SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JUNE 17, 2010**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2434 In re Albert F.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
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Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about April 1, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and imposed a conditional discharge for a period of 12 months, affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The Family Court had the unique opportunity to view the witnesses and evaluate their credibility. It drew the reasonable inference that appellant

knew he had stolen merchandise in his backpack, and it found appellant's explanation for the presence of the stolen merchandise in his bag to be implausible (*see Matter of Edward H.*, 61 AD3d 473 [2009]). A reasonable inference can be drawn from this record that appellant knew that there was stolen merchandise in his backpack when he attempted to leave the store.

The appellant testified that he had been carrying only a notebook and a folder in his backpack when he entered the store, and the Family Court properly rejected his claim that he did not notice the extra weight or bulk added by two pairs of adult jeans, which he stated were placed in the bag by another person. It was also within the province of the hearing court to reject appellant's testimony that he loaned his backpack to his friend who was trying on jeans, that he went to another floor to meet another friend, and that he made no plan to retrieve his bookbag.

It is the dissent's position that "knowing" possession of stolen property was not proven, citing the appellant's testimony that his friend had his backpack for a period of time, that the jeans in the backpack were not his size, and that he cooperated with the security guard when asked to open his backpack. However, it was within the province of the Family Court to have found the appellant's testimony incredible, the size of the stolen merchandise irrelevant, and appellant's cooperation not persuasive as to his guilt. The court's dismissal of the petit

larceny charge does not warrant a different conclusion. While a person may be guilty of stealing and criminally possessing the same property, the court's choice to make a finding as to one offense and dismiss the other should not entitle appellant to the windfall of yet another dismissal (*see People v Rayam*, 94 NY2d 557 [2000]).

All concur except Moskowitz and Freedman, JJ. who dissent in a memorandum by Freedman, J. as follows:

FREEDMAN, J. (dissenting)

I respectfully dissent because I believe that the evidence did not establish beyond a reasonable doubt that defendant knowingly possessed the two pairs of jeans that were in his backpack when he attempted to exit the store (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Knowledge is a critical element of criminal possession of stolen property, (Penal Law § 165.40). Since defendant testified that the backpack had been in possession of another youth who had tried on jeans during the time that he had been in the store, since the jeans were not defendant's size, and since defendant cooperated completely when asked to open his backpack, I would find that "knowing" possession had not been established beyond a reasonable doubt.

The Family Court acquitted defendant of petty larceny but found him guilty of criminal possession of stolen property. I would find him not guilty of both charges.

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

ENTERED: JUNE 17, 2010

CLERK

Andrias, J.P., Saxe, Nardelli, McGuire, Acosta, JJ.

1932 Lisa C. Green, Index 600420/03
Plaintiff-Appellant,

-against-

William Penn Life Insurance Company
of New York,
Defendant-Respondent.

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Thomas Torto, New York, for appellant.

Bleakley Platt & Schmidt, LLP, White Plains (Robert D. Meade of counsel), for respondent.

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Judgment, Supreme Court, New York County (Harold Beeler, J.), entered June 29, 2006, reversed, on the facts, without costs, and the matter remanded for a new trial.

Saxe and Acosta, JJ. concur in a separate memorandum by Saxe, J.; McGuire, J. concurs in a separate memorandum; and Andrias, J.P. and Nardelli, J. dissent in a memorandum by Andrias, J.P. as follows:

SAXE, J. (concurring)

On this appeal we are required to consider the evidence in a case where a man died under circumstances that led the trial court to rule that he committed suicide. On our first review of that determination, we held, by a vote of 3-2, that as a matter of law, the common law presumption against suicide had not been sufficiently rebutted (48 AD3d 37 [2007]). An appeal to the Court of Appeals followed. The Court of Appeals disagreed with our reliance on the presumption to determine the appeal as a matter of law, observing that "the evidence was strong enough to permit a finding of suicide, though not to require it," and remitted the matter to this Court for exercise of our weight of the evidence review power (12 NY3d 342, 347 [2009]). Following the Court of Appeals' instructions, and conducting a weight of the evidence review, a plurality of this Court now concludes that while there was evidence that *permitted* a finding of suicide (*see* 12 NY3d at 347 [emphasis added]), it was not strong enough to outweigh the evidence tending to point to death by means other than suicide, and that therefore a new trial is needed. A third justice concurs with the conclusion that a new trial is necessary, but declines to reach the weight of the evidence issue, concluding instead that the erroneous mid-trial ruling

allowing defendant to present expert testimony alone requires a new trial.

Before addressing the evidence, we must first determine the correct standard of review to be applied. While there are cases stating the standard in a variety of ways, not all of which are reconcilable, the correct standard is, in fact, well established. In *Cohen v Hallmark Cards* (45 NY2d 493 [1978]), the Court of Appeals explained the distinction between appellate review of the weight of the evidence and appellate review of the sufficiency of the evidence; in doing so, it instructed that as to a weight of the evidence review of a nonjury determination, the Appellate Division has the power to make new findings of fact:

> "In reviewing a judgment of Supreme Court, the Appellate Division has the power to determine whether a particular factual question was correctly resolved by the trier of facts. If the original fact determination was made by a jury, as in this case, and the Appellate Division concludes that the jury has made erroneous factual findings, the court is required to order a new trial, since it does not have the power to make new findings of fact in a jury case. The result is, of course, different *in cases not involving the right to a jury trial, since then the Appellate Division does have the power to make new findings of fact.* In either situation, the determination that a factual finding was against the preponderance of the evidence is itself a factual determination based on the reviewing court's conclusion that the original trier of fact has incorrectly assessed the evidence" (*id.* at 498 [citations omitted] [emphasis added]).

It has therefore become well settled that in reviewing a case tried without a jury, the Appellate Division's "authority is as broad as that of the trial court" (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *see also* 1 Newman, New York Appellate Practice, § 4.03[5], at 4-26). The Appellate Division "may render the judgment it finds warranted by the facts, taking into account in a close case the fact that the trial judge had the advantage of seeing the witnesses" (*Northern Westchester Professional Park, supra* [internal quotation marks and citation omitted]).

Yet, defendant asserts that our review power is more limited here. It suggests that appellate review of nonjury determinations may be either de novo review, which it says is applicable where essentially legal issues were presented at trial, or weight of the evidence review, which it claims is appropriate where the determination under review was based on credibility, and which it characterizes as a more limited type of appellate review (citing *Coliseum Towers Assoc. v County of Nassau*, 2 AD3d 562 [2003]). It reasons that when the Court of Appeals remitted this matter for a "weight of the evidence" review, the Court intended to circumscribe this Court's authority, and preclude a de novo review of the evidence. We reject this reasoning. To the extent some cases characterize weight of the evidence review as "limited" (*see e.g. Coliseum*

*Towers*), we disagree. The Court of Appeals' remittitur referred to a weight of the evidence review in order to distinguish that type of review from our prior determination, which was made on the law rather than on the facts.

Nor do we accept defendant's suggestion that *Thoreson v Penthouse Intl.* (80 NY2d 490, 495 [1992]) dictates that our only task here is to decide whether the trial court's determination was based on a fair interpretation of the evidence. The *Thoreson* decision concerned an award of punitive damages under Executive Law § 297(9), and merely recited, without discussion, its agreement with the use of the "fair interpretation of the evidence" standard there. The questions raised in that case did not involve, and the Court neither discussed nor mentioned, the Appellate Division's well established broad authority to make its own findings of fact, as recognized in *Northern Westchester Professional Park Assoc.* (60 NY2d at 499).

Moreover, the *Thoreson* decision specifies that the "fair interpretation" approach applies "*especially* when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (80 NY2d at 495 [internal quotation marks and citations omitted] [emphasis added]). Limiting appellate review to the fair interpretation of the evidence approach may be appropriate where the findings rest predominantly on credibility determinations, because the latter are entitled to

substantial deference. However, it is not appropriate where the trial court's findings rest largely on inferences drawn from established facts and verifiable assertions. In that case, there is no valid rationale for precluding the appellate court from finding facts, as indicated in *Northern Westchester Professional Park Assoc.* (60 NY2d at 499).

Here, although plaintiff's credibility was properly called into question by the trial court in some respects, when the entirety of the evidence is considered, it becomes apparent that the question of whether Mr. Green committed suicide is not logically dependent on findings regarding plaintiff's credibility. That is, our analysis does not turn on whether plaintiff was lying or telling the truth. Rather, this fact-finding determination is based predominately on inferences drawn from established facts such as empty pill vials and prescription dates, objectively verifiable assertions regarding the decedent's conduct shortly before his death, and statements by witnesses whose credibility is not questioned. As to those aspects of plaintiff's testimony in which her credibility is arguably relevant to a finding, those assertions that are appropriately discounted or rejected based upon credibility problems do not have a significant impact on the question of whether Mr. Green committed suicide.

To conclude this preliminary discussion of the proper

standard of review, we observe that since the Court of Appeals has already asserted that "the evidence [in this case] was strong enough to permit a finding of suicide, though not to require it" (12 NY2d at 347), there would be little point in further assessment if our task were limited to merely deciding whether the trial court's determination was based on a fair interpretation of the evidence, rather than assessing de novo whether the weight of the evidence supports the determination.

In accordance with the foregoing, the standard of review we will apply here is the de novo weighing of the evidence set forth in *Northern Westchester Professional Park Assoc.*, rather than the more limited approach referred to in *Thoreson*.

Before proceeding to weigh the evidence, we must also clarify defendant's burden of proof. Plaintiff's burden of proof on her claim for the life insurance benefit is satisfied simply by proof of Mr. Green's death, the existence of the life insurance policy, and plaintiff's status as the beneficiary of that policy (*Schelberger v Eastern Sav. Bank*, 93 AD2d 188, 192-193 [1983], *affd* 60 NY2d 506 [1983]). The claim that benefits are not payable because Mr. Green committed suicide constitutes an affirmative defense, which must be proved by defendant insurance company. Any affirmative defense -- even one with no applicable presumption to overcome -- places the burden of proof of that issue on its proponent (57 NY Jur 2d, Evidence and

Witnesses § 164). Here, however, there is an additional burden on defendant. To establish the affirmative defense of suicide, an insurer must overcome a presumption that has been called "one of the strongest presumptions in the law" (*Schelberger*, 93 AD2d at 190). This burden has been said to require the insurer to establish suicide by "clearly establishing such facts as will exclude any reasonable hypothesis of accidental death" (*id.* at 192, quoting Vance, Insurance, at 571). Stated as the pattern jury instruction directs, the finding of suicide may be made only if the finder of fact is satisfied "that no conclusion other than suicide may reasonably be drawn" (PJI 4:57; PJI 1:63.2). The Court of Appeals, in remanding this matter, approved the use of that instruction, although it also re-phrased the instruction as one that tells jurors that suicide should not be found "unless the evidence shows suicide to be highly probable" (12 NY3d at 347). We therefore conclude that it is our obligation, just as it was the obligation of the trial court acting as factfinder, to apply the presumption against suicide in connection with defendant's burden of proof on its affirmative defense, so as to find against suicide unless "no conclusion other than suicide may reasonably be drawn" (PJI 4:57) or "the evidence shows suicide to be highly probable" (12 NY3d at 347).

With these parameters in mind, we turn to the evidence.

As alluded to earlier in this discussion, we acknowledge,

and to an extent agree with, the trial court's view that in some respects plaintiff's trial testimony was not credible. Initially, we note that where the trial court questioned plaintiff's credibility based *not* on her courtroom demeanor -- which this Court cannot observe and therefore could not rely on to question credibility -- but on statements she is reported by others to have made shortly after her husband's death, this Court is also capable of independently assessing plaintiff's credibility on that basis. Moreover, we would closely question plaintiff's credibility in any event, given her pecuniary interest in the matter.

The portion of plaintiff's testimony that warrants rejection on credibility grounds is the part in which she protested that her husband had not been depressed at the time of his death. This assertion was directly contradicted by her reported statements to police and to her sister-in-law on the day of Mr. Green's death and the next day, that he had been depressed and that he must have overdosed on his medications. Moreover, the fact of Mr. Green's depression was established by the unassailable testimony of his internist, Dr. Robert Bos, with whom he spoke the day before his death.

However, while plaintiff's unwillingness to acknowledge at trial her husband's emotional difficulties may provide reason for rejecting her assertions on credibility grounds, it does not

provide a basis to make affirmative findings of fact against her on the issue on which her adversary has the burden of proof, that is, that Mr. Green committed suicide. It is up to defendant to present evidence compelling that finding.

In an effort to establish that it has made such a showing, defendant characterizes as admissions plaintiff's expressions of fear, at the scene and shortly thereafter, that her husband must have died of a drug overdose. However, plaintiff's expressed fear or suspicion that her husband took an overdose of medication is not an admission of anything. Plaintiff's statements may not logically be relied on either to establish the *actual* cause of his death or his intent at the time. Her expressions of fear or suspicion could satisfy defendant's burden of proving that the feared possibility was a fact only if it were shown to be based on facts or events known to plaintiff and established at trial, that objectively support the conclusion that suicide, rather than accidental or unintentional death, was highly probable.

Another problem with the trial court's finding that Mr. Green committed suicide is that the court improperly allowed, and then placed excessive reliance on, the testimony of defendant's belatedly offered expert, forensic pathologist Dr. Michael Baden, when it found that

> "[t]he presence of suicidal thoughts in an individual is an important factor in determining whether the death of that individual was as a result of a suicide. The fact that an individual had been depressed in the

> immediate period before death is an important factor in determining whether the death of that individual was the result of suicide; and many suicides can be the results of acute reactive depressions which result from personal financial problems of a few days' duration."

Dr. Baden had asserted that depression and suicidal thoughts are very important factors in making a diagnosis of suicide and that most suicides are not planned but are committed on the basis of opportunity.

Under the specific circumstances presented here, the ruling allowing defendant to present this testimony constituted an abuse of discretion.

CPLR 3101(d)(1) provides that a party shall not be precluded from introducing an expert to testify at trial despite noncompliance with the statute's notice requirement *where the party has shown good cause for the belated application*. The requirement of showing good cause has been considered satisfied where testimony offered by a witness at trial was entirely new and came as a surprise, such as in *Simpson v Bellew*, 161 AD2d 693 [1990], *lv denied* 77 NY2d 808 [1991]), a personal injury action involving a pedestrian hit and killed by a van, in which a police officer called by the defendant testified for the first time at trial that the driver of the van told him that he had hit the pedestrian in the crosswalk, although no such admission had been noted in his police report. The surprise testimony not only was completely new, but it also was the type of information that

would rationally be expected to be included in the police report, so the officer's failure to report it before testifying at trial necessitated a new witness on the subject. In contrast, here, notwithstanding the defense's characterizations, Dr. Bos's testimony at trial contained nothing new.

While a trial court has wide discretion to allow a party to introduce expert testimony despite its failure to give the other side proper notice pursuant to CPLR 3101(d) (*see e.g. Putchlawski v Diaz*, 192 AD2d 444, 445 [1993], *lv denied* 82 NY2d 654 [1993]), *in the absence of prejudice* (*see St. Hilaire v White*, 305 AD2d 209, 210 [2003]), here, the lack of prior notice of Dr. Baden's testimony prejudiced plaintiff by leaving her unable to properly counter that testimony. Plaintiff should have been entitled to rely on the absence of notice of a defense expert to conclude that she need not retain or consult her own expert beyond her husband's treating physician, Dr. Bos.

