was no longer true, as long as the circumstances were such that a failure to amend the response would amount to “a knowing concealment.”

CPLR 3101(h) does essentially the same thing. Subdivision (h) requires a party to amend or supplement a response previously given in disclosure in two circumstances. The first instance arises if a party obtains information that the response “was incorrect or incomplete when made.” The second instance requiring supplementation arises when a party obtains information that a prior disclosure response, though correct and complete when made, is no longer

correct and complete. While the federal rule spoke of “a knowing concealment,” the updating of a previously correct response is required under the New York provision when a failure to reveal the new information would be “materially misleading.”

A party who has some doubt about whether supplementation is required may feel it wise to reveal the new data and not take chances. Resolving doubts the other way, and withholding the new information, can have serious repercussions at the trial. If the party proposes to introduce the new matter at trial, the other side may convince the court that it is matter that should have been revealed before the trial under the supplementation requirement of subdivision (h). The court may ultimately prevent the party from using the material.

The supplementation requirement of subdivision (h) applies to all of the disclosure devices in Article 31, as the Advisory Committee Report notes. *See* 1993 Report of the Advisory Committee on Civil Practice to the Chief Administrator of the Courts of the State of New York (1992). Therefore, CPLR 3101(h)'s requirements apply no matter what the tool is that brought on the original disclosure, i.e., a notice, stipulation, court order, etc., and no matter what device was used (deposition, discovery, interrogatory, etc.).

The form that the supplementation takes would not seem to be important, as long as it accomplishes the task of fully updating the other parties and placing the supplementing matter into a form that the other party can use just as effectively as the original matter being supplemented. If the information to be updated first came out in a deposition by party X, for example, X may simply serve a statement on the other parties advising that the answer she gave in response to a particular question now appears to be incorrect, and that based on subsequent information coming to the deponent's attention the answer should be changed to thus-and-so. It should be a sworn statement, however, just as the original deposition was, so that the other parties may use it as they would the deposition itself. *See* [CPLR 3116\(a\)](#) (requiring the signing of the deposition, with any changes, under oath). The same applies to supplementing interrogatories. *See* [CPLR 3133\(b\)](#) (requiring that interrogatories “be answered in writing under oath”).

If a [CPLR 3120](#) notice to produce documents is the device that was earlier used, and the document or thing sought was not available earlier but can now be furnished, it should be furnished with an accompanying explanation in a letter, notice, or statement. Ordinarily, a swearing in this instance should not be necessary. The sending of the thing with the lawyer's statement of what it is, and why it was not produced earlier, should ordinarily suffice to enable opposing parties to assume its accuracy. The court can resolve issues like this if they arise, and if any kind of verification is needed to give the supplementation legitimacy for all relevant uses, the court can direct it.

The court is not likely to be concerned about the specifics of the form of supplementing or amending. The form should be acceptable as long as the correcting or updating has been carried out with integrity and the new disclosure is just as functional within the litigation as the materials supplemented and no party can claim any prejudice.

CPLR 3101(h)'s supplementation requirement only applies to a “party.” Therefore, a nonparty who produces records pursuant to a [CPLR 3120\(1\)\(i\)](#) demand has no obligation to supplement the production at a later date. If additional documents might be available after an original production, a second [CPLR 3120\(1\)\(i\)](#) subpoena may be necessary. *See* Commentary C3120:3.

Subdivision (h) requires the amendment or supplementation to be made “promptly” upon the party's obtaining the new information. It should make no difference when the party obtains the information. The amendment or supplementation should certainly be made sufficiently in advance of trial so the party entitled to it can adequately prepare, but acting “promptly” is the key. Lawyers should review their prior responses to disclosure with their clients at certain intervals during the litigation to ensure that they are correct. If a prior response was incomplete or incorrect, or circumstances have changed relevant to a prior correct response, it is the client who most often possesses this knowledge. A regular review of disclosure responses with the client will help to avoid trouble at trial, including possible preclusion.

In New York practice, a party can continue to demand disclosure before the note of issue is filed, subject of course to the court's intervention with a protective order. But once the note of issue and statement of readiness are filed, further disclosure is not permitted, except by court order. *See Siegel & Connors, New York Practice* § 352. The rules of court say that no court order is to issue for further disclosure unless “unusual or unanticipated circumstances” are present. *See, e.g., 22 N.Y.C.R.R. § 202.21(d)* (applicable in supreme and county courts); Commentary C3102:3. Nonetheless, the certificate of readiness rule should be no barrier to an amendment or supplementation required by CPLR 3101(h).

It would be a good idea for all lawyers and parties to keep in mind that supervening in all of practice today, and at all stages of litigation, is the monetary sanction of Rule 130-1, the frivolity rule. A monetary penalty, compensatory or punitive or both, can be imposed by the court, either by itself or with some other curative step, whenever the failure to supplement can be found to rise to the level of frivolous conduct. *See Siegel & Connors, New York Practice* § 414A. These penalties can be imposed on the party, the lawyer, or both. *Id.*

This again highlights the importance of the lawyer's oversight in the disclosure process. *See Forman, 30 N.Y.3d at 662 n.2, 70 N.Y.S.3d at 162 n.2* (“Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process.”). A detailed review of disclosure responses with the client, both when the disclosure is produced and sufficiently in advance of trial, is advisable to avoid monetary sanctions. The lawyer will have to sign virtually all responses to disclosure. *See 22 N.Y.C.R.R. § 130-1.1a(a)*. By signing the paper, the attorney certifies that, “to the best of [her] knowledge, information and belief, formed after an inquiry reasonable under the circumstances,” the contents of the paper are not frivolous. *22 NYCRR § 130-1.1a(b)*. If initial responses to disclosure are inaccurate, or are rendered inaccurate through the events of time, sanctions may be imposed on a party or a party's attorney. *22 N.Y.C.R.R. § 130-1.1(b), (c)(3)*. The lawyer's ability to establish that she has undertaken an adequate review of disclosure responses with the client both before and after the responses were served will go a long way toward demonstrating that the lawyer has engaged in “an inquiry reasonable under the circumstances.” This, in turn, will help the lawyer avoid the imposition of sanctions directly against her if the responses to the disclosure are ultimately determined to be false. *22 N.Y.C.R.R. § 130-1.1(c)(3)*.

#### **C3101:49A Lawyer's Duties under the New York Rules of Professional Conduct.**

If the lawyer discovers that a prior response to a disclosure request was based on materially inaccurate information, the lawyer will normally consult with the client and there will be an agreement to amend the prior response. In rare situations, the client might object to any amendment and, for various reasons, desire to go to trial relying on the inaccurate disclosure responses. Short of seeking to withdraw from the representation pursuant to [Rule 1.16\(b\)\(1\) of the New York Rules of Professional Conduct](#), does the lawyer have any independent obligations or recourse under these difficult circumstances?

[Rule 1.6\(b\)\(3\) of the New York Rules of Professional Conduct](#) allows a lawyer to withdraw a prior response to disclosure “where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.” No consent is required from the client under these circumstances, even if the withdrawal of the response will implicitly reveal confidential information of the client. More specifically, the lawyer can withdraw the prior response to disclosure even if it will implicitly reveal that the client lied in submitting the prior response. It should be emphasized, however, that Rule 1.6(b)(3) does not allow the lawyer to expressly reveal the accurate response absent the client's permission. It merely permits the withdrawal of a prior response in certain specified circumstances.

