SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**SEPTEMBER 1, 2009**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Nardelli, McGuire, JJ.

3659 The People of the State of New York, Respondent, Ind. 1502/04

-against-

Terrell Gilford,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Frances Y. Wang of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered September 6, 2006, convicting defendant, after a nonjury trial, of manslaughter in the first degree, assault in the first degree and criminal possession of a weapon in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 20 years, 20 years and 1 year, respectively, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the assault conviction to attempted assault in the first degree and reducing the sentence thereon to a term of 10 years, and otherwise affirmed.

We reject defendant's claim that the manslaughter verdict

was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The court found the eyewitness credible and there is no adequate basis for disturbing that determination. The eyewitness, a friend of the decedent who saw the fight between defendant and decedent from inches away and who had no plausible motive to falsely accuse defendant of inflicting the fatal wound, testified she was certain that it was defendant who stabbed the decedent in the chest. Moreover, DNA testing established that blood on defendant's shirt was the decedent's. Under the circumstances, the inference is compelling that defendant stabbed the decedent with a long knife that was never recovered, rather than the short knife found at the scene that apparently was incapable of causing the fatal wound. Defendant's written statement to the police in which he claimed that he brandished a small knife that someone gave to him in an open position during the melee, a knife he nonetheless described in some detail, could reasonably be interpreted by the fact-finder as a deliberate and implausible attempt to distance himself from the longer weapon. In addition, we conclude that the court properly rejected defendant's justification defense with respect to each of the charges.

We agree with defendant that the evidence was legally insufficient to support his first-degree assault conviction, relating to another victim, and we review his unpreserved claim

in the interest of justice. The evidence establishes that the second victim was stabbed in the back three times while engaged in a fight with a person other than defendant. This victim also ended up in an altercation with defendant. While there is no evidence to support any theory under which defendant would be criminally liable for the deep and dangerous wounds to this victim's back, the evidence is legally sufficient to establish that defendant, confronting the victim and threatening to "poke" him, thrust a knife into his abdomen. However, the abdominal wound was superficial, did not damage any internal organs, and did not constitute serious physical injury (*see e.g. People v Castillo*, 199 AD2d 276 [1993]; *People v Robles*, 173 AD2d 337, 338 [1991], *lv denied* 78 NY2d 1014 [1991]). Since defendant's conduct of thrusting the knife into this victim's abdominal area evinced an intent to cause serious physical injury (*see People v Willock*, 298 AD2d 161 [2002], *lv denied* 99 NY2d 555 [2002]), we reduce the conviction to attempted assault in the first degree.

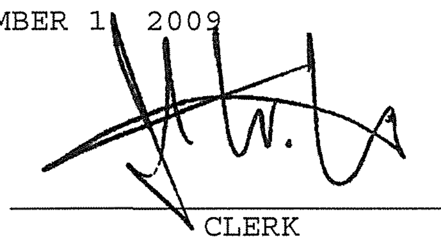
The court properly denied defendant's motion to suppress identification testimony. Defendant challenges a showup identification conducted by an officer who was unaware that, in an unchallenged procedure, the witness had already pointed defendant out to the police as defendant stood in a crowd of people outside the club where this incident occurred. We find no basis for suppression of the showup or in-court identifications,

because the showup was within permissibly close temporal and geographic proximity to the crime (*see People v Duuvon*, 77 NY2d 541, 544-545 [1991]), took place shortly after the witness had already made a reliable identification (*see People v Gilbert*, 295 AD2d 275, 276 [2002], *lv denied* 99 NY2d 558 [2002] ["This confirmatory identification following the initial identification made during the street canvass was clearly distinguishable from a precinct showup employed as the initial identification procedure after the crime."]), and was conducted in a manner that was not unduly suggestive (*see People v Gatling*, 38 AD3d 239, 240 [2007], *lv denied* 9 NY3d 865 [2007]).

Except with respect to the reduced assault conviction, we perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 1, 2009



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Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

672 Darius Bygrave, etc., Index 7292/04
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

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Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered December 4, 2007, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion denied and the complaint reinstated.

In February 1997, the infant plaintiff and his family moved into an apartment owned by defendant. He was 21 months old at the time. In November 1997, paint on the walls and ceiling of the apartment began to bubble and peel, and dust from the paint accumulated on the windowsills and baseboards. Plaintiff would often play with the paint bubbles and place his fingers in his mouth after they became covered with dust. Shortly after plaintiff first moved into the apartment, a blood test revealed that his blood contained 4 micrograms (μg) of lead per deciliter (dl). In September 1998, a blood test revealed that plaintiff

had a blood lead level of 10.4 µg/dl. Six weeks thereafter plaintiff's lead level rose to 12.6 µg/dl. Plaintiff's mother notified defendant that she believed her son had been poisoned by lead paint in the apartment. Defendant abated the lead paint condition in March 1999. Shortly before the abatement work began, the lead levels in plaintiff's blood began to decline. They never again exceeded 10 µg/dl.

In January 2000, the New York City Department of Education referred plaintiff for various evaluations to assess whether he qualified for preschool special education services. Plaintiff's mother had expressed concerns regarding his language and his fine motor and independent living skills, all of which appeared to her to be progressing normally until plaintiff began to ingest lead paint. A psychological evaluation determined that plaintiff had a "General Conceptual Ability" score in the low range. He was found to have some "mild autistic-like characteristics . . . which include . . . difficulty maintaining eye contact, difficulty relating meaningfully at times, repetitive speech, difficulty with language, unusual response to loud sounds, difficulty adapting to changes and unusual play." Physical and occupational therapy evaluations found plaintiff's gross and fine motor skills to be significantly delayed. A psychiatric

evaluation resulted in a diagnosis of "PDDNOS[1] (perhaps secondary to lead exposure)." In early 2003, the Social Security Administration diagnosed plaintiff with autism and mental retardation.

Plaintiff commenced this action against defendant and in his bill of particulars alleged the following injuries from exposure to lead paint:

> "Plumbism, lead poisoning and its sequelae; Anemia; Elevated blood lead levels; Increased lead burden in blood and infant's body, causing developmental delays and brain damage; Cognitive deficits and learning difficulties; Loss of I.Q.; Behavioral irregularities; Anti-social behavior patterns; Developmental delays resulting in inability to fully interact and play with others; Difficulties in concentration, unfocused and shortened attention span, attention deficits; Necessity for extensive medical monitoring; Learning difficulties and impairment in ability to carry out responsibilities; Inability to participate in usual childhood activities; Language deficits and delay; Necessity for multiple and painful blood tests; Physical and mental pain, suffering, and anguish; Embarrassment and humiliation; Increased lead in bony formations; Elevated bone lead level; Sleep disorders; Visual disturbances; Hyperactivity; Lack of concentration; Memory Loss; Infant plaintiff has also suffered subclinical joint and connective tissue disease, disease of the immune system, kidney disease, hypertension and visual and auditory system processing deficits."

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[1] PDDNOS stands for Pervasive Developmental Disorder (PDD) Not Otherwise Specified.

At the close of discovery, defendant moved for summary judgment. Its motion was primarily supported by the affidavit of Joseph Maytal, a pediatric neurologist who had performed a physical examination of plaintiff. In analyzing the effects of plaintiff's lead exposure, Dr. Maytal relied on a 1991 statement of the United States Centers for Disease Control (CDC) entitled *Preventing Lead Poisoning in Young Children*. The statement was intended to guide pediatric health care providers in how to react when confronted by blood lead levels over 10 μg/dl. It noted that "studies suggest that adverse effects of lead occur" at levels over that threshold. Dr. Maytal explained that according to the CDC statement, children with blood levels between 10 μg/dl and 14 μg/dl are in a "border zone," and "'the adverse effects of blood lead levels of 10-14 μg/dl are subtle and not likely to be recognizable or measurable in the individual child.'"

Dr. Maytal further asserted that:

> "[I]t is my opinion, within a reasonable degree of medical certainty, that the infant plaintiff's impairments alleged in the Verified Bill of Particulars were not caused by the infant plaintiff's very slightly and very briefly elevated blood lead levels. The mere fact that [plaintiff's] lead level was documented to be minimally elevated does not mean that any of his problems are attributable to his blood lead level. Indeed, as reported by the CDC, the adverse effects of the blood lead levels measured in the infant plaintiff are subtle and not likely to be measurable."

In addition, he quoted from an unattached report of an organization called the American Council on Science and Health (ASCH) entitled *Lead and Human Health.* According to Dr. Maytal, that publication acknowledges that lead is capable of causing neurological effects at high doses, but states that "'it is difficult if not impossible to attribute toxicologically significant behavioral or neurological effects to increasingly lower [blood lead levels] because of the numerous confounding factor [*sic*] that influence intelligence and development in children.'" These so-called "confounding factor[s]," which Dr. Maytal related the article as identifying, "include 'socioeconomic status, childhood diseases, parenting skills, genetic predisposition . . . maternal and paternal intelligence . . . child abuse, nutrition and prenatal care, labor and delivery, and personality characteristics."

Finally, Dr. Maytal stated that:

> "It must be noted that there is absolutely no objective, empirical, scientific or medical report or study which links minimally and briefly elevated blood lead levels to the development of autism or mental retardation. Nor is such a link recognized by the relevant medical or scientific communities. It is therefore my opinion, within a reasonable degree of medical certainty, that the infant plaintiff's minimally and briefly elevated blood lead levels did not contribute to the development of either his autism or mental retardation."

The motion court held that defendant met its burden of

establishing prima facie entitlement to summary judgment through Dr. Maytal's affidavit. It further held that plaintiff did not present evidence in opposition sufficient to raise an issue of fact. The court found that plaintiff's evidence, including the affirmations and affidavits of three medical experts who had examined plaintiff, collectively did not, other than through "bald conclusions," demonstrate that plaintiff's injuries were caused, at least in part, by exposure to lead. This was fatal to plaintiff's case, the court stated, because "there are several possible causes for . . . plaintiff's deficits, for many of which the defendant is not responsible."

The court erred in awarding defendant summary judgment because defendant did not establish its prima facie entitlement to such relief. Dr. Maytal's opinion that plaintiff's lead exposure did not result in his injuries was based not on an individualized assessment of plaintiff's particular condition but rather on the CDC's statement that "the adverse effects of blood lead levels of 10-14 µg/dl are subtle and not likely to be recognizable or measurable in the individual child."

To bar plaintiff's claim on that basis would be to effectively declare that a child with blood lead levels in that range can never sue for damages and we decline to make such a far-reaching determination. First, such an approach would ignore the fact that the CDC statement expressly recognizes that there

is a deleterious effect on the human body attributable to blood lead levels over 10 µg/dl. Second, the CDC statement did not state that a child can *never* exhibit ill effects as a result of blood lead levels between 10-14 µg/dl, only that it is "unlikely" that he or she would. It is worth noting that the CDC statement predates plaintiff's allegation of lead poisoning by 13 years. During this time, the ability of the medical community to recognize "the adverse effects of blood lead levels of 10-14 µg/dl" has presumably advanced. Finally, the New York City Health Code provides that "lead *poisoning* [is] to be defined as a blood lead level of 10 micrograms per deciliter or higher" (24 RCNY 11.03) (emphasis added). The term "poisoning" is generally defined not merely as a person's exposure to a dangerous substance itself, but rather to an exposure that is likely to result in injury. For example, Merriam-Webster's Collegiate Dictionary [11th ed] defines "poison" as "a substance that through its chemical action usu. kills, injures, or impairs an organism." Thus, the City of New York has determined that lead paint exposure which causes a child's blood lead level to rise above 10 µg/dl usually "injures" or "impairs" the child. To not recognize the possibility that plaintiff's injuries in this case were caused by lead paint exposure would be at odds with that determination.