One reason it is so troubling that plaintiff was prejudiced in this manner is that the situation defense counsel was attempting to solve with his sudden introduction of an expert witness was of his own making. It arose from defense counsel's litigation decision to use Mr. Green's treating internist, Dr. Robert Bos, on his direct case to establish that Mr. Green had been suicidal. Plaintiff did nothing to create the predicament in which the defense found itself. Since the burden was always

on defendant to overcome the presumption and prove that Mr. Green committed suicide, and plaintiff had no burden on the issue, defendant cannot possibly point to plaintiff's not calling an expert to justify defendant's initial decision not to call its own expert.

Moreover, the defense's decision to prove through Dr. Bos that Mr. Green had been suicidal relied on a rather broad view of Dr. Bos's deposition testimony. Dr. Bos testified at his deposition that Mr. Green said he had "suicidal thoughts," but he further testified that Mr. Green immediately assured him that he did not want to kill himself, did not have plans to do so, and would never do such a thing.

Contrary to defense counsel's characterization in the context of the mid-trial application to call Dr. Baden as a witness, Dr. Bos's testimony at trial was not inconsistent with his deposition testimony. He testified at trial that Mr. Green "may not have cared about being alive at that point," used words to the effect that he "[did not] feel life [was] worthwhile" and may have said he did not "see . . . the point of being alive." Dr. Bos explained that it was based on such statements by Mr. Green that he made the notation "suicidal thoughts" in his records, but he explained how he differentiated between suicidal statements or thoughts and the state of actually being suicidal.

The purported contradictions defense counsel relied on in

making the mid-trial application were not substantive contradictions and provided no actual support for the application. Defense counsel cited Dr. Bos's failure to testify at trial that Mr. Green said he did not see the point of living, although he testified to that effect at his deposition. However, Dr. Bos's trial testimony was virtually indistinguishable from his deposition testimony; to the extent he omitted mentioning at trial any particular statement attributed to Mr. Green at deposition, no direct contradiction was made out. Nor did Dr. Bos testify at trial, as defense counsel claimed, that "suicidal thoughts do[] not mean anything." Rather, at both deposition and trial he discussed the statements Mr. Green made to describe how he then felt about his life.

Nor do defense counsel's arguments on the present appeal support the claim that Dr. Bos changed his testimony, thereby making it necessary for the defense to call a new expert witness. The record does not support defendant's contention that Dr. Bos tried to "distance himself" from his earlier testimony characterizing Mr. Green as having suicidal thoughts, based on Mr. Green's statement that he did not see the point of living.

The defense's assertion that "Dr. Bos testified at trial that suicidal thoughts, without a plan to implement them, do not present a serious warning" is a distortion of the trial testimony. When we consider the testimony itself, as well as the

manner in which it was elicited, it is clear that it cannot properly support a ruling allowing defense counsel to present a surprise expert witness. What occurred was that on redirect examination of Dr. Bos, defense counsel attempted to press its point that Mr. Green's "suicidal thoughts" reflected that he was a suicide risk, by asking Dr. Bos a question more suited to an expert witness than to a fact witness. Specifically, defense counsel asked, "In somebody who is depressed, and . . . having suicidal thoughts, does that person present the same risk for suicide as a person who is depressed but is not having suicidal thoughts?" Dr. Bos replied that merely questioning the purpose of daily life does not, in itself, mean that a depressed person is going to take his own life. He added that it is "when they express to you a plan, and a concrete plan of really ending it all, then that would establish suicidality."

While defense counsel clearly found this unexpected answer unsatisfactory, his unhappiness with Dr. Bos's responses did not justify the court's allowing him to bring in an expert in mid-trial. Dr. Bos's answer did not contradict his earlier testimony. Rather, counsel asked him at trial a question he had not been asked before, and then did not like the answer. Moreover, since that portion of Dr. Bos's testimony was elicited by defense counsel on a point not raised at deposition, on a subject more suited to an expert witness than to a fact witness,

counsel should not have been permitted to rely on the unexpected answer to support his claim that he suddenly needed a new expert.

We also reject the suggestion of our dissenting colleague that the belated introduction of Dr. Baden was justified because Dr. Bos had purposely attempted to "weaken the implication that Mr. Green had committed suicide" by his testimony that merely questioning the purpose of life does not mean that a depressed person is going to take his own life. Dr. Bos was simply providing a fuller, more balanced and more nuanced answer to defense counsel's question than the simple response counsel seemed to expect.

Finally, the minor discrepancies in Dr. Bos's testimony as to who first told him over the telephone after Mr. Green's death that Mr. Green had taken pills in a manner suggesting suicide fail to justify any relief. Indeed, while Dr. Bos expressed some uncertainty on this general subject, after his recollection was refreshed, he clarified that it was plaintiff who told him about the empty pill vial and the possibility of suicide.

In view of plaintiff's objection, the trial court should not have allowed defendant to present a new expert at that juncture. It was fundamentally unfair to allow the defense to bring in an expert witness in mid-trial when the sudden need for expert testimony was created by the defense's strategic decision to attempt to establish through Mr. Green's treating physician, a

fact witness, a general truth about suicidal people, and that decision backfired.

The prejudice plaintiff experienced as a result of the surprise introduction of an expert in mid-trial was not eliminated by the offer of time for plaintiff to obtain a competing expert. In the midst of trial, attempting that task would entail an unacceptable diversion of counsel's attention; as a practical matter, plaintiff's counsel could not undertake the task of locating a new expert to challenge Dr. Baden's opinions and assertions as part of a rebuttal case. Counsel's decision to decline the illusory offer of time was simply realistic, and should not be interpreted to mean that plaintiff was not prejudiced.

The ruling admitting Dr. Baden's testimony is especially problematic because the trial court relied on it so heavily, particularly with regard to a questionable assertion by the expert that most suicides are not planned and are committed on the basis of opportunity. In fact, contrary to earlier research suggesting that many suicides are the result of impulsive decisions, recent research establishes that most suicides are *not* attempted impulsively, but involve a plan (*see* Smith et al., *Revisiting Impulsivity in Suicide: Implications for Civil Liability of Third Parties*, 26 Behav Sci & L 779 [2008]). Nor was any explanation offered for permitting a forensic pathologist

to testify as an expert on the psychology or state of mind of an individual who commits suicide. The resulting finding of suicide is particularly troubling, in the absence of evidence here tending to show any suicide plan on Mr. Green's part, insofar as it was so heavily based on this surprise expert testimony that plaintiff was unable to effectively controvert.

Dr. Baden's testimony must therefore be excluded in its entirety from the evidence to be considered in determining whether the verdict is supported by the weight of the evidence. Because that testimony provided by far the strongest evidentiary support for the finding that Mr. Green had committed suicide, and the remaining evidence consists largely of surmise, once this testimony is excluded from consideration, justification for the verdict is substantially undermined.

Even if we found that permitting Dr. Baden to testify did not constitute an abuse of discretion, we would nevertheless find that the trial court placed excessive reliance on his testimony, and in our present independent weighing of the evidence, we would, in any event, find that Dr. Baden's testimony is entitled to little weight.

Another important component of the trial court's finding of suicide was the inference the court drew from the empty pill vials that had contained Ambien and hydrocodone. The court calculated, based on the time it had taken Mr. Green to finish

the prescription for 30 Ambien pills that he received on December 8, 2001 and refilled on February 6, 2002, that the amount of medication that would have been in the vial on the day he died was "inconsistent with an accident and only consistent with the fact that it was a deliberate suicidal act." It further relied on the possibility that Mr. Green also took some of the 40 hydrocodone pills that had been prescribed for him in January after hernia surgery.

In our view, however, the conclusion that Mr. Green intentionally took an overdose of these two pills is based upon conjecture and is not sufficiently supported by the record. As to the painkiller hydrocodone, there is no basis for the conclusion that *any* of it remained in its vial by the date of his death, since it had been prescribed 27 days earlier and, if taken at anything like the prescribed rate of two every four hours, all 40 pills would have been taken well before that date. As to the Ambien, we simply cannot say how many pills remained in the Ambien vial by that date. Mr. Green's earlier use of 30 Ambien pills during a previous 60-day period may be relevant, but cannot be relied upon by itself to establish as a fact his usage during the weeks preceding his death. Importantly, plaintiff said that Mr. Green took the Ambien regularly and that if he woke in the middle of the night, he took another pill or half a pill. She also admitted to having taken approximately five of the Ambien

pills herself. This described usage could have left the vial empty or nearly empty on the date in question, without enough Ambien to cause death. But even if we do not credit plaintiff's description of how the Ambien was used, the mere fact that Mr. Green had been given 30 Ambien pills two weeks before his death creates, at best, a mere possibility that he had enough pills to overdose on them, not a circumstance that establishes a deliberate suicidal act.

Parenthetically, it seems perverse, to say the least, that a court would give greater credence to the contention that a drug addict who overdosed did so accidentally than to the suggestion that a non-addict may have overdosed accidentally, as the trial court seemed to do in reliance on *Schelberger v Eastern Sav. Bank* (93 AD2d 188 [1983], *affd* 60 NY2d 506 [1983], *supra*).

Finally, the trial court acted improperly to the extent it determined that plaintiff was incredible based on the perceived inconsistency between her refusal to permit a toxicological exam or an autopsy of Mr. Green's body on religious grounds and her arranging for Mr. Green's remains to be cremated in accordance with his stated wishes, which the court asserted was in violation of those same religious tenets. It is presumptuous to term these two decisions inconsistent in support of a determination that plaintiff is not credible. Jews vary widely in their observance of Jewish law; while some attempt to strictly follow all 613

mitzvot in the Torah, others abide by far fewer. Each Jew makes an independent choice as to which of the mitzvot he or she will live by. There is nothing suspect in a Jewish person's unwillingness to abide by particular tenets of Jewish law, and the decisions that person makes do not permit others to call into question that person's character, sincerity or credibility. It is improper to find a Jewish person unworthy of belief simply because the person abides by some aspect of Jewish law but not another. This is what the trial judge did, and this is what Justice Andrias does as well. And, when the credibility determination based on the so-called inconsistency is examined in the sunlight and seen for what it is, a substantial chunk of the trial court's findings falls away.

Moreover, the two decisions are not necessarily logically inconsistent. A Jew may express, while alive, a wish for his body to be cremated, without expressing any wish or preference concerning autopsies or toxicological exams. In such circumstances, after that individual's death, the surviving relatives may feel bound by his expressed wish to be cremated, but, in the absence of any other direction about how his body should be treated, may feel authorized to make any remaining decisions based on *their own* views and observances.

The purported inconsistency therefore ought not serve as a basis for any sort of negative inference.

Nor is it appropriate to make a finding of suicide based on the conclusion that plaintiff sought to avoid the post-mortem testing because she feared that an overdose would be discovered. The trial court reasoned that plaintiff did not permit the procedures because she "didn't really want to find out" or was afraid of finding out that her husband did, in fact, commit suicide. However, this reasoning employs the same fallacy as defendant's reliance on plaintiff's statements of fear that her husband had died of an overdose of his medications. Plaintiff's fear that her husband had committed suicide, and her purported desire to avoid having that fear confirmed, does not justify the inference that he committed suicide. It establishes neither the fact of an overdose nor that any such overdose was intentional rather than accidental.

We also reject defendant's argument that plaintiff's refusal to consent to an autopsy or toxicological exam could not have been motivated by religious tenets, because if she had wanted to respect the family's wishes, she would have consulted Mr. Green's adult son or his sister, rather than his cousin. Nothing in the testimony reflects that Mr. Green was closer with his adult son or his sister than he was with his cousin, while there *is* evidence that Mr. Green and his cousin were close.

In addition, I find it objectionable that my colleague seems to implicitly draw a negative inference from plaintiff's failure

to change her mind and grant permission for an autopsy and toxicology after the Deputy Medical Examiner advised her that it might be hard to collect on a life insurance claim in the absence of test results as to the cause of death. There is no reason why plaintiff should have reconsidered her decision based on the suggestion or advice of an M.E. In this context, my colleague also seems to imply that there was something untoward about the input of Mr. Green's cousin, whom he refers to as "attorney Wolff," in plaintiff's decision to refuse an autopsy and toxicology. It seems as though the term "attorney" is intended to raise the spectre of connivance and obfuscation. Any such implication is without any basis, however; the only evidence on the point shows Mr. Green to have been close to Mr. Wolff, which makes plaintiff's consultation with him nothing but appropriate.

Besides rejecting many of the underpinnings of the trial court's finding of suicide, we observe that, notwithstanding the doubt cast on some of plaintiff's testimony, there is no reason to reject, and much evidentiary support for, plaintiff's testimony recounting her husband's conduct on the morning of February 20, 2002, the day of his death. Indeed, the trial court accepted as fact plaintiff's assertions that Mr. Green told her that he would be going to the gym that morning and that he had to make telephone calls, including a work-related conference call, that afternoon. Those assertions are confirmed by the fact, also

found by the trial court, that when she found him on the bed that evening, he was dressed in gym clothes -- jeans, t-shirt and sweatshirt, with his sneakers on the floor next to the bed. Additionally, Mr. Green's cousin, Richard Wolff, who was representing Mr. Green in litigation with his former attorney, testified that he spoke with Mr. Green that morning, and that they scheduled a meeting for the following week. According to Mr. Wolff, Mr. Green was upbeat, positive and excited about the consulting business he had begun.

Furthermore, the testimony of Dr. Bos reflects that while Mr. Green was experiencing emotional difficulties, he was not overcome by them. Dr. Bos, upon hearing Mr. Green acknowledge that he was experiencing depression, anxiety and insomnia, directly inquired as to whether Mr. Green felt suicidal, and Mr. Green replied without qualification that "he would never do such a thing, he was not suicidal, he was just down." We also observe that by going to the trouble of following up on his internist's referral to a psychiatrist, with whom he left a voicemail message, Mr. Green demonstrated that he recognized, but refused to succumb to, his current state of depression.

The inference that Mr. Green's death was unintended is further supported by additional facts as found by the trial court, including Mr. Green's actions shortly before his death, such as contacting a psychiatrist, and the items found

surrounding him at the time of his death, including a copy of the New York Times, his Palm Pilot and his portfolio. All these items, conversations and appointments point to a man engaged in life, not one determined to depart it.

As plaintiff reasonably suggested at trial, there are a variety of possible reasonable explanations for her husband's death: It might have been caused by any number of sudden events such as a heart attack, an aneurysm, or an adverse reaction to medication. And if it was an overdose, it could just as easily have been accidental rather than intentional.

Weighing anew the entirety of the evidence, we find that the evidence tending to permit an inference of suicide is not sufficiently substantial to outweigh the strong presumption against suicide. We find suicide to be merely one possible cause of Mr. Green's death but far from the only reasonable conclusion to reach. The presumption against suicide not being overcome, the weight of the evidence does not support the trial court's finding, and a new trial is appropriate (*Cohen v Hallmark Cards*, 45 NY2d 493, 498-500 [1978], *supra*).

We recognize, of course, that only two members of this bench explicitly rule that the reversal we order should be based on the weight of the evidence; the concurring justice, declining to address the weight of the evidence, bases his determination that reversal is necessary on the improper introduction of an expert

witness in mid-trial. However, it should not escape notice that the concurring justice has implicitly agreed with that portion of our plurality opinion which concludes that two important components of defendant's case must be excluded when this court weighs the evidence. First, the conclusion that it was error to permit Dr. Baden's testimony logically requires Dr. Baden's testimony to be removed from the balance sheet. Second, by agreeing that plaintiff's expressions of her fears or beliefs with regard to how her husband died do not constitute affirmative proof of how he died, our colleague's opinion precludes reliance on that testimony to support defendant's claim of suicide. I submit that, even ignoring the other errors, simply removing those two components of defendant's evidence from the balance sheet, particularly considering the centrality of Dr. Baden's testimony, supports our factual finding that what remains is a puny quantum of evidence insufficient to overcome the ancient common-law presumption against suicide.