In less than four years at the beginning of this century, the Court of Appeals handed down two full opinions addressing the responsibilities of a criminal defense attorney whose client intends to commit perjury. In *People v. DePallo*, 96

[N.Y.2d 437](#), [729 N.Y.S.2d 649 \(2001\)](#), the Court held that it was proper for defense counsel to notify the court during a jury trial that his client had committed perjury after counsel unsuccessfully attempted to dissuade the client from testifying. In *People v. Andrades*, [4 N.Y.3d 355](#), [795 N.Y.S.2d 497 \(2005\)](#), the criminal defense lawyer believed that his client intended to commit perjury at a *Huntley* hearing, in which a judge sits as the finder of fact. After unsuccessfully attempting to dissuade the client from testifying falsely, defense counsel communicated with the judge presiding over the hearing in a manner that was “open to the inference” that the client intended to commit perjury. The *Andrades* Court concluded that defense counsel proceeded properly under the circumstances, but was still “bound to honor defendant’s right to testify on his own behalf.” In carrying out this responsibility, the Court observed that defense counsel “should refrain from eliciting the testimony in traditional question-and-answer form and permit defendant to present his testimony in narrative form.” This unorthodox manner of conducting direct examination immunizes the lawyer from the charge that she participated in the fraud. See [New York Rules of Professional Conduct, Rule 1.2\(d\)](#). If the defendant perjures herself in the narrative, counsel may not use the perjured testimony at any time during the proceeding. See [New York Rules of Professional Conduct, Rule 3.3\(a\)\(3\)](#).

Despite all of the attention it receives in the criminal arena, the criminal defense bar does not have a monopoly on the perplexing problem of client perjury. Lawyers representing clients in civil litigation also face the dilemma with some frequency. Unlike the criminal defendant, a party in civil litigation does not necessarily have a constitutional right to testify and there are fewer barriers to prevent a civil litigant from testifying and committing perjury at trial. In civil litigation, however, the lawyer and client typically make a series of representations in disclosure well before trial. If the lawyer subsequently learns that some of the disclosure responses provided during the course of a civil action are now materially misleading, the lawyer faces ethical obligations in addition to the duty to amend or supplement under CPLR 3101(h).

An inquiry posed to the New York State Bar Association’s Committee on Professional Ethics highlights the problem and offers some solutions. In Formal Opinion 781 (2004), a matrimonial lawyer submitted the client’s financial statement and signed the paper to certify its accuracy. This type of document is familiar to lawyers representing clients in actions involving alimony, maintenance, child support and equitable distribution, in which a party is required to exchange and file sworn statements of net worth. See [22 N.Y.C.R.R. § 202.16\(b\)](#). After filing the statement with the court, the lawyer learned that it contained a material error because substantial client assets were omitted.

Searching for a resolution to this dilemma places us at the crossroads of attorney ethics and civil procedure, with several provisions from different sets of laws outlining the lawyer’s duties. While Formal Opinion 781 was issued under the reign of the former New York Lawyer’s Code of Professional Responsibility, it is still instructive under the New York Rules of Professional Conduct, which became effective on April 1, 2009. The discussion that follows will apply the relevant provisions of the New York Rules of Professional Conduct to the inquiry presented in Formal Opinion 781, even though it leads to a somewhat different conclusion than that reached by the Committee’s interpretation of the prior New York Lawyer’s Code of Professional Responsibility.

Rule 3.3(a)(1) requires the lawyer in this situation “to correct [the] false statement of material fact ... previously made to the tribunal by the lawyer.” In addition, Rule 3.3(a)(3) requires that, as a “reasonable remedial measure[ ],” the lawyer promptly request that the client correct the omission. See [New York Rules of Professional Conduct, Rule 3.3](#), cmt. 6 (“If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered.”). If the client refuses to correct the financial statement, the lawyer must continue “tak[ing] reasonable remedial measures, including, if necessary, disclosure to the tribunal.” [New York Rules of Professional Conduct, Rule 3.3\(a\)\(3\)](#). In what constitutes a sea change from the prior Code, [Rule 3.3\(c\) of the New York Rules of Professional Conduct](#) now prescribes that the “duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of [confidential] information otherwise protected by Rule 1.6.” In other words, under Rule 3.3 the duty to reveal the truth to the court now trumps the duty of confidentiality to the client. Furthermore, in case there is any doubt on the subject, the duties in Rule 3.3

apply to information provided during pretrial disclosure. *See* [New York Rules of Professional Conduct, Rule 3.3](#), cmt. 1 (“[The Rule] also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.”).

While the withdrawal of a written or oral opinion under the circumstances outlined in Rule 1.6(b)(3) is permissible, the obligation to correct a false statement under Rule 3.3 is mandatory. This distinction will be irrelevant to most lawyers entangled in this predicament, who will simply desire some authority to withdraw a false document that they have certified, regardless of whether the authority is permissive or mandatory. The lawyer’s desire to take action here is based on the legitimate fear that she may be personally subject to sanctions for allowing the misrepresentation to linger. As noted above, Part 130 of the Rules of the Chief Administrator require that “[e]very pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney.” [22 N.Y.C.R.R. § 130-1.1a\(a\)](#). In signing a litigation paper, the attorney certifies to the accuracy of its contents. [22 N.Y.C.R.R. § 130-1.1-a\(b\)](#). An attorney does not warrant the truth of every fact asserted in every paper served on behalf of the client in litigation. Rather, the signature certifies that “to the best of that person’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances,” the contentions in the paper are not “frivolous.” *Id.*

The paper is “frivolous” if it “asserts material factual statements that are false.” [22 N.Y.C.R.R. § 130-1.1\(c\)\(3\)](#). Furthermore, an additional factor courts must consider in determining whether actions taken in disclosure are frivolous includes “whether or not the conduct was continued when its lack of ... factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.” [22 N.Y.C.R.R. § 130-1.1\(c\)](#). If the conduct is deemed frivolous, costs and/or sanctions can be imposed upon a party or attorney responsible for it. [22 N.Y.C.R.R. § 130-1.1\(a\)](#). The amount of sanctions awarded cannot exceed \$10,000 “for any single occurrence of frivolous conduct,” but there is no cap on an award for costs. [22 N.Y.C.R.R. § 130-1.2](#). *See* [Siegel & Connors, New York Practice § 414A](#).

Viewing the facts presented in NYSBA Opinion 781 in light of Part 130’s standards for frivolous conduct, a strong argument can be made that the lawyer is subject to sanctions if she fails to take action. Even if she conducted a reasonable inquiry prior to certifying the statement of net worth, its lack of factual basis has since been brought to her attention. In sum, the representations in the statement of net worth are now frivolous. If she does not amend or withdraw the statement, which contains her certification, she is allowing the frivolous conduct to continue with her apparent blessing. The potential victim in this scenario, the adverse party acting in reliance on the false financial statement, could be significantly damaged as a result of the omission. The extent of any damage caused by the misrepresentation will be a factor for the court to consider in determining the amount of any costs and sanctions to be imposed on the lawyer. [22 N.Y.C.R.R. § 130-1.1\(a\)](#).

CPLR 3101(h) will also mandate that action be taken in these circumstances. CPLR 3101(h) directs a party to amend or supplement a response previously provided in disclosure if that party obtains information that it was incorrect or incomplete when made. If the party refuses to supplement an incomplete or incorrect disclosure, the lawyer’s prior certification can no longer withstand scrutiny under either Part 130 or CPLR 3101(h).