Because the CDC statement is insufficient to generally bar

all personal injury claims by children with blood lead levels between 10 and 14 µg/dl, defendant was required to establish that in this particular case there was no causal link between the specific injuries alleged in plaintiff's bill of particulars and his lead paint exposure. Defendant failed to do this through Dr. Maytal's affidavit, because Dr. Maytal offered only the conclusory statement, without any scientific evidentiary support, that "plaintiff's impairment . . . were not caused by . . . 'border zone' blood lead levels" (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). A detailed explanation of why plaintiff's alleged injuries in this case could not have been related to lead paint exposure was required to shift the burden to plaintiff.

Nor does reliance on the ASCH report avail defendant. Dr. Maytal did not state whether that report identifies at what blood lead levels it becomes "difficult, if not impossible" to discern between "toxicologically significant behavioral or neurological effects" and "the numerous confounding factor [*sic*] that influence intelligence and development in children." In addition, Dr. Maytal failed to establish that autism, mental retardation or one of the other so called "confounding factors" cited in the ASCH report was far more likely than lead poisoning to have caused plaintiff's symptoms.

Indeed, Dr. Maytal's focus on plaintiff's autism and mental

retardation did not assist defendant in meeting its prima facie burden, because plaintiff's bill of particulars does not allege those injuries. Even if some of plaintiff's symptoms are attributable to his autism and mental retardation, the burden was on defendant, in the first instance, to explain why none of the injuries alleged in plaintiff's bill of particulars could have been the result of lead poisoning, as opposed to those ailments. Nowhere in his affidavit did Dr. Maytal state that it is impossible to separate the effects of autism and mental retardation from the effects of lead exposure such that no jury could possibly award damages for the latter notwithstanding the existence of the former. Similarly, Dr. Maytal did not address the possibility that the lead exposure exacerbated those symptoms which were initially caused by autism or mental retardation.

This is not to say that blood lead levels of 10-14 µg/dl will *always* give rise to a suit for damages. A plaintiff must still prove that he or she developed physical symptoms as a result of having been exposed to lead paint. For example, in *Veloz v Refika Realty Corp.* (38 AD3d 299 [2007]), the plaintiff alleged very mild cognitive deficits which the defendant challenged as not being generally recognized as ordinary sequelae of lead poisoning. This Court affirmed a grant of summary judgment dismissing the complaint, stating that "[t]hrough its expert's affirmation, the owner established its entitlement to

summary judgment on the ground that the infant plaintiff did not suffer any physical or cognitive injuries stemming from the alleged lead poisoning, thus shifting the burden to plaintiffs to raise an issue of fact" (38 AD3d at 300). In that case, the plaintiff did not raise an issue of fact because his expert's affirmation "fail[ed] to support either the general proposition that early exposure to lead results in such impairments or his specific conclusion that plaintiff's early exposure resulted in the impairments he saw" (*id.*) Here, in contrast to *Veloz*, plaintiff is not alleging injuries which have never before been recognized as being caused by lead paint exposure. To the contrary, there is nothing novel in the theory that lead paint exposure causes cognitive deficits. Accordingly, defendant was required to establish by other than conclusory statements that those deficits were not caused by the lead paint exposure.

Because defendant failed to meet its initial burden of establishing entitlement to judgment in its favor as a matter of law, the motion court should have denied the motion for summary judgment without even considering the sufficiency of plaintiff's opposition papers (*see Winegrad,* 64 NY2d at 853). Even if we were to find that defendant shifted the burden, however, we would find that plaintiff submitted sufficient evidence to raise an issue of fact. Plaintiff's three medical experts collectively presented numerous scientific articles concluding that exposure

to lead paint which results in blood lead levels of even less than 10 µg/dl can cause demonstrable injuries. This directly contradicted Dr. Maytal's opinion. Additionally, all three experts opined that, to a reasonable degree of medical certainty, the symptoms they observed in plaintiff were causally related to his lead poisoning, and were separate injuries from his autism and mental retardation.

Finally, since plaintiff's opposition is academic, we need not decide whether the motion court should have refused to consider plaintiff's experts' affidavits and affirmations on the ground that plaintiff allegedly failed to disclose those experts in a timely fashion pursuant to CPLR 3101(d)(1)(i).

All concur except Buckley, J. who concurs in a separate memorandum as follows:

BUCKLEY, J. (concurring)

I would find that defendant met its initial burden of establishing entitlement to summary judgment, although I agree that plaintiff's opposition was sufficient to create a triable issue of fact.

Plaintiff was approximately 21 months old when he and his family moved into an apartment owned by defendant. Three months later, on May 13, 1997, plaintiff's lead paint blood test revealed 4 micrograms of lead per deciliter of blood (µg/dl). Testing thereafter revealed: 10.4 µg/dl on September 19, 1998, 12.6 µg/dl on November 30, 1998, 9 µg/dl on January 27, 1999, 8 µg/dl on May 1, 1999, under 3 µg/dl on November 3, 1999, 7 µg/dl on January 22, 2001, under 3 µg/dl on December 12, 2001, 6 µg/dl on June 29, 2002, 3 µg/dl on February 13, 2005.

According to a 1991 publication by the Centers for Disease Control (CDC), relied on by defendant's pediatric neurologist, Dr. Joseph Maytal, blood lead levels of less than 10 µg/dl are "not considered to be indicative of lead poisoning." Levels of 10-14 µg/dl are "in a border zone," in which the adverse effects "are subtle and are not likely to be recognizable or measurable in the individual child"; moreover, the report indicates that, "[s]ince the laboratory tests for measuring blood lead levels are not as accurate and precise as we would like them to be *at these levels*, many of these children's blood lead levels may, in fact,

be <10 μg/dl" (emphasis added). Children with levels of 15-19 μg/dl are "at risk for decreases in IQ of up to several IQ points and other subtle effects" and "should receive followup testing." Children with levels of 20-69 μg/dl "should have a full medical evaluation," and those with levels of 70 μg/dl or greater "constitute a medical emergency." Thus, according to plaintiff's medical records, he had a blood level in the "border zone" for at most four months, after which it declined to levels not indicative of poisoning.

Dr. Maytal also relied on an American Council on Science and Health (ACSH) 2000 report titled, *Lead and Human Health*, which states that "it is difficult if not impossible to attribute toxicologically significant behavioral or neurological effects to increasingly lower [blood lead levels] because of the numerous confounding factor[s] that influence intelligence and development in children," including "socioeconomic status, childhood diseases, parenting skills, genetic disposition . . ., maternal and paternal intelligence . . ., child abuse, nutrition and prenatal care, labor and delivery, and personality characteristics."

Based on his examination of plaintiff, interview with plaintiff's mother, review of the medical and school records, medical experience, and use of the CDC and ACSH reports, Dr. Maytal opined, with a reasonable degree of medical certainty,

that "the infant plaintiff's impairments alleged in the Verified Bill of Particulars were not caused by the infant plaintiff's very slightly and very briefly elevated blood lead levels."

Dr. Maytal's scientifically supported opinion was sufficient to establish defendant's prima facie entitlement to summary judgment on the issue of causation (*see Diamond v DiLuzio*, 22 AD3d 517 [2005]). Contrary to the majority's assertion, neither Dr. Maytal's opinion, nor the CDC report, compels a determination that no child with blood lead levels within the "border zone" can ever recover from exposure to lead. Dr. Maytal merely testified that plaintiff's very brief and moderate level within the "border zone," which subsequently decreased, did not support a finding that plaintiff's particular conditions were caused by lead. Nor can Dr. Maytal be faulted for failing to refute the "presum[ed] advance[s]" in blood testing techniques hypothesized by the majority. Nevertheless, the majority seems to suggest that because it is generally accepted that lead can cause cognitive deficiencies, it was defendant's burden, in the first instance, to present a medical opinion far exceeding reasonable medical certainty, and more approximating absolute conviction, that lead was not the cause of any of plaintiff's claimed injuries.

Although defendant met its initial burden on the summary judgment motion, the testimony of plaintiff's experts was sufficient to raise an issue of fact at least as to whether some

of plaintiff's conditions were exacerbated by exposure to lead. However, I depart from the majority in noting that most of the scientific articles relied on by plaintiff's experts are of little or no relevance.

For example, an article published in The Journal of Applied Research in 2005, titled *Autism and Autistic Symptoms Associated with Childhood Lead Poisoning*, concerned a study of two children. The first child's blood lead level exceeded 50 µg/dl, and elevated levels persisted for at least 26 months; the second child's blood lead level peaked at 110 µg/dl, and elevated levels continued for at least five years. Thus, both children in that study had blood lead levels that far exceeded plaintiff's in both severity and duration.

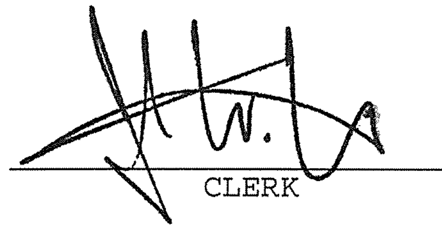
Another article, *Cognitive Deficits Associated with Blood Lead Concentrations <10 µg/dl in US Children and Adolescents*, published in Public Health Reports in 2000, "suggest[ed] that cognitive deficits are associated with blood lead concentrations lower than 5 µg/dl." The ambiguous conclusions of "suggest" and "associated" were further diluted by the report's concession that the absence of an adjustment for such variables as home environment and maternal intelligence "may have resulted in . . . overestimating the detrimental effects of lead."

Another study, *Intellectual Impairment in Children with Blood Lead Concentrations below 10 µg per Deciliter*, published in

the New England Journal of Medicine in 2003, merely produced results that "suggest that children with blood lead concentrations below 10 μg per deciliter merit more intensive investigation."

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

ENTERED: SEPTEMBER 1, 2009



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Tom, J.P., Saxe, Catterson, Moskowitz, DeGrasse, JJ.

4870 William D. Friedmann, etc., Index 400800/01
Plaintiff-Respondent,

-against-

The New York Hospital-Cornell
Medical Center, et al.,
Defendants,

Silvercrest Extended Care Facility,
Defendant-Appellant.

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Ptashnik & Associates, New York (Neil B. Ptashnik of counsel), for appellant.

Nicolosi & Nicolosi, LLP, Manhasset (Maura Nicolosi of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered July 11, 2005, which, to the extent appealed from, denied the motion of defendant Silvercrest Extended Care Facility (Silvercrest) for summary judgment dismissing the complaint as against it, affirmed, without costs.

The right leg of plaintiff's decedent ruptured after it struck a bed rail while aides at Silvercrest were preparing her for dinner and adjusting her bedding. The decedent was bedridden and had fragile skin that was prone to rupture as a result of medications she took for her numerous ailments. The facility also allegedly failed to promptly respond to the decedent's calls for assistance, and unreasonably delayed in calling 911. The death certificate listed blunt impact trauma to the right lower

leg with contusional hematoma complicated by soft tissue disruption and hemorrhage as the cause of death.

"An action to recover for personal injuries or wrongful death against a medical practitioner or a medical facility or hospital may be based either on negligence principles or on the more particularized medical malpractice standard" (*see Coursen v New York Hosp.-Cornell Med. Ctr.*, 114 AD2d 254, 256 [1986]). Simple negligence principles are applicable to those cases where the alleged negligent act may be readily determined by the trier of fact based on common knowledge. However, where the directions given or treatment received by the patient is in issue, consideration of the professional skill and judgment of the practitioner or facility is required and the theory of medical malpractice applies (*see Reardon v Presbyterian Hosp. in City of N.Y.*, 292 AD2d 235, 236-237 [2002]).

The motion court properly concluded that the claims against Silvercrest sound in negligence, rather than malpractice, and that there are triable issues of fact warranting the denial of summary judgment. For example, a trier of fact can evaluate, without the benefit of expert testimony, whether allegedly permitting the decedent's leg to strike the bed rail while she was being prepared for dinner constituted a negligent act; whether the alleged failure to respond to her calls for assistance was negligent under the circumstances; and whether the

delay, if any, in calling 911 was negligent (*see e.g. Halas v Parkway Hosp.*, 158 AD2d 516, 517 [1990]; *Papa v Brunswick Gen. Hosp.*, 132 AD2d 601, 603-604 [1987]).