Accordingly, the judgment of the Supreme Court, New York County (Harold Beeler, J.), entered June 29, 2006, dismissing the complaint after a nonjury trial, reversed, on the facts, without costs, and the matter remanded for a new trial.

McGUIRE, J. (concurring)

For the reasons stated by Justice Saxe, I agree that we should direct a new trial because Supreme Court erred in granting defendant's mid-trial application to have Dr. Baden testify as an expert witness. In my view, the court abused its discretion in granting the application. In any event, I would substitute our discretion for that of Supreme Court and hold that Dr. Baden should not have been permitted to testify (*see Brady v Ottoway Newspapers*, 63 NY2d 1031 [1984]). As a new trial is necessary for this reason alone, there is no need to reach the issue of whether the verdict is against the weight of the evidence. But because there will be a new trial, I add that I also agree with Justice Saxe to the extent he concludes that the evidence concerning expressions by plaintiff of a fear or belief that her husband committed suicide are not affirmative evidence that he did commit suicide and that Supreme Court gave undue weight to that evidence.

I disagree with Justice Saxe's view that I have "implicitly agreed with" him in two particular respects. My conclusion that Dr. Baden should not have been permitted to testify does not "logically require[] Dr. Baden's testimony to be removed from the [weight-of-the-evidence] balance sheet." First, evidence that should not have been admitted at trial is nonetheless evidence that was admitted at trial. Justice Saxe cites no authority for

the proposition that when the weight of the evidence is assessed we must disregard evidence that was considered by the trier of fact on the ground that it should not have been admitted. In a criminal case, I think it plain that, for example, if we were to determine that an inculpatory statement of the defendant admitted at trial should have been suppressed, we would not appraise either the sufficiency or the weight of the evidence as if the statement had not been admitted. Nor can we assume there are no circumstances under which Dr. Baden (or another expert) might testify at the new trial. Second, the evidence relating to plaintiff's expressions of her fears or beliefs with regard to how her husband died may be admitted for impeachment purposes even though they are not substantive proof of how he died (see generally *Barnes v City of New York*, 44 AD3d 39, 47 [2007] [Sullivan, J.], *lv denied* 10 NY3d 711 [2008]). To that extent, my opinion does not "preclude reliance on that [evidence] to support defendant's claim of suicide."

ANDRIAS, J.P. (dissenting)

In this action by the widow of Alan Green, deceased, to recover the proceeds of his life insurance policy, the complaint was dismissed, after a nonjury trial, based on a finding that there was no reasonable explanation for Mr. Green's death other than suicide. On appeal, we reversed and directed, by a vote of 3-2, the entry of judgment for plaintiff on the ground that "the evidence failed as a matter of law to overcome the presumption against suicide" because "there are other reasonable conclusions that may be drawn [therefrom], aside from suicide" (48 AD3d 37, 44, 40 [2007]).

The Court of Appeals, stating that the presumption against suicide "is a guide for the factfinder, not a rule that compels a result," and that the jury instruction approved in *Schelberger v Eastern Sav. Bank* (60 NY2d 506 [1983]) "should not be taken to mean that, where more than one conclusion is reasonably possible, suicide is excluded as a matter of law," reversed our determination "because there was evidence legally sufficient to support Supreme Court's decision [that Mr. Green committed suicide]" (12 NY3d 342, 345, 347 [2009]). The matter was then remitted to this Court "for consideration of the facts and issues raised but not determined on the appeal to [this] Court."

The plurality, employing a de novo review, would again reverse the judgment in defendant's favor and remand for a new

trial on the grounds that the finding that defendant committed suicide is against the weight of the evidence and that the trial court improvidently allowed Dr. Michael Baden, a forensic pathologist, to testify as a defense expert. The concurrence agrees that Dr. Baden's testimony should not have been admitted and would reach no other issue. Because I believe that allowing Dr. Baden to testify was not an improvident exercise of discretion and that the trial court's finding of suicide, based largely on its credibility determinations, is not against the weight of the evidence, a fair interpretation of which, when viewed as a whole, shows Mr. Green's suicide to be highly probable, I would affirm the judgment dismissing the complaint.

On December 3, 2001, defendant issued a $500,000 policy insuring the life of Mr. Green, age 54. On February 20, 2002, plaintiff, Mr. Green's wife, returned from work to find Mr. Green lying dead on their bed. When she requested payment as the policy's primary beneficiary, defendant invoked a policy clause that provided that if Mr. Green died as a result of suicide within two years of the date of issue, the death benefit would be limited to the return of the premiums. This action ensued and a bench trial was held in 2005.

The record reflects that Mr. Green resigned his employment in August 2001 and formed a venture to provide information technology consulting services. A restrictive covenant, the

enforceability of which he was litigating, prevented Mr. Green from soliciting his former employer's customers for two years, and he did not earn any income from the new venture or from any other employment from the date of his resignation to the date of his death. In September 2001, Mr. Green was unable to pay the initial $318.50 premium due with the application for his new life insurance policy, so plaintiff paid it. Mr. Green also borrowed $30,000 from plaintiff to meet his child support obligations from an earlier marriage.

The day before he died, Mr. Green saw Dr. Bos, who was treating him for pain related to a January 2002 hernia surgery. Mr. Green, a non-smoker and regular exerciser who took good care of his health, did not complain of pain related to the surgery and was found to be in excellent health during that examination and in those performed in the months before he died.

Mr. Green told Dr. Bos that he was depressed, out of work, feeling under lots of pressure and suffering from insomnia. He also said words to the effect that he didn't see "the point of being alive," which Dr. Bos interpreted as Mr. Green's having suicidal thoughts. However, Mr. Green said he had no suicidal plans and Dr. Bos's notes indicate that Mr. Green had "suicidal thoughts" but was "[n]ot suicidal." Dr. Bos found that Mr. Green had "reactive depression" and referred him to a psychiatrist. Mr. Green called the psychiatrist that day and left a message for

the psychiatrist to return the call.

Richard Wolff, Mr. Green's cousin, represented Mr. Green in the employment litigation. On the morning of his death, Mr. Green told attorney Wolff that he "hurt[] like hell" due to his hernia surgery, and they scheduled a meeting for the following week. According to Wolff, Mr. Green was upbeat, positive and excited about the consulting business he had begun and his life in general. However, after he resigned from his job, Mr. Green had told Wolff that he was under financial pressures in connection with his child support obligations.

On the morning of his death, Mr. Green told plaintiff that he was going to the gym to swim. When plaintiff returned home that evening, she found Mr. Green lying on the made bed wearing jeans, a T-shirt and a sweatshirt. An empty glass was on the nightstand beside him, and the New York Times, work papers and a Palm Pilot were on the bed next to him. When plaintiff could not awaken Mr. Green, she called 911 and EMS personnel responded. Plaintiff's mother and sister-in-law and Wolff also came to the apartment. EMS personnel pronounced Mr. Green dead at the scene. No suicide note was found. Mr. Green had no history of mental illness or known previous suicide attempts.

On the night of Mr. Green's death, plaintiff told a police officer that Mr. Green had been "depressed[,] and overdosed on pain medication." She also told a representative of the Office

of the Chief Medical Examiner that Mr. Green had been depressed and unemployed. Plaintiff, after consulting with attorney Wolff, refused to permit an autopsy or toxicological exam to be conducted by the Medical Examiner's office, claiming it violated Jewish religious law and the family's wishes. Plaintiff and Wolff adhered to this decision despite being told by a Deputy Medical Examiner that in the absence of proof of the cause of death, plaintiff might have difficulty with any later insurance claim. Although cremation is prohibited by Jewish law, plaintiff allowed Mr. Green to be cremated. According to plaintiff, this was because Mr. Green had requested before his death that he be cremated and his ashes scattered over Yankee Stadium.

On December 8, 2001, Mr. Green had received a prescription for 30 Ambien pills, which he refilled on February 6, 2002, two weeks before his death. In January 2002, Mr. Green had filled a prescription for 40 hydrocodone pills for pain following his hernia surgery; that prescription was not refilled. The empty vials for the Ambien refill and hydrocodone were found by the Medical Examiner's office at the scene. The Medical Examiner's office also found a vial containing 61 Vicodin pills and an empty vial from a prescription for Percocet previously issued to plaintiff.

On the evening of Mr. Green's death, plaintiff spoke to Dr. Bos and indicated that "pills were missing," which suggested to

Dr. Bos that Mr. Green may have committed suicide by taking the pills. Plaintiff told her sister-in-law the next day that pills were involved in Mr. Green's death and that he had been depressed as a result of financial problems and had recently cancelled Valentine's Day plans due to depression. Plaintiff implored her sister-in-law not to tell one of Mr. Green's friends, a dentist, anything about the pills. Plaintiff testified at trial, inconsistently, that she and Mr. Green might have taken all the pills in normal doses over a period of weeks preceding his death.

The death certificate lists the cause of death as "undetermined." Plaintiff testified that she did not know what caused Mr. Green's death, but speculated that it might have been a heart attack, an aneurysm or an adverse reaction to medication.

On direct examination, Dr. Baden testified that depression and suicidal thoughts are very important factors in evaluating whether a death is suicidal or not, and are particularly significant in the absence of an admitted plan to commit suicide, since most suicides are not planned and are committed on the basis of opportunity. He also testified that the ingestion of 10 10-milligram Ambien pills or 20 5-milligram hydrocodone pills would be sufficient to cause death and that Vicodin would still be effective two years after it was prescribed.

On cross-examination, Dr. Baden testified, among other things, that pathologists usually determine whether a person

committed suicide through an autopsy or toxicology study, by reviewing the decedent's history and circumstances, and by excluding other competing causes. Although he could not tell how many pills Mr. Green had taken because there was no autopsy, Dr. Baden believed that Mr. Green committed suicide because he was depressed and the medical records showed no other condition that would have caused his death. Dr. Baden explained that medical examiners deal with "acute reactive depressions," i.e. someone "reacts to something going on in his life," which can lead to suicide even "after one or two days of such thoughts." While acknowledging that no suicide note was found in this case, Dr. Baden testified that suicide notes are found in only approximately 25% of cases where suicide is later determined to have been the cause of death.

Consistent with this evidence, the trial court found that the facts that an individual had suicidal thoughts and "had been depressed in the immediate period before death" were "important factor[s] in determining whether the death . . . was the result of suicide; . . . [that] many suicides can be the results of acute depressions . . . result[ing] from personal financial problems of a few days[']duration"; that Mr. Green "was suffering from depression at the time of his death and many people commit suicide without a plan as the result of acute reactive depression"; that "[a] toxicological examination . . .

would have established whether [Mr. Green's] death was the result of an overdose of medication"; that "[a]n autopsy . . . would have established the cause of death even more definitively than a toxicological examination and would have determined whether [Mr. Green's] death . . . was as a result of an overdose of medication [or] the result of some other medical condition or . . . natural cause"; and that Mr. Green's "medical records [did] not establish that [he] was suffering from any other condition which would have caused him to die of natural causes."

In its conclusions of law, the trial court found that plaintiff made out a prima facie case by producing the life insurance policy and proof of Mr. Green's death, which shifted the burden to defendant to prove that Mr. Green committed suicide. Guided by the pattern jury instruction approved by the Court of Appeals in *Schelberger v Eastern Sav. Bank* (60 NY2d 506 [1983], *supra*), the trial court concluded that defendant met its burden of overcoming the presumption against suicide because there was no "reasonable explanation in this case [for Mr. Green's death] other than suicide"; it was "pure speculation that his death was as a result of natural causes"; and "[t]he amount of medication taken is inconsistent with an accident and only consistent with the fact that it was a deliberate suicidal act." In so ruling, the court noted that, unlike the decedent in

*Schelberger*, Mr. Green was not a drug addict who had previously overdosed on drugs.

Initially, I disagree with the plurality about the applicable standard of review. It is true that this Court's authority in reviewing the evidence in a nonjury trial is as broad as that of the trial court and that we may render any judgment we find "warranted by the facts, taking into account in a close case 'the fact that the trial judge had the advantage of seeing the witnesses'" (*see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983], quoting *York Mtge. Corp. v Clotar Constr. Corp.*, 254 NY 128, 133-134 [1930]). However, it is well settled that in exercising this power, where the findings of fact rest in whole or in part upon considerations relating to the credibility of the witnesses, we should not disturb the decision of the trial court "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992] [internal quotation marks and citations omitted]; *Kermanshah Oriental Rugs, Inc. v Latefi*, 51 AD3d 562, 563 [2008]; *Bragdon v Bragdon*, 23 AD3d 203 [2005]).

Here, the trial court, in determining whether the only reasonable inference to be drawn from the evidence was suicide, expressly stated that it was "of course taking into account the *critical factor* of the credibility of the witnesses" (emphasis

added). Still, the plurality contends that de novo review is warranted and that *Thoreson's* fair interpretation of the evidence approach is inapplicable because "the question of whether Mr. Green committed suicide is not logically dependent on findings regarding plaintiff's credibility" but rather is "based predominately on inferences drawn from established facts such as empty pill vials and prescription dates, objectively verifiable assertions regarding the decedent's conduct shortly before his death, and statements by witnesses whose credibility is not questioned." This position cannot withstand scrutiny.

In an action to recover on a life insurance policy, the presumption against suicide applies for the duration of the case, and the burden of proof of suicide is on the insurer (*see Schelberger v Eastern Sav. Bank*, 60 NY2d 506 [1983], *supra*; *Wellisch v John Hancock Mut. Life Ins. Co.*, 293 NY 178 [1944]). However, even "where more than one conclusion is reasonably possible, suicide is [not] excluded as a matter of law," since "[e]xcept in rare cases, a claim of suicide presents a factual issue, not a legal one" (*Green v William Penn Life Ins. Co. Of N.Y.*, 12 NY3d 342, 347 [2009], *supra*). Further, as to the burden of proof, the Court of Appeals has explained that

> "[t]he [pattern jury] instruction [approved in *Schelberger*] that a finding of suicide is permissible only when 'no conclusion other than suicide may reasonably be drawn' is directed at jurors deciding facts, not at judges deciding the law; it is a way of impressing on jurors' minds that the presumption

> against suicide is a strong one -- of telling them they should not find suicide unless the evidence shows suicide to be highly probable. Of course, the same is true of a judge sitting as factfinder in a nonjury trial".[1] (*id.*)

A "highly probable" burden of proof may be satisfied by circumstantial evidence (*see Matter of Philip*, 50 AD3d 81, 82-83 [2008]; *Maier v Allstate Ins. Co.*, 41 AD3d 1098, 1099-1100 [2007] [the standard of proof in civil arson cases is "clear and convincing," and the insurer may prove the elements of motive and opportunity by circumstantial evidence]). Circumstantial evidence is sufficient if a party's conduct may be reasonably inferred from it (*see Gayle v City of New York*, 92 NY2d 936 [1998]; *Benzaken v Verizon Communications, Inc.*, 21 AD3d 864, 865 [2005]; *see* PJI 1:70).

Because there was no autopsy, toxicological report or eyewitness, no direct evidence of the cause of Mr. Green's death exists, and plaintiff's beliefs, as well as those of his family and friends, are relevant in determining whether it is "highly probable" that he committed suicide. As the trial court found, while plaintiff is not a doctor, this is not simply a medical issue, and plaintiff's observations of Mr. Green around the time of his death and her belief that he committed suicide by overdosing on missing pills have probative value.

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[1]The Court of Appeals found that in this case "the evidence was strong enough to permit a finding of suicide, though not to require it" (*id.*)

In weighing the beliefs of plaintiff and other witnesses, the trial court's findings of fact strongly relied on inferences drawn from circumstantial evidence, including evidence of Mr. Green's motive for committing suicide and the availability of a sufficient quantity of pills to cause his death. This, in turn, rested largely on the trial court's credibility determinations, including the finding that "in many ways Mrs. Green, the plaintiff, was not credible."