As noted above, a motion for withdrawal under [Rule 1.16\(b\)\(1\) of the New York Rules of Professional Conduct](#) would likely be required if the client refuses to correct the material omission. This will not resolve the lawyer’s dilemma. Even if the court grants the lawyer’s motion for withdrawal, the lawyer’s certification of the financial statement lingers, exposing the lawyer to sanctions in the future. In other words, the lawyer’s withdrawal from representation will not dispense with the lawyer’s obligations under Rule 3.3 and Part 130.

### **C3101:49B Penalties and Remedies for Failure to Timely Supplement.**

CPLR 3101(h) is somewhat ambivalent about the penalties to be imposed for a failure to supplement, showing once again how the New York Legislature, when finally persuaded to adopt a new disclosure provision, hesitates about the penalties to be imposed when the provision is disobeyed.

CPLR 3101(h) does not provide a specific remedy for an outright failure to amend or supplement responses. A party can move to compel another to amend or supplement under [CPLR 3124](#), but that should be a rare event. The first sentence of CPLR 3101(h) places the burden of amending or supplementing a prior response squarely on the party who has served the response. See *Dehaney v. N.Y.C. Transit Auth.*, 180 Misc.2d 695, 694 N.Y.S.2d 831 (N.Y. City Civ. Ct. 1997); see also *Firmes*, 50 A.D.3d at 35, 852 N.Y.S.2d at 162 (“[P]laintiffs are under a continuing obligation to promptly amend or supplement a collateral source response if an initial response is incorrect or incomplete, or if correct and complete when initially made, circumstances are such that the failure to amend or supplement would render the initial response misleading ....”).

*Green v. Staten Island Univ. Hosp.*, 161 Misc.2d 976, 615 N.Y.S.2d 856 (Sup. Ct., Richmond Co. 1994), holds that while the supplementation provision doesn't call for motion practice, a motion is permissible “to force an amendment or supplementary response.” Therefore, where one party knows that the opposing side has information, but has not supplied it, the party seeking the information may make a motion to force an amendment or supplementation. *Id.* The court also notes that a mere letter can be used to bring the requirement to the other side's attention. Here a motion was used, but was denied by the court on the ground that while the new data would make the original response incomplete, its withholding in this case would not be misleading.

Typically, a party will move to preclude and for other penalties under [CPLR 3126](#), which does apply to a failure to supplement under CPLR 3101(h). See [Commentary C3126:6](#). If it is found that the party had ample time for the required amending or supplementing, the court can simply order preclusion with respect to the information that should have been forthcoming.

*Ward v. Mehar*, 264 A.D.2d 515, 694 N.Y.S.2d 726 (2d Dep't 1999), is one of the few appellate court decisions on CPLR 3101(h). In *Ward*, the Second Department required preclusion of a log book that was not timely exchanged, reversing the trial court that allowed the book into evidence. In *Curbean v. Kibel*, 12 A.D.3d 206, 207, 784 N.Y.S.2d 518, 519 (1st Dep't 2004), the First Department cited to CPLR 3101(h) in noting that plaintiff's “list of property damages containing previously unclaimed items, first produced on the eve of trial without a reasonable excuse, should have been precluded ..., or, at the least, if feasible and otherwise warranted by the circumstances, defendants given an opportunity to conduct disclosure with respect thereto.”

If a party obtains information an insufficient amount of time before trial and, therefore, cannot appropriately amend or supplement the prior disclosure, “the party shall not thereupon be precluded from introducing evidence at the trial solely on grounds of noncompliance with this subdivision.” CPLR 3101(h). If the information comes in on the eve of trial, “the court may make whatever order may be just” upon the motion of a party or on its own motion. *Id.* The statute contemplates that preclusion will not result solely because the information was not obtained until the eve of trial. Moreover, the party seeking to introduce the evidence is not required to show “good cause” to amend or supplement at such a late date, as is required under CPLR 3101(d)(1)(i) for providing expert disclosure on the eve of trial. Courts are, however, likely to impose some type of “good cause” requirement on a party attempting to amend or supplement immediately before or during trial, possibly requiring a reasonable justification for failing to present the information with the prior disclosure, or at least at an earlier point in time. Cf. [CPLR 2221\(e\)\(3\)](#) (requiring party making motion to renew to state reasonable justification for failing to present facts on prior motion); [Siegel & Connors, New York Practice § 254](#).

The language in CPLR 3101(h) is frighteningly similar to that used in CPLR 3101(d)(1)(i), which was adopted in 1985, on the disclosure of expert witnesses. As the Practice Commentary on the expert disclosure provision demonstrates, the standards in CPLR 3101(d)(1)(i) have proved unwieldy. *See* Commentary C3101:29A, above.

The last sentence of subdivision (h) says that “[f]urther amendment or supplementation may be obtained by court order.” May a party simply serve a notice demanding amendment or supplementation from the other side? Is a party required to request amendment or supplementation before she can be heard to object at trial when new information is sought to be introduced? The statute says nothing specific about a party's demanding an updating from the other side, and none should be required.

### *Subdivision (i)*

#### **C3101:50 Disclosure of Films, Photographs, Tapes, Etc.**

CPLR 3101(i), introduced in 1993, allows for full disclosure of all “films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in [CPLR 3101(a)(1)].” As if this is not broad enough, the provision goes on to require disclosure “of all portions of such material, including out-takes, rather than only those portions a party intends to use.” Certain materials compiled for law enforcement purposes are exempt from the broad scope of this subdivision. *See* Pub. Off. Law § 87(2)(e).

CPLR 3101(i) arrived with scant legislative history, but the practice of secretly taping an allegedly injured plaintiff going about his affairs in the hope of catching him engaged in robust physical activity had developed a loyal following by 1993. As a result, videotape surveillance and the disclosure of its fruits has been the subject of many decisions both before and after CPLR 3101(i)'s enactment. The cases since 1993 have attempted to resolve many issues not specifically addressed by the subdivision and have altered the law as it existed prior to the passage of CPLR 3101(i). With the social media age upon us and the postings of pictures and videos everywhere, CPLR 3101(i) continues to be an important battleground.

Disputes frequently arose concerning the timing of the production of videotapes. In the typical case, defendant desired to depose plaintiff before producing the surveillance tapes in an attempt to commit plaintiff to testimony concerning injuries that might not be consistent with the activities captured on videotape. Plaintiff, on the other hand, wanted disclosure of the videotape before the deposition to better prepare for questions that would likely be propounded by defendant. One year prior to the enactment of CPLR 3101(i), the Court of Appeals determined that plaintiffs were entitled to disclosure of surveillance videotapes as material prepared in anticipation of litigation, but had to submit to a deposition before obtaining them under CPLR 3101(d)(2). *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992). The *DiMichel* decision only required production of tapes that would be used at trial.

After the passage of CPLR 3101(i) in 1993, which did not limit production to materials that would be used at trial, all four departments revisited the issue of timing of disclosure of videotapes under the subdivision. In 2003, the Court of Appeals resolved a conflict that developed on the issue in *Tran*, 99 N.Y.2d 383, 756 N.Y.S.2d 509, holding that the enactment of CPLR 3101(i) significantly altered *DiMichel*. *Tran* held that CPLR 3101(i) requires “full disclosure [of tapes, etc.] with no limitation as to timing.” Significantly, the Court also determined that the language of CPLR 3101(i) eliminates any qualified privilege that previously attached under CPLR 3101(d)(2) for materials prepared in anticipation of litigation. *See* Commentary C3101:29, above. Parties seeking the materials covered by CPLR 3101(i) need no longer establish “substantial need” or “undue hardship.” *See* Commentary C3101:40, above. With the qualified privilege now absent, *DiMichel*'s “timing rule lost its statutory moorings.” *Tran*, 99 N.Y.2d at 388, 756 N.Y.S.2d at 513. In sum, a party is now entitled to request production of any material covered by CPLR 3101(i) prior to submitting to a deposition.