We have considered Silvercrest's remaining arguments and find them unavailing.

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON, J. (dissenting)

I must respectfully dissent because, in my opinion, basic negligence principles suggest that the plaintiff's claim sounds in medical malpractice not simple negligence, and, in the absence of a physician's affidavit in these circumstances, the complaint should be dismissed. The harm that befell plaintiff's decedent, the rupture of her right leg, and a massive loss of blood resulting in death after her leg was allegedly knocked into a bed rail by an aide, was not foreseeable by the average, reasonably prudent person. In 1928, Judge Cardozo wrote what has become, perhaps, the most-cited phrase in negligence jurisprudence: "[t]he risk reasonably to be perceived defines the duty to be obeyed." Palsgraf v. Long Is. R.R. Co., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

In this case, foreseeability, and thus the duty to exercise reasonable care in order to avoid the harm that, in fact, was sustained required the application of special skills and knowledge of medical science. In my opinion, this clearly removes the action from the realms of simple negligence.

The plaintiff's decedent was a patient in Silvercrest Extended Care Facility (hereinafter referred to as "Silvercrest") for three years prior to her death on January 4, 1998. She was diagnosed initially with emphysema, chronic obstructive pulmonary disease, and depression. She was ventilator and steroid

dependent. She was admitted in the hope that she could be weaned from the ventilator and returned to her home. Her skin was very fragile, a common side effect of steroids, and she suffered from open wounds on her hip, shoulder and hand. She was also bedridden and needed assistance with daily tasks too difficult for her to accomplish alone because of her condition.

The plaintiff, decedent's husband and the administrator of her estate, testified at deposition that during a visit with his wife on January 3, 1998, he was asked to leave her room around dinner time so that aides could assist her with her personal hygiene in preparation for dinner. When he returned, she complained that the aides had been "very rough." She said they had hit her lower right leg and hurt it. The plaintiff further testified that subsequently he left to go to dinner with friends but was called by his wife and returned to find a pool of blood on the floor and the bedding soaked with blood.

A Silvercrest accident report from January 3, 1998 stated that at 6:30 P.M., a nurse was called because the plaintiff's decedent was complaining of pain in the right leg. A hematoma of 3 cm by 3 cm was noted. The plaintiff's decedent reported that the pain started after two aides helped her clean up and get ready for dinner.

The report further stated that a physician's assistant was called and noted that the right leg was swollen. He, in turn,

called the patient's primary care physician, and while talking to the physician, the plaintiff decedent's leg spontaneously ruptured with about 300cc of blood loss. The report indicated that an ambulance arrived in about 15 minutes, and that the patient was alert when she was transferred to the hospital where she died later that night. The death certificate listed the cause of death as blunt impact trauma to the right lower leg with a contusional hematoma complicated by soft tissue disruption and hemorrhage.

The plaintiff commenced this action against New York Hospital-Cornell Medical Center, owner and operator of Silvercrest, in March 1999. The complaint alleged that injuries were sustained by the plaintiff's decedent when her right leg ruptured after it was allegedly injured on a bed rail by staff who were helping her get ready for dinner. The complaint also alleged that the plaintiff's decedent was left unattended for a substantial period of time after her leg ruptured resulting in large loss of blood that led to her death.

On May 20, 2003, the plaintiff filed and served a notice of medical malpractice action on counsel for Silvercrest, which stated that counsel consulted with at least one doctor who was knowledgeable of the relevant issues and had concluded on the basis of that review that there was a reasonable basis for the action. On March 28, 2005, Silvercrest moved for summary

judgment. It submitted an affidavit of Dr. Joseph A. Buda, a Professor of Clinical Surgery, Emeritus, at Columbia University, College of Physicians and Surgeons, in support of the motion. Upon a review of the medical records, the bill of particulars, and other relevant documents, Dr. Buda opined that the injury sustained when the patient's leg hit the rail was not caused by any deviation from accepted standards of care and no act or omission by the staff at Silvercrest caused her death five hours later.

In opposition to the motion, the plaintiff submitted an affirmation of counsel, which stated that there were triable issues of fact concerning the negligence of Silvercrest with respect to whether it provided adequate care in the circumstances, whether there was a long delay in rendering assistance to the plaintiff's decedent, and whether the initial acts of Silvercrest ultimately led to her death. The plaintiff submitted the affidavit of Dr. Alan Lewis Schechter, who opined that the treatment rendered by staff at the hospital to which the plaintiff's decedent was taken from Silvercrest was the direct and proximate cause of the patient's death. The affidavit did not mention Silvercrest.

In a decision dated June 30, 2005, the court noted that the plaintiff had not provided any evidence that raised a triable issue of fact as to whether Silvercrest committed medical

malpractice and that if the allegations against Silvercrest sounded in malpractice, the omission would be fatal and the motion would be granted. However, the court denied the motion for summary judgment, holding that the allegations against Silvercrest "do not really involve diagnosis or treatment or the failure to follow a physician's instructions, all situations where malpractice is the issue and where testimony by a medical expert is necessary." Additionally, the court found that the claims did not sound in medical malpractice because Silvercrest is a "residential extended care facility for those unable to reside on their own rather than an exclusively medical facility."

Instead, the court agreed with the plaintiff that the claims against Silvercrest sound in simple negligence. The court held that the claims against Silvercrest were that plaintiff's decedent was injured at the outset by the careless treatment of aides preparing her for dinner, and that subsequently she was left unattended for a substantial period of time while bleeding profusely. The court thus concluded that these were claims of simple negligence that a jury could resolve without the aid of expert testimony.

In my opinion, the motion court erred. I believe its observation that the act complained of was not medical malpractice because it did not really involve diagnosis or treatment does not further the analysis. Moreover, its

conclusion that this is not a malpractice action because expert testimony is not required is a rationale that was roundly rejected by this Court in an opinion that was subsequently cited by the Court of Appeals as detailed below.

As a threshold matter, I believe the motion court erred in ruling out a malpractice action based on a differentiation between extended-care facilities and "wholly" medical establishments. Public Health Law § 2801(3) states that a residential health care facility means a nursing home (which is defined in section 2801(2) as a facility providing nursing care and health-related service) or a facility providing health-related service. Moreover, it is well settled that malpractice actions may "apply to acts and omissions committed by *individuals and entities* other than physicians where those acts and omissions either constitute medical treatment or bear a substantial relationship to the rendition of medical treatment." Karasek v. LaJoie, 92 N.Y.2d 171, 174-175, 677 N.Y.S.2d 265, 267, 699 N.E.2d 889, 891 (1998)(emphasis added), citing Bleiler v. Bodnar, 65 N.Y.2d 65, 489 N.Y.S.2d 885, 479 N.E.2d 230 (1985). In any event, there is no dispute, here, that Silvercrest was a facility that offered medical diagnosis and treatment. Hence, I do not believe that any bright line may be or should be drawn based on the classification of an extended-care facility as more residential than medical.

More significantly, in Karasek, the Court of Appeals acknowledged that while it had defined *who* may be the object of a malpractice action, it had not yet addressed *what* categories of health-related activity constitute medical treatment or bear a substantial relationship to the rendition of such treatment. 92 N.Y.2d at 175, 677 N.Y.S.2d at 267. It did so in Karasek only to the limited extent of holding that licensed psychologists did not offer the sort of medical services that would be covered by the malpractice statute of limitations. In essence, the decision highlighted the lack of a bright line rule as had other Court decisions in the past. See Scott v. Uljanov, 74 N.Y.2d 673, 543 N.Y.S.2d 369, 541 N.E.2d 398 (1989) (no rigid analytical line separates malpractice and negligence); see also Weiner v. Lenox Hill Hosp., 88 N.Y.2d 784, 650 N.Y.S.2d 629, 673 N.E.2d 914 (1996). The Court thus ensured that lower courts would continue, in its own words, to "grapple" with the issue of when an act or omission sounds in malpractice, and when it sounds in simple negligence (Karasek, 92 N.Y.2d at 174, 677 N.Y.S.2d at 266) - in my view, unnecessarily so.

It is well established that "[f]oreseeability of risk is an essential element of a negligence cause of action because a person can only be 'negligent' when the event giving rise to the injury could have been reasonably anticipated - and thus avoided

with the exercise of appropriate care." Pinero v. Rite Aid of N.Y., 294 A.D.2d 251, 252, 743 N.Y.S.2d 21, 22 (2002), aff'd, 99 N.Y.2d 541, 753 N.Y.S.2d 805, 783 N.E.2d 895 (2002), citing Di Ponzio v. Riordan, 89 N.Y.2d 578, 657 N.Y.S.2d 377, 679 N.E.2d 616 (1997); see also Havas v. Victory Paper Stock Co., 49 N.Y.2d 381, 386, 426 N.Y.S.2d 233, 236, 402 N.E.2d 1136, 1138 (1980), citing Heaven v. Prender, 11 QBD 503, 509 Britt MR (1883).

Most law school students can recite by rote the premise that negligence is the failure to exercise reasonable care by ignoring the risk of harm to others. A reasonably prudent man will anticipate natural and probable consequences. O'Neill v. City of Port Jervis, 253 N.Y. 423, 433, 171 N.E. 694, 697 (1930). "[R]easonable foresight is required but not prophetic vision." Cartee v. Saks Fifth Ave., 277 App. Div. 606, 609-610, 101 N.Y.S.2d 761, 764-765 (1st Dept. 1951).

It is beyond cavil that foreseeability is an equally essential element of malpractice. In 1898, the Court of Appeals held that "the law relating to malpractice is simple and well settled [...] [u]pon consenting to treat a patient, it becomes [the physician's] duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed." Pike v.Honsinger, 155 N.Y. 201, 209, 49 N.E. 760, 762 (1898).

The import, therefore, is clear: Medical malpractice, like

negligence, is the failure to exercise reasonable care, and as in negligence, foreseeability is an essential element. However, in malpractice actions, the element of foreseeability is circumscribed by medical skills and knowledge. In other words, reasonable foreseeability that an act or omission carries the risk of harm, or is likely to cause harm, depends on applying the skills and knowledge that a health practitioner is deemed to possess, and is not within the range of apprehension of the ordinary reasonable prudent person. See O'Neill v. City of Port Jervis, 253 N.Y. at 433, 171 N.E. at 697.

In the decades following the seminal case of Pike v. Honsinger, the increasingly convoluted analysis employed by various courts has only served to obfuscate the true distinction between negligence and its subset of medical malpractice. Currently, the determination of whether an action sounds in malpractice or simple negligence depends less on whether foreseeability is within the realm of an average reasonable person or whether medical science or knowledge is required for such reasonable foresight. Rather, determinations are made by utilizing the ritually-cited holding of the Bleiler Court that, in a malpractice action, the challenged conduct "constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician." Bleiler v Bodnar, 65 N.Y.2d at 72, 489 N.Y.S.2d at 889.

As set forth below, the rule has not shown itself susceptible to uniform application. Perhaps not surprisingly since the Bleiler Court also observed that "[a] hospital in a general sense is always furnishing medical care to patients, but clearly not every act of negligence toward a patient [by a doctor or nurse] would be medical malpractice." Bleiler, 65 N.Y.2d at 73, 489 N.Y.S.2d at 890.

This case in particular underscores the confusion wrought by such holdings. On appeal, the plaintiff asserts that the motion court correctly determined the action sounds in negligence since the act complained of was nothing more than assistance with personal hygiene. Silvercrest, however, argues that the specialized assistance and care that the plaintiff's decedent received at the facility was part of her treatment in light of her medical condition of fragile skin and propensity to bruise and bleed.