In particular, the trial court found that plaintiff's testimony that Mr. Green was not really depressed or under real pressure before his death was incredible because it conflicted with her statements to third parties shortly after Mr. Green's death that, among other things, he was depressed and out of work, that pills were missing and that Mr. Green overdosed on prescription medication. This credibility finding goes directly to the material issues of whether Mr. Green had a motive to commit suicide and whether a sufficient number of pills was available to cause his death.

As to the latter, the trial court found that there had been a sufficient number of pills available in the apartment on February 20, 2002 to cause Mr. Green's death. The court reasoned that because Mr. Green's first prescription for 30 Ambien pills "lasted approximately 60 days . . . [t]here is no reason to believe the 30 [Ambien] pills that were prescribed [two weeks

before his death] would have lasted any longer or any shorter than" that. While the trial court did not specify an exact number, at the rate of one pill every two days, Mr. Green would have used only seven Ambien pills in the 14 days after the prescription was issued, leaving approximately 23 pills available on the date of his death. Indeed, even if Mr. Green had taken one Ambien pill per day, a dosage twice as much as was reflected in his earlier usage of 30 pills in 60 days, there would have been approximately 16 pills left in the vial on February 20, 2002. Based on the unrebutted expert testimony at trial, either amount supports the inference that there was a sufficient number of Ambien pills available on February 20, 2002 to cause Mr. Green's death. The trial court also noted that an empty vial of hydrocodone and a vial containing 61 Vicodin pills were found.

The plurality deems this finding to be conjecture. As to the hydrocodone, it maintains that there is no basis to find that any pills would have remained on the date of Mr. Green's death because the hydrocodone was prescribed 27 days earlier and would have been finished if taken at the prescribed rate. As to the Ambien, the plurality relies on plaintiff's testimony as to her and Mr. Green's alleged usage beyond the prescribed dosage, which could have left the refill vial nearly empty. However, the trial court was free to consider that Mr. Green had not taken his previous prescription for Vicodin, a brand of hydrocodone, at the

prescribed rate and to reject plaintiff's testimony as to usage of the Ambien refill in a manner that was inconsistent with Mr. Green's usage of the original prescription. Instead, the trial court could rationally rely on plaintiff's repeated statements shortly after Mr. Green's death that pills were missing, which implies that the vials containing the prescription medication were not empty on the morning of his suicide.

Clearly, plaintiff's credibility was relevant to the determination of this issue, given the court's implicit acceptance of her testimony that a number of pills sufficient to cause death was available and taken by Mr. Green and rejection of her testimony indicating that the vials were nearly empty on the date of his death. Indeed, if the plurality's analysis were accepted as logical, the obvious question would be: Why did plaintiff make statements on several occasions shortly after her husband's death that "pills were missing" or that pills were involved in her husband's death?

Another prong of the trial court's decision was its finding that plaintiff's refusal to allow an autopsy or toxicological exam of her husband on religious grounds was "not reasonable or credible," given that she allowed him to be cremated. The court noted that "a simple toxicological examination . . . would have shed a huge amount of light concerning the cause of her husband's death," and that plaintiff was trying to "hav[e] it both ways" by

"arguing a lack of evidence to overcome the presumption [against suicide] and at the same time engaging in actions [that prevented her from finding out] how her husband, in fact, died." In the court's opinion, plaintiff "didn't really want to find out [the cause of her husband's death] because she was afraid . . . that [he], in fact, did commit suicide."

The plurality contends that plaintiff's decision to bar the autopsy and toxicology report but to allow cremation can be reconciled because she testified that Mr. Green told her he wanted to be cremated. This again turns on credibility, and the trial court was free to reject that testimony, which it implicitly did when it found that a conflict existed.

The plurality opines that in any event plaintiff's fears that defendant committed suicide do not establish an intentional overdose. This ignores the fact that "[c]ircumstances insignificant in themselves may acquire probative force as links in the chain of circumstantial proof" (*Van Inderstine Co. v Barnet Leather Co.*, 242 NY 425, 435 [1926]). The Court of Appeals expressly included the conflict between plaintiff's position as to an autopsy and toxicology examination and her position on cremation, which undermines plaintiff's credibility as a whole, in summarizing the "[c]onsiderable evidence [that] supported defendant's contention that Mr. Green committed suicide" (12 NY2d at 345).

In an attempt to avoid the consequence of this conflict and limit the finding that plaintiff was not credible to those specific instances where her testimony was directly contradicted by her own prior inconsistent statements or by the testimony of other witnesses, the plurality dons an ethicist's cap to argue that each Jew makes an independent choice as to which of the 613 mitzvot of the Torah he or she will live by and that it is improper to find a Jewish person unworthy of belief based on the reasoning that he or she abides by some aspect of Jewish law but not another. While the plurality states that this is what the trial court did, and that I do it as well, it is in fact the plurality that turns a blind eye to the record and the role of the finder of fact in making credibility determinations and weighing evidence.

"A judicial factfinder should make credibility determinations on the basis of demeanor, forthrightness in answering, consistency or lack thereof in the account being given, interest in the outcome and other relevant considerations" (*Gass v Gass*, 42 AD3d 393, 401 [2007], Sullivan, J., dissenting). New York Pattern Jury Instruction 1:41, "Weighing Testimony," similarly provides:

> "In deciding what evidence you will accept you must make your own evaluation of the testimony given by each of the witnesses, and decide how much weight you choose to give to that testimony. The testimony of a witness may not conform to the facts as they occurred because he or she is intentionally lying, because the witness

> did not accurately see or hear what he or she is testifying about, because the witness' [*sic*] recollection is faulty, or because the witness has not expressed himself or herself clearly in testifying. There is no magical formula by which you evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you decide for yourselves the reliability or unreliability of things people tell you. The same tests that you use in your everyday dealings are the tests which you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the age, the appearance, the manner in which the witness gives testimony on the stand, the opportunity that the witness had to observe the facts about which he or she testifies, the probability or improbability of the witness' testimony when considered in the light of all of the other evidence in the case, are all items to be considered by you in deciding how much weight, if any, you will give to that witness' testimony."

Applying these standards, the trial court, in weighing the evidence, could consider that there was no proof that Mr. Green himself was observant of Jewish law to any degree whatsoever or that he instructed that, in the event of his death, no autopsy or toxicology examination should be performed because they would violate his adherence to Jewish law.

The plurality contends that in the absence of any direction by Mr. Green on the issue of an autopsy and toxicological exam, his surviving relatives could feel free to make the decision based on their own views and observances. Although one would understand that, on the night of her husband's death, plaintiff was upset and did not want to allow an invasion of Mr. Green's body, the plurality ignores the evidence that plaintiff adhered

to her decision not to allow an autopsy or toxicological report after consulting with attorney Wolff and being advised by a deputy medical examiner of the potential insurance consequences of not allowing such examinations. The trial court rightfully found that these circumstances reflect "a much more studied[,] deliberate decision," based on potential legal ramifications, rather than on Jewish law, and that a negative inference may be drawn therefrom.

Lastly, the trial court's determination was based in part on its acceptance of the unrebutted expert testimony of Dr. Baden. It is well settled that the credibility of experts and the appropriate weight to be accorded to their testimony are matters to be resolved by the trial court, sitting as the finder of fact (*see Sagarin v Sagarin*, 251 AD2d 396 [1998]).

The foregoing demonstrates that the trial court's findings of fact as to material issues, including motive and opportunity, rest largely upon considerations relating to credibility. Accordingly, contrary to the plurality's position, this matter must be reviewed under the *Thoreson* "fair interpretation of the evidence" standard (*see e.g. Siebert v Dermigny*, 60 AD3d 526 [2009]; *Matter of Falk*, 47 AD3d 21, 28 [2007], *lv denied* 10 NY3d 702 [2008]; *Watts v State of New York*, 25 AD3d 324 [2006]; *Saperstein v Lewenberg*, 11 AD3d 289 [2004]). Further, because the trial court was in the unique position of observing the

witnesses's demeanor, its credibility determinations are owed deference (*see Sterling Inv. Servs., Inc. v 1155 NOBO Assoc., LLC*, 65 AD3d 1128, 1129-1130 [2009], *lv denied* 13 NY3d 714 [2009]).

Applying the correct standard of review, I find that the trial court's determination that defendant met its burden of overcoming the presumption against suicide is supported by a fair interpretation of the evidence. While there was no evidence that Mr. Green had a plan to commit suicide, there was strong circumstantial evidence indicating that it is "highly probable" that he did so. This evidence includes Mr. Green's statements to Dr. Bos the day before he died that he was depressed, having difficulty sleeping, out of work, and feeling under pressure and that he did not see the point of being alive; Mr. Green's financial and legal problems, including his child support obligations and inability to earn, due to the restrictive covenant he was litigating, which left him unemployed for months; the discovery of Mr. Green lying on his bed with an empty glass on the nightstand beside him and two empty bottles that had contained recently prescribed pain medication in the nightstand drawer; plaintiff's comments to several parties shortly after Mr. Green's death that he was depressed, that pills were missing and that Mr. Green overdosed on medication; Mr. Green's general good health, aside from the hernia operation; and the conflict between

plaintiff's refusal to permit an autopsy or a toxicological examination of Mr. Green's body based on Jewish law while ordering the body cremated in violation thereof. Further, there was the unrebutted expert testimony of Dr. Baden that most suicides are not planned and are committed on the basis of opportunity; that suicide is frequently the result of an "acute reactive depression"; that the ingestion of 10 10-milligram Ambien pills or 20 5-milligram hydrocodone pills would be sufficient to cause death; and that suicide notes are found in only approximately 25% of cases where suicide is later determined to have been the cause of death.

To avoid this result, the plurality and the concurrence contend that the trial court improvidently allowed Dr. Baden to testify despite late disclosure. I disagree.

Before trial, in response to an interrogatory, defendant advised plaintiff that it had not retained an expert. After Dr. Bos testified at trial, defendant sent plaintiff a letter stating that it had retained Dr. Baden as an expert "as the result of the surprising efforts of Dr. Bos to change his deposition testimony concerning the admissions made to him by [plaintiff] on February 20, 2002 and what I am told is his inaccurate testimony concerning the significance of 'suicidal thoughts.'" As to the scope of Dr. Baden's anticipated testimony, the letter stated:

> "Dr. Baden has reviewed the claim file and is expected to testify that the presence of suicidal

> thoughts is a significant factor in determining whether the death of an individual was the result of suicide under the circumstances presented. He is also expected to testify that toxicology could have determined whether Alan Green took a quantity of medication sufficient to cause his death and the quantity of hy[d]rocodone and/or Ambien sufficient to cause death. Dr. Baden is also expected to testify that there is no recognized religious objection to performing a toxicological examination of a Jewish decedent."

Plaintiff moved to preclude Dr. Baden's testimony, and defendant opposed the motion. Upon consideration of the parties' written submissions and oral argument, the trial court found that defendant made a "sufficient showing of good cause" for the delay in retaining Dr. Baden because while Dr. Bos's trial testimony was similar to his deposition testimony in many respects, "in its totality, his testimony at trial significantly weakened the position that Mr. Green committed suicide based upon his interview of Mr. Green, as well as upon his conversations with Mrs. Green and the police." Significantly, the trial court found that there would be no prejudice to plaintiff as a result of allowing Dr. Baden to testify, because the late notice did not affect the way that plaintiff had conducted her case until then, except that if plaintiff had known defendant was going to call an expert, she might have engaged her own expert as well. To remedy any prejudice in that regard, the trial court offered plaintiff the opportunity to retain her own expert and to have the expert testify at trial as to the same issues that Dr. Baden would address, going so far as to state that it would allow plaintiff

to expand on those issues upon proper notice. The trial court also offered to direct defendant to specify the exact basis for Dr. Baden's opinion, the facts on which he was relying, and his qualifications. Plaintiff declined both offers.

CPLR 3101(d)(1)(i) provides that

> "[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion."

The statute further provides that where a party "retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof," it must show "good cause" for the delay. In that regard, "upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just" (*id.*).

Whether expert disclosure is so late as to warrant preclusion "is left to the sound discretion of the trial court" (*McGlauflin v Wadhwa*, 265 AD2d 534 [1999]; *Tamborino v Burakoff*, 224 AD2d 609 [1996]; *Lesser v Lacher*, 203 AD2d 181 [1994]). A party should not be precluded from proffering expert testimony "merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (*Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 710-711 [2007]

[internal quotations and citations omitted]; *St. Hilaire v White*, 305 AD2d 209, 210 [2003]; *Lanoce v Kempton*, 8 AD3d 449, 451 [2004]; *Karoon v New York City Tr. Auth.*, 286 AD2d 648 [2001]). Further, good cause has been found to exist to permit an expert to respond to evidence at trial where the need for the testimony came as a surprise during the trial (*see* e.g. *Benedict v Seasille Equities Corp.*, 190 AD2d 649, 649-650 [1993]; *Simpson v Bellew*, 161 AD2d 693, 698 [1990], *lv denied* 77 NY2d 808 [1991]).

Here, there is no indication either that defendant's failure to disclose Dr. Baden until the middle of trial was intentional or that plaintiff was prejudiced by the late disclosure. Rather, defendant was surprised when Dr. Bos tried to distance himself at trial from the testimony that he gave at his deposition that *plaintiff* believed that defendant had committed suicide. While Dr. Bos testified at his deposition that when plaintiff called him after Mr. Green's death she mentioned suicide and missing pills and that he did not remember plaintiff telling him that the police or an EMT told her it was suicide, at trial he initially testified that he did not think that plaintiff had mentioned the word suicide, that he did not remember whether plaintiff had said that Mr. Green had taken pills, and that he could not recall whether plaintiff or the police inspector told him that there was an empty pill vial. Dr. Bos also sought to weaken the implication that Mr. Green had committed suicide by testifying

that it was not uncommon for people who feel depressed not to see the purpose of life, but that "besides the behavior patterns and the general impression at the time of the consultation," it was "a concrete plan of really ending it all" that would establish that someone was suicidal.

Accordingly, the trial court providently exercised its discretion when it permitted defendant to call Dr. Baden as a witness to respond to Dr. Bos's statements, limited the scope of that testimony, and offered plaintiff the opportunity to call her own expert witness in rebuttal, thereby eliminating any prejudice (*see Putchlawski v Diaz*, 192 AD2d 444 [1993], *lv denied* 82 NY2d 654 [1993]). In *Putchlawski*, under similar circumstances, we stated:

> "CPLR 3101(d)(1)(i), which, in medical malpractice actions, requires disclosure of the subject matter on which an expert is expected to testify, but not his or her identity, also gives the court discretion 'for good cause shown' to 'make whatever order may be just' in the event of noncompliance. Such discretion was properly exercised here under circumstances showing that the noncompliance was not calculated to put plaintiff at an unfair disadvantage. The court gave plaintiff an opportunity to call a pathologist expert of his own, and placed appropriate restrictions on the testimony of the challenged expert witness" (192 AD2d at 445 [citation omitted]).

The plurality finds that the differences between Dr. Bos's deposition and his trial testimony do not rise to the level of good cause. However, given that there is no showing that defendant's conduct was intentional or that plaintiff was

prejudiced, it cannot be said that the trial court improvidently exercised its discretion, and there is no basis for this Court to substitute its discretion for that of the trial court, even if the decision to preclude would equally have been a provident exercise of discretion (*see Tamborino*, 224 AD2d at 610). As the trial court explained, "[E]ven though, individually, one can argue about the interpretation of his testimony with respect to Mrs. Green and the pills or Mr. Green and whether he said life wasn't worth living or used different words, in it's totality [*sic*] Dr. [] Bos's testimony weakened the case which the defendant has to show in this case to prove its affirmative defense." This view of the testimony should not be disturbed because there is a material difference between Dr. Bos's deposition testimony that plaintiff, not the police, told him that Mr. Green took pills and committed suicide and his trial testimony that he merely drew the impression from his conversation with plaintiff that Mr. Green may have committed suicide. It was also appropriate to retain Dr. Baden to respond to Dr. Bos's trial testimony that a person who expresses suicidal thoughts does not present the same risk as one who expresses a suicidal plan, and that, while, forensically speaking, a lethal dose of Ambien exists, he had never read about patients overdosing on the drug.