The basis for *Tran*'s holding was somewhat surprising. As noted in previous sections of the Commentaries, it had long been understood that the supreme court possesses the discretion to direct the priority in which a party may use disclosure devices. *See, e.g.*, Commentaries C3101:2, C3101:46, above. This discretion is somewhat tempered by the decision in *Tran*, at least with respect to materials covered by CPLR 3101(i). The Court also noted that “the subdivision does not contain any limitation even as to relevancy or subject matter.” *Tran*, 99 N.Y.2d at 388, n.2, 756 N.Y.S.2d at 512, n.2. The relevance standard in CPLR 3101(a) has generally been understood to apply to all disclosure, regardless of the materials sought or the particular device used. *See Kavanagh v. Ogden Allied Maint. Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998); Commentary C3101:3, above. *Tran* does recognize, however, that a party is free to seek a protective order to restrict disclosure of materials under the terms of CPLR 3103(a). *Tran*, 99 N.Y.2d at 388, n.2, 756 N.Y.S.2d at 512, n.2. Perhaps, in an appropriate case, CPLR 3103(a) could also be invoked to alter the general timing requirement established in *Tran*.

The citation of CPLR 3103 in *Tran* seems to be the Court's admonition that the ordering of a deposition in advance of the surrender of the surveillance tapes is not absolutely forbidden; that on the facts of a given case the court can order it on CPLR 3103's authority. That would require a special showing by the defendant, of course, such as evidence--perhaps already in the record--of inconsistencies in the plaintiff's claimed injuries or a significant variance between the complaint and the bill of particulars in respect of injuries. The *Tran* Court acknowledged the possibility of the plaintiff's tailoring testimony to conform to the graphic evidence on the tapes, but sees the matter foreclosed by the enactment of CPLR 3101(i).

The timing sequence of disclosure prescribed in *Tran* has somewhat altered the timing of the videotape surveillance itself. Many defendants in personal injury cases have responded to *Tran* by postponing their surveillance activities until after deposing the plaintiff, and making doubly sure at the deposition to probe the damages issue thoroughly.

In workers' compensation proceedings, where videotape surveillance is also a common practice, the Workers' Compensation Board has the authority to govern disclosure. While there are limited references to the CPLR in the Workers' Compensation Law, the Board may withhold the production of surveillance videotapes until after the claimant's testimony and is not bound by CPLR 3101(i)'s timing requirements. *See Matter of Maffei v. Russin Lumber Corp.*, 146 A.D.3d 1207, 1209, 45 N.Y.S.3d 671, 673 (3d Dep't 2017); *Reimers v. American Axle Mfg.*, 2 A.D.3d 1246, 1247, 768 N.Y.S.2d 833, 834 (3d Dep't 2003).

Disputes have arisen over what must be produced under CPLR 3101(i). The amendment expressly overruled that portion of *DiMichel* that only required production of tapes that a party planned to use at trial. The provision requires a party to produce “all portions of such material, including out-takes, rather than only those portions a party intends to use.” In *Zegarelli v. Hughes*, 3 N.Y.3d 64, 781 N.Y.S.2d 488 (2004), the Court held that CPLR 3101(i) does “not require parties making disclosure of surveillance tapes to be more forthcoming than they would with any ordinary discovery material.” The Court concluded that videotapes are subsumed under the phrase “documents and things,” and are, therefore, obtainable by using a CPLR 3120 notice for discovery and inspection. CPLR 3120(1)(i) requires a party “to produce and permit the party seeking discovery ... to inspect, copy, test or photograph” the items produced. The Court observed that CPLR 3120 requests are customarily satisfied by the party's lawyer, who makes copies of the items sought and forwards them to the party serving the notice. “Where that is done, it is understood that the originals must be available for inspection on request.” *Id.* at 69, 781 N.Y.S.2d at 491.

In *Zegarelli*, defendant sent a VHS copy of a surveillance tape to plaintiff's counsel. At trial, defendant called an investigator who testified that a particular exhibit was a copy of a videotape he had made of plaintiff shoveling snow, that the tape fairly and accurately showed what he observed, and that the tape had not been edited. Plaintiff's counsel objected to the tape's admissibility because he did not see the original. The appellate division affirmed the order precluding the introduction of the videotape at trial on the ground that the original had not been disclosed.

The Court of Appeals reversed, concluding that defendant's counsel had followed the “customary procedure” under [CPLR 3120](#) when he sent a copy of the tape to plaintiff's counsel. The plaintiff failed to demonstrate that the difference in format between the original and the copy was of any significance and failed to ask defendant to view the original, despite having the copy for over a year prior to trial. The procedure followed by defendant constituted the “full disclosure” required under [CPLR 3101\(i\)](#).

Although VHS tapes have been relegated to the attic, the *Zegarelli* decision provides instruction to both sides in the surveillance tape battle under [CPLR 3101\(i\)](#). A [CPLR 3120](#) notice is the proper vehicle for obtaining surveillance tapes and any other material covered by [CPLR 3101\(i\)](#). A party or nonparty can comply with this type of disclosure demand by delivering a complete copy of the material or tape sought. If a copy is provided, it should be clearly identified as such. Although it was apparently not done in *Zegarelli*, it is also advisable to expressly afford the party seeking the disclosure an opportunity to inspect the original.

Video surveillance tapes of premises and businesses, which are frequently sought in disclosure under [CPLR 3101\(i\)](#), often contain mechanisms that automatically delete footage after a period of time. Therefore, a party seeking disclosure of this type of material should serve a demand for production as early as possible or, at the very least, forward a letter advising that the tape in issue not be destroyed. See *Siegel & Connors, New York Practice § 362* (discussing litigation holds and preservation letters). In *Savino v. Great Atlantic and Pacific Tea Co., Inc.*, 22 Misc.3d 792, 869 N.Y.S.2d 334 (Sup. Ct., Queens Co. 2008), plaintiff allegedly fell and sustained injuries in the defendant's supermarket. She sought disclosure of defendant's video surveillance tapes, which she believed captured the actual slip-and-fall and the surrounding circumstances. The *Savino* court warned that:

if a subpoena or letter has advised a business or store not to destroy a video surveillance tape, and the full tape has not been preserved by the business as requested, the court will impose the appropriate sanction against such business and will instruct the jury regarding the business' spoliation of a vital piece of evidence and the inferences to be derived therefrom.

*Savino*, 22 Misc.3d at 796, 869 N.Y.S.2d at 338; cf. *Green v. McClendon*, 2009 WL 2496275 (S.D.N.Y. 2009) (noting that, under federal law, the obligation to preserve electronically stored information “runs first to counsel, who has ‘a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.’ ”).

In *Savino*, the court ordered the immediate production of the “full, unredacted video surveillance tape, starting from three hours before the alleged slip-and-fall through the taking of the plaintiff ... by Emergency Medical Service personnel from the scene of the accident.” *Savino*, 22 Misc.3d at 797, 869 N.Y.S.2d at 338. Furthermore, the defendant was required to disclose “a complete list of the names, addresses, and telephone numbers of all store employees, managers, or any of its agents shown on the video surveillance tape” so the plaintiff could obtain information concerning potential witnesses to the event. *Id.*; see Commentary C3101:41 (“Making Adversary Reveal Witnesses' Names”), above. The *Savino* court did not reference the Court of Appeals decision in *Tran*, but consistent with that opinion it ordered disclosure of the videotape “before the commencement of any depositions.” *Savino*, 22 Misc.3d at 797, 869 N.Y.S.2d at 338.