The seeds of confusion were sown, and took root, decades ago. In 1957, the Court of Appeals, in a major departure from precedent and in an attempt to clarify the liability of hospitals, abandoned the distinction between administrative and medical mistakes. Bing v Thunig, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957). Judge Fuld, writing for the majority, observed that the distinction had arisen as a result of "a judicial policy of compromise between the doctrines of repondeat

superior and total immunity for charitable institutions." 2 N.Y.2d at 661, 163 N.Y.S.2d at 6 [internal quotation marks and citation omitted]. In brief, until then, charitable hospitals were not responsible for the negligence of their physicians and nurses in the treatment of patients, only for injuries that occurred through the negligence of an employee while "performing an 'administrative,' as contrasted with a 'medical,' act." 2 N.Y.2d at 659-660, 163 N.Y.S.2d at 5. But as Judge Fuld noted, "illustrative cases" had not provided "a consistent and clearly defined distinction" between administrative and medical acts. 2 N.Y.2d at 660, 162 N.Y.S.2d at 6.

For example, placing an improperly capped hot water bottle on a patient's body was found to be administrative, keeping a hot water bottle too long on a patient's body, medical; a blood transfusion administered to the wrong patient was administrative, administering the wrong blood to the right patient was medical; using an improperly sterilized hypodermic needle was administrative, improperly administering a hypodermic injection was medical; failing to place sideboards on a bed after a nurse decided they were necessary was administrative; failing to decide they should be used when the need clearly existed was deemed medical. Id. at 660-661, 163 N.Y.S.2d at 6 (internal citations omitted).

The Court ruled that a hospital could be held responsible

for the negligent acts of its employees whether administrative or medical. The distinction between administrative and medical acts was not erased completely, however. Instead, it transmogrified into the distinction between simple negligence and medical malpractice. See Morwin v. Albany Hosp., 7 A.D.2d 582, 185 N.Y.S.2d 85 (3rd Dept. 1959); see also Miller v. Albany Med. Ctr. Hosp., 95 A.D.2d 977, 464 N.Y.S.2d 297 (3rd. Dept. 1983). In the latter case, the Court enunciated that where "the conduct of hospital staff during care and treatment has been held more 'administrative' than medical, [it can be] measured by ordinary negligence standards." 95 A.D.2d at 978, 464 N.Y.S.2d at 299.

In Morwin, the Court held that, to prove negligence, in many instances, it would not be necessary to get into the realm of malpractice. It then categorized those cases formerly labeled "administrative" mistakes as cases of "negligence easily discernible by a jury on common knowledge." 7 A.D.2d at 585, 185 N.Y.S.2d at 88. Thus, for example, the failure to have sideboards placed on the bed and the blood transfusion mistakenly administered to the wrong patient, which previously had been labeled administrative acts, were now deemed simple negligence.[1] 7 A.D. at 585, 185 N.Y.S.2d at 88. The Morwin Court thus

[1]It is interesting to note that the Court in Morwin labeled the act complained of in Bing as administrative, and so one of simple negligence, although the intermediate appellate court had found it to be a medical mistake. 1 A.D.2d 887, 149 N.Y.S.2d 358 (1956).

determined: "True, the medical-administrative distinction is gone, but that relates only to the hospital's liability and not to the quality of the act." 7 A.D.2d at 585, 185 N.Y.S.2d at 88.

The Morwin Court held that the difference between medical and administrative acts, now the difference between negligence and malpractice, could be determined by whether a trier of fact could determine liability on common knowledge. "A layman may easily determine whether the placing of a scalding hot water bottle against a patient was a negligent act, but can he adequately determine whether or not a delicate operation ha[s] been performed properly?" 7 A.D.2d at 585, 185 N.Y.S.2d at 88. It then concluded: "Malpractice is a peculiar kind of negligence. It is difficult of proof. The jury must usually be presented evidence educed from the testimony of conflicting experts." 7 A.D.2d at 585, 185 N.Y.S.2d at 88.

Other courts embellished this observation in attempting to create a bright line rule from the evidentiary requirements. In Hale v. State of New York (53 A.D.2d 1025, 1025, 386 N.Y.S.2d 151, 152 (4th Dept. 1976), lv. denied, 40 N.Y.2d 804, 387 N.Y.S.2d 1032, 356 N.E.2d 484 (1976)) the Court held that "the theory of simple negligence is restricted to those cases where the alleged negligent act is readily determinable by the trier of the facts on common knowledge." In Twitchell v. MacKay, the Court established that "[m]alpractice, of course, is negligence

but the jury must usually be presented with evidence educed from the testimony of conflicting experts." 78 A.D.2d 125, 127, 434 N.Y.S.2d 516, 518 (4th Dept. 1980). The Court elucidated: "the test becomes one of whether the case involves a matter of science or art requiring special knowledge or skill not ordinarily possessed by the average person or is one where the common everyday experiences of the trier of the facts is sufficient [...] In the former, expert testimony is ordinarily required to aid the trier of the facts." 78 A.D.2d at 127, 434 N.Y.S.2d at 518; Smith v. Pasquarella, 201 A.D.2d 782, 783, 607 N.Y.S.2d 489, 491 (3rd Dept. 1994); see also Miller, 95 A.D.2d at 978, 464 N.Y.S.2d at 298-299.

Indeed, the motion court in this case determined that because the issue was one the jury could resolve on basis of common knowledge, the complaint sounds in simple negligence. Of course, determining the issue on the basis of an evidentiary requirement is standing the issue on its head, and creates a series of assumptions which lead to further mischief.

As this Court held in Payette v. Rockefeller Univ. (220 A.D.2d 69, 643 N.Y.S.2d 79 (1st Dept. 1996)), while expert testimony may be an evidentiary requirement in a malpractice cause of action, it cannot be the determinative factor in distinguishing negligence from malpractice actions. Justice Sullivan's unanimous decision for the Court observed, first, that

the Court of Appeals in its seminal decisions on the elements of a malpractice action had not defined it by whether the acts complained of lay within the realm of a jury's comprehension or whether instead they required expert testimony. Then he noted: "Common sense would seem to dictate that the difference between a medical malpractice and negligence action could never be made to turn on whether expert testimony is required to establish liability." 220 A.D.2d at 73, 643 N.Y.S.2d at 82. He added: "Not all malpractice claims require expert testimony. For instance such [expert] testimony would hardly be required to show that leaving a scalpel in a patient does not constitute accepted medical practice [...] Furthermore, a plaintiff may rely on the doctrine of res ipsa loquitur to establish medical malpractice." 220 A.D.2d at 73, 643 N.Y.S.2d at 82.

Conversely, the necessity for expert testimony does not turn an action into a malpractice one. Indeed, the Court of Appeals held that a case where a patient was given AIDS-tainted blood in a transfusion was a case of negligence not medical malpractice even though there was a necessity for expert testimony, and even though there was physician oversight. Weiner v. Lenox Hill Hosp., 88 N.Y.2d 784, 789, 650 N.Y.S.2d 629, 632, 673 N.E.2d 914, 917 (1996), supra, citing Payette, 220 A.D.2d at 69, 643 N.Y.S.2d at 79.

The Weiner Court reiterated the lack of a bright line rule.

It observed, "the distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and 'no rigid analytical line separates the two.'" Weiner, 88 N.Y.2d at 787, 650 N.Y.S.2d at 631, quoting Scott v. Uljanov, 74 N.Y.2d at 674, 543 N.Y.S.2d at 370. Not surprisingly such holdings have created much opportunity for mischief as abundant case law demonstrates. This is particularly true because the one indisputable distinction, as conferred by the Legislature, is that different statutes of limitations apply to the two causes of action. See CPLR 214-a (a 2 year and six-month statute of limitations applies to malpractice actions; three years to negligence actions).

It is virtually axiomatic that defendants will assert that a claim sounds in medical malpractice when the statute of limitations mandates dismissal of a malpractice, but not a simple negligence action. It is equally possible to surmise from the plethora of seemingly arbitrary and inconsistent determinations that courts have sometimes used the lack of a bright line rule in order to grant a plaintiff his/her day in court rather than dismiss on the grounds of an untimely pleading, or as in this case, the absence of a doctor's affidavit. See e.g. Coursen v. New York Hosp. Cornell Med. Ctr., 114 A.D.2d 254, 499 N.Y.S.2d 52 (1st Dept. 1986). In Coursen, where a 63-year old post-hernia operation patient was instructed by the doctor to walk around,

the claim against the doctor was deemed malpractice (and dismissed); the claim against the nurse who accompanied him on the walk during which he fell was deemed negligence. However, a case where a postoperative patient fell walking to the bathroom was malpractice because the breach of duty sprang from an improper assessment of how much supervision was required particularly with regard to ability to walk post-op. Fox v. White Plains Med. Ctr., 125 A.D.2d 538, 509 N.Y.S.2d 614 (2nd Dept. 1986).

In Stanley v. Lebetkin (123 A.D.2d 854, 507 N.Y.S.2d 468 (2nd Dept. 1986)), in which the plaintiff fell off an examining table, the court found malpractice because the duty arose from the physician-patient relationship and the court noted that, if the plaintiff had not consulted defendant as a physician, he would not have been on the examining table; but where, after a biopsy, a patient fell off an examining table while alighting with the help of the physician but not the attending nurse, the Court found negligence, holding that the physician failed to exercise ordinary care because his decision required only his common sense and judgment. Reardon v. Presbyterian Hosp. in City of N.Y., 292 A.D.2d 235, 739 N.Y.S.2d 65 (1st Dept. 2002).

In both Papa v. Brunswick Gen. Hosp. (132 A.D.2d 601, 517 N.Y.S.2d 762 (2nd Dept. 1987)), involving a geriatric patient with multiple medical problems who fell after climbing out of a

bed with side rails, and Halas v. Parkway Hosp. (158 A.D.2d 516, 551 N.Y.S.2d 279 (2d Dept. 1990)), involving a 79-year old weak patient with a fever who fell out of bed without side rails, the claims were found to sound in negligence. The Papa Court found that the allegations did not involve diagnosis or treatment and that the gravamen concerned a failure to exercise ordinary and reasonable care to insure no unnecessary harm befell the patient. The Halas court also found a failure to exercise ordinary and reasonable care where the facts established that the patient's condition was delicate and where the "risk of harm was recognized." 158 A.D.2d at 517, 551 N.Y.S.2d at 280.

Meanwhile, the Court in Raus v. White Plains (156 A.D.2d 354, 548 N.Y.S.2d 307 (2nd Dept. 1989)) found that a patient who fell out of a bed without side rails after being given a sedative had a claim sounding in malpractice because there were allegations of an "improper assessment of her condition [which] bears a substantial relationship to the rendition of her medical treatment." 156 A.D.2d at 355, 548 N.Y.S.2d at 307. Further, a patient who fell after being placed in a chair after complaining of light-headedness was found to have a claim sounding in malpractice (Smee v. Sisters of Charity Hosp. of Buffalo, 210 A.D.2d 966, 620 N.Y.S.2d 685 (4th Dept. 1994)), as did a patient who fell walking to the bathroom after staff failed to respond to

her calls for help. Zellar v. Tompkins Community Hosp., 124 A.D.2d 287,508 N.Y.S.2d 84 (3rd Dept 1986).

Because the rationale for each of these decisions does not appear to be based on any one clear guiding principle, the decisions bear all appearance of being simply arbitrary. However, some of these same cases were the subject of an interesting analysis by the court in LaMarca v. United States (31 F.Supp.2d 110 (E.D.N.Y. 1998)) in which the court noted that, the "fall" cases deemed to be malpractice were those where it was alleged that "the patient's medical condition was improperly assessed by the hospital staff." Id., at 121, citing Stavely v. St. Charles Hosp., 173 F.R.D. 49, 52 (E.D.N.Y. 1997).

The court concluded that the findings for a malpractice action were proper in those actions because "[T]he determination of whether a patient is a fall risk is an act which is a 'matter of medical science... requiring special skills not ordinarily possessed by lay persons.'" La Marca, 31 F.Supp.2d at 121.