The plurality believes that plaintiff was prejudiced because

defense counsel sought to call Dr. Baden to remedy a problem caused by the testimony of Dr. Bos, a witness called by the defense, not by plaintiff, who did nothing to create the predicament in which the defense found itself. However, this is the very situation that occurred in *Simpson v Bellew* (161 AD23d 693 [1990], *supra*), which the plurality cites. In *Simpson*, the appellate court found that the trial court properly exercised its discretion when it allowed defendant to call an expert to rebut the surprise testimony of a police officer, notwithstanding that the police officer was a defense witness.

The plurality also finds that plaintiff was prejudiced because "as a practical matter, plaintiff's counsel could not undertake the task of locating a new expert to challenge Dr. Baden's opinions and assertions as part of a rebuttal case." This speculative contention is belied by the record, which establishes that the trial court's offer, in this *nonjury* trial, was not illusory and that, in rejecting it, plaintiff made a strategic choice:

> "THE COURT: You [plaintiff] rest. It is a non jury case. That's one of the reasons the type of flexibility that was permitted in this case was taken into account. And if you want to call an expert *we'll wait for you to do that*.
>
> "PLAINTIFF COUNSEL: Thank you for the opportunity, Judge, but it doesn't, *its not in my plans*—
>
> "THE COURT: All right.

"PLAINTIFF COUNSEL: - *or the plaintiff's plans to call an expert* (emphasis added)."

Nor is there merit to the plurality's objection to Dr. Baden's testimony on the ground that no explanation was given as to why a forensic pathologist should be permitted to testify on the psychology or state of mind of an individual who commits suicide. Under New York law, "expert opinions are admissible on subjects involving professional or scientific knowledge or skill not within the range of ordinary training or intelligence" (*Matter of Nicole V.*, 71 NY2d 112, 120 [1987]). Courts of this State have admitted expert testimony regarding physical and behavioral responses and reactions that are not generally understood (*see People v Henson*, 33 NY2d 63 [1973]) ["battered child syndrome"]). In *Broun v Equitable Life Assur. Soc. of U.S.*, (69 NY2d 675, 676 [1986]), the Court of Appeals held:

> "There must, nevertheless, be a reversal, for the exclusion of Dr. Baden's opinion that decedent's death was a suicide was an abuse of discretion as a matter of law. Although the jury may have been able to evaluate some of the evidence presented, *whether the number of pills required to reach the level of toxicity found in decedent's body could have been taken inadvertently or whether the circumstances surrounding the body were consistent with general patterns of behavior exhibited by other suicide victims were not matters within their ken*" (emphasis added).

Here too, Dr. Baden testified about general patterns of behavior exhibited by suicide victims. Moreover, the record reflects that Dr. Baden's direct testimony was limited and that

plaintiff elicited testimony from him on cross-examination that exceeded the scope of his direct examination, such as the statement that suicide is frequently the result of "acute reactive depression" and that suicide notes are only found in 25% of cases. Further, by rejecting the trial court's offer to demand that defendant amplify its response to her interrogatory, plaintiff waived her argument that defendant's expert notice failed to comply with CPLR 3101(d)(1)(i).

The plurality also contends that Dr. Baden's testimony was given an undue weight. This conclusion does not withstand scrutiny.

It is well settled that the weight to be accorded an expert's testimony, based upon his qualifications, is for the trier of fact to decide (see *Borawski v Huang*, 34 AD3d 409, 410-11 [2006]; *Beizer v Schwartz*, 15 AD3d 433, 434 [2005]; *Rushford v Facteau*, 280 AD2d 787, 789 [2001]). "Moreover, the trial court's assessment of the credibility and weight to be accorded an expert's testimony in a nonjury trial is entitled to deference by a reviewing court" (*Levy v Braley*, 176 AD2d 1030, 1033 [1991]). Although an expert's testimony may be rejected by the trial court if it is improbable, in conflict with other evidence or otherwise legally unsound, Dr. Baden's testimony was not rebutted and no such challenge is raised on appeal. While the plurality states that, contrary to Dr. Baden's assertion that most suicides are

not planned and are committed on the basis of opportunity, recent studies establish that most suicides are not attempted impulsively and do involve a plan, this retrospective critique of Dr. Baden carries no weight. The trial was held in 2005 and the fact that a single 2008 study, which was not in the trial record, disagrees with Dr. Baden's opinion does not establish either that he did not present the trial court with the prevailing scientific view at the time of trial or that his opinion has in fact been discredited by the scientific community.

The plurality also argues that the presumption against suicide was not overcome because suicide was "far from the only reasonable conclusion to reach" since there were a variety of other possible explanations for Mr. Green's death, such as natural causes, an adverse reaction to medication or an accidental overdose. However, the Court of Appeals has explained that the instruction that a finding of suicide is permissible only when "no conclusion other than suicide may reasonably be drawn" is a way of telling jurors that "they should not find suicide unless the evidence shows suicide to be highly probable" (*Green*, 12 NY3d at 347), a conclusion that, for the reasons set forth above, is supported in this case by a fair interpretation of the evidence.

Further, as the trial court found, "it is pure speculation that [Mr. Green's] death was [] a result of natural causes,"

particularly given "the availability of pills in the apartment which were sufficient to cause his death." Plaintiff was not aware that Mr. Green had ever experienced an adverse reaction to either hydrocodone or Ambien, and, aside from a recent non-life-threatening hernia operation, Mr. Green was in very good health at the time of his death.

The plurality's hypothesis of an accidental overdose might be plausible if there were some pills left in the prescription vials after Mr. Green's death. Thus, if one, two, three, four, five, or even 10 pills had been left in either vial, a plausible argument could be made that Mr. Green may have accidentally or mistakenly taken too much of either Ambien or hydrocodone or a combination of both. However, there were no pills left in either vial, and it was up to the trial court, as the trier of fact, to draw the appropriate inferences. While there was no direct evidence that Mr. Green committed suicide, as noted above, there was extremely strong circumstantial evidence supporting the court's conclusion that he committed suicide by overdosing on prescription pills.

Finally, as noted by the trial court, while it is true that, in many of the cases, including *Schelberger* and *Wellisch*, cited by plaintiff, the jury found that the defendant insurer had not overcome the presumption against suicide, the issue before all the appellate courts, with few exceptions, was whether or not

there should have been a directed verdict for the defendant or a determination that the finding of the jury that there was no suicide was against the weight of the evidence. Here, however, we are reviewing a finding by the trier of fact that defendant overcame the presumption against suicide.

Accordingly, the judgment dismissing the complaint should be affirmed.

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2210 M-479 & M-438
Alfred LaRosa, et al.,
Plaintiffs-Respondents,

Index 600742/07

-against-

Avigail Arbusman, et al.,
Defendants-Appellants,

Tali Arbusman, et al.,
Defendants.

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Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

Phillips Nizer LLP, New York (Stuart A. Summit of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered March 16, 2009, that granted plaintiffs' motion for partial summary judgment on the twelfth cause of action alleging conversion, unanimously affirmed, with costs.

Plaintiffs' decedent, Thomas Elmezzi, a retired businessman, who was 90 years of age at the time of these events, decided to invest in a jewelry business. He entered into an agreement with defendant-appellant, Avigail Arbusman, an experienced jewelry retailer who owned defendant-appellant Jewels by Viggi, Ltd. with her husband, defendant-appellant, Dan Arbusman. Elmezzi and Avigail executed a Memorandum of Understanding (MOU) to set forth their understanding concerning the formation and governance of Vito, Ltd. The MOU explicitly states that: (1) its purpose was "to set forth the understandings of the parties in order to form

and provide for the governance of a corporation formed by the parties;" (2) that the matters it contained "shall be construed as a binding commitment to effectuate the terms of this Memorandum" and (3) that both parties shall have an equal share in the corporation. The MOU obligated each party to contribute "an equal amount of capital" to Vito, Ltd. However, it is undisputed that while Elmezzi contributed $750,000 in capital, defendants did not invest any funds in Vito, Ltd. The MOU further provides that the parties intended "to negotiate in good faith [*sic*] draft and execute more detailed documents dealing with the matters contained herein and any related items including a Shareholder Agreement, Buy Sell Agreement, and Corporate Bylaws ("Bylaws"), and any other documents necessary to effectuate the purposes of this Memorandum."

On May 26, 2005, Avigail, Dan and Elmezzi executed a 17-page Stockholders' Agreement. The Stockholders' Agreement authorized the corporation to issue 200 shares of common stock, but noted that the corporation had already issued 50 shares, of which Avigail held 25 shares and Elmezzi held 25 shares. The Stockholders' Agreement further provided that in the event of death or permanent disability of either shareholder, "the shares of the Deceased or Disabled Shareholder shall pass free and clear to the Surviving Shareholder who shall remain the sole shareholder of the Corporation."

The Stockholders' Agreement also contains a merger clause and an arbitration clause. Paragraph 17, the merger clause, states:

> This Agreement contains the entire understanding between the Parties concerning the subject matter contained herein. There are no representations, agreements, arrangements or understandings, oral or written, between or among the Parties, relating to the subject matter of this Agreement, which are not fully expressed herein.

Paragraph 9, the arbitration clause, states, in pertinent part:

> Any controversy arising out of this Agreement or its breach shall be settled by arbitration if, prior to the commencement of any legal proceedings dealing with a controversy arising out of this Agreement or its breach, any Party to this Agreement demands that such controversy be arbitrated.

Approximately seven months after Vito, Ltd. incorporated, Elmezzi died. Avigail took control of Vito, Ltd. and removed funds from the corporation. Plaintiffs maintain that Avigail's actions constitute conversion because at the time of Elmezzi's death, Avigail had no rights as a shareholder, as she had never made the capital contribution the MOU or Business Corporation Law § 504(a) required. Defendants-appellants contend that Avigail was entitled to the funds because she became the owner of the decedent's shares in Vito, Ltd., upon his death, pursuant to the terms of the Stockholders' Agreement, that, they claim,

superseded the MOU.

The Stockholders' Agreement, that Avigail and Elmezzi specifically contemplated in the MOU and that Avigail, Dan and Elmezzi executed after the MOU, does not refer to or mention capital contributions by shareholders or otherwise refer to the amount the parties were to pay for shares of Vito, Ltd. Instead, the Stockholders' Agreement treats the shares as having already been issued. Thus, the Stockholders' Agreement does not alter, amend, revoke or supersede the MOU's provision concerning capital contributions. Although the Stockholders' Agreement specifically provides that it supersedes prior agreements concerning the "subject matter contained herein," because the Stockholders' Agreement does not address the subject of capital contributions, the MOU's treatment of capital contributions did not merge into the Stockholders' Agreement.

Because the MOU is clear and unambiguous, the motion court properly declined to consider parol evidence to ascertain its meaning and the parties' intentions (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Moreover, merely because the parties acknowledged in the MOU that they intended to negotiate, in more detail than the two-page MOU provided, how to govern Vito, Ltd., this does not render the MOU incomplete or abrogate the requirement in the MOU that each shareholder will provide an equal amount of capital.

To obtain shareholder rights, a shareholder must provide some kind of consideration (*see Heisler v Gingras*, 90 NY2d 682 [1997]). Because Avigail made no capital contribution to Vito, Ltd., in consideration for shares of stock, she never attained shareholder status (*see Matter of KSI Rockville v Eichengrun*, 305 AD2d 681 [2003]; *Josephthal Holdings v Weisman*, 5 AD3d 221 [2004]). Avigail's claim that she secured her shares in the corporation through "sweat equity" is without merit. Although Business Corporation Law § 504(a) provides that consideration for issue of shares can be in the form of "labor or services actually received by or performed for the corporation" or "a binding obligation to perform services having an agreed value," defendants-appellants have failed to offer any evidence to show that Avigail performed any services for the corporation during its formation or prior to its incorporation, or that there was a "binding obligation" by Avigail to provide services, having an agreed value, to the corporation in lieu of capital for shares. The only service that Avigail provided during the seven months that Vito, Ltd. was in existence was allegedly to have business cards made. Vito, Ltd. made no sales and did no business during those months. Avigail admittedly "put the business on hold" during the summer of 2005. Thus, we cannot conclude that Avigail provided services of equal value to the decedent's $750,000 capital contribution to Vito, Ltd.

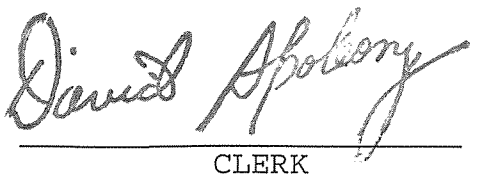
The arguments defendants-appellants raise for the first time on appeal asking this Court to search the record and grant summary judgment in their favor dismissing the conversion claim, are without merit. Defendants-appellants waived their right to arbitrate as provided in paragraph 9 of the Stockholders' Agreement by continuing to litigate after failing to appeal the court's denial of their motion to compel arbitration in 2007, by failing to assert an affirmative defense relating to arbitration in their answer and by extensively engaging in this litigation for years (*see Ryan v Kellogg Partners Inst. Servs.*, 58 AD3d 481 [2009]). Moreover, because plaintiffs are seeking to recover the value of their decedent's personal interest in Vito, Ltd. at his death, that the shares of stock decedent held represent, they have demonstrated a claim for conversion (*see Agar v Orda*, 264 NY 248, 251 [1934]; *Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 290 [2007]).

**M-479 & M-438 - LaRosa, et al., v Arbusman, et al.,**

Motion to strike portions of reply brief and cross motion seeking costs denied.

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

ENTERED: JUNE 17, 2010



CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2739N Fashion Institute of Technology, Index 115104/08
Petitioner-Respondent,

-against-

United College Employees of Fashion Institute of Technology, Local 3457, American Federation of Teachers,
Respondent-Appellant.

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James R. Sandner, New York (Mitchell H. Rubinstein of counsel), for appellant.

Littler Mendelson, P.C., New York (Bertrand B. Pogrebin of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered May 14, 2009, which granted the CPLR article 75 petition and permanently stayed arbitration in this labor dispute, unanimously affirmed, without costs.

The collective bargaining agreement ("CBA") between the parties that was in effect at the relevant time had separate and distinct provisions governing general "Grievances" on the one hand, and "Disciplinary Procedure," on the other. Section 7.0 of the CBA, entitled "Grievance Procedure," set forth a three-step process for resolving employee grievances, defined in Section 7.3 as "any claim by a grievant [an employee or the Union] that there has been a violation, misinterpretation, or misapplication of any provisions of [the CBA] which concern the grievant . . . *if the sustaining of such a claim would not be inconsistent with the*

*provisions of this contract*" (emphasis added). An unresolved grievance, if it reached the third and final step, was subject to arbitration.

