SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 21, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, Renwick, Manzanet-Daniels, JJ.

1441 The People of the State of New York, Ind. 10/05
Respondent,

-against-

Feliberto Felipe,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

Judgment, Supreme Court, New York County (Michael Ambrecht, J.), rendered on or about January 6, 2006, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JANUARY 21, 2010

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2016 The People of the State of New York, Ind. 3044/06
Respondent,

-against-

Luis Ortiz,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Cleary Gottlieb Steen & Hamilton LLP, New York (Kristen M. Santillo of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered December 12, 2007, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, unanimously reversed, on the law and as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

On cross-examination of defendant, the prosecutor improperly attempted to impeach defendant with his supposed dishonesty in initially entering pleas of not guilty in prior cases followed by allegedly belated pleas of guilty (*see People v Garcia*, 169 AD2d 358, 361-364 [1991], *lv denied* 79 NY2d 857 [1992]). As in *Garcia*, "the tenor of the prosecutor's questioning of the defendant could not help but mislead the jury concerning the true

import of defendant's prior pleas of not guilty," which were not the equivalent of "factual assertion[s] of innocence" (*id.* at 361). This questioning not only tended to draw an improper inference of dishonesty, but also violated the court's *Sandoval* ruling, which only permitted elicitation of the existence of defendant's prior convictions. As counsel specifically argued, and as the court itself had initially agreed, defendant's simple mention on direct examination that he had pleaded guilty in one of his previous cases did not open the door to any questioning going beyond the *Sandoval* ruling. This casual remark cannot be viewed as suggesting to the jury that defendant's failure to plead guilty in the case on trial was some proof of innocence. To the extent that defendant went on to discuss his motivation for entering guilty pleas in other cases, and the timing of such pleas, this was entirely the product of the prosecutor's improper line of cross-examination, which delved into whether defendant's practice was to "step up and take responsibility," and then attacked him for not doing so at the inception of each of his prior cases.

The prosecutor also erred when, on cross-examination of defendant, he introduced a mugshot of defendant's nontestifying girlfriend and repeatedly referred to her criminal history. This evidence was totally irrelevant, notwithstanding the prosecutor's

meritless argument that the girlfriend's recent arrest tended to support a missing witness inference in that it somehow related to defendant's ability to locate her. This evidence had no purpose but to suggest that defendant was associated with a disreputable person (*see People v Cheatham*, 158 AD2d 934, 935 [1990]).

Additionally, during summation, the prosecutor engaged in a an impermissible, prejudicial pattern of conduct (*see e.g. People v Bowie*, 200 AD2d 511, 513 [1994] *lv denied* 83 NY2d 869 [1994]), including extensive use of defendant's prior record as evidence of criminal propensity, along with comments that defendant "knows he did it," and that he was waiting for the jury to "give him his razor back and let him walk out the door." Although none of defendant's challenges to the prosecutor's summation are preserved, we exercise our discretion to review them in the interest of justice.

The cumulative effect of the prosecutor's cross-examination and summation errors deprived defendant of a fair trial (*see People v Calabria*, 94 NY2d 519, 523 [2000]). This case turned on a question of credibility, in which defendant claimed that the incident was an altercation rather than a home invasion, and the evidence was not so overwhelming as to render the misconduct harmless.

In view of this determination, we do not reach any other issues.

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

ENTERED: JANUARY 21, 2010

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2017 Coldwell Banker Hunt Kennedy, Index 112601/07
Plaintiff-Respondent,

-against-

Howard L. Wolfson, et al.,
Defendants-Appellants.

Davidoff Malito & Hutcher LLP, New York (Mark E. Spund of counsel), for appellants.

Law Offices of Bryan W. Kishner & Associates, New York (Brian W. Kishner of counsel), for respondent.

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered July 14, 2008, in an action to recover a real estate brokerage commission, awarding plaintiff damages pursuant to an order, same court and Justice, entered July 1, 2008, which granted plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, the judgment vacated and the motion for summary judgment denied.

Defendant Wolfson's affidavit raises issues of fact as to, inter alia, whether the e-mail exchanges relied on by plaintiff, which admittedly reflect agreement as to the selling price and commission rate, were intended by the parties to constitute the entire brokerage agreement; whether the parties also agreed, orally, that payment of the agreed-to commission was conditioned on a closing actually taking place; and whether defendants willfully defaulted on their contract of sale with the

prospective purchaser or otherwise prevented the closing from taking place (*see Graff v Billet*, 64 NY2d 899 [1985]).

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

ENTERED: JANUARY 21, 2010

DEPUTY CLERK
CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2019 In re Abraham P. and Another,

Children Under the Age of
Eighteen Years, etc.,

Violeta J.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Michael S. Bromberg, Sag Harbor, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about December 10, 2008, which placed appellant's children in the custody of their nonparty father, with supervision for a period of 12 months, upon a February 2007 fact-finding determination that appellant had abused her infant son, causing his death, and derivatively abused the subject children, unanimously affirmed, without costs.

Petitioner agency established, by a preponderance of the evidence through the testimony of the medical examiner, that appellant's four-month-old son died of asphyxiation when a coin lodged in his airway, and that the infant was too young to have been able to pick up the coin himself. The autopsy also revealed that the infant had suffered at least one previous anoxic event.