In other words, the court concluded that where the risk can be perceived only with medical knowledge or skills, the action sounds in malpractice. This rationale, in effect, brings the issue squarely back within basic negligence principles. For example, foreseeing the risk of a fall for a postoperative patient requires some knowledge of the effects of sedative, the type of surgery that was conducted, a knowledge of how long

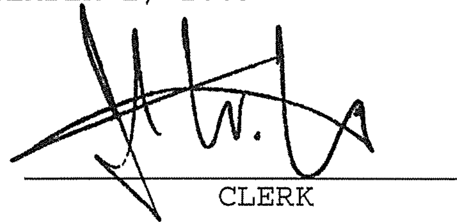
before effects of anesthesia wear off and when a patient is ready to sit up, or walk unaccompanied or be left without side rails. On the other hand, the geriatric patients in Papa and Halas were recognized risks and no special skills or knowledge were necessary to assess the risk of harm in leaving such obviously frail patients unsupervised.

In the instant case, Silvercrest asserts that the allegations all pertain to the improper assessment of the patient's condition and the degree of supervision required. Silvercrest's failure to realize or assess that her leg would rupture from being bruised on a bed rail involves diagnosis of her condition at the time, and therefore requires the special knowledge and skills of a health practitioner. The plaintiff, on the other hand, argues that "shifting a patient in bed does not require specialized medical knowledge." But the plaintiff then further argues: Silvercrest "[d]ue to *its knowledge of her physical condition*, [...] owed decedent a higher duty of care in its treatment of her. The breach of this duty resulted in foreseeable injury and ultimately, her demise." (Emphasis added).

In my opinion, that correct assertion supports a finding that the claim sounds in medical malpractice not simple negligence.

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

ENTERED: SEPTEMBER 1, 2009



CLERK

Tom, J.P., Friedman, Catterson, Moskowitz, Renwick, JJ.

601 In re Gary C. B.,
Petitioner-Respondent,

-against-

Sandra I. M.,
Respondent-Appellant.

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Anna Stern, New York for appellant.

David L. Martin, Mineola for respondent.

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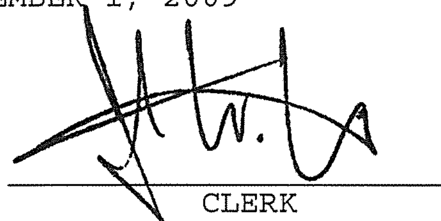
Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about August 20, 2008, which, to the extent appealed from as limited by the briefs, granted petitioner father custody of the subject child and awarded visitation to respondent mother, unanimously affirmed, without costs.

The referee's conclusion that the award of custody to the father with liberal visitation to the mother was in the best interests of the child has a sound and substantial basis in the record (*see Matter of Osbourne S. v Regina S.*, 55 AD3d 465 [2008]; *Matter of Brass v Otero*, 40 AD3d 752 [2007]). The referee appropriately evaluated these best interests under the

totality of the circumstances (*see Friederwitzer v Friederwitzer*, 55 NY2d 89, 94-96 [1982]).

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

ENTERED: SEPTEMBER 1, 2009



CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

649 Eugene Miniero, et al, Index 25285/92
Plaintiffs-Respondents,

-against-

The City of New York, et al.,
Defendants-Appellants.

- - - - -

James Carroll, et al.,
Plaintiffs-Respondents,

-against-

Mine Safety Appliances Company,
Defendant-Appellant.

[And A Third-Party Action]

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Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for municipal appellants.

Quirk and Bakalor, P.C., New York (Brian P. Sexton of counsel), for Mine Safety Appliances Company, appellant.

Cronin & Byczek, LLP, Lake Success (Rocco G. Avallone of counsel), for Miniero, Pepitone, Wilhelm, DePalma and Carroll respondents.

Decolator, Cohen & DiPrisco, LLP, Garden City (Joseph L. Decolator of counsel), for Sblendido, Parisi and Hernandez respondents.

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Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered February 13, 2007, which, in consolidated actions to recover for hearing loss and related injuries allegedly suffered by current and former members of the New York City Police Department as a result of their exposure to the sound of gunfire at Police Department firing ranges and the lack of adequate

protective devices, denied defendants' motions for summary judgment dismissing the complaints, unanimously reversed, on the law, without costs, the motions granted and the complaints dismissed. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

As we held in *Casson v City of New York* (269 AD2d 285 [2000], *lv denied* 95 NY2d 756 [2000]), claims of injuries like those alleged by plaintiffs, which, according to their own expert, can manifest themselves immediately upon exposure to high sound levels, are governed not by the exceptional accrual rules applicable to toxic torts (CPLR 214-c) and repetitive stress injuries (*see Blanco v American Tel. & Tel. Co.*, 90 NY2d 757 [1997]), but by the traditional first-exposure rule. Plaintiffs furnished this Court with precisely the same expert affidavits as were submitted in *Casson* in their attempt to circumvent the time bar by claiming in some instances that a particular event closer in time to the commencement of the lawsuit triggered the hearing loss. However, each plaintiff was exposed to gunfire over a period of time, and each plaintiff's first exposure (between 1972 and 1987) occurred more than three years before the commencement of this suit. The expert averred that hearing loss occasioned by high sound levels usually occurs over time. Thus, there can be no dispute that all the complaints are barred by CPLR 214 and that defendants are entitled to summary judgment.

Moreover, the claim against the City is also barred because a governmental authority is generally immune from liability for the consequences of official action involving the exercise of discretion based on its own rational judgment (*see Amodio v City of New York,* 33 AD3d 456 [2006], *lv denied* 8 NY3d 805 [2007]). The selection of protective equipment is a discretionary function for which liability can be imposed only if the municipality behaved irrationally (*id.*). The ear protectors manufactured by defendant Mine Safety Appliances Company (MSA) were tested and certified by the American National Standards Institute (ANSI) to reduce noise by 23 decibels when correctly worn. Although there is a warning on this product indicating that it might not be totally effective for high-impact sounds such as gunshots, it cannot be said that the decision to use this equipment was irrational at the time that it was used.

We note that, although plaintiffs claim to have used MSA's Noisefoe Mark IV ear protectors, they failed to preserve the ear protectors they used. Thus, there is some question as to which product was used. However, assuming that plaintiffs used defendant's product, the breach of warranty claims are time-barred because the last sale of the ear protector in question was in 1988. Failure to warn claims are also barred because the

Noisefoe Mark IV labels featured a warning that complied with the Environmental Protection Agency standards set forth in 40 CFR 211.101 *et seq.*, pursuant to the Noise Control Act of 1972 (42 USC § 4907). The warning specifically stated:

> "Although hearing protectors can be recommended for protection against the harmful effects of impulsive noise, the Noise Reduction Rating is based on the attenuation of continuous noise *and may not be an accurate indicator of the protection attainable against impulsive noise such as gunfire*" (emphasis added).

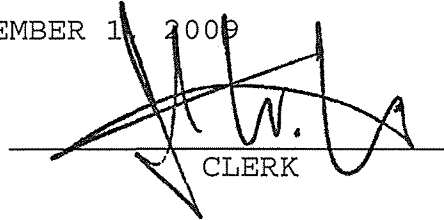
It is thus unnecessary to decide, as defendants urge, whether the failure to warn claims are preempted by federal standards.

Moreover, plaintiffs have not set forth any basis for a design or manufacturing defect claim against MSA. There is no evidence of a manufacturing defect or improper construction, since the product neither broke nor malfunctioned in any specific way (*see Caprara v Chrysler Corp.*, 52 NY2d 114, 128-129 [1981]). Nor has there been a showing of a design defect relative to the purposes for which the particular ear protectors were intended (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106-107 [1983]). While it is not necessary to prove a specific defect to succeed in a product defect case, it must at least be shown that the product did not perform as intended (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 42 [2003]). Here, there was no showing that

the ear protectors did not reduce noise by 23 decibels, and that inference cannot be drawn from the fact that plaintiffs suffered hearing loss over a period of time.

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

ENTERED: SEPTEMBER 1[illegible], 2009



CLERK

Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

781 Mary Jane Stewart, et al., Plaintiffs-Respondents, Index 116886/04

-against-

Honeywell International Inc.,
Defendant-Appellant,

Genlyte Thomas Group, LLC, et al.,
Defendants.

[And A Third-Party Action]

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Arnold & Porter, LLP, New York (Kerry A. Dziubek of counsel), for appellant.

Larkin, Axelrod, Ingrassia & Tetenbaum, LLP, Newburgh (James Alexander Burke of counsel), for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 26, 2009, which, to the extent appealed from, denied so much of the motion of defendant Honeywell International Inc. for summary judgment as sought dismissal of plaintiffs' "failure to warn" claims, unanimously reversed, on the law, without costs, the motion granted, and any claims predicated on defendant Honeywell's failure to warn are dismissed.

Plaintiff lost a thumb and two fingers while operating a machine used to mill tin. The accident occurred when she reached into the die area of the machine to remove a finished piece, and the machine unexpectedly recycled, or double-cycled, meaning that the machine's ram lowered.

At issue on this appeal is whether the manufacturer, or, in

this case, its successor, defendant Honeywell International, Inc., is liable for failure to post appropriate warnings on the machine. As recited in the expert's affidavit submitted in opposition to Honeywell's motion for summary judgment, plaintiff alleges that the manufacturer was negligent in failing to provide certain specific warnings:

> There should have been prominent and permanent warnings placed on the press with the signal word DANGER or WARNING informing the user that this press had no positive non-repeat mechanism and was subject to unexpected double cycling and that it should NEVER be used without physical and effective point-of-operation barrier guarding.

The machine did, however, have labels with other warnings. One specifically said, "Closing ram and die will result in loss of fingers or limbs if placed in machine. Never place your hands or any part of your body in this machine." Plaintiff admitted that she had seen the label, and was aware that it meant "Never place your hand or any part of your body under the die." She had also read and understood another label which alerted her to the possibility that she could lose her hand or fingers by putting them under the die.

Plaintiff had worked as a press operator for more than 35 years before the accident, and had operated the machine on which she suffered her injury about five times before her accident. She was also aware before her accident of two coworkers being injured when presses double-cycled.

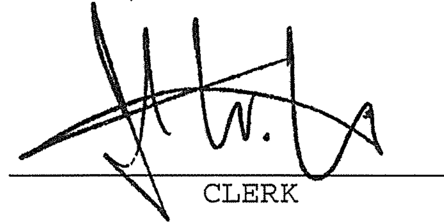
"A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]). Additionally, where a product "is purposefully manufactured to permit its use without a safety feature, a plaintiff may recover for injuries suffered as a result of removing the safety feature" (*id. at* 238). On the other hand, "where the injured party was fully aware of the hazard through general knowledge, observation or common sense," or where the hazard is patently dangerous or poses an open and obvious risk, the duty to warn may be obviated (*id. at* 241).

Here, plaintiff admitted that she was aware of the warning not to place her hands in the die, and did so anyway. She also was experienced in the use of machines such as the one that caused her injury, and was aware of the possibility of a machine double-cycling. Under such circumstances, regardless of whatever else may have been the proximate cause of plaintiff's injuries, which issues are not before us, the accident cannot be deemed to have resulted from a failure to warn about the dangers of double-cycling or operating the machine without appropriate

safety guards. Any claims predicated on Honeywell's failure to warn are thus dismissed.

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

ENTERED: SEPTEMBER 1, 2009



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Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

783 Bruckmann, Rosser, Sherrill & Co., L.P., et al., Index 602738/05
Plaintiffs-Appellants-Respondents,

-against-

Marsh USA, Inc., et al.,
Defendants-Respondents-Appellants.

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Anderson Kill & Olick, P.C., New York (Marshall Gilinsky of counsel), for appellants-respondents.

Willkie Farr & Gallagher LLP, New York (Christopher J. St. Jeanos of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 19, 2008, which granted defendants' motion for summary judgment dismissing the complaint, modified, on the law, to reinstate the causes of action for negligence and breach of contract, and otherwise affirmed, without costs.