Section 28.28.0 of the CBA, entitled "Disciplinary Procedure," provided that "[n]o employee may be disciplined except for just cause." The section further provided for disciplinary charges to be reviewed by a two-person disciplinary committee, consisting of one Fashion Institute of Technology (FIT) representative and one Union representative, which would issue a recommended disposition to FIT's President within 60 days. Upon receipt of the report, the President "may take disciplinary action," which "may include, but is not limited to, reprimand . . ., suspen[sion] with or without pay, or termination." The parties' contract provided that "[i]f the President's decision is to *terminate* a part-time employee who is a bargaining unit member and who holds a certificate of continuous employment [CCE], the College and Union will refer the case to an outside arbitrator for final and binding determination" (emphasis added). Notably, the determination to terminate a part-time employee was expressly subject to arbitration, whereas no similar provision rendered the determination to suspend a part-time employee subject to arbitration.

In March 2008, FIT instituted a disciplinary proceeding

against part-time employee Les Katz pursuant to Section 28.28.0 of the CBA. As per CBA §§ 28.28.0(d)-(e), a two-person disciplinary committee investigated the charge. On May 16, 2008, the committee issued a report to FIT President Joyce F. Brown, recommending that Katz be given a written warning. After review of the record, on June 4, 2008, pursuant to CBA § 28.28.0(f), President Brown suspended Katz without pay until January 26, 2009 (the first day of the spring semester).

On September 2, 2008, the Union filed a CBA grievance with FIT purporting to challenge President Brown's determination to suspend Katz. On September 18, 2008, FIT dismissed ("returned") the grievance, asserting that Brown's determination was "not grievable" under the CBA. On October 22, 2008, the Union served FIT with a demand for arbitration before the AAA, asserting that the school had "[i]mproperly disciplined Les Katz in violation of the CBA." On November 10, 2008, FIT filed a petition in Supreme Court, New York County, seeking an order pursuant to CPLR 7503(b) permanently staying the arbitration.

We agree with the motion court that petitioner's claim is not subject to arbitration. Les Katz was cited, disciplined and suspended in accordance with the disciplinary procedures set forth in Section 28 of the CBA. The specific provisions of the CBA, entitled "Disciplinary Procedure," clearly govern in this case, and do not provide for arbitration of the determination to

suspend a part-time employee.

The union maintains that the issue of whether Katz was properly suspended is subject to arbitration pursuant to the general grievance procedure set forth in Section 7 of the CBA. Section 7, by its terms, applies only where sustaining the employee's claim "would not be inconsistent with the provisions of this contract." The motion court properly recognized that the Section 7 general grievance procedures were separate and not relevant to employee discipline, which is covered by a different section of the contract. The reading of the contract proposed by the union, which would graft the procedures in Section 7 onto the disciplinary procedures in Section 28.28, would render superfluous the provisions of Section 28.28, which provide for a limited right of arbitration for part-time employees only if they are terminated.

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

ENTERED: JUNE 17, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2837N Bridget De Socio, Index 102850/06
Plaintiff-Respondent,

-against-

136 East 56th Street Owners, Inc., et al.,
Defendants-Appellants.

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Litchfield Cavo LLP, New York (Daniel T. Hughes of counsel), for appellants.

Law Office of Michael K. O'Donnell, White Plains (Michael K. O'Donnell of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered on or about February 19, 2009, which, to the extent appealed from, granted plaintiff's motion pursuant to CPLR 3126 to strike the answer for failure to provide discovery, unanimously reversed, on the law and the facts, without costs, the motion denied, the answer reinstated, and the matter remanded for consideration, after affording the parties an opportunity to be heard, of such lesser penalty than striking the answer, as the court deems just.

The preliminary conference in this matter was held on April 25, 2007, and plaintiff's first document request is dated August 7, 2007. During 2007 and 2008, several conferences were held and defendants were directed to respond to plaintiff's discovery demands. In March 2008, plaintiff sent a second document demand requesting, among other things, all minutes of the Board

concerning this litigation and all documents concerning this litigation in the custody or control of the current management company for the building. In June 2008, plaintiff's counsel wrote to defendants' counsel noting that defendants had failed to comply with the court's discovery orders. The letter apprised counsel that a motion seeking appropriate sanctions would be filed unless defendants complied with all court orders immediately. On July 30, 2008, plaintiff's counsel again wrote to defendants' counsel, noting that there had been no response to the June letter and enclosing a draft notice of motion. On July 31, 2008, defendants' counsel responded that there would be a complete response to the letter by August 8 and that there was no need for plaintiff to make a motion. On September 12, 2008, after failing to receive the requested discovery, plaintiff's counsel again wrote to defendants' attorney indicating that plaintiff intended to file a sanctions motion. It is that motion, which sought either striking of the answer or a conditional order of preclusion, which is the subject of this appeal.

In opposition to the motion, defendants provided an affidavit from Stuart Smolar, the current property manager of defendant 136 East 56th Street, who explained that after receiving copies of plaintiff's document demands on October 28, 2008, he and another property manager searched various files and

document indexes but were unable to locate any responsive materials. Defendant Heron no longer exists as an operating company; its assets were purchased by Halstead Management Company.[2] After the motion was filed, defendants' counsel sent a subpoena to Halstead seeking documents and materials related to the subject of this litigation. In response, counsel received an affidavit from Charles Mintz, an employee of Halstead, who explained that Halstead had no records regarding the subject of this litigation. That affidavit was provided to the court as part of defendants' response to the sanctions motion.

Although the determination of an appropriate sanction pursuant to CPLR 3126 lies in the trial court's discretion and should not be set aside absent a clear abuse of discretion (*Arts4all, Ltd. v Hancock*, 54 AD3d 286, 286 [2008], *affd* 12 NY3d 846 [2009], *cert denied* ___ US ___, 130 S Ct 1301 [2010]), here the trial court made no findings of fact and offered no explanation for its decision to strike the answer. Thus, no basis exists for deferring to the trial court's determination.

Although defendants now claim that the documents cannot be located because of the change in the building's management, they offer no credible reason for their failure to provide this simple explanation to either plaintiff or the court until after the

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[2] Plaintiff disputes this claim, noting that filings with the State suggest that Heron is an active corporation.

sanctions motion was filed. The record does not show that defendants ever alerted the court to the possibility that they could not locate the records, despite the fact that the court kept extending their deadline to produce them. The affidavits from Mintz and Smolar do not show that any search was conducted during the year and a half this case was pending. It is noteworthy that defendants' submissions do not explain whether the records ever existed, but merely state that no records could be found as of late October 2008. Moreover, the opposition papers are silent as to whether Board minutes from 2003, among the items requested, are retained by anyone currently on the Board or by corporate counsel.

Defendants' behavior in this matter cannot be excused. Their exhibited pattern of noncompliance and their failure to account for their actions over a period of a year and a half warrant a penalty pursuant to CPLR 3126 (*see Figdor v City of New York*, 33 AD3d 560 [2006]). Although defendants try to justify their own inaction by focusing on plaintiff's alleged discovery delays, defendants were not entitled to ignore the court's orders merely because plaintiff may not have been deposed.

Nonetheless, as this Court recently noted, "mere lack of diligence in furnishing some of the requested materials may not be grounds for striking a pleading" (*Elias v City of New York*, 71 AD3d 506, 507 [2010]). "While the conduct of defendant[s] here

was unsupportable, we cannot find that it rose to the level that would justify striking the answer" (*Virola v New York City Hous. Auth.*, 185 AD2d 122, 124 [1992]), particularly in light of the fact that defendants, albeit belatedly, have now come forward with an explanation for the nonproduction. We believe that some lesser sanction, monetary or otherwise, is warranted, and we remand the matter for the court to determine the appropriate sanction (*see Allstate Ins. Co. v Buziashvili*, 71 AD3d 571 [2010]; *see also Elias v City of New York*, 71 AD3d at 506).

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3068 Michael Carlsen, et al., Index 110191/07
Plaintiffs, 591069/07

-against-

Rockefeller Center North, Inc., et al.,
Defendants.
- - - - -
Rockefeller Center North, Inc.,
Third-Party Plaintiff-Respondent,

-against-

David Shuldiner, Inc.,
Third-Party Defendant-Appellant.

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Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for appellant.

Tarshis & Hammerman, LLP, Forest Hills (Roberta E. Tarshis of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered January 14, 2010, which, insofar as appealed from as limited by the briefs, denied the motion of third-party defendant David Shuldiner, Inc. (Shuldiner) for summary judgment dismissing third-party plaintiff Rockefeller Center North, Inc.'s (RCN) claim for breach of contract and granted RCN's cross motion for summary judgment on that claim and declared that Shuldiner breached its contract with RCN by failing to procure the necessary insurance coverage naming RCN as an additional insured, unanimously affirmed, with costs.

The record shows that RCN made an emergency call to Shuldiner to replace a cracked window at RCN's building. The parties had a long business relationship, and during the course of that relationship, it was agreed that Shuldiner would procure insurance coverage for the benefit of RCN before Shuldiner could perform any work at the building. To show compliance with RCN's requirements, Shuldiner had been submitting yearly blanket certificates of insurance containing language stating that RCN was an additional insured. While working on the window, an employee of Shuldiner fell off a scaffold and sustained injuries. The employee commenced an action against RCN and was subsequently granted summary judgment on the issue of liability. In the interim, Shuldiner's insurer denied RCN additional insured coverage because there was no written agreement indicating that RCN was to be named an additional insured under Shuldiner's general liability insurance policy.

Contrary to Shuldiner's contention, there is nothing in the record showing that RCN premised its breach of contract claim solely on the existence of a written agreement so as to preclude it from recovering for breach of an oral contract (*compare Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 40 [2006]). The evidence establishes the existence of a valid and binding oral contract, as the terms were clear and definite, and the conduct of the parties evinces "mutual assent

sufficiently definite to assure that the parties [were] truly in agreement with respect to all material terms" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]; *see also Travelers Indem. Co. of Am. v Royal Ins. Co. of Am.*, 22 AD3d 252 [2005]; *Richter v Zabinsky*, 257 AD2d 397, 398 [1999]). Shuldiner's vice president acknowledged that RCN had spoken to him about procuring insurance naming RCN as an additional insured before Shuldiner could begin any work on the premises, and that RCN had required Shuldiner to insert specific language into the certificate of insurance indicating that it was an additional insured. Although Shuldiner submitted certificates containing such language, there was no agreement in writing that RCN be added as an additional insured, as required under the policy, so as to fulfill its obligation under the parties' oral agreement.

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

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3069 In re Louie M.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Frederic P. Schneider, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about May 4, 2009, which adjudicated appellant a juvenile delinquent upon a finding that he committed acts which, if committed by an adult, would constitute the crimes of menacing in the second degree, harassment in the first degree and menacing in the third degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously modified, on the law, to change the incident dates for count 3 (menacing in the second degree) and count 4 (harassment in the first degree) on page 3 of the order from July 24, 2008 to "on or about May 2008 to August 14, 2008," and otherwise affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for

disturbing the court's determinations concerning credibility. The evidence clearly established the elements of each of the offenses at issue, and that each offense occurred on the date or range of dates set forth in the petition. There is no merit to appellant's argument that certain counts should be dismissed because of a lack of proof that the events in question occurred on the date set forth on the last pages of the fact-finding and dispositional orders. Although the last pages of these orders appear to limit the incident date to July 24, 2008, the first page of each order states that the findings of menacing in the second degree and harassment in the first degree were based on continuing events that occurred from on or about May 2008 to August 14, 2008. This appears to be no more than a clerical discrepancy between recitals on different pages of the same documents, and we see no reason to find that the dates recited on the last page of each document are controlling, when the dates on the first page conform to the petition, the evidence, and the court's oral decision.

However, we modify the last page of dispositional order to reflect the correct range of dates. Appellant's argument that he would be prejudiced by such a correction is without merit.

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3072-
3073-
3073A

Index 601907/07

GLC Securityholder LLC,
Plaintiff-Appellant,

-against-

Goldman, Sachs & Co., et al.,
Defendants-Respondents.

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Smith Valliere PLLC, New York (Mark W. Smith and Timothy A. Valliere of counsel), for appellant.

Schindler Cohen & Hochman LLP, New York (Lisa C. Cohen for Goldman, Sachs & Co., respondent.

Wollmuth Maher & Deutsch LLP, New York (David H. Wollmuth of counsel), for American General Life Insurance Company and AIG Annuity Insurance Company, respondents.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered March 9, 2010, declaring, inter alia, that the subject notes provide for payment of monthly interest in Canadian dollars, and awarding damages in favor of defendants note holders and against plaintiff issuer of the notes on account of the latter's payment of interest in U.S. dollars, unanimously affirmed, with costs. Appeal from two orders, same court and Justice, both entered October 14, 2009, which granted defendants' motions for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Within two months after issuance of the notes, all of the original note holders entered into side agreements with plaintiff

that, contrary to the indenture calling for all payments of the notes to be made in Canadian dollars, called for payment in U.S. dollars. After defendants, subsequent purchasers of the notes, demanded payment of the notes' monthly interest in Canadian dollars, plaintiff refused. Although plaintiff argues that one cannot assign greater rights than one has, the question is whether the side agreements "attach[ed]" to the notes (*see Matter of International Ribbon Mills [Arjan Ribbons]*, 36 NY2d 121, 126 [1975]). The answer is no. The side agreements, between plaintiff and the original note holders, could not modify the indenture, which is between plaintiff and the indenture trustee, and provides, in obvious contemplation of a secondary market, that transferees of the notes take them "free from [i.e., without assignment of] all equities or rights of set-off or counterclaim between [plaintiff] and the original or any intermediate Holder."

Nor does it avail plaintiff either to invoke the rule that agreements executed at about the same time, by the same parties, in the same transaction may be considered a single contract (*see Williams v Mobil Oil Corp.*, 83 AD2d 434, 439 [1981]), or to argue that the sale of the notes to defendants also constituted an assignment of the side agreements to defendants. The sale agreements and side agreements are not between the same parties, the sale agreements make no reference to the side agreements, and the side agreements, unlike the sale agreements, do not purport

to be binding on assigns.

There is no merit to plaintiff's argument that the provision of the indenture barring oral modifications authorizes amendments to be made by any writing signed by the party to be charged, e.g. the side agreements. Plaintiff's reading of that provision impermissibly renders nugatory the specific clauses in the indenture governing amendments of the indenture (*see Bank of Tokyo-Mitsubishi, Ltd. N.Y. Branch v Kvaerner, a.s.*, 243 AD2d 1, 8 [1988]). Nor could the indenture, an unambiguous, integrated written agreement, be modified by the parties' conduct (*see Union Chelsea Natl. Bank v PGA Mktg.*, 166 AD2d 369 [1990]).

While defendants would be barred by the indenture's "no action" clause from commencing an action to recover payments due on the notes, they are not barred from asserting counterclaims for such relief (*see Local Union No. 38, Sheet Metal Workers' Intl. Assn., AFL-CIO v Pelella*, 350 F3d 73, 82 [2d Cir 2003], *cert denied* 541 US 1086 [2004]). Plaintiff, while noting that the indenture is governed by Ontario law, cites no Ontario authority to the contrary.

In view of the foregoing, we do not reach whether defendants

are entitled to judgment by reason of holder in due course status.

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3074 Mahin Dokht Karoon, Index 350251/97
Plaintiff,

-against-

Majid Karoon,
Defendant.
- - - - -
Cox Padmore Skolnik & Shakarchy, LLP,
Nonparty-Appellant,

-against-

Kayvan Karoon, et al.,
Nonparty-Respondents.

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Cox Padmore Skolnik & Shakarchy LLP, New York (Sanford J. Hausler of counsel), for appellant.

Frenkel Sukhman LLP, White Plains (Michael Y. Sukhman of counsel), for respondents.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered September 21, 2009, which denied the motion of non-party appellant to have the sons of the deceased defendant substituted as defendants in this divorce action, unanimously reversed, on the law, with costs, the motion granted, and Kayvan and Kamran Karoon, as heirs and/or administrators of the Estate of Majid Karoon, substituted as parties defendant.