In virtually every reported case on videotape disclosure, there are indications that the activity captured on the tape harms the plaintiff's case in some way. The tables were turned in *Hairston v. Metro-North Commuter Railroad*, 6 Misc.3d 399, 786 N.Y.S.2d 890 (Sup. Ct., New York Co. 2004), where defendant conducted videotape surveillance of the plaintiff performing her daily activities. Rather than capturing the plaintiff engaged in robust activity, the videotape showed her using a walker. Plaintiff, who had obtained a copy of the videotape through disclosure, was permitted to offer it in her own case despite the defendant's objection. *Hairston* relied on *Zegarelli*, 3 N.Y.3d 64, 781 N.Y.S.2d 488, in holding that the tape plaintiff offered in evidence, which was the very one that defendant had produced, was properly authenticated, even in the absence of testimony from the videographer. Plaintiff accomplished this task when she testified that the videotape was accurate. Although the admission of the videotape into evidence may have prejudiced

the defendant, it did not result in “undue prejudice” and was probative of plaintiff’s damage claims. The defendant’s hearsay objection was also overruled. The videotape had no sound other than static and plaintiff did not commit any nonverbal acts that constituted hearsay. The *Hairston* court, borrowing from Shakespeare’s *Hamlet*, summarized the situation concisely: “Defendant was hoisted by its own petard in videotaping plaintiff.” *Hairston*, 6 Misc.3d at 401, 786 N.Y.S.2d at 892.

Turnabout of this nature has long been fair play in the realm of surveillance videotapes. In *Srok v. L.I.R.R.* (Sup. Ct., N.Y. Co., August 18, 1993, Index No. 1671/92; J. Cohen), defendant requested production of plaintiff’s own wedding videotape. The wedding occurred approximately 18 months after the alleged accident. The court required production of the tape, even though it was undoubtedly procured by plaintiff at a significant cost. The tape was relevant to plaintiff’s alleged injuries because it likely depicted her “in activity which contrasts with her claims that she is no longer able to exercise regularly.” See *Sgambelluri v. Recinos*, 192 Misc.2d 777, 747 N.Y.S.2d 330 (Sup. Ct., Nassau Co. 2002) (court ordered production of wedding reception videotape under CPLR 3101[i], noting that the statute encompasses “any film, photograph or videotape”). If the plaintiff was married after the accident, but felt that videographers would be too intrusive or expensive, all is not lost. The defendant could still invoke CPLR 3101(i) to seek production of any photographs capturing the plaintiff at the wedding. While a wedding videotape, or photographs of a wedding, may depict “sensitive or embarrassing materials of marginal relevance,” the party resisting disclosure can seek a protective order. *Forman*, 30 N.Y.3d at 665, 70 N.Y.S.3d at 165.

In light of the decision in *Hairston*, defense lawyers have concluded that it may be appropriate to specifically instruct a videographer to tape only those activities that cast doubt on a plaintiff’s weakened state. CPLR 3101(i) seemingly requires a defendant to produce such an instruction if it is in writing. The subdivision mandates full disclosure of “transcripts or memoranda” relating to any materials that fall within its scope. The courts have recognized that disclosure of this material is essential to ascertain if the tape has been distorted or manipulated, even in a subtle fashion. See *Marigliano v. Krumholtz*, 159 Misc.2d 596, 600 (Sup. Ct., Queens Co. 1993) (“For example, camera angles, lighting and splicing, among other techniques can cause a film or video to be distorted.”).

A problem of this sort arose in *Beckford v. Gross*, 3 Misc.3d 638, 774 N.Y.S.2d 316 (Sup. Ct., Monroe Co. 2004), where the defendant’s liability insurer hired investigators to conduct videotape surveillance of the plaintiff. The investigators also prepared a “report” of their work, which plaintiff sought in disclosure. Defendant refused to provide it, arguing that it constituted a “confidential correspondence consisting of material prepared for litigation containing commentary, opinions and conclusions of the investigator, as well as suggestions as to how to proceed with the investigation.” Noting the absence of appellate authority construing the terms “transcripts or memoranda thereof” contained in CPLR 3101(i), the court traced the interpretation of these terms in several trial court decisions. The *Beckford* court shunned adherence to labels appended to any “transcripts or memoranda” and held that if such documents “concern a videotape of a party to litigation,” they are subject to disclosure.

The cases cited in *Beckford* recognized that a privilege might attach to certain information contained in transcripts or memoranda relating to videotapes. In the wake of the Court of Appeals’ decision in *Tran*, which held that CPLR 3101(i) eliminated any qualified privilege that previously attached to surveillance videotapes, it is doubtful that the qualified privilege in CPLR 3101(d)(2)—for materials prepared in anticipation of litigation—applies to “transcripts or memoranda thereof.” *Beckford* also notes that if a memo contains privileged communications between the attorney and client, it may be subject to redaction. A report of an investigator would not likely contain a communication between the lawyer and client. If it did, however, a strong argument could be made that the privilege had been waived when the communication was revealed to the videographer.

If a lawyer provides an oral instruction to a videographer regarding the method of taping, that too can be subject to disclosure. In *Dittmer v. Terzian*, 6 Misc.3d 590, 787 N.Y.S.2d 617 (Sup. Ct., Rockland Co. 2004), the court relied on CPLR 3101(i) in granting plaintiff’s motion to depose the defendant’s videographer regarding his outdoor surveillance

of the plaintiff. This result is also consistent with CPLR 3101(a)'s broad mandate allowing disclosure of any relevant information. If the videographer was instructed by a party's lawyer to conduct the surveillance in a particular manner, that would certainly be relevant to the accuracy of what was captured on the tape. Although the deposition of a videographer is not expressly addressed in CPLR 3101(i), the statute does require the production of "any other matter which may be subject to disclosure." *Dittmer* also ordered disclosure of out-takes, as specifically prescribed by CPLR 3101(i)'s language, and granted plaintiff the opportunity to examine the original tapes. *See Zegarelli*, 3 N.Y.3d at 68-69, 781 N.Y.S.2d at 491.

*Tran* concluded that CPLR 3101(i) eliminated any qualified privilege that previously attached to surveillance videotapes of a party, as defined by CPLR 3101(a)(1). The subdivision does not, however, pertain to tapes of a nonparty. Therefore, if a party has obtained any films, photographs, videotapes or audiotapes of a nonparty, they are not subject to disclosure under CPLR 3101(i). These materials, if relevant, would still be subject to disclosure under CPLR 3101(a), with a [CPLR 3120\(1\)\(i\)](#) demand serving as the vehicle for obtaining them. If the tapes, films or photographs were "prepared in anticipation of litigation," they would be entitled to the qualified privilege in CPLR 3101(d)(2). *See* Commentary C3101:29, et seq., above.

A question may have occurred to the reader perusing these cases: is all of this stealth ethical? [Rule 8.4\(c\) of the New York Rules of Professional Conduct](#) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation," while Rule 4.2(a) generally prohibits a lawyer from "caus[ing] another to communicate" with an adverse party on the subject of the representation without the consent of the adverse party's lawyer. These two provisions can reasonably be interpreted to prohibit a lawyer from directing an investigator to secretly tape record conversations with a represented party.