The second cause of action for breach of contract should be reinstated. "Under New York law, a party who has engaged a person to act as an insurance broker to procure adequate insurance is entitled to recover damages from the broker if the policy obtained does not cover a loss for which the broker contracted to provide insurance, and the insurance company refuses to cover the loss" (*Long Is. Light. Co. v Steel Derrick Barge "FSC 99,"* 725 F2d 839, 841 [2d Cir 1984]; *Landusky v Beirne*, 80 App Div 272 [1903], *affd* 178 NY 551 [1904]). Plaintiffs' settlement of their underlying claim against the

insurer, under circumstances in which the merits of the claim for coverage were equivocal, did not break the chain of proximate causation with respect to their claim against their broker for failure to procure appropriate coverage (*see Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1990]). *Resources Fin. v National Cas. Co.* (219 AD2d 627 [1995]), upon which the motion court relied, is distinguishable because the insured there settled its claim against the insurer despite having prevailed against the insurer on the underlying coverage issue.

An insurance agent or broker can be held liable in negligence if he or she fails to exercise due care in an insurance brokerage transaction. Thus, a plaintiff may seek to hold a defendant broker liable under a theory of either negligence or breach of contract (*Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792, 793-794 [2007]; *see also Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 644-645 [2007]; *Katz v Tower Ins. Co. of N.Y.*, 34 AD3d 432 [2006]). On this appeal, defendants did not argue that the negligence claim should be dismissed as duplicative of the breach of contract claim, and it is clear that plaintiffs allege a breach of duty independent of the contract itself. Specifically, plaintiffs maintain that defendants' failure to exercise due care is shown, inter alia, by their failure to include in the binder a reference to the tie-in provision and to timely review the draft policy and alert

plaintiffs to the potential for a reduction in the limits of liability. Thus, the first cause of action for negligence should be reinstated.

The third and fourth causes of action for breach of the duty of loyalty and breach of fiduciary duty were properly dismissed. What is involved here is a dispute between insureds and their broker over whether the broker failed to obtain coverage requested and whether the broker is liable for damages as a result of that failure. "[T]he law is reasonably settled . . . that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). Thus, absent a special relationship, a claim for breach of fiduciary duty does not lie (*see e.g. People v Liberty Mut. Ins. Co.*, 52 AD3d 378, 380 [2008]; *Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency*, 297 AD2d 430, 431-432 [2002]). Punitive damages are not available, since they are not

recoverable for an ordinary breach of contract (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]) or for ordinary negligence (*Munoz v Puretz*, 301 AD2d 382, 384 [2003]).

All concur except Tom, J.P. and Nardelli, J., who dissent in part in a memorandum by Nardelli, J. as follows:

NARDELLI, J. (dissenting in part)

I agree with the majority that the cause of action for breach of contract should be reinstated and that the causes of action for breach of the duty of loyalty and breach of fiduciary duty should not. I respectfully dissent, however, from the majority's determination to reinstate the first cause of action for negligence, which I view as duplicative of the cause of action for breach of contract.

I recognize, as the majority observes, that an aggrieved client can proceed against a broker in negligence or contract. I do not believe, however, that, in the circumstances presented, plaintiffs can proceed simultaneously under both contract and negligence. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract" (*Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 144 [1995], *lv dismissed in part, denied in part*, 87 NY2d 937 [1996]).

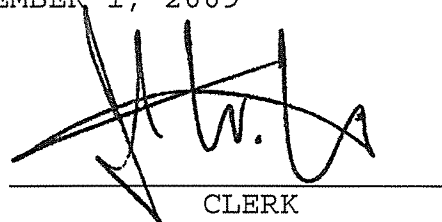
The majority concludes that the failure to include in the binder a reference to the tie-in provision, or to conduct a review of the insurance policy issued, constitutes the breach of duties independent of the original contract to obtain insurance.

I submit, respectfully, that these claims of negligence duplicate the contractual claims. Defendant brokers were retained to obtain specified insurance, and apparently failed to do so. That the appropriate coverage was not obtained because defendants failed to read the terms of the policy which was procured is irrelevant - plaintiffs did not get the coverage requested. The proof that defendants breached the contract to procure specific coverage will track the proof that they were negligent in performing their duties to procure that coverage.

Thus, since plaintiffs can be made whole by proof that defendants breached their contract to obtain the requisite insurance, I believe that only the second cause of action need, or should be, reinstated.

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

ENTERED: SEPTEMBER 1, 2009



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Saxe, J.P., Sweeny, Moskowitz, Acosta, Richter, JJ.

797-
798 Navarone Productions, N.V., Plaintiff,

Index 600707/04

-against-

HSBC Gibbs Gulf Insurance Consultants Limited, et al., Defendants,

- - - -

Sony Pictures Entertainment, Inc., Interpleading Plaintiff,

-against-

Navarone Productions, N.V., et al., Interpleaded Defendants-Respondents,

Janet Nechis, etc., et al., Interpleaded Defendants,

Eberhard Kuehl, Interpleaded Defendant-Appellant.

---

Nixon Peabody LLP, New York (Frank H. Penski of counsel), for appellant.

Storch Amini & Munves, P.C., New York (Bijan Amini of counsel), for Navarone Productions respondents.

Meredith L. Friedman, New York for HSBC respondents.

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Order, Supreme Court, New York County (Herman Cahn, J.), entered June 24, 2008, that, after a nonjury trial, found Navarone Productions, N.V. entitled to certain film distribution revenues, and order, same court and Justice, entered December 31, 2008, that, to the extent appealed from, as limited by the briefs, directed Sony Pictures to pay Navarone 60% of the

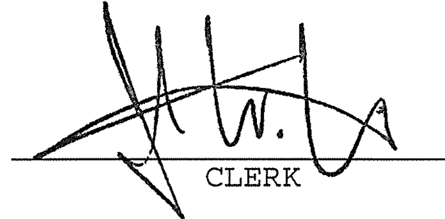
revenues it is holding and all future revenues from the film, unanimously affirmed, with costs.

This interpleader action required the trial court to determine who was entitled to receive monies that Sony holds, and will receive in the future, representing proceeds on the distribution of a 1970's movie entitled Force Ten from Navarone. In determining that plaintiff Navarone Productions, N.V. was entitled to all monies and to future distributions, the trial court based its findings on a fair interpretation of the evidence (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]), especially in light of appellant's scheme with the interpleaded defendants to defraud Sony into wrongfully paying them by failing to notify Sony that appellant had already received full payment under a settlement agreement (*see generally Pecorella v Greater Buffalo Press, Inc.*, 107 AD2d 1064, 1065 [1985]). We find that the court did not err in its evidentiary rulings and that the rulings, regardless of their validity, would not have altered the outcome of the case (*see e.g. Vertical Computer Sys., Inc. v Ross Sys., Inc.*, 59 AD3d 205 [2009]).

We have considered appellant's other contentions and find them unavailing.

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

ENTERED: SEPTEMBER 1, 2009



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SEP 1 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
John W. Sweeny, Jr.
John T. Buckley
James M. Catterson, JJ.

5044
Index 117297/04

x

Slattery Skanska Inc., et al.,
Plaintiffs,

Bombardier Transit Corporation,
Plaintiff-Respondent,

-against-

American Home Assurance Company,
Defendant-Appellant,

Aon Risk Services Companies,
Inc., et al.,
Defendants.

x

Defendant American Home Assurance Company appeals from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered January 3, 2008, which, to the extent appealed from as limited by the briefs, denied its motion for summary judgment dismissing the complaint, granted plaintiffs' motions for partial summary judgment as to coverage and ordered an inquest as to damages.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Steven J. Ahmuty, Jr., Christopher Simone and Gerard S. Rath of counsel), and White Fleischner & Fino, LLP, for appellant.

McKenna Long & Aldridge LLP, New York (Charles E. Dorkey III, Alan F. Kaufman and S. Jane Moffat of counsel), for respondent.

CATTERSON, J.

This action arises out of an accident that occurred on September 27, 2002, in which an AirTrain light rail transit test train derailed in a curve on the aerial guideway that runs between the Howard Beach station and the Federal Circle station near JFK International Airport in Jamaica, Queens.[1] At the time of the accident, the test train, with three cars and no occupants except the train operator, was participating in an acceleration test. When the test train derailed, large concrete slabs that had been placed in the lead car for added weight followed Newton's first law of motion, shifted, and then crushed the train operator against the operator's console. As a result of the accident, the train operator was killed. Furthermore, there was some $16 million in property damage.

In 1997, plaintiffs Slattery Skanska Inc., Perini Corporation, Koch Skanka, Inc., and Skanka (USA), Inc. (hereinafter referred to as "Slattery") and plaintiff Bombardier Transit Corporation (hereinafter referred to as "Bombardier"), formed a consortium known as the Air Rail Transit Consortium

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[1]AirTrain-JFK is owned by the Port Authority of New York and New Jersey. It is designed to be a fully automated, driverless transit system that runs from JFK Airport to Howard Beach for connection to the New York City Transit System and to Jamaica, New York, for connection to the Long Island Railroad and the New York City Transit System.

(hereinafter referred to as "ARTC"). In April 1998, the Port Authority of New York and New Jersey (hereinafter referred to as the "Port Authority") entered into a Design and Build Contract (hereinafter referred to as the "contract") with ARTC for the construction of the AirTrain.

The contract provided for the design, fabrication, installation, testing and demonstration of the track system, guideway superstructure and rail cars of the AirTrain. Slattery was responsible for the construction of the AirTrain infrastructure, including the train stations, power substations and elevated track or guideway. Bombardier was responsible for manufacturing and supplying the train cars, control systems and communication systems, and testing and commissioning of the AirTrain.

The contract contained a comprehensive insurance scheme that required the Port Authority to secure the following insurance policies covering the ARTC members and their suppliers and subcontractors (1) first-party builder's risk insurance "covering the improvements or other [w]ork to be effectuated by the [c]ontractor and the [s]ubcontractors" (2) third-party commercial general liability insurance (3) worker's compensation and employer's liability insurance and (4) excess liability insurance.

The Port Authority initially obtained builder's risk insurance from Reliance Insurance Company. When Reliance became insolvent, the Port Authority placed the policy with defendant American Home Assurance Company (hereinafter referred to as "AHA"), with a policy period of August 15, 2000 to December 31, 2003 (hereinafter referred to as the "AHA Policy").

Bombardier's AirTrain Test and Commissioning Rule Book (hereinafter referred to as the "T&C Rule Book") sets out "operational rules to ensure that the [AirTrain] system is operated safely and efficiently." It describes the relevant testing and commissioning process as follows:

> "The Testing and Commissioning [...] process begins when the first section of the Jamaica - JFK with Howard Beach Light Rail System (AirTrain) is handed over to the Test & Commissioning Organization [...] for the start of test and commissioning. It is complete when the entire Light Rail System is ready for revenue operation [...]
>
> "Typically, Test & Commissioning for each test section begins with the first traction power application in the test section and the subsequent start of vehicle/ATC dynamic testing. Once the section is handed over from construction, any access to that section is under the control of the Test & Commissioning Organization."

Section 12.0 of the T&C Rule Book described the protocol for waiving operating constraints. It states:

> "Waiving of Operating Constraints - If the test involves the waiving of any normal operating constraints (as given in this manual), the Test & Commissioning supervisor or delegate must identify the specific operating constraints to

be waived and the safety precautions to be taken to ensure the safe conduct of such a test."

An attachment to the T&C Rule Book, entitled "Instruction Number: 6 - Waiver of Constraints For Testing" states that the "purpose of this instruction is to ensure the safety of personnel during Test and Commissioning where, due to testing requirements, T&C rules and/or Safety systems are required to be temporarily suspended." It then describes the procedure to follow in the event that a "safety system" is required to be temporarily suspended.