It was undisputed that the baby was in appellant's exclusive care on both occasions.

Appellant failed to sustain her burden of rebutting the evidence of her culpability and the court properly drew the strongest negative inference from her failure to testify (*see Matter of Nicole H.*, 12 AD3d 182, 183 [2004]). Contrary to her claim, there was sufficient evidence that appellant derivatively abused the subject children in light of the fact that -- at best -- she took no action to assist the baby on more than one occasion when he was unable to breathe while in her exclusive care (*see Matter of Vincent M.*, 193 AD2d 398, 404 [1993]).

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

ENTERED: JANUARY 21, 2010

DEPUTY CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2020 Michael G. Pipero, Jr., Index 17478/04
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Birbrower & Beldock, P.C., New City (Jeffrey B. Saunders of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 16, 2009, which, in an action for personal injuries allegedly sustained as a result of a slip and fall on snow and ice, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing that plaintiff fell during a storm in progress by submitting certified weather records showing that snow began the day before plaintiff's accident and, while the intensity decreased, continued through the end of the day of plaintiff's fall (*see Pippo v City of New York*, 43 AD3d 303, 304 [2007]; *Powell v MLG Hillside Assoc.*, 290 AD2d 345 [2002]).

In opposition, plaintiff raised a triable issue of fact as to whether a storm was in progress at the time of the accident based on his deposition testimony that it had not snowed on the

day of his accident and that the snow had existed since the previous day (*see Mosley v General Chauncey M. Hooper Towers Hous. Dev. Fund Co., Inc.*, 48 AD3d 379, 380 [2008]). Plaintiff also raised a triable issue of fact as to whether the weather reports clearly indicate that the accident occurred while the storm was still in progress or whether there was a significant lull in the storm (*see Powell*, 290 AD2d at 346; *compare Ioele v Wal-Mart Stores*, 290 AD2d 614, 616 [2002]).

Furthermore, even if a storm was in progress at the time of the incident, plaintiff's testimony and defendant's own records raise issues of fact as to whether defendant gratuitously and negligently performed snow and ice removal operations and as to whether its failure to place sand or salt on the stairs created or exacerbated a dangerous condition (*see Sanchez v City of New York*, 48 AD3d 275 [2008]; *Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 337-338 [2004]).

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

ENTERED: JANUARY 21, 2010

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2021 Christina Hernandez, Index 101891/05
Plaintiff-Appellant,

-against-

Pace Elevator Inc.,
Defendant-Respondent,

Schindler Elevator Corporation,
Defendant.

Oshman & Mirisola, LLP, New York (David L. Kremen of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Larry H. Lum of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered October 8, 2008, which granted defendant Pace Elevator Inc.'s motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The IAS court providently exercised its discretion in denying plaintiff's request for spoliation sanctions. There is no evidence that Pace refused to obey an order for disclosure or that it wilfully failed to disclose the contract at issue and any records of five-year tests. There is also no evidence that Pace destroyed the missing documents. Indeed, Pace's president testified that it searched for the missing documents, but could not find them. Under such circumstances, spoliation sanctions are not warranted (*see Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 526 [2009]).

Because Pace's president sufficiently explained the unavailability of the contract and established that Pace did not lose it in bad faith, the IAS court properly determined that secondary evidence could be utilized to determine the terms of the lost contract (*see generally Schozer v William Penn Life Ins. Co.*, 84 NY2d 639, 643-644 [1994]). Although Pace's president could not recall all of the details of the contract, his deposition testimony and affidavit were sufficient to warrant summary judgment in Pace's favor, particularly since the City never disputed the existence or terms of the contract. Furthermore, plaintiff failed to present any evidence to raise an issue of fact as to whether Pace had a duty to maintain or repair the elevators.

Contrary to plaintiff's contention, this Court may review Pace's argument that it did not owe plaintiff a duty of care. Indeed, the legal argument is based on facts in the record and could not have been avoided by plaintiff had it been raised below (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]). Moreover, the IAS court addressed the issue in its order. As the IAS court noted, a service contractor does not owe a non-contracting third party a duty of care, and none of the exceptions to this rule apply in this case (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Contrary to Pace's contention, the IAS court properly

determined that Pace's contract with the City was not so comprehensive and exclusive as to displace the City's obligations to maintain the elevators in a safe condition (*see Fernandez v Otis Elevator Co.*, 4 AD3d 69, 73 [2004]).

The IAS court also properly determined that plaintiff's expert affidavit failed to raise an issue of fact as to whether Pace launched a force or instrument of harm by failing to exercise reasonable care in the performance of its duties. The expert's opinion that Pace was negligent for giving the subject elevator a satisfactory rating in October 2003 despite the fact that a five-year test had not been performed, was based on mistaken facts, namely that plaintiff's accident occurred in April 2004, not April 2003. The IAS court also properly discounted the expert's suggestion that Pace was negligent for failing to remove the elevator from service until a five-year test was completed. The expert's opinion is without factual support since there is no evidence that Pace had the authority, or was required, to shut an elevator down due to an overdue five-year test. Moreover, the expert never identified a specific cause of the accident. Where, as here, an expert's affidavit is "vague, conclusory and factually unsupported," it fails to raise an issue of fact as to the elevator company's liability (*Kleinberg v City of New York*, 27 AD3d 317, 317-318 [2006]; *see also Karian v G & L Realty, LLC*, 32 AD3d 261, 262-263 [2006]).