There has been a debate raging on this front, however, and there are meritorious arguments on both sides. In 2001, the American Bar Association opined that undisclosed taping of a conversation by a lawyer does not necessarily violate model rules of attorney conduct. ABA Formal Op. 01-422 (2001). This required the ABA to withdraw its prior opinion on the subject, which had concluded that undisclosed taping by a lawyer generally was unethical. The Association of the Bar of the City of New York refused to follow the ABA's lead and opined in 2003 that "undisclosed taping smacks of trickery and is improper as a routine practice." Assoc. of the Bar of the City of N.Y., Formal Op. 2003-02, 2004 WL 837933 (2003). The opinion recognizes, however, that "there are circumstances in which undisclosed taping should be permissible on the ground that it advances a generally accepted societal good." *See also Mena v. Key Food Stores Co-op, Inc.*, 195 Misc.2d 402, 758 N.Y.S.2d 246 (Sup. Ct., Kings Co. 2003) (in workplace racial bias suit, court refused to suppress secretly taped telephone conversations between plaintiff and employees of defendant). A careful review of these opinions is essential for any lawyer planning to engage in secret taping of a conversation.

These authorities primarily address the audio taping of conversations, rather than the videotaping of acts. CPLR 3101(i) covers both audiotapes and videotapes, however, and a particular tape could contain elements of both, especially if the videographer communicates with the party being taped. If a party can establish that particular statements or acts were captured on tape as a result of a violation of the New York Rules of Professional Conduct, there is precedent to preclude the introduction of the tapes in evidence and/or disqualify the offending attorney. *See, e.g., U.S. v. Hammad*, 858 F.2d 834, 840-42 (2d Cir. 1988), *cert. denied* 498 U.S. 871 (1990); *Meachum v. Outdoor World Corp.*, 171 Misc.2d 354, 654 N.Y.S.2d 240 (Sup. Ct., Queens Co. 1996). The offending lawyer may also be forced to answer a disciplinary proceeding.

It will be difficult to ascertain precisely where videotaping and audiotaping cross the border into the realm of unethical behavior. In what circumstances does undisclosed taping of conversations "advance a generally accepted societal good"? Are there circumstances in which the mere videotaping of acts might constitute "conduct involving dishonesty, fraud, deceit, or misrepresentation"? One can easily envision an aggressive mode of surveillance videotaping that

would qualify, and the lawyer would likely be denied the fruits of the investigation. See [Rule 8.4\(a\) of the New York Rules of Professional Conduct](#) (lawyer may not circumvent disciplinary rule “through the acts of another”).

### C3101:50A Disclosure of Materials on Social Media Sites.

As noted in the section immediately above, back in the dark ages of the 1990's, before the technology boom, defendants frequently conducted videotape surveillance in the hopes of catching plaintiffs on film engaged in robust activity. As recently as 2003, the Court of Appeals observed that “[i]n the world of personal injury litigation, defendants will sometimes conduct videotaped surveillance seeking to verify the extent of plaintiffs' injuries or to establish that plaintiffs have feigned or exaggerated them.” *Tran*, 99 N.Y.2d at 385, 756 N.Y.S.2d at 510. These days, surveillance videographers are short on work and have gone the way of the Maytag repairman. Their services are now rarely required because plaintiffs perform their own surveillance, carefully documenting and recording their lives, and then posting it all on social networking sites, complete with editorial comments.

In personal injury litigation, social networking sites often contain a treasure trove of relevant information and dozens of reported decisions in New York State have addressed disclosure disputes involving the production of such material, with most focused on disclosure of Facebook postings. See *Siegel & Connors, New York Practice* § 344. In February of 2018, the Court of Appeals had its first opportunity to address the disclosure of materials posted on a plaintiff's Facebook page in *Forman*, 30 N.Y.3d 656, 70 N.Y.S.3d 157.

In *Forman*, plaintiff fell from defendant's horse and claimed numerous injuries including “spinal and traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation.” *Forman*, 30 N.Y.3d at 659-60, 70 N.Y.S.3d at 160. During a deposition, plaintiff admitted that she previously had a Facebook account where she posted “a lot” of photographs of her active lifestyle before the accident, but stated she could not remember if she posted any photos thereafter. She also stated that she deactivated the account six months after the accident.

Defendant then sought an unlimited authorization to obtain plaintiff's entire “private” Facebook account, arguing that the photographs and writings posted there satisfied the relevance standard under CPLR 3101(a). When plaintiff failed to provide the authorization, defendant moved under [CPLR 3124](#) to compel plaintiff to comply with the request. Defendant contended that plaintiff's Facebook postings were relevant to her claims that she could no longer cook, travel, engage in sports such as horseback riding, attend the movies or the theater, or go boating, and that the fall also diminished her “ability to read, write, word-find, reason and use a computer.” *Forman*, 30 N.Y.3d at 660, 70 N.Y.S.3d at 161.

Although social media is a 21st century phenomenon, the Court addressed the problem by applying New York's “well-established” disclosure rules under CPLR Article 31, which is now in the sixth decade of its reign. While CPLR 3101(a) requires disclosure of “all matter *material and necessary* to the prosecution or defense of an action,” in 1968 the Court liberally interpreted “material and necessary” to include anything that is “relevant.” See *Allen*, 21 N.Y.2d at 406, 288 N.Y.S.2d at 452; Commentary C3101:5, above.

As the *Forman* Court notes, CPLR 3101 grants certain categories of relevant information an immunity from disclosure. CPLR 3101(b) grants absolute immunity to any information that is protected by any of the recognized evidentiary privileges, see Commentary C3101:25, above, while CPLR 3101(c) grants a similar immunity to the “work product of an attorney,” which has been accorded a very limited scope by the courts. See Commentary C3101:28, above; *Siegel & Connors, New York Practice* §§ 346-47. CPLR 3101(d)(2) grants a conditional immunity to “materials ... prepared in anticipation of litigation,” commonly known as work product. See Commentary C3101:29, above; *Siegel & Connors, New York Practice* § 348. These limitations are, however, narrowly construed to promote New York's policy of affording liberal discovery. See, e.g., *Ambac*, 27 N.Y.3d at 624, 36 N.Y.S.3d at 842.

With that backdrop, one may wonder what all of the fuss in this area was about. In a case like *Forman*, where plaintiff's claimed injuries were so extensive, the defendant should be able to establish with relative ease that postings on Facebook depicting plaintiff's lifestyle both before and after the accident are relevant under CPLR 3101(a). Moreover, such materials are not covered by any of the three categories of immunity listed above. The postings are not within any recognized evidentiary privilege, CPLR 3101(b), do not constitute the work product of an attorney, CPLR 3101(c), and certainly do not constitute material prepared in anticipation of litigation, CPLR 3101(d)(2).

Yet, an unfortunate precedent developed in this area where a party posted information on what is called a "private" site, which can only be accessed by those who have been granted "friend" status by the holder of the social media account. See *Siegel & Connors, New York Practice* § 344 (tracking the extensive caselaw in this area during the last decade leading up to *Forman*). Alas, in all of the reported decisions, the plaintiff and defendant were not "friends" and that access required some cooperation by the account holder in the disclosure process, which was not forthcoming. (The third parties who operate the social networking sites, such as Facebook, can be notoriously uncooperative in providing information sought by a subpoena without the consent of the account holder.)