The procedure provides, in pertinent part:

> "5.1 Activity covered by the Work Authorization can only take place provided approval of the Site Safety Engineer, T&C Supervisor and Site Engineering Manager.
>
> "5.2 - Rules and Safety systems temporarily suspended/disabled must be clearly identified.
>
> "5.3 - Alternate Safety measures must be clearly identified and must be in place before the activity can take place.
>
> "5.4 - The waiver can only cover the activity identified under the Permit Number. For each activity a new waiver must be approved and no waiver can cover any similar activity."

The "Waiver of Constraints For Testing" form, which was also attached to the T&C Rule Book, specifically lists the supervisory and management personnel authorized to waive safety constraints. The only three individuals authorized to waive safety constraints

were Safety Engineer Jeremy Jordon, T&C Supervisor Baha Guliter and Engineering Manager Brian Heeney.

It is undisputed that as part of the project's testing and commissioning process, a Power Distribution System Integration Test (hereinafter referred to as the "acceleration test") was required to ensure the safety of future passengers of the AirTrain. The test was designed to calibrate the trip limits of certain transit power substation circuit breakers. It involved the simultaneous starting and accelerating of two trains at maximum throttle, one at the Howard Beach inbound platform and the other at the Lefferts Boulevard inbound platform. The record reflects that it was necessary that the trains accelerate simultaneously, at maximum throttle, in order to achieve a high enough current draw so that the circuit breakers could be calibrated to a level that would be reflective of starting and/or stopping several trains in actual service. The written parameters for the acceleration test, contained within Bombardier's "Power Distribution System Integration Test Procedures," specified that each of the trains involved in the test would have four cars. It also specified that the two trains would accelerate in the same direction in "Automatic Train Control" (hereinafter referred to as "ATC mode").

The record reflects that ATC mode is the mechanism that

physically controls and operates the train in the place of a human operator. The ATC directs the train's starting and stopping and intervals between other trains. The ATC mode also controls the train's rate of acceleration, known as "jerk limiting," so that "the passengers are not thrown around inside the vehicle."

Shortly before the acceleration test, however, a Bombardier systems engineer working offsite at its Canada headquarters advised, in an e-mail, that the test be performed in manual mode. In other words, he advised that a driver control the train with direction from an operations center instead of using the prescribed driverless ATC mode of operation. The e-mail was sent to the three individuals at Bombardier that possessed authority to waive safety constraints.

It is undisputed that Bombardier conducted the test in manual mode. It is also undisputed that Bombardier disengaged the speed governor that limited train speed to 15 mph in manual mode during the acceleration test.[2]

Furthermore, the record is clear that Bombardier ran the trains with two instead of four cars, and, to compensate for the

---

[2]Each car contains a speed governor that prevents the train from exceeding 15 mph in the manual mode. If a train exceeds 15 mph in manual mode, an alarm sounds and automatic brakes apply.

loss, loaded tons of concrete blocks onto the first cars. The slabs were placed unsecured on sheets of plywood in the passenger compartments of each of the loaded vehicles.

Since the transit system was not yet in operation and was designed to be a driverless, fully automated system, neither of the two operators assigned for the test had experience operating on the main line. The operators were normally responsible solely for moving and positioning cars and trains within yards where they operated in manual mode and where the speed governor limited train speed to 15 mph. Although operators were trained to retrieve disabled trains from the main line, such retrievals were performed in manual mode with its 15-mph maximum speed. The operators did not receive any training in operating trains at speed greater than 15 mph.

It is undisputed that no "waiver of constraints" form to conduct the acceleration test in manual mode, with the speed governor disabled or with only two cars loaded with concrete blocks, was ever prepared or approved.

On the morning of September 27, 2002, Bombardier made preparations for the manual acceleration test, which included disabling the speed governors on the two trains. In order to disable the speed governor, a Bombardier employee had to open the driver control panel and disconnect a wire. Then, a technician

prepared each train for manual operation, and the two trains were loaded with concrete blocks for weight.

During the second round of testing, train No. 121 accelerated to approximately 58 mph, entered a curved portion of the guideway with a speed limit of 25 mph and derailed, damaging the train and 150 feet of the noise parapet wall. When the train derailed, the concrete slabs that had been placed in the lead car for added weight shifted and pinned the train operator against the operator's console, severely injuring him. He was transported to a local hospital where he died later that day.

The accident was the subject of investigations by Bombardier, the Port Authority and the National Transportation Safety Board. Each came to the same conclusion: the accident resulted from the driver missing his assigned stopping point, overspeeding into a curved section of the guideway and derailing.

Plaintiffs submitted notices of loss in September 2002 based on Section 10 of the AHA Policy which provides:

> "This policy, subject to the terms, exclusions, limitations and conditions contained herein or endorsed hereon, insures against all risks of direct physical loss of or damage to Insured Property while at the project location, while in offsite storage or while in transit all within the Territorial Limits specified in the policy and during the term of this insurance contract."

"Insured Property" is defined in Section 11(A):

> "This policy insures all material, supplies, machinery, equipment, fixtures, scaffolding, temporary structures, falsework, forms, hoardings, excavations, site preparation and other property of a similar nature owned by the Insured, all of which is to be used in or incidental to the fabrication, erection, or completion of the Project while situated at the Project Location defined in the policy, whether the property of the [i]nsured or property of others for which the insured may be legally liable, subject to the exclusions, limitations, terms and conditions of this Policy and to the extent such values are reported for premium purposes."

In October 2002, AHA reserved its rights. In March 2004, AHA denied coverage based on Section 11(B)(4) of its policy. Specifically, AHA, identified the ATC mode, the speed governor and the waiver of constraints paperwork as supervisory or safety systems that were each deliberately circumvented by Bombardier. Section 11(B), entitled "Extensions of Coverage," provides:

> "Subject to the terms, exclusions, limitations and conditions contained herein or endorsed hereon, this policy also insures:
>
> . . .
>
> "(4) Testing/Commissioning
>
> > "If a specific premium rate has been assigned under this policy for testing/commissioning, then this policy covers testing/commissioning for the specified period as enumerated in this policy.
> >
> > "This policy is extended to cover loss resulting from or caused by Insured Property undergoing performance

testing, commissioning and/or start up runs.

> "For purposes of coverage and premium computation, the performance testing, commissioning and/or start up runs period shall mean and be limited to that period beginning either with the first introduction into the Insured Property of feedstock or other materials for processing or handling or the commencement of supply to a system and continuously thereafter whether or not such testing, commissioning or start up runs is continuous or intermittent and termination on the expiry period of time as provided in the policy.
>
> "The Insured warrants that supervisory or safety systems shall not be deliberately circumvented during such periods, but the Company shall not withhold coverage where it can be reasonably show[n] that the management or supervisory staff was not aware of such situations.
>
> "The foregoing provisions where not otherwise in conflict shall apply to functional tests but not limited to hydrostatic, pneumatic, electrical, mechanical and hydraulic and included in all circumstances without limitations to time period of coverage."

In March 2004, plaintiffs brought this action for damages contending that the accident was covered by the plain language of Sections 10 and 11(a) of the policy. Slattery asserted alternative claims against AON Risk Services Companies, Inc. and AON Hamond & Regine, Inc. (hereinafter referred to as "AON"), in the event that the AHA policy was determined to not provide coverage for Slattery's claims. Bombardier did not assert a claim against AON.

AHA moved for summary judgment arguing, <u>inter alia</u>, that, as

a matter of law, the plaintiffs had breached the warranty in Section 11(b)(4) of the policy prohibiting them from deliberately circumventing "supervisory or safety systems." Subsequently, plaintiffs each moved for partial summary judgment as to coverage, with an inquest on damages to follow. In support, plaintiffs argued, inter alia, that a plain reading of Sections 10 and 11(a) mandates coverage.

AON's motion to dismiss asserted that, in the event the court granted Slattery's summary judgment motion on its coverage claim against AHA, Slattery's alternative claims against AON should be dismissed as moot. AON's motion also raised independent grounds for dismissal of Slattery's claims, including that Slattery lacked standing to sue AON as an additional insured under the policy issued by AHA to the Port Authority.

By an order dated December 17, 2007, the court denied AHA's motion for summary judgment dismissing the complaint and granted the motions of Bombardier and Slattery for partial summary judgment on their causes of action for breach of contract. The court denied as moot AON's motion to dismiss Slattery's alternative claims against AON.

The motion court reviewed the language of Sections 10 and 11(A) of the policy, and concluded that they unambiguously covered the instant accident. Because coverage was provided by

Sections 10 and 11(A), the court determined that Section 11(B)(4) was irrelevant.

Despite the fact that Section 11(B)(4) is entitled "Extensions of Coverage," the court construed AHA's invocation of 11(B)(4) as an argument that 11(B)(4) was an "exclusion" of coverage. It then concluded that any ambiguity in the section would make it insufficient to support a rejection of coverage.

The court then found that the term of the "testing period" was ambiguous, because it commenced when the project received "feedstock" or "supply." The court determined that these terms were lifted from a policy concerning a manufacturing facility and had no meaning here. In order to save the section from having no purpose, the court concluded that 11(B)(4) conferred coverage on the plaintiffs in the event that during a test an accident damaged third party property. As such, it read the section as creating third party liability coverage.

The court further determined that, because the acceleration test could not be conducted using the ATC and speed governor, there could be no basis for excluding coverage for failure to employ those devices during the test in question. Finally, the court rejected Bombardier's argument that AHA's failure to comply with Commercial Division Rule 19-a warranted judgment in insured's favor, finding that denial of the insurer's motion "on

substantive grounds" was sanction enough.

On appeal, AHA contends that the motion court fundamentally misapprehended the nature of first-party property insurance by holding that 11(A) covered damage to Bombardier's own property whereas 11(B)(4) covered damage to the property of third parties. AHA further asserts that it properly rejected coverage for breach of the warranty regarding supervisory and safety systems contained in section 11(B)(4). In support of its argument, AHA points to the undisputed facts that Bombardier disengaged a speed governor on the rail cars and failed to adhere to the required procedure for waiving operating constraints by conducting the acceleration test in "manual mode" with an untrained driver.

Bombardier maintains that the purpose of the policy was to protect it against *any* physical damage to the project, prior to its completion. In support of its argument, Bombardier points to the language in Section 10 of the policy which expressly insures against "all risks of direct physical loss of or damage to Insured Property." While acknowledging that the protection offered in Section 10 applies only to "Insured Property," Bombardier contends that "all material, supplies, machinery, equipment, fixtures [...]" are included in the definition of insured property, and receive the protection set forth in Section 10.

Bombardier claims that Section 11(B)(4) has no application to the rest of the policy. Indeed, Bombardier argues that the section appears to have been "cut and pasted" from an inapposite policy and placed here, where it has no applicability at all. Its only possible meaning, according to Bombardier, is to either add a coverage for third-party liability in the event of a testing accident, or to extend coverage beyond completion of the work, but only to damage caused by testing.

Alternatively, Bombardier asserts that Section 11(B)(4) is ambiguous and should be interpreted against AHA. Bombardier challenges AHA's interpretation of "deliberate circumvention of supervisory or safety systems" arguing that (1) the terms "deliberate circumvention" and "supervisory or safety systems" are ambiguous (2) the ATC mode of vehicle operation and speed governor are not supervisory or safety systems and (3) completion of the waiver of constraints, a Bombardier form, was not required by the policy and, in any case, Bombardier identified the increased safety risks and implemented alternative safety measures.

As a preliminary matter, the motion court did not improvidently exercise its discretion in refusing to decide the competing summary judgment motions in Bombardier's favor solely

because of AHA's failure to comply with Commercial Division (22 NYCRR 202.70) Rule 19-a regarding the statement of uncontroverted material facts. See Holtz v Rockefeller & Co. Inc., 258 F3d 62, 72-74 (2d Cir 2001).