The court erred in finding that appellant's application was barred by CPLR 5208. That section is not applicable here because, at least at this juncture, appellant is not seeking to enforce a money judgment obtained after the death of a debtor

(*see Oysterman's Bank & Trust Co. v Weeks*, 35 AD2d 580, 581 [1970]). The motion to substitute should not have been denied as untimely, since the delay was not egregious (*see Rosenfeld v Hotel Corp. of Am.*, 20 NY2d 25, 28-29 [1967]), and especially since the proposed defendants have not demonstrated any prejudice resulting therefrom (*see Schwartz v Montefiore Hosp. & Med. Ctr.*, 305 AD2d 174 [2003]).

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3075 The People of the State of New York, Ind. 330/06
Respondent,

-against-

Daniel Graham,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Lisa A. Packard of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered October 23, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of 5 years, unanimously affirmed.

Regardless of whether defendant's oral and written waivers, when taken together, establish a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248, 257 [2006]), we perceive no basis for reducing the

sentence. No issue is before us concerning the consecutive sentence imposed for the bail jumping conviction.

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3076-
3077 Jeremy S. Pitcock,
Plaintiff-Appellant,

-against-

Kasowitz, Benson, Torres
& Friedman LLP, et al.,
Defendants-Respondents,

Sitrick and Company,
Defendant.

- - - - -

Kasowitz, Benson, Torres & Friedman LLP,
Plaintiff-Appellant,

-against-

Jeremy S. Pitcock,
Defendant-Respondent.

Index 601984/08
601965/08

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Balestriere Fariello, New York (John G. Balestriere of counsel), for appellant/respondent.

Sullivan & Cromwell LLP, New York (Gandolfo V. DiBlasi of counsel), for respondents/appellant.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered October 1, 2009, insofar as it granted the motion by defendants Kasowitz, Benson, Torres & Friedman LLP (KBTF) and Eric Wallach in the first action to dismiss plaintiff-former partner's (the Partner) causes of action alleging defamation, tortious interference with business relations, injurious falsehood and unjust enrichment, and which also granted the Partner's motion to dismiss KBTF's complaint in the second action, unanimously affirmed, without costs.

Order, same court and Justice, entered February 25, 2010, which granted the Partner's motion to reargue the dismissal of the above-stated four causes of action and, upon reargument, adhered to its original determination, unanimously affirmed, without costs.

The Partner alleged in the first action, inter alia, that his former employer, KBTF, defamed him personally, as well as his business reputation, by KBTF's issuance of a press release stating that he had been "terminated for cause," ". . . because of extremely inappropriate personal conduct," and through a subsequent statement by a KBTF partner that the termination had occurred after a "thorough" and "weeklong" investigation by KBTF. The press release and statement were made after a certain publication reported that the Partner had joined his new firm "after jumping ship" from KBTF, taking with him certain important clients, and that the new firm had "nab[bed]" him. When the trade publication did not issue what KBTF regarded as a sufficient correction, KBTF published the allegedly defamatory statements quoted above.

The IAS court correctly dismissed the Partner's defamation claims upon finding that the Partner's pleading, and a December 2007 e-mail which he had sent to a senior partner at KBTF, effectively admitted that he was terminated for cause due to his inappropriate personal conduct while at KBTF. A review of the

pleadings and documentary evidence submitted supports the motion court's conclusion that KBTF's alleged defamatory remarks were substantially true (*see Carter v Visconti*, 233 AD2d 473 [1996], *lv denied* 89 NY2d 811 [1997]; *Ingber v Lagarenne*, 299 AD2d 608 [2002], *lv denied* 99 NY2d 507 [2003]). KBTF's use of the term "extreme" to qualify the Partner's inappropriate conduct, when viewed in the context of KBTF's warranted response to the new firm's initial announcement, would be viewed by a reasonable reader as constituting opinion, and thus would be privileged (*see Brian v Richardson*, 87 NY2d 46 [1995]).

The Partner failed to state a claim for tortious interference with business relations, inasmuch as his pleadings asserted that KBTF's alleged defamatory statements were made to gain, inter alia, economic advantage, and were not published solely out of malice; nor, for the reasons stated above, can the Partner prevail on this claim on the theory that KBTF employed "wrongful means" in making the challenged statements (*see generally Snyder v Sony Music Entertainment*, 252 AD2d 294 [1999]). The Partner's injurious falsehood claim was insufficiently pleaded absent viable allegations that false and disparaging statements were made which harmed the Partner's property or business reputation (*see generally Rall v Hellman*, 284 AD2d 113 [2001]; *Cunningham v Hagedorn*, 72 AD2d 702 [1979]). The Partner's equitable claim alleging KBTF was unjustly enriched

because he performed "transition" services for KBTF without pay was properly dismissed inasmuch as the parties' partnership agreement covered compensation issues for partners both in good standing with the firm, and those like the plaintiff, who had been expelled.

The court properly dismissed the causes of action in KBTF's complaint given the vague, boilerplate allegations of damages which were insufficient to sustain the causes of action asserted therein (*see generally Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 [1988]; *see also Rall v Hellman*, 284 AD2d at 114).

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3078-
3079 James A. McCay,
Plaintiff-Respondent,

-against-

J.A. Jones-GMO, LLC,
Defendant,

Columbia University, et al.,
Defendants-Appellants.

- - - - -

[And a Third-Party Action]

- - - - -

The Trustees of Columbia University
in the City of New York, etc., et al.,
Second Third-Party Plaintiffs-Appellants,

-against-

Del Savio Construction Corp.,
Second Third-Party Defendant.

Index 127838/02
590312/03
590546/08

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Lewis Scaria & Cote, LLC, White Plains (Deborah A. Summers of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Feinman, J.), entered February 26, 2010, which, upon granting plaintiff's motion for reargument, granted plaintiff's motion for partial summary judgment on the issue of defendants-appellants' liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff's testimony that he was injured when bricks falling from above caused him to step off the plywood platform on which he was carrying a bundle of steel rebar beams, and into a

hole that was approximately six-feet deep and four- to five-feet wide, suffices to show that his injuries were caused by an elevation-related risk. For purposes of section 240(1), it does not avail defendants to argue that the accident was caused by the falling bricks (*see Gallagher v New York Post*, 14 NY3d 83, 86 [2010] [worker propelled into uncovered hole when blade of his saw jammed]; *Joyce v Rumsey Realty Corp.*, 17 NY2d 118, 122-123 [1966]). The unsworn hospital report on which defendants rely was improperly submitted for the first time in opposition to plaintiff's motion to reargue (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 989 [1988]). In any event, the report, which stated that plaintiff was carrying a heavy object at the time of his accident, does not conflict with plaintiff's account that he fell into a hole. We decline plaintiff's request to search the record for the purpose of granting him summary judgment on his section 241(6) claim, which, although a subject of his prior motion for summary judgment, was not a subject of his motion for reargument.

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3081 The People of the State of New York, Ind. 6712/05
Respondent,

-against-

Mo Powers, etc.,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

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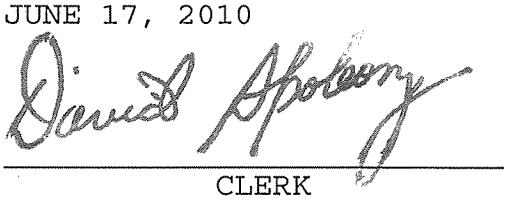
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about April 24, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JUNE 17, 2010



CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3082 John Gleeson, Index 301851/08
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

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Cheriff & Fink, P.C., New York (Bruce J. Cheriff of counsel), for appellant.

Steve S. Efron, New York, for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 20, 2009, which granted defendant's summary judgment motion dismissing the complaint, unanimously affirmed, without costs.

Defendant met its prima facie burden of establishing its entitlement to summary judgment with evidence that there was a storm in progress at the time of the accident. Plaintiff's argument that the weather report submitted by defendant was inadmissible is improperly raised for the first time on appeal (*see Mayblum v Schwartzbaum*, 253 AD2d 380 [1998]). In any event, defendant's employee's testimony that it was snowing at the time of the accident was sufficient to establish defendant's prima facie case.

In opposition, plaintiff failed to raise an issue of fact. It is undisputed that it had snowed on the date of the accident. While there is conflicting testimony with respect to whether it was snowing at the specific time of plaintiff's accident, plaintiff offered no evidence as to the elapsed time between cessation of the storm and his accident. Accordingly, he did not raise an issue of fact as to whether defendant had a reasonable time to remove the snow (*see Barresi v Putnam Hosp. Ctr.*, 71 AD3d 811 [2010]; *see also Karanikas v New York City Tr. Auth.*, 33 AD3d 451 [2006]; *Valentine v City of New York*, 86 AD2d 381, 383-384 [1982] *affd* 57 NY2d 932 [1982]).

The record shows that defendant's employee was in the process of removing snow and ice and salting the steps when the accident occurred. There is simply no evidence that by removing the snow and applying salt, defendant exacerbated the condition (*cf. De Los Santos v 4915 Broadway Realty, LLC*, 58 AD3d 465 [2009]). Indeed, plaintiff testified that part of the steps had been shoveled and salted. The fact that he did not see any salt on the step after he fell is insufficient to impose liability

(*Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 463 [2007]), particularly since plaintiff testified that there was salt on his jacket after he fell.

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3083 The People of the State of New York, Ind. 5800/04
Respondent,

-against-

Patrick Mooney,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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Judgment, Supreme Court, New York County (James A. Yates, J.), rendered May 3, 2006, convicting defendant, after a nonjury trial, of robbery in the second degree and criminal possession of stolen property in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 16 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. To establish defendant's guilt of second-degree robbery under Penal Law § 160.10(3), the People were only required to prove he stole a motor vehicle by means of any kind of force. While placing his hand in his pocket and making a pointing gesture, defendant told

the victim, "This is a carjacking," and instructed her to give him her car keys and get in the car. The victim surrendered the keys but fled, and defendant took the car. This evidence was more than enough to establish a forcible taking (*see People v Woods*, 41 NY2d 279, 282-283 [1977]).

The court properly denied defendant's motion to suppress identification testimony. When a detective was notifying the victim of an impending lineup, he told her the person whose photograph she had previously selected from an array was in custody. Although it was inadvisable, we do not find that this statement created a serious risk of misidentification (*see People v Rodriguez*, 64 NY2d 738, 740-741 [1984]). The People met their burden of going forward to establish the fairness of a computer-generated photo array even though they were unable to produce the photographs at the hearing (*see People v Patterson*, 306 AD2d 14 [2003], *lv denied* 1 NY3d 541 [2003]). All of defendant's remaining arguments concerning the composition and conduct of the photographic and lineup procedures are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. There was nothing in

any of these procedures that unfairly singled defendant out (*see generally People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3084-
3085-
3086 In re William B.,

A Person Alleged to Be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about November 9, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, obstructing governmental administration in the second degree and menacing in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. Although neither the victim nor his companion saw the face of the person who stole the victim's watch, appellant's identity as the robber was

established by circumstantial evidence. Like the robber, appellant was a young male black wearing a white hooded sweatshirt. The robber was one of a group of four males, and, when the police saw appellant a short time after the robbery a few blocks away, he was also one of a group of four or five males. Appellant ran away as soon as the police approached and asked to speak with him. Finally, when the police arrested appellant after chasing him several blocks, he was wearing a watch of the same color, brand, and model as the victim's. While no single factor was sufficient by itself, when taken together, they warranted the conclusion that appellant was the robber (*see People v Welcome*, 181 AD2d 628 [1992], *lv denied* 79 NY2d 1055 [1992]; *Matter of Ryan W.*, 143 AD2d 435 [1988], *lv denied* 73 NY2d 709 [1989]). Although appellant argues that there were many people on the street, that white sweatshirts and watches of the type at issue are common, and that flight is equivocal, the court properly rejected coincidence as an explanation for the simultaneous presence of all the incriminating factors.

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3088 Lisaydee Serrano, Index 113359/07
Plaintiff-Appellant,

-against-

Prestige Realty Associates, L.P.,
Defendant-Respondent.

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Law Office of Robert Osuna, P.C., New York (Robert Osuna of counsel), for appellant.

Furey, Kurley, Walsh, Matera & Cinquemani, P.C., Seaford (Lauren B. Bristol of counsel), for respondent.

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Order, Supreme Court, New York County (Marilyn Shafer, J.), entered May 13, 2009, which, in an action for personal injuries sustained in a slip and fall down a staircase in defendant's building, granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it had no notice of the alleged slippery condition that caused plaintiff's fall (*see Serrano v Haran Realty Co.*, 234 AD2d 86 [1996]). The testimony of defendant's building superintendent established that he had mopped the landing several hours prior to plaintiff's accident and had received no complaints about the defective condition of the landing. Nor did he receive any complaints

about an allegedly defective banister, which he had re-secured several months prior to the accident (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

In opposition, plaintiff failed to raise a triable issue of fact with respect to notice. We further disregard the legal opinion offered by plaintiff's expert as to the proximate cause of the accident (*see e.g. Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 68-69 [2002]).

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

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

ENTERED: JUNE 17, 2010

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3089N Samuel Badillo,
Plaintiff-Respondent,

Index 109665/07
111480/09

-against-

400 East 51st Street Realty LLC, et al.,
Defendants,

890 First LLC, et al.,
Defendants-Appellants.

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Palmeri & Gaven, New York (Ann Teresa McIntyre of counsel), for appellants.

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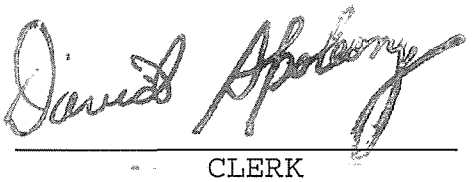
Order, Supreme Court, New York County (Louis B. York, J.), entered November 13, 2009, which, in an action for personal injuries sustained in a fall on a sidewalk adjacent to premises owned and managed by defendants-appellants (defendants), denied defendants' motion to consolidate this action with a subsequently commenced action alleging the same accident and injuries but adding as a defendant the contractor allegedly hired by defendant management company to perform sidewalk repair work, unanimously reversed, on the facts, without costs, and the motion to consolidate granted.

The motion was denied on the ground that the first action was on the trial calendar whereas the second, commenced two years after the first, had not yet had a preliminary conference. This was error given no dispute that the two actions involve common questions of law and fact and the possibility of inconsistent

verdicts, and where neither plaintiff nor the contractor opposed the motion except to request time to conduct disclosure in connection with the claims made by and against the contractor. Indeed plaintiff stated that he would consent to vacate the note of issue if necessary. No reason appears why the parties' preference for consolidation and additional disclosure cannot be accommodated without causing undue delay or other prejudice (*see Matter of Progressive Ins. Co. [Vasquez-Countrywide Ins. Co.]*, 10 AD3d 518, 519 [2004]; *Morell v Basa*, 300 AD2d 134, 135 [2002]).

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

ENTERED: JUNE 17, 2010



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Karla Moskowitz
Rolando T. Acosta
Sheila Abdus-Salaam, JJ.

1602
Ind. 3669/02

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The People of the State of New York,
Respondent,

-against-

Steven Sanchez,
Defendant-Appellant.

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Defendant appeals from an order of the Supreme Court, Bronx County (Martin Marcus, J.), entered April 3, 2009, which summarily denied his motion to vacate the judgment, same court and Justice, rendered May 11, 2004, convicting him, after a jury trial, of murder in the second degree, and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur and Rosemary Herbert of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun and Peter D. Coddington of counsel), for respondent.

TOM, J.P.