Contrary to plaintiff's contention, the expert's conclusory assertion that it is industry-wide practice to remove an elevator from service until it passes a five-year test failed to raise an issue of fact as to Pace's negligence (*see Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]).

The IAS court properly determined that the doctrine of res ipsa loquitur does not apply in this case. The record indicates that Pace did not have exclusive control over the elevators at the time of plaintiff's accident (*see generally Karian*, 32 AD3d at 263-264). Indeed, the City's employees testified that only the City was responsible for maintaining and repairing the elevators.

Even if Pace owed plaintiff a duty of care, there is no evidence that it created or had notice of a defective condition (*see Clark v New York City Hous. Auth.*, 7 AD3d 440 [2004]), or that any negligence on its part was a substantial factor in causing plaintiff's accident (*see Karian*, 32 AD3d at 262).

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

ENTERED: JANUARY 21, 2010

David Spolony

DEPUTY CLERK
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Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2022 Jack Levine, Index 100463/04
Plaintiff-Appellant,

-against-

Pita Grill II,
Defendant-Respondent.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Law Offices of Andrew J. Spinnell, LLC, New York (Andrew J. Spinnell of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 24, 2008, which, in an action for personal injuries sustained on defendant's premises, granted defendant's motion to dismiss the complaint for lack of jurisdiction, unanimously reversed, on the law, with costs, the motion denied, and the complaint reinstated.

It is undisputed that plaintiff incorrectly named Pita Grill II, a nonexistent entity, as defendant in the original summons and complaint, and that plaintiff never effected proper service on the intended defendant, Pita Grill II Inc., within the applicable three-year statute of limitations. However, any limitations defense was waived by Pita Grill II Inc.'s failure to raise it in either the preanswer motion it made to vacate the default judgment that plaintiff had obtained against Pita Grill II and dismiss the action for failure to serve process in

accordance with CPLR 311(a)(1), or in the answer Pita Grill II Inc. served pursuant to the stipulation in which it agreed to waive all jurisdictional defenses and plaintiff agreed to vacate the default judgment (CPLR 3211[e]). Such stipulation, by its plain terms, also waived the defense, apparently accepted by the motion court, that service of process was never properly made on a corporate officer of Pita Grill II Inc. in accordance with CPLR 311(a)(1).

To the extent Pita Grill II Inc. argues that the stipulation was signed on behalf of the nonentity Pita Grill II, not Pita II Grill Inc., the argument lacks merit. After obtaining a default judgment against the nonentity Pita Grill II, plaintiff levied on assets owned by an entity known as Pita Grill Northeast LLC. The latter, moving by order to show cause, successfully stayed such levy; in the same order to show cause, Pita Grill II Inc., represented by Andrew J. Spinnell Esq., who described himself as "the attorney for Intervenor herein Pita Grill II Inc. s/h/a Pita Grill II," moved to vacate the default judgment so that it might defend the action on the ground that it was never properly served with process in accordance with CPLR 311(a)(1). The parties then entered into the stipulation in which plaintiff agreed to vacate the default judgment and defendant agreed to interpose an answer within 20 days and waive all jurisdictional defenses. Although the stipulation bore the original caption naming Pita Grill II as

the defendant, it was executed by attorney Spinnell, identified as "counsel for defendants." Pita Grill II, a nonentity, could not have agreed to anything.

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

ENTERED: JANUARY 21, 2010

DEPUTY CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2023 In re Patrick Pryce, Petitioner, Index 114511/08

-against-

New York City Housing Authority, Respondent.

Silberman Law Firm, New York (Martin N. Silberman of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Samuel Veytsman of counsel), for respondent.

Determination of respondent New York City Housing Authority, dated July 2, 2008, which terminated petitioner's employment as a motor vehicle operator, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Walter B. Tolub, J.]), entered January 7, 2009, dismissed, without costs.

The findings that petitioner committed misconduct by driving agency vehicles unsafely, sleeping while on duty, and failing to report an arrest are supported by substantial evidence, including the testimony of petitioner's co-workers and supervisors (*see Matter of Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 [1974]). The penalty of termination of employment does not shock

our sense of fairness (*see Matter of Kocur v Erie County Water Auth.*, 9 AD3d 910, 911 [2004], *lv denied* 4 NY3d 703 [2005]; *Matter of Malloch v Ballston Spa Cent. School Dist.*, 249 AD2d 797, 800 [1998], *lv denied* 92 NY2d 810 [1998]; *Matter of Smith v Board of Educ. of City School Dist. of City of Kingston*, 125 AD2d 813, 813 [1986]; Matter of *Marsh v Hanley*, 50 AD2d 687, 687-688 [1975]).

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

ENTERED: JANUARY 21, 2010

DEPUTY CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2024 511 9th LLC, Index 650225/08
Plaintiff-Appellant,

-against-

Credit Suisse USA, Inc., et al.,
Defendants-Respondents.