We find that the AHA policy is not a liability policy, but a first party casualty insurance policy. The sole purpose of the AHA policy was to insure certain property from physical harm. This purpose is plainly spelled out in Section 10 of the policy. That section states that the insurance is for "physical loss of or damage to Insured Property," not for any liability or claim asserted by a third party. Accordingly, the motion court's conclusion that Section 11(B)(4) only covered damage to the property of third parties during testing and commissioning was fundamentally flawed.

We further conclude that the motion court erroneously determined that Sections 10 and 11(A) govern plaintiffs' claim for property damage arising from the acceleration test. Instead, it is clear that Section 11(B)(4) controls the claim.

It is undisputed that Section 10 provides coverage subject to Section 11(A). Section 11(A) states that "insured property" is "material, supplies, machinery, equipment, fixtures, scaffolding, temporary structures, falsework, forms, hoardings, excavations, site preparation and other property of a similar

nature." Moreover, the listed property was modified by the phrase, "all of which is to be used in or incidental to the fabrication, erection, or completion of the Project." Accordingly, "Insured Property" within the meaning of Sections 10 and 11(A) referred to materials "used in or incidental to" the construction of something, not the completed structure.

Because the property damaged in the accident (the rail cars and guideway) had already been fabricated, and was not "used in or incidental to" such fabrication, it cannot be considered "insured property" under Sections 10 and 11(A). Once construction was complete and the segment had been turned over to Bombardier for testing/commissioning, coverage was available only through the "extensions" of coverage found in 11(B)(4). Any other interpretation would render Section 11(B)(4) meaningless, and obscure its intended place and usefulness in the AHA Policy. See Jefferson Ins. Co. Of N.Y. v. Travelers Indem. Co., 92 N.Y.2d 363, 370, 681 N.Y.S.2d 208, 212, 703 N.E.2d 1221, 1225 (1998) (rejecting interpretation of policy that "fails to give the provision meaning").

Moreover, contrary to the motion court's determination, we find that the first condition of the applicability of Section 11(B)(4) was satisfied: a premium rate was applied to the AHA policy for testing and commissioning. The record demonstrates

that the premium charged by AHA for the replacement Builder's Risk policy specifically included a charge earmarked for "testing and commissioning." In any event, Bombardier admitted in its complaint that "the Port Authority paid additional premiums to AHA to extend coverage [...] to the testing and commissioning phase" of the project.

We further conclude that the motion court erroneously determined that section 11(B)(4), if applicable at all, was not a warranty. In Section 11(B)(4), Bombardier "warrants" it would not deliberately circumvent any supervisory or safety systems during the testing period. The section manifestly is a warranty because it begins: "the Insured *warrants* that [...]" (emphasis added). See Star City Sportswear v. Yasuda Fire & Mar. Ins. Co. of Am., 1 A.D.3d 58, 61-62, 765 N.Y.S.2d 854, 857 (1st Dept. 2003), aff'd, 2 N.Y.3d 789, 781 N.Y.S.2d 255, 814 N.E.2d 425 (2004). This plain language confirms the parties' intent to require as a "condition precedent [...] the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract." See Insurance Law § 3106(a).

The central issue in this case is whether, as a matter of law, Bombardier breached the warranty in Section 11(B)(4) of the

AHA policy by (1) deactivating ATC mode, (2) operating the train in manual mode with the speed governor disengaged and (3) failing to comply with the waiver of constraints procedure.

For the reasons set forth below, we find that there is no question that Bombardier deliberately circumvented "safety systems" within the meaning of the policy. Not only is it undisputed that Bombardier deliberately disconnected a wire in the driver control panel in order to disengage a speed governor, but it is also undisputed that Bombardier disregarded the procedure for waiving specific operating constraints.

It is well settled that contracts of insurance are "to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." <u>Breed v. Insurance Co. of N. Am.</u>, 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 355, 385 N.E.2d 1280, 1282 (1978) (internal quotation marks and citation omitted). The best evidence of what the parties to an agreement intended is the language of the agreement itself (<u>See Greenfield v. Phillies Records</u>, 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 569, 780 N.E.2d 166, 170 (2002)), especially where, as here, the parties to the insurance policy were sophisticated commercial entities.

Courts "may not disregard clear provisions which the insurers inserted in [an insurance policy] and the insured

accepted." Caporino v. Travelers Ins. Co., 62 N.Y.2d 234, 239, 476 N.Y.S.2d 519, 521, 465 N.E.2d 26, 28 (1984). Where the provisions of the policy "are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement." See United States Fid. & Guar. Co. v. Annunziata, 67 N.Y.2d 229, 232, 501 N.Y.S.2d 790, 791, 492 N.E.2d 1206, 1207 (1986) (internal quotation marks and citations omitted). "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." Vermont Teddy Bear, Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 768, 807 N.E.2d 876, 879 (2004) (internal quotation marks and citations omitted).

Whether a contractual term is ambiguous must be determined by looking within the four corners of the document and not to extrinsic sources. Kass v. Kass, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 356, 696 N.E.2d 174, 180 (1998). Extrinsic evidence cannot be used to create an ambiguity in an agreement, but only to resolve an ambiguity. Kass, 91 N.Y.2d at 568, 673 N.Y.S.2d at 357. That one party to the agreement may attach a particular, subjective meaning to a term that differs from the term's plain

meaning does not render the term ambiguous. See Moore v. Kopel, 237 A.D.2d 124, 125, 653 N.Y.S.2d 927, 929 (1st Dept. 1997).

When the terms and conditions of an insurance policy are clear and unambiguous, the construction of the policy presents a question of law to be determined by the court (Town of Harrison v. National Union Fire Ins. Co. of Pittsburgh, Pa., 89 N.Y.2d 308, 653 N.Y.S.2d 75, 675 N.E.2d 829 (1996), and the court may properly grant summary judgment. See Hartford Acc. & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 172, 350 N.Y.S.2d 895, 898, 305 N.E.2d 907, 909 (1973) (in insurance coverage cases, summary judgment is appropriate where there is no relevant evidence extrinsic to an insurance policy, such as questions of credibility or inferences to be drawn).

Here, although the term "circumvent" is not specifically defined in the policy, the lack of a definition does not, in and of itself, mean that the word must be ambiguous. Bombardier argues that the term "circumvent" means "to get the better of or prevent from happening by craft or ingenuity." That, of course, is not the only meaning of "circumvent." Indeed, AHA cites another dictionary definition of "circumvent" that is, "to bypass."

Bombardier's definition of "circumvent" is not only nonsensical when viewed within the parameters of this dispute but

reduces the section to a nullity, giving it no comprehensible meaning at all. In context, there can be no question that the plain meaning of circumvent intended by the policy is to bypass or avoid.

Similarly, the phrase "safety system," also undefined in the policy, is unambiguous. Construing the phrase according to common usage, a "safety system" implies a combination of parts forming a unitary whole that is designed to prevent danger, risk or injury. Merriam Webster's Collegiate Dictionary, at 1030, 1197 (10th ed. 1995).

This definition is consistent with the definition of "system" supplied by Bombardier. Bombardier, citing its Safety Certification Program Plan, defines "system" as:

> "A composite of people (employees, passengers, others), property (facilities and equipment), environment (physical, social, institutional), and procedures (standard operating, emergency operating and training) which are integrated to perform a specific operational function in a specific environment."[3]

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[3]Both sides acknowledge that this definition derives from the Military Safety Standard 882C which the contract required Insured to use. That standard states:

> "System: A composite, at any level of complexity, of personnel, procedures, materials, tools, equipment, facilities and software. The elements of this composite entity are used together in the intended operational or support environment to perform a given task or achieve a specific purpose, support, or mission requirement."

The record clearly reflects that Bombardier's "safety system" consisted of various component parts including but not limited to: (1) the waiver of operating constraints *and* (2) a train operating in ATC mode without a driver on board *or* a train operating in manual mode with a properly trained driver on board with the speed governor engaged. In other words, these "parts" combined to form a unitary whole that was designed to prevent danger, risk or injury. Even Bombardier's driving trainer testified that a speed governor was part of the train's "overall safety system."

Bombardier's testing protocols, listed in its Test Procedures manual, mandated that the acceleration test be conducted in ATC mode. By deactivating "ATC mode," placing the train in manual mode, disengaging the speed governor, and placing a driver on board who lacked the requisite training to operate the train at high speed, Bombardier "deliberately circumvented" all of the components of the "safety system" thereby eviscerating the "safety system" in its entirety.

Indeed, it is undisputed that had the speed governor not been disabled, the train would not have derailed: the driver would not have been able to speed through the 25 mph turn at 58 mph as the speed governor would not have allowed the train to

exceed 15 mph. Accordingly, there can be no doubt that Bombardier's failure to comply with the warranty materially increased the risk of loss. See M. Fabrikant & Sons v. Overton & Co. Customs Brokers, 209 A.D.2d 206, 618 N.Y.S.2d 294 (1st Dept. 1994) (a breach of warranty that materially increases the insurer's risk will support rejection).

Bombardier asserts that it could not perform the test in manual mode with the speed governor engaged and that it was necessary to perform the test under alternate conditions to ensure the safety of future passengers of the AirTrain.[4] Essentially, Bombardier asserts that if AHA's interpretation of the policy is accepted, the very purpose of procuring the policy would be frustrated. We disagree.

Bombardier disengaged the ATC mode and then physically disabled the speed governor. It then permitted the train to be operated at almost 60 mph around a 25 mph curve by a driver who had no training above 15 mph operation. Even if, viewing the evidence in the light most favorable to the plaintiffs, we accept that these measures were necessary in order to conduct the acceleration test, Bombardier was nevertheless required to complete the waiver of operating constraints.

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[4]AHA asserts that the test could, and was designed to, be conducted in ATC mode.

Indeed, the waiver of operating constraints is itself a "supervisory or safety system" within the meaning of the policy. It was a composite of personnel and procedures used together to achieve a specific purpose. In other words, the waiver ensured that proper safety precautions were taken before a test begins when the operating constraints have been modified. Moreover, the waiver requires the project supervisors to be aware of, and consulted on, any modifications of the operating constraints.

Bombardier asserts that "[t]he waiver of constraints is a document prepared [...] only in circumstances where there is a departure from normal operating constraints," but that no such departure occurred for this test. That representation is not only preposterous, but it is patently contradicted by the record, which dictates that the normal operating constraints for the acceleration test was the ATC mode. Moreover, Bombardier cannot seriously contend that "[i]t is not a departure from normal operating constraints to operate in manual mode with the speed governor deactivated" when it had to physically open the hostler panel and disconnect a wire in order to disable the speed governor.

We also reject Bombardier's argument that evidence that the waiver of constraints requirement was, in substance, satisfied because the three Bombardier employees authorized to sign the

waiver of constraints form took alternative safety measures. The policy does not say that "some" supervisory or safety systems shall not be deliberately circumvented. Nor does the policy state that Section 11(B)(4) is inapplicable if other safety measures are instituted in place of the speed governor.

It is clear that an insurance company issues a policy pursuant to a calculated risk. Here, AHA entered the agreement with the bargained-for expectation that Bombardier would not "deliberately circumvent" any "supervisory or safety systems" during the testing and commissioning process. Bombardier's failure to comply with the waiver of constraints procedure is not a matter of "form over substance" because Bombardier's decision to ignore the waiver clearly elevated the risk that AHA was willing to underwrite.

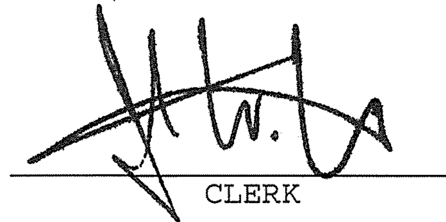
Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered January 3, 2008, which, to the extent appealed from as limited by the briefs, denied defendant AHA's motion for summary judgment dismissing the complaint, granted plaintiffs' motions for partial summary judgment as to coverage and ordered an inquest as to damages, should be reversed, on the law, with costs, defendant AHA's motion granted,

plaintiffs' motions denied, and the direction for an inquest vacated. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: SEPTEMBER 1, 2009



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