Defendant, who was found guilty of one count of depraved indifference murder, appeals from the denial of his motion to vacate the judgment of conviction in which he alleged that his trial counsel, Lynne Stewart[1] failed to provide him with effective assistance, in violation of his constitutional rights (CPL 440.10[1][h]). A Justice of this Court granted leave to appeal (CPL 460.15), and we now affirm. The motion presumes prescience as the standard of effective assistance of counsel, which far exceeds the constitutional requirement to afford a defendant with meaningful representation "viewed in totality and as of the time of the representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

The victim, Jason Maldonado, was being driven home after spending the night at various clubs. The driver, Gregory Bright, agreed to give a ride to two women, one of whom, Jessica Herrera, was defendant's girlfriend of two years. She had promised to go to defendant's house earlier that evening, but instead spent the entire night with her girlfriend, the fourth occupant of the car, first at a night club in Manhattan and then at a friend's

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[1] Counsel was disbarred by this Court, effective February 10, 2005 (*Matter of Stewart*, 42 AD3d 59 [2007]), after her conviction of federal conspiracy charges.

apartment. Defendant conceded that he was "very, very upset" with Herrera and had called her a number of times during the night, once while she was in the car. Defendant took the "biggest knife" he could find in his mother's kitchen, put it in his pocket, and went down to wait for Herrera at a street corner. When Herrera arrived in the vicinity of defendant's home and got out of the vehicle, defendant came over and pushed or slapped her in the face. As Maldonado was closing the car door, defendant kicked it shut, injuring Maldonado's arm. Bright testified that as Maldonado emerged from the car and before he could step away from the vehicle, he "sat back," and asked to be taken to the hospital because he had been stabbed. Bright then watched as Maldonado pulled a knife from the left side of his abdomen and could see his intestines protruding through the wound. Maldonado later passed out. The emergency medical technician at Lincoln Hospital saw Maldonado upon arrival bleeding from the abdominal area, with two feet of his large intestine protruding from his abdomen. The victim later died of hemorrhagic shock as the result of perforation of major blood arteries. The fatal stab wound was "V-shaped," and as explained by the medical examiner was caused either by the victim twisting and turning as the knife entered his body, or by the perpetrator twisting the knife as he

plunged it into the victim. The blade penetrated five to six inches into the abdominal cavity.

Defendant testified that Maldonado and one other person (presumably Bright) were hitting him, that he had not intended to stab Maldonado with the knife but had "waved it around," contending that Maldonado was stabbed as he swung at defendant and came into contact with the blade. Defendant testified that he took the knife because he was "scared" to go outside.

Defendant was charged with two counts of murder in the second degree under a so-called "dual-count indictment" alleging both intentional and depraved indifference murder (*see People v Feingold*, 7 NY3d 288, 291 [2006]), as well as manslaughter in the first degree and criminal possession of a weapon in the fourth degree. After the close of evidence, the court denied a defense motion to dismiss the indictment, in which counsel asserted, "The People have not made out a prima facie case of intentional murder." On March 16, 2004, the jury returned a verdict of guilty on the count of second-degree murder under the depraved indifference theory. On April 15, trial counsel moved to set aside the verdict and reduce the conviction to manslaughter in the second degree (CPL 330.30). The trial court denied the motion, finding that by confining his motion for a

trial order of dismissal to the charge of intentional murder, defendant had failed to preserve the issue of the sufficiency of the evidence with respect to the charge of depraved indifference murder. The court rendered judgment on May 11, 2004, sentencing defendant to a term of imprisonment of 18 years to life.

This Court affirmed the judgment, agreeing that the sufficiency claim as to the charge of depraved indifference murder was unpreserved and stating that were we to review it, "we would find the verdict was based on legally sufficient evidence, based on the court's charge as given without exception" (40 AD3d 468 [2007], *lv denied* 9 NY3d 881 [2007]). Likewise, we found that "the verdict was not against the weight of the evidence in light of the elements of the crime as charged to the jury without objection" (*id.* at 468-469).

Defendant then brought this CPL 440.10 motion claiming that his trial counsel failed to provide him with effective assistance. The moving papers assert that counsel was remiss in failing to argue that the depraved indifference second-degree murder count, although sustainable under an objective recklessness standard, was not supported by the requisite subjective depravity on defendant's part. Had counsel properly distinguished recklessness and depravity, defendant argued, the

court would have dismissed the depraved indifference murder count or modified its instructions to the jury, with the result that "the jury might well have acquitted Mr. Sanchez on the depraved indifference count." In any event, defendant argued, a properly detailed objection "would have allowed the Appellate Division to conduct a plenary review of the weight of the evidence, without limitation to review of the 'elements of the crime as charged to the jury without objection' . . . and Mr. Sanchez would have obtained a reversal of his conviction as against the weight of the evidence." The accompanying affidavit of Lynne Stewart stated that the failure to "make an argument regarding the depraved murder count . . . was simply an oversight on my part. I did not have any strategic or tactical reason for not specifically addressing the depraved murder count," while conceding that she "was generally aware of the unsettled state of the law regarding depraved indifference murder and that some courts had found that depraved indifference murder was not adequately differentiated from reckless manslaughter."

Over the course of a few years, the crime of depraved indifference murder,[2] as it applies to a single victim, has

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[2] Penal Law § 125.25 provides, in pertinent part, that a person is guilty of murder in the second degree when, "Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death

evolved from a killing characterized by wanton recklessness, as an objective test determined from the factual circumstances of the crime (*see Feingold*, 7 NY3d at 291), to an unintentional killing carried out with a requisite mental state, or mens rea, that constitutes "the core criminal element, depraved indifference" (*id.* at 295).

At the time of trial, the law with respect to depraved-mind murder was delineated by *People v Register* (60 NY2d 270 [1983], *cert denied* 466 US 953 [1984]) and *People v Oswaldo Sanchez* (98 NY2d 373 [2002]), which looked to the "factual setting in which the risk creating conduct must occur," to determine whether the actions causing death reflected a depraved indifference to human life (*Register*, 60 NY2d at 276). It was only a dissenting viewpoint that depravity was intended by the Legislature to be the mens rea of the offense (*id.* at 281-282 [Jasen, J., dissenting]), or that the *Register* formulation failed to draw a substantive distinction between intentional and depraved indifference murder (*Sanchez*, 98 NY2d at 394 [Rosenblatt, J., dissenting]). "[*T*]*he majority,*" as Judge Rosenblatt put it,

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to another person, and thereby causes the death of another person."

Penal Law § 15.05(3) provides that "A person acts recklessly . . . when he is aware of and consciously disregards a substantial and unjustifiable risk."

"*leaves no conceivable circumstances under which a charge of intentional murder will not be amenable to a conviction for depraved indifference murder*" (*id.* [emphasis in original], cited with approval in *Feingold*, 7 NY3d at 291).

The year before defendant was convicted, the Court of Appeals decided *People v Hafeez* (100 NY2d 253 [2003]), which defendant contends began to recognize Judge Rosenblatt's view of the scope of depraved indifference murder. In *Hafeez*, the defendant and his codefendant waited while a third person lured the victim from a bar. The victim was then pushed up against a wall by the defendant, and struggled with the codefendant, who administered the fatal stab wound. The Court of Appeals found that the trial evidence clearly showed a calculated and intentional murder, rather than a depraved indifference murder, and affirmed the Appellate Division's reversal of the defendant's conviction of depraved indifference murder. Judge Rosenblatt applauded the majority for "rejecting the incongruous notion that an intentional killing can reflect depraved indifference" and emphasized depravity as a distinct element of the crime, not mere recklessness (*id.* at 260 [Rosenblatt, J., concurring]). However, to arrive at its decision, the *Hafeez* Court continued to adhere

to *Sanchez* and to rely on the requirement it imposed on the People in *Register* to demonstrate that the "defendant's acts were 'imminently dangerous and presented a very high risk of death to others'" (*id.* at 259, quoting *Register*, 60 NY2d at 274). The Court reasoned that the People had met this burden in *Sanchez* because while the fatal shots were fired at point-blank range from behind a partially closed door, that shooting had occurred in "an area where children were playing, presenting a heightened risk of unintended injury" (*id.*). But the circumstances in *Hafeez* permitted "no valid line of reasoning that could support a jury's conclusion that defendant possessed the mental culpability required for depraved indifference murder. The 'heightened recklessness' required for depraved indifference murder was simply not present" (*id.*). The Court emphasized that "both defendants were focused on first isolating, and then intentionally injuring, the victim" (*id.*).

Shortly before defendant moved to set aside the jury verdict herein, the Court of Appeals decided *People v Gonzalez* (1 NY3d 464 [2004]). There, the defendant kicked in the door of a barber shop,

> "stepped inside, pulled a gun from his waistband and shot the victim in the chest from a distance of six to seven feet. As the victim fell to the floor, defendant fired again, shooting him in the head. Defendant

> then leaned over the prone body and fired eight more shots into the victim's back and head. Defendant waved the gun at the only eyewitness — the barber — warned him not to say anything and walked out the door" (*id.* at 465-466).

In affirming the dismissal of a second-degree depraved murder count, the Court noted, "Depraved indifference murder differs from intentional murder in that it results not from a specific, conscious intent to cause death, but from an indifference to or disregard of the risks attending defendant's conduct" (*id.* at 467). The Court emphasized that "a person cannot act both intentionally and recklessly with respect to the same result. 'The act is either intended or not intended; it cannot simultaneously be both'" (*id.* at 468, quoting *People v Gallagher*, 69 NY2d 525, 529 [1987] [counts of intentional and depraved mind murder arising out of the same killing must be submitted to the jury in the alternative]), and since "'guilt of one necessarily negates guilt of the other,' intentional and depraved indifference murder are inconsistent counts" (*id.*, quoting *Gallagher*, 69 NY2d at 529).

Again, the Court stated that its decision was not contrary to *Sanchez*. There, "[t]he defendant's conduct in firing from behind a partly closed door established his indifference to the

grave risk of death posed by his actions. [In *Gonzalez*], by contrast, the only conclusion reasonably supported by the evidence was that defendant shot to kill his intended victim" (*id.*). It was unnecessary to even consider the risk that the defendant's conduct may have posed to bystanders, leading the Court to conclude that "[w]hen a defendant's conscious objective is to cause death, the depravity of the circumstances under which the intentional homicide is committed is simply irrelevant" (*id.*).

In sum, as of April 15, 2004, when counsel moved to set aide the jury verdict, only two limited constraints had been imposed by the Court of Appeals on the *Register* recklessness standard applicable to depraved indifference murder. First, the grave risk of death presented by the defendant's conduct must extend to someone other than the victim (*Hafeez*, 100 NY2d at 259). Second, if the intent to take the victim's life is apparent from the circumstances of the crime, a conviction of depraved indifference murder is unsupportable, and the count should not be submitted to the jury (*Gonzalez*, 1 NY3d at 469). Neither factor affords a basis for dismissal of the depraved indifference murder count against defendant in this case, and he does not suggest what argument his trial counsel realistically could have made that

would have resulted in a favorable ruling on either the motion to set aside the verdict or the motion to vacate the judgment of conviction.

It is defendant's contention that had counsel's motion to dismiss been based on the ground that the evidence was insufficient to prove the requisite mental state for depraved indifference murder, the trial court might have dismissed that count or, alternatively, defendant's conviction would have been reversed on appeal. However, defendant cites no case decided prior to either of his motions requiring that a defendant convicted of depraved mind murder must have acted with a particular mental state rather than under circumstances characterized by a heightened degree of recklessness.

The law defendant now relies upon evolved in the two years following his conviction. In *People v Payne* (3 NY3d 266, 272 [decided October 19, 2004]), the Court of Appeals articulated that depravity is a specific form of recklessness, quoting the drafters of the Penal Law to the effect that "depraved indifference murder is 'extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness.'" *Payne* reiterated that such "[i]ndifference to the victim's life . . . contrasts with the intent to take it"

(*id.* at 270). It was not until *People v Suarez* (6 NY3d 202, 214 [2005]) that the Court distinguished depravity from recklessness, stating that depraved indifference "constitutes an additional requirement of the crime — beyond mere recklessness and risk — which in turn comprises both depravity and indifference, and that a jury considering a charge of depraved indifference murder should be so instructed." The Court cautioned that depraved indifference murder will rarely apply to a killing involving a single victim (*id.* at 212). Significantly, it was only in *Feingold* (7 NY3d at 294) that the Court directly addressed "whether depraved indifference is a mental state (mens rea)," finally portraying it as the "core criminal element" and concluding, "[We] cannot conceive that a person may be guilty of a depraved indifference crime without being depravedly indifferent" (*id.* at 295).

While defendant's dismissal motion was directed solely at the intentional murder count and the trial court did not examine the sufficiency of the evidence in support of the depraved murder count, defendant's own testimony provides grounds to sustain the verdict. Defendant testified that he did not intend to kill Maldonado, that he was waving a large knife around while being struck by Maldonado and another person, and that the knife

entered Maldonado as he was attempting to hit defendant. Therefore, it could be concluded that by waving a large kitchen knife around in close proximity to Maldonado and the other unidentified person, defendant acted recklessly and with wanton disregard of the grave risk of death his action posed to his victim and another person.

Defendant's assertion that counsel should have requested a jury charge focusing on his mental state, rather than the objective circumstances, suffers from the same infirmity as his contention that the motion to dismiss should have differentiated between recklessness and depravity; the law, as then constituted, provided absolutely no basis for requesting such an instruction, and defendant does not suggest what instruction counsel might have requested that would have led to his acquittal on the depraved indifference murder count.

Insofar as the claim of ineffective assistance is concerned, defendant has failed, even at this late juncture, to state what objection counsel could have interposed that would have led the trial court, on the basis of then prevailing law, to dismiss the depraved murder count as unsupported by sufficient evidence. It is immaterial that the law subsequently changed; counsel's performance must be assessed on the basis of the facts and viewed

as of the time of the asserted deficiency in representation, without the benefit of hindsight (*see Strickland v Washington*, 466 US 668, 690 [1984]; *People v Gatien*, 17 AD3d 101 [2005], *lv denied* 4 NY3d 886 [2005]). Counsel could hardly have been expected to anticipate the parameters of subsequent decisions in *Payne*, *Suarez*, or certainly *Feingold*, that defendant now relies on in stating that the evidence of depraved indifference was insufficient.

Finally, whatever objection counsel might have raised has no bearing on this Court's weight-of-the-evidence review, which is mandatory (*see People v Patterson*, 38 AD3d 431, 432 [2007], *lv denied* 9 NY3d 868 [2007]). Similarly, this Court "is constrained to weigh the evidence in light of the elements of the crime as charged without objection by defendant" (*People v Noble*, 86 NY2d 814, 815 [1995]).

As this Court noted in *People v Lane* (93 AD2d 92, 98 [1983], *lv denied* 59 NY2d 974 [1983]), effective assistance of counsel means adequate, not perfect, assistance. "The principle, however, does not require that counsel be held accountable to a standard of clairvoyance, to anticipate disposition as to novel issues well in advance of consideration by any appellate court in the State" (*id.* at 99). In short, the adequacy of counsel's

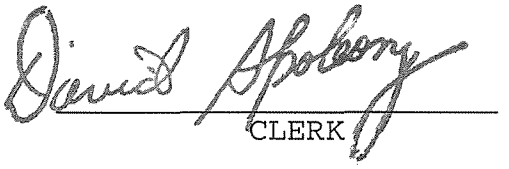
representation cannot be measured in retrospect by judging the merits of a motion made in 2004 under a legal standard that was not established until 2006.

Accordingly, the order of Supreme Court, Bronx County (Martin Marcus, J.), entered April 3, 2009, which summarily denied defendant's motion to vacate the judgment, same court and Justice, rendered May 11, 2004, convicting him, after a jury trial, of murder in the second degree, and sentencing him to a term of 18 years to life, should be affirmed.

All concur.

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

ENTERED: JUNE 17, 2010



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