Richard J. Migliaccio, New York, for appellant.

Duval & Stachenfeld LLP, New York (Brian A. Burns of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 10, 2009, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the promissory estoppel and equitable estoppel causes of action, unanimously affirmed, with costs.

The documentary evidence "conclusively refutes" plaintiff's allegations that it reasonably and detrimentally relied on oral assurances by defendants that they intended to close the financing agreement (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). The Term Sheet entered into among the parties expressly provides that the summary of terms "should not be construed to constitute a commitment to lend" and that "no binding agreement shall exist until" final loan documents have been executed and delivered by all parties (*see Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 179-180 [2007]; *Prospect St. Ventures I, LLC v Eclipsys*

Solutions Corp., 23 AD3d 213, 214 [2005]). In addition, the Term Sheet lists about 20 conditions precedent to closing and provides that defendants' obligation to close was "subject to there being, in the sole opinion of the Lender, no material adverse change in the conditions prevailing in the syndicated debt market [or] the real estate capital markets." The complaint does not allege that the conditions precedent were satisfied or contradict defendants' assertion that they determined not to proceed due to an adverse change in the syndicated debt market. In light of the foregoing, plaintiff could not reasonably have relied on any alleged representations by defendants.

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

ENTERED: JANUARY 21, 2010

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2026 The People of the State of New York, Respondent,

-against-

Benjamin Kelly, Defendant-Appellant. Ind. 4411/02

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Craig A. Ascher of counsel), for respondent.

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about September 12, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence supports the court's assessment of 15 points under the risk factor for history of drug or alcohol abuse. Defendant identified himself to the Department of Correctional Services as a person in need of treatment for a substance abuse problem, and not merely a casual user of drugs and alcohol, and this admission led to his placement in a substance abuse program (*see People v Schlau*, 60 AD3d 529 [2009], *lv denied* 12 NY3d 712 [2009]). Defendant's present explanations for his acknowledgment of substance abuse are speculative. Defendant also relies on the report of a defense psychiatrist

that was prepared at the time of defendant's 2002 sentencing on the underlying sex crime conviction. However, those portions of the report minimizing defendant's use of drug and alcohol are based entirely on defendant's statements, which were self-serving, ambiguous, and inconsistent with contemporaneous statements defendant made to the probation officer who prepared the presentence report.

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

ENTERED: JANUARY 21, 2010

CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2027 The People of the State of New York, Ind. 226/96
Respondent,

-against-

Darryl Robinson,
Defendant-Appellant.

Patrick Joyce, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgment, Supreme Court, New York County (Bernard J. Fried, J. at plea, Carol Berkman, J. at sentence), rendered October 22, 2008, convicting defendant of robbery in the first degree and burglary in the first degree, and sentencing him to concurrent terms of 10 to 20 years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment, made on the ground of delay in sentencing (*see* CPL 380.30[1]; *People v Drake*, 61 NY2d 359, 364-367 [1984]. The 11-year delay between plea and sentence was "attributable almost entirely to defendant's conduct" (*People v Maldonado*, 52 AD3d 344, 345 [2008], *lv denied* 11 NY3d 790 [2008]).

Defendant concedes that he was initially responsible for the delay because he failed to appear for sentencing in 1997. However, he argues that the People had opportunities to produce him when he was arrested in New Jersey in 1999 and in Pennsylvania in 2005, but they failed to do so, and should

therefore be charged with all the subsequent delay. We reject this argument, because after his brief incarcerations in those states defendant remained at large and continued to disregard his legal duty to present himself for sentencing in New York (*see id.*). In any event, with respect to the New Jersey arrest, there is no evidence that law enforcement authorities in New York learned of it until after defendant had already been released and had absconded again. With respect to the Pennsylvania arrest, the People made reasonable efforts to bring defendant to New York by way of a prompt request for extradition, but never had a reasonable opportunity to follow up on that request because, after only 10 days in custody, defendant yet again was released and absconded.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 21, 2010

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2029 Felix Rios, et al., Index 17200/06
Plaintiffs-Appellants,

-against-

Gristedes Delivery Service Inc., et al.,
Defendants,

Premier Carting of New York,
Defendant-Respondent.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellants.

Baxter Smith & Shapiro, P.C., Hicksville (Dennis S. Heffernan of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 24, 2008, which, in an action for personal injuries, granted the motion of defendant Premier Carting of New York for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

"Where the evidence as to the cause of the accident which injured plaintiff is undisputed, the question as to whether any act or omission of the defendant was a proximate cause thereof is one for the court and not for the jury" (*Rivera v City of New York*, 11 NY2d 856, 857 [1962]; *Lee v New York City Hous. Auth.*, 25 AD3d 214 [2005], *lv denied* 6 NY3d 708 [2006]). Here, the evidence shows that plaintiff's injury was caused by his decision to climb into a smaller dumpster that was elevated and resting on a forklift's blades in order to grab bags of garbage and place

them into a larger dumpster owned and serviced by defendant Premier Carting. That the larger dumpster had a gate that would have made the elevation unnecessary, but was rendered inaccessible by the placement of that dumpster against a storage container, did not create liability on defendant's part, especially in light of the uncontradicted testimony of Premier Carting's president that it did not determine the location of its dumpster, but rather that it was dictated by an employee of the property owner (*see Baker v Sportservice Corp.*, 142 AD2d 991, 992 [1988]; *see also Vazquez v Sea-Land Serv.*, 236 AD2d 321 [1997]). Furthermore, plaintiffs failed to demonstrate that any circumstances exist under which Premier Carting, a contractor, owed a duty of care to them (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Sakai-Figurny v Irastan, LLC*, 67 AD3d 985 [2009]).