Many courts faced with motions to compel the production of materials posted by a plaintiff on a private social media site required the seeking party to demonstrate that information on the site contradicted the plaintiff's claims. See, e.g., *Spearin v. Linmar, L.P.*, 129 A.D.3d 528, 11 N.Y.S.3d 156 (1st Dep't 2015); *Kregg v. Maldonado*, 98 A.D.3d 1289, 1290 (4th Dep't 2012); *Melissa "G" v. North Babylon Union Free Sch. Dist.*, 48 Misc.3d 389, 6 N.Y.S.3d 445 (Sup. Ct., Suffolk Co. 2015). This hurdle could be satisfied if there was material on a "public" portion of the plaintiff's site, which could be accessed by most anyone, that conflicted with the alleged injuries. If so, the courts deemed it likely that the private portion of the site contained similarly relevant information. See *Richards v. Hertz Corp.*, 100 A.D.3d 728, 730, 953 N.Y.S.2d 654, 656 (2d Dep't 2012); *Romano v. Steelcase Inc.*, 30 Misc.3d 426, 432, 907 N.Y.S.2d 650, 657 (Sup. Ct., Suffolk Co. 2010). If, however, the defendant simply claimed that information on plaintiff's private social media site "may" contradict the alleged injuries, the disclosure request was often deemed a mere "fishing expedition" and the motion was denied. See, e.g., *Tapp v. N.Y. State Urban Dev. Corp.*, 102 A.D.3d 620 (1st Dep't 2013); *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1525, 910 N.Y.S.2d 614, 615 (4th Dep't 2010).

The major obstacle confronted by many defendants was that the plaintiff might not have had a public site, or had only minimal postings on the public site, such as in *Forman* where the plaintiff's public site contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. Furthermore, the entire social media site might have been deactivated, as the plaintiff in *Forman* had done six months after the accident. That often provided the defendant with scant information to establish that materials previously on a private social media site were relevant and should be disclosed.

The plaintiff sought to invoke the above precedent in *Forman*, but the Court of Appeals rejected the argument, noting that it permits a party to "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion of the account." *Forman*, 30 N.Y.3d at 664, 70 N.Y.S.3d at 164. Moreover, the Court noted that "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information." *Id.* In sum, the standard for obtaining disclosure remains one of relevance, regardless of whether the material is in a traditional print form or posted in an electronic format on a "private" Facebook page.

The *Forman* Court also expressly rejected the notion that a social media account holder's privacy settings somehow govern the scope of disclosure. In examining this issue, it is helpful to make comparisons to disclosure requests for printed materials, with the personal diary being the most closely analogous hard copy version of a private social networking site. Courts have allowed disclosure of relevant materials in a personal diary notwithstanding any privacy concerns. See *Faragiano v. Town of Concord*, 294 A.D.2d 893, 741 N.Y.S.2d 369 (4th Dep't 2002). Why shouldn't

the same result apply to disclosure of postings on a private social media site, where the material is more broadly distributed to others? See *Patterson v. Turner Construction Co.*, 88 A.D.3d 617, 618, 931 N.Y.S.2d 311, 312 (1st Dep't 2011) (“The postings on plaintiff’s online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access ..., just as relevant matter from a personal diary is discoverable.”).

In this regard, even if none of the three categories of statutory immunity under CPLR 3101 apply, the plaintiff can still seek to limit the scope of disclosure through CPLR 3103’s protective order powers. As the *Forman* court noted, a social media account holder, like any party to litigation, can seek to prevent the disclosure of sensitive or embarrassing material of minimal relevance through a motion under CPLR 3103(a). In *Forman*, for example, the supreme court properly exempted from disclosure any photographs of plaintiff on the Facebook site depicting nudity or romantic encounters. (Just how “private” was this site?) See also *Melissa “G”*, 48 Misc.3d at 393, 6 N.Y.S.3d at 449 (court denied defendants’ request for disclosure of “the complete, unedited account data” for plaintiff’s Facebook accounts, noting that it was “mindful that ‘[t]he fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress’”).

The Court also cautioned that broad and unlimited disclosure requests for information on social media sites, such as defendant’s in *Forman*, are inappropriate. See *Doe v. Bronx Preparatory Charter School*, 160 A.D.3d 591, 176 N.Y.S.3d 126 (1st Dep’t 2018) (“Defendant’s demands for access to social media accounts for five years prior to the incident, and to cell phone records for two years prior to the incident, were overbroad and not reasonably tailored to obtain discovery relevant to the issues in the case.”). This has long been the case in the world of paper, where New York practice differs from that in the federal courts. See *Siegel & Connors, New York Practice § 362* (noting that blunderbuss demands for documents using broad and general descriptions, especially when they require the production of massive quantities of papers or other items, are generally not enforced by the courts). The party seeking disclosure of materials on a social media site should make “a targeted demand” for relevant information in accordance with CPLR 3120 (1) and (2). *Forman*, 30 N.Y.3d at 662 n.2, 70 N.Y.S.3d at 162 n.2; see *Siegel & Connors, New York Practice § 362* (discussing contents of CPLR 3120 discovery notice or subpoena).

Several courts had ordered the production of materials on a social media site for in camera review by the court or a referee. See, e.g., *Spearin*, 129 A.D.3d at 528, 11 N.Y.S.3d at 156 (remanding matter “for an in camera review of plaintiff’s post-accident Facebook postings for identification of information relevant to his alleged injuries”); *Richards*, 100 A.D.3d at 730, 953 N.Y.S.2d at 656-57; Commentary C3104:1. If a court in this day and age is required to conduct a full in camera review in every instance in which a party alleges that there is relevant material on another’s social networking site, the wheels of justice may grind to a halt. In *Forman*, the Court of Appeals seemed to discourage the practice of courts conducting an in camera review of social media materials in the first instance to determine relevance under CPLR 3101(a). The Court observed that counsel for a party responding to a disclosure demand:

--after examining any potentially responsive materials--should be able to identify and turn over items complying with the demand. Attorneys, while functioning as advocates for their clients’ interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process. When the process is functioning as it should, there is little need for a court in the first instance to winnow the demand or exercise its in camera review power to cull through the universe of potentially responsive materials to determine which are subject to discovery.

*Forman*, 30 N.Y.3d at 662 n.2, 70 N.Y.S.3d at 162 n.2; *Melissa “G”*, 48 Misc.3d at 392, 6 N.Y.S.3d at 449 (citing to federal caselaw, the court observed that “[i]n discovery matters, counsel for the producing party is the judge of relevance in the first instance” and that “in camera inspection in disclosure matters is the exception rather than the rule”).

With the *Forman* decision on the books, disclosure of materials on social media websites should be easier to obtain. As noted in the section immediately above, CPLR 3101(i) expressly allows for “full disclosure of any films, photographs,

video tapes or audio tapes, including transcripts or memoranda thereof, involving a [party to the action].” This provision generally requires production of any photograph or video of a party, essentially deeming these items relevant, subject to the court’s protective order powers under CPLR 3103. See *Tran*, 99 N.Y.2d at 388 n.2, 756 N.Y.S.2d at 512 n.2 (noting that CPLR 3101(i) does not contain any limitation as to relevancy or subject matter). The Court declined to address this subdivision in *Forman* because neither party cited it to the supreme court and, therefore, it was unpreserved. It appears, however, that CPLR 3101(i) would require production of a substantial amount of material posted on a social networking site and that the provision should be invoked by lawyers seeking this information.

Moving forward, lawyers might consider requesting that their clients deactivate a social media site, as the plaintiff did in *Forman*, or remove certain postings from the site. Can lawyers representing clients advise them of the dangers of compiling and posting this information? The die may have been cast before the client walks in the door, but is it too late to advise the client to remove the picture, film, or post, or to shut down the social networking site entirely? Is such conduct ethical?

In New York County Lawyers Association Opinion Ethics Opinion 745, 2013 WL 11305902 (2013), the ethics committee provided guidance for lawyers advising clients with respect to existing or proposed postings on social media sites. The opinion concludes that, among other things, a lawyer is permitted to advise a client to use the highest level of privacy settings available on a social media site to prevent others, such as adverse counsel, from having direct access to the contents of the site. Furthermore, an attorney “may properly review a client’s social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes.”

