SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 24, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Saxe, DeGrasse, Richter, JJ.

7965-
7965A Ronald Alleva, Index 16510/03
84226/04
Plaintiff-Appellant,

-against-

United Parcel Service, Inc.,
Defendant-Respondent,

Gary Callwood,
Defendant.
- - - - -
United Parcel Service, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Pitt Investigations, Inc.,
Third-Party Defendant-Respondent.

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Law Offices of Edmond J. Pryor, Bronx (William J. Clyne of counsel), for Ronald Alleva, appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondent/appellant.

Churbuck, Calabria, Jones & Materazo, Hicksville (Joseph A. Materazo of counsel), for Pitt Investigations, Inc., respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.),

entered May 5, 2011, which denied plaintiff's motion to strike

defendant United Parcel Service, Inc.'s (UPS) answer, unanimously

affirmed, with costs. Order, same court and Justice, entered May 6, 2011, which, to the extent appealed from as limited by the briefs, granted UPS's motion for summary judgment dismissing the complaint as against it, and granted third-party defendant Pitt Investigations, Inc.'s motion for summary judgment dismissing the claim for contractual indemnification, unanimously modified, on the law, to deny UPS's motion as to the negligent retention and supervision claims, to deny Pitt's motion, and to grant UPS's motion for summary judgment on its claim for contractual indemnification against Pitt, and otherwise affirmed, without costs.

Plaintiff, a security guard employed by defendant Pitt at a UPS distribution center, seeks to recover for injuries he sustained when he allegedly was assaulted by defendant Callwood, a UPS employee, while searching Callwood's belongings.

UPS's unexplained failure to provide plaintiff with its "center file" on Callwood, which, inter alia, would document any previous disciplinary issues, and which UPS's counsel asserted, without elaboration, "no longer exist[s]," constitutes spoliation. The file would be critical in determining whether UPS had notice of Callwood's propensity for violence, an issue central to plaintiff's claims. Plaintiff cannot be faulted for his inability to establish that the missing records contained

critical evidence (*see Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 17 [2000], *lv dismissed* 96 NY2d 937 [2001]). However, the extreme sanction of striking UPS's answer — the only relief plaintiff sought — is not warranted, since the center file does not constitute the sole source of the information and the sole means by which plaintiff can establish his case (*see Schantz v Fish*, 79 AD3d 481 [2010]; *Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402 [2009]). A lesser sanction, such as an adverse inference charge, if sought, at trial, would be more appropriate.

Accordingly, summary judgment in favor of defendant dismissing the