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

ENTERED: JANUARY 21, 2010

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2030 John A. Morgan, Index 17020/05
Plaintiff-Respondent,

-against-

Juan Cruz Candia, et al.,
Defendants-Appellants,

Superior Sales & Services, Inc.,
Defendants.

O'Connor Redd LLP, White Plains (Amy L. Fenno of counsel), for appellants.

Wingate, Russotti & Shapiro LLP, New York (William P. Hepner of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 10, 2009, which, insofar as appealed from as limited by the brief, in an action for personal injuries arising out of a motor vehicle accident, denied defendants Juan Cruz Candia and American Secured Fencing Corp.'s motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of said defendants dismissing the complaint as against them.

The court properly accepted plaintiff's untimely papers in opposition to defendants' motion, as defendants did not suffer

any prejudice (*see Matter of Jordan v City of New York*, 38 AD3d 336, 338 [2007]; *Dinnocenzo v Jordache Enters.*, 213 AD2d 219 [1995]).

Viewing the evidence in the light most favorable to plaintiff, and allowing for the circumstance that he was unable to provide an explanation for the rear-collision accident, we find that plaintiff has not shown facts and conditions from which it may reasonably be inferred that defendants bore any fault for the accident (*see Morales v Morales*, 55 AD3d 306 [2008]; *Somers v Condlin*, 39 AD3d 289 [2007]; *Black v Loomis*, 236 AD2d 338 [1997]).

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

ENTERED: JANUARY 21, 2010

DEPUTY CLERK
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Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2031 In re Leonard Wright, etc., Index 116544/08
Petitioner,

-against-

Raymond W. Kelly, etc., et al.,
Respondents.

Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel) for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

Determination of respondent Police Commissioner, dated October 6, 2008, which found petitioner guilty of discourtesy to a police sergeant and imposed a forfeiture of 15 vacation days, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Eileen A. Rakower, J.], entered April 10, 2009), dismissed, without costs.

Substantial evidence, including eyewitness testimony, supports the hearing officer's finding of guilt (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). In light of petitioner's disciplinary record and the fact that the act of discourtesy occurred in the presence of at least two other sergeants, the penalty does not shock our

conscience (*see Matter of Kelly v Safir*, 96 NY2d 32, 39-40[2001]; *Matter of Sanders v Safir*, 284 AD2d 163 [2001]).

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

ENTERED: JANUARY 21, 2010

DEPUTY CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2032 In re Jacquelyn E. Jackson, Index 407225/07
Petitioner-Appellant,

-against-

N.Y.S. Division of Human Rights, et al.,
Respondents-Respondents.

Jacquelyn E. Jackson, appellant pro se.

Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered on or about April 15, 2008, which denied the petition and dismissed the proceeding brought to annul the determination of respondent New York State Division of Human Rights (DHR), dated September 28, 2007, finding no probable cause to believe that respondent Retail Brand Alliance, Inc. had engaged in discriminatory employment practices, unanimously affirmed, without costs.

Dismissal of the proceeding was appropriate since it was brought more than 60 days after service of DHR's determination (*see* Executive Law § 298; *Matter of Gil v New York State Div. of Human Rights*, 17 AD3d 365 [2005]).

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

ENTERED: JANUARY 21, 2010

DEPUTY CLERK
CLERK

Gonzalez, P.J., Tom, Sweeny, Catterson, Abdus-Salaam, JJ.

2033N Nancy Waldbaum Nimkoff, Index 350768/02
Plaintiff-Respondent,

-against-

Ronald A. Nimkoff,
Defendant-Appellant.

The Nimkoff Firm, New York (Ronald A. Nimkoff of counsel), for appellant.

Katsky Korins, LLP, New York (Sharon T. Hoskins of counsel), for respondent.

Order, Supreme Court, New York County (Laura E. Drager, J.), entered September 14, 2009, which, in this matrimonial action, *inter alia*, denied defendant-husband's application for counsel fees to retain an attorney for the economic trial of this matter and to oppose plaintiff's appeal and also reserved for trial his request for downward modification of his child support obligations, unanimously affirmed, with costs.

The motion court providently exercised its discretion in denying defendant's motion for prospective counsel fees and expenses in the absence of a showing of financial hardship and the estimated value and extent of the legal services contemplated (*see Block v Block*, 296 AD2d 343, 344 [2002]). Moreover, it is well-settled that in the absence of a substantial and unanticipated change in circumstances, not here demonstrated, the

proper remedy for any perceived inequity in a pendente lite award is a speedy trial (*see Ayoub v Ayoub*, 63 AD3d 493, 496-497 [2009]).