From an ethics standpoint, an attorney is permitted to advise a client to remove postings from a social media site, but cannot advise the client to destroy such information. Rule 3.4(a)(1) of the New York Rules of Professional Conduct provides that a lawyer “shall not ... suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce.” Furthermore, under Rule 3.4(a)(3), a lawyer may not “conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.”

While not addressed in *Forman*, lawyers advising clients regarding the contents of a social media site must be aware of potential disclosure obligations and the duty of preservation, which begins at the moment litigation is reasonably anticipated. See *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep’t 2012); Siegel & Connors, *New York Practice* §§ 362, 367 (discussing litigation holds and penalties for spoliation); Commentary C3126:8A (“Sanction for Spoliation of Evidence”). Once litigation is reasonably anticipated, anything of potential relevance that is removed from a site must be preserved so a party can comply with any future obligations to produce the materials in disclosure. The New York County Lawyers’ ethics opinion also notes that “a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client’s lawyer must take prompt remedial action in the case of any known material false testimony on this subject.” NYCLA Eth. Op. 745, 2013 WL 11305902; see *New York Rules of Professional Conduct*, Rule 3.3(a)(3); 22 N.Y.C.R.R. Part 130 (“Costs and Sanctions”); Commentary C3101:49A, above; Siegel & Connors, *New York Practice* § 352A.

In sum, while a piece of relevant information may be removed from a social media site by a party, the party will need to disclose that fact if asked whether the site was revised. Furthermore, once litigation is reasonably anticipated, anything of potential relevance that is removed from a site must be preserved so a party can comply with any future obligations to produce the materials in disclosure.

## LEGISLATIVE STUDIES AND REPORTS

In the introduction to this article appearing in the First Report of the Revisers to the Legislature it is said that this article was designed to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse. Experience indicates that when the parties are aware of all the facts more cases are settled, trials are shorter and the probability of deciding questions of fact accurately is increased.

It is further stated that the Revisers considered the need to prevent overburdening our courts with a large number of motions, and the desirability of maintaining, to the extent practicable, maximum control and supervision of litigation by the parties rather than the courts. This article is designed to encourage attorneys to settle their procedural disputes informally without the aid of the courts, and where they cannot or will not do this, it gives the court the power to strike hard to prevent abuse.

The word “disclosure” is taken from the Connecticut practice. It is preferable to the Federal title “depositions and discovery” because it includes interrogatories, examinations, inspections, and requests for admissions, in addition to depositions and discovery, enabling the term “disclosure devices” to be used, as in § 3103, as a shorthand for all these methods of obtaining information. Moreover, the connotations of the word “disclosure” seem more desirable than those of “discovery.” Cf. C.P.A. § 828 (“Disclosure by party in aid of discovery”).

**Subd. (a)** of this section is based on §§ 288 (part), 292-a (part), 1094-a (part) and 1221-c of the civil practice act, and the first paragraph of rule 9-a of the rules of civil practice.

In the original draft of this subdivision which provided: “Except as otherwise specifically provided in these rules, there shall be full disclosure before trial of all relevant evidence and all information reasonably calculated to lead to relevant evidence” the Revisers proposed to wipe the slate clean of the bulk of statutory and case law limitations on the scope of disclosure. However, they dropped the broad scope of disclosure permitted by the original draft, and in its final form this subdivision essentially restates the practice under the civil practice act and the rules of civil practice.

The words “before trial” were not carried forward into CPLR for the reason that the Revisers desired to indicate that disclosure is not limited to pre-trial stage.

**Subd. (b)** of this section has no counterpart in the civil practice act or the rules of civil practice. It is noted by the Revisers in the First Report to the Legislature that the exception of privileged matter exists under New York law as well as under [rule 26\(b\) of the Federal Rules of Civil Procedure, 28 U.S.C.A.](#) The witness may be called; he must claim the privilege when specific questions are asked. The term privilege should be given the same meaning that it would receive on the trial. For example, McKinney's Insurance Law, § 149(4), provides that invoking the patient-doctor privilege to “prevent full disclosure and proof of the nature” of a medical impairment gives rise to a presumption that a misrepresentation by an applicant for insurance was material. Claiming the privilege to prevent disclosure under this article should bring the presumption into the case. Cf. [Engl v. Aetna Life Ins. Co., 139 F.2d 469 \(2d Cir. 1943\)](#).

**Subds. (c) and (d)** of this section are new provisions added by the Revisers. In their remarks accompanying these subdivisions in the First Report to the Legislature the Revisers state that they have adopted the rule laid down by the Supreme Court in [Hickman v. Taylor, 67 S.Ct. 385, 329 U.S. 495, 91 L.Ed. 451 \(1947\)](#). The rule has been stabilized by the numerous decisions in the Federal courts since the decision in *Hickman v. Taylor*. Where there is a conflict among Federal circuits, it will be desirable to follow the second circuit in order to encourage in New York a uniform practice and client-attorney relationship that does not vary depending upon whether a case is destined for a state or Federal court.

The advisory committee further notes that it rejected as impractical the possibility of distinguishing between attorneys regularly retained as investigators of accidents by public utilities and insurance companies and those assigned to particular matters after litigation has begun or been threatened. Even the lawyer hired for routine investigations will shape his inquiry and report by what he considers relevant in view of some legal theory. Reports prepared by a layman primarily for use by attorneys are exempt, for similar reasons. Whether an internal business report of an accident, for example, is designed for use in litigation or for use

by management in disciplining employees, avoiding future accidents, or making required governmental reports may be a close question best left to the courts. Cf. *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122 (2d Cir.), cert. denied, 71 S.Ct. 1020, 341 U.S. 951, 95 L.Ed. 1374 (1951); *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954).

It is also said that since experts work so closely with attorneys that their reports often reflect the attorney's detailed tactical considerations, some protection of the work of experts was deemed necessary. The hired expert also has an ethical obligation not to accept a retainer from the other side. See Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 Colum.L.Rev. 1026, 1049-1053 (1950). The restriction is designed to cover work done for purposes of litigation. For example, it would not include a routine report of a chemist made in the normal course of manufacture. Such reports should be available when they are relevant unless they involve trade secrets, a question which the court could consider under § 3103.

In the original draft of subd. (d) of this section the committee had considered, but decided against, making an explicit exception of investigations and tests of experts which could no longer be duplicated because of a change in condition. However, the final draft included the words "the material can no longer be duplicated because of a change in conditions."

**Subd. (e)** of this section also has no counterpart in the civil practice act or the rules of civil practice. In their discussion of this subdivision, the Revisers state that the examining party ought to be able to obtain his own statements without having the difficult burden of proving fraud and overreaching on the part of an investigator--which is the usual situation in which this problem arises. There is strong support for this provision, both in Federal cases and in various state statutes. See Wright, *Recent Trends in the Practical Use of Discovery*, 16 NACCA L.J. 409, 417-18 (1955). The courts should be relieved of the burden of deciding these cases.

Official Reports to Legislature for this section:

1st Report Leg.Doc. (1957) No. 6(b), p. 117.

5th Report Leg.Doc. (1961) No. 15, p. 442.

6th Report Leg.Doc. (1962) No. 8, p. 294.

#### [Notes of Decisions \(3991\)](#)

McKinney's CPLR § 3101, NY CPLR § 3101

Current through L.2023, chapters 1 to 418. Some statute sections may be more current, see credits for details.