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

ENTERED: JANUARY 21, 2010

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

805 Gloria Rosenthal, etc., Index 116974/06
Plaintiff-Appellant,

-against-

Quadriga Art, Inc.,
Defendant-Respondent.

Marin Goodman, LLP, New York (Margret M. McBurney of counsel), for appellant.

Graubard Miller, New York (Joseph H. Lessem of counsel), for respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered May 13, 2008, that, in an action arising out of a contract in which defendant agreed to pay plaintiff's decedent commissions for selling defendant's products, insofar as appealed from as limited by the briefs, upon the parties' respective motions for partial summary judgment, held that defendant is not obligated to pay plaintiff certain post-death commissions, affirmed, with costs.

On or about August 4, 1994, plaintiff's decedent, Alfred Rosenthal, entered into a contract with defendant to sell defendant's products for a 10% commission. The contract, that defendant's president, Thomas Schulhof, an attorney, prepared, stated:

> The term of this agreement shall commence on September 1, 1994, and shall be in effect for one year, at which time it will automatically renew from year to year. However, either party has the right to terminate this

> agreement, upon thirty (30) days notice in writing by either certified or registered letter. However, no notice can be given for the first sixty (60) days of contract.
>
> However, in the event of termination, the following shall survive:
>
> a. You shall agree not to solicit any Quadriga accounts for a three-year period following the date of notice of termination.
> b. Quadriga agrees to pay commission to you on any accounts introduced to Quadriga, not previously served by Quadriga, by you and which were being serviced by you at the time of termination and for which orders are shipped during the same three-year period.

Thus, the letter agreement provides that it would automatically renew for one-year periods unless either party gave a 30-day notice of termination in writing. Upon termination, Alfred agreed he would refrain from soliciting defendant's clients and defendant agreed to continue to pay certain commissions to decedent, both for a three year period. The parties worked together, pursuant to the contract, until July 4, 2004, when Alfred passed away.

On or about November 9, 2006, plaintiff commenced this action claiming entitlement to commissions on the theory that the contract terminated upon Alfred's death and that, pursuant to the contract, defendant was obligated to pay three years' worth of commissions. On or about November 29, 2007, plaintiff moved for partial summary judgment. Defendant cross-moved for, among other things, partial summary judgment with respect to payments allegedly due after Alfred's death. The motion court denied

plaintiff's motion and granted defendant's motion for summary judgment dismissing the case. Noting that "no one solicits accounts after death," the court interpreted the agreement to mean that the payments for three years was in return for decedent refraining from soliciting defendant's accounts. Because Alfred had died, there would be no solicitation and therefore no commissions.

The motion court was correct. The post-termination payments are clearly in exchange for plaintiff agreeing not to compete. There is no provision that states or even implies that plaintiff's death will entitle his estate to collect three years in post-death payments (*Sodus Manufacturing Corp., v Reed*, 94 AD2d 932, 933 [1983]). Moreover, decedent never adhered to the procedures for termination, namely "thirty (30) days notice in writing by either certified or registered letter." Without a proper termination, the obligation to pay commissions is not triggered.

We have considered plaintiff's remaining contentions and find them unavailing.

All concur except Saxe, J.P., and Acosta, J. who concur in a separate memorandum by Saxe, J.P. as follows:

SAXE, J.P. (concurring)

Issues of contract interpretation can be troublesome even where the contract is short and facially uncomplicated. In this appeal, we are asked to decide whether the words "in the event of termination" in the contract between defendant and plaintiff's decedent refer only to termination on the terms provided for in the immediately preceding paragraph, or whether those words should be understood to include termination of the contract by reason of one party's death.

Alfred J. Rosenthal entered into a contract with defendant Quadriga Art in August 1994, in which it was agreed that beginning September 1, 1994, he would sell defendant's products for a 10% commission. The written contract, prepared by defendant's president, included the following provisions:

> The term of this agreement shall commence on September 1, 1994, and shall be in effect for one year, at which time it will automatically renew from year to year. However, either party has the right to terminate this agreement upon thirty (30) days notice in writing by either certified or registered letter. However, no notice can be given for the first sixty (60) days of contract.
>
> However, in the event of termination, the following shall survive:
>
> a. You shall agree not to solicit any Quadriga accounts for a three-year period following the date of notice of termination.
> b. Quadriga agrees to pay commission to you on any accounts introduced to Quadriga, not previously served by Quadriga, by you and which were being serviced by you at the time of termination and for which orders are shipped during the same three-year period.

Alfred worked for Quadriga until his death on July 4, 2004. In this action, brought by his widow, it is alleged that under the terms of the contract, his estate is entitled to continued payments for three years as required by subparagraph (b) of the contract, which obligation plaintiff contends survived when the contract was terminated due to Alfred's death.

Plaintiff requested partial summary judgment seeking a declaration that the employment contract terminated upon Alfred's death and that, pursuant to the contract, defendant was therefore obligated to pay three years' worth of commissions from the date of termination -- in this instance, the date of his death. Defendant cross-moved for partial summary judgment dismissing the claim for payments allegedly due after Alfred's death, contending that the clear and unambiguous language of the contract demonstrates that Alfred's death did not create any right for his estate to receive post-death payments.

I conclude that the motion court was correct in granting defendant's application.

The applicable rules of contract interpretation are undisputed. "[O]ur role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract. If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further" (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]).

Each side suggests a different "plain meaning" of the word "termination" and the phrase "in the event of termination." However, the existence of a disagreement about the "plain meaning" of the words does not necessarily render those words ambiguous for purposes of construing the contract (*see Graev v Graev*, 46 AD3d 445, 451 [2007], *revd and remitted* 11 NY3d 262 [2004]). Rather, we must decide whether the intended meaning of the words is plain by considering their use in context (*id.*). "[A]greements should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases" (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]; *see also South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]). In doing so, we must be careful not to add new terms or alter the terms of the contract in the guise of interpreting it (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]).

Our obligation, then, is to examine the contract as a whole, and in particular, the two above-quoted paragraphs in that context. Plaintiff essentially asserts that Alfred's death constituted a termination of the contract, just as would a 30-day written notice of termination, so as to invoke defendant's contractual obligation to pay three years' worth of continued commissions on his accounts. Plaintiff contends that we must

employ the dictionary definition of the word "termination," which she says is "an end of time or existence" (citing Merriam-Webster's Online Dictionary), and reasons that the death of a party would constitute such an end in time or existence. She goes on to argue that the word "termination" as used in subparagraph (b) must be construed to include termination by the death of a party to the contract. She adds that any ambiguity in the meaning of the word "termination" as used in subparagraph (b) must be construed against Quadriga, who drafted it.

Plaintiff's proposed interpretation of the contract at issue here is wrong.

Initially, the dictionary definition offered by plaintiff sheds no particular light on the intended meaning of the provision in question. The suggestion that the word "termination" as used in the contract must necessarily include the "foreseeable contingency" of death is incorrect. The foreseeability of death does not automatically make it a means by which the contract, by its terms, may be terminated. Not all contracts are necessarily terminated upon the death of one party (*see Di Scipio v Sullivan*, 30 AD3d 660 [2006]), so the prospect of a party's death is not automatically subsumed in the use of the word "termination."

Plaintiff relies on the rule that while the obligations of an individual to perform pursuant to a personal services contract

are excused by that individual's death, the obligations of a corporation to pay for services rendered pursuant to that contract are not excused (*see Buccini v Paterno Constr. Co.*, 253 NY 256, 258 [1930]). She equates this situation with that considered in *Clark v Gilbert* (26 NY 279, 282 [1863]), in which an employee hired to superintend engineering work, whose wage was to be one-third of the profits, died before the work was completed; it was held there that his estate was entitled to recover, as compensation, his one-third share of that portion of the profits that was attributable to the part of the job accomplished during the time he performed services under the contract, up to the time of his death.

Notably, however, the cases on which plaintiff relies concern amounts earned by the estates' decedents for work they performed prior to their death. The commissions discussed in subparagraph (b) of the contract here are *not* compensation earned by Alfred for orders taken by him from his customers during the course of his employment. Rather, subparagraph (b) contemplates continuing to pay commissions based upon orders placed after termination of Alfred's employment, which orders therefore would not have been handled by Alfred.

Ultimately, the assertion that the contract was intended to include Alfred's death as an event of "termination" creating a right to continued commissions is simply too strained an

interpretation of this contract. Since employers do not ordinarily continue to pay an employee's estate for work actually performed by others after the employee's death, we would expect a provision which creates such a continuing right to have been specifically negotiated, and that some quid pro quo in exchange for the unusual benefit would be reflected in the agreement. Here, the inclusion of defendant's continuing obligation to pay commissions on Alfred's accounts for three years after his termination is accounted for to the extent it was given in exchange for Alfred's refraining from soliciting those accounts during that same three-year period. Since, as the motion court observed, no one solicits accounts after his or her death, the agreement reflects no other motivation for defendant to provide the continued benefit to Alfred's estate after his death.

The question for this Court to address is not whether death -- or indeed, other events such as serious illness -- may work a termination of a contract in the abstract. It is whether the plain meaning of the language in subparagraph (b), discerned from examining the context of the words, was intended to cover death as a form of termination.

There is no ambiguity here. The plain meaning of the language "in the event of termination" and the word "termination" may be clearly ascertained from examining the context in which these words are used. In making provision for the continued

payment of commissions after the contract's termination, the parties were addressing the type of termination that they had defined in the preceding paragraph.

In considering the context of the phrase at issue, it is noteworthy that the second paragraph covering the event of termination begins with the word "however." Because "however" is a transitional term, it automatically refers the reader back to the preceding clause. That preceding clause is the one that gives either party the right to terminate the agreement on 30 days notice in writing; it makes no other reference to any other means by which the agreement might be terminated. Reading the two paragraphs together makes plain that the "event of termination" language in the second paragraph refers solely to the termination event that occurs when either side gives the other 30 days written notice of the contract's termination.

That the first paragraph and the second paragraph are related, and that subparagraphs (a) and (b) of the second paragraph are interrelated, is inescapable. The reasonable reading of the two paragraphs at issue is that in the event either party sent a 30-day written notice terminating their contract (albeit not during the first 60 days of the agreement), Alfred agreed not to solicit any of defendant's accounts for three years and defendant agreed to continue paying him commissions for that period on accounts he brought in. I reject

plaintiff's suggestion that the period punctuating subparagraph (a) denotes that subparagraph (b) is completely independent of what precedes it, and was intended to apply in the event of Alfred's death. Rather, both subparagraphs come into play equally, and solely, upon either party's terminating the contract by giving the other 30 days' written notice.

This analysis is unaffected by the fact that defendant was responsible for drafting the agreement, since the rule of contra proferentum applies only where there is ambiguity in the meaning of the contract (*see Lesal Assoc. v Board of Mgrs. of Downing Ct. Condominium*, 309 AD2d 594, 595 [2003]), a circumstance not present here.

Finally, this interpretation of the agreement does not, as plaintiff suggests, render subparagraph (b) meaningless. Nor does it, as plaintiff contends, alter the terms of the contract in the guise of interpreting it. The Court of Appeals has explained that "courts 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.*, 1 NY3d at 475 [internal quotation marks and citations omitted]). In *Vermont Teddy Bear* the Court of Appeals considered a lease provision allowing the tenant to elect to terminate the lease if the premises were rendered wholly unusable by fire or other casualty, and the

landlord failed to restore the premises within one year of written notice by the tenant; it rejected an interpretation of the provision that would require the landlord to give written notice of the completion of the restoration within the one-year period, since no such requirement was included in the provision.

The interpretation advanced here does not add a term not present in the contract. Indeed, it would be a modification of the writing, in effect adding a term not present in it, if we were to construe the agreement as making three years' worth of continued commissions payable in the event of Alfred's death, based upon the termination of his *services* rather than the termination of the contract.

For the foregoing reasons, the order on appeal should be affirmed.

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

ENTERED: JANUARY 21, 2010

CLERK

McGuire, J.P., Moskowitz, Acosta, DeGrasse, JJ.

1261 David Santos, et al., Index 8631/03
Plaintiffs-Appellants,

-against-

Ford Motor Company,
Defendant-Respondent,

Action Nissan, Inc.,
Defendant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellants.

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered on or about June 7, 2007, upon a jury verdict in favor of defendant Ford Motor Company, unanimously affirmed, without costs.

The vehicle at issue was a 1995 Ford Explorer, model UN-105. The court permitted testimony about the predecessor Explorer, model UN-46, that Ford produced from mid-1990 through mid-1995, but precluded certain testimony about the Bronco II, allegedly the predecessor to the UN-46. Even assuming evidence about the Bronco II was relevant to the issue whether the UN-105 was defective, the court had discretion to exclude it from this already lengthy trial (*see People v Primo*, 96 NY2d 351, 355 [2001]).

The minor difference between Mechanical Systems Analysis,

Inc.'s (MSAI) Accident Avoidance Maneuver test and the Consumers Union test did not render the MSAI test novel within the meaning of *Frye v United States* (293 F 1013 [DC Cir 1923]) (*see Styles v General Motors Corp.*, 20 AD3d 338, 339 [2005]). However, any error in precluding testimony about the MSAI test was harmless because plaintiffs' expert was allowed to testify extensively about the Consumers Union test.

The court properly denied plaintiffs' request for a missing document charge because Ford gave a reasonable explanation for failing to preserve the test data that it entered into its computer program (*see Crespo v New York City Hous. Auth.*, 222 AD2d 300, 301 [1995]), and there was no evidence that Ford disposed of the data in anything other than the ordinary course of business or with notice of its potential evidentiary value (*see Balaskonis v HRH Constr. Corp.*, 1 AD3d 120 [2003]). Regardless, the Ford employee who was responsible for signing off on the testing with respect to the particular model in contention denied loading it with sandbags so that it would pass Ford's internal test. Finally, plaintiffs presented evidence from which the jury could have inferred that Ford's testing was unreliable. Accordingly, there was no prejudice to plaintiffs in denying their request for a missing document charge.

The court correctly submitted, as the first question to the jury, whether the 1995 Explorer was defective. Plaintiffs could

not prevail under either negligence or strict liability unless the jury found that defendant's product was defective (*see Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 480 [1980] [negligence]; PJI 2:141 [2006][1] [strict liability]).

The court correctly declined to charge the jury on failure to warn. While plaintiffs' failure-to-warn claim (Ford's failure to say that the Explorer becomes more unstable as it is loaded with passengers and cargo) is not the same as their design defect claim (the Explorer's alleged propensity to roll over), "it remains plaintiff's burden to prove that defendant's failure to warn was a proximate cause of [the] injury" (*Sosna v American Home Products, et al*, 298 AD2d 158, 158 [2002]). Here, there was no evidence that plaintiffs would have bought a vehicle other than the Explorer or packed the car differently had Ford given a warning beyond those it already gave. Thus, the failure-to-warn claim was correctly dismissed for failure to establish the causation element (*see Berger v Ford Motor Co.*, 95 Fed Appx 520 [4th Cir 2004]).

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[1]The trial took place in 2006.

We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: JANUARY 21, 2010

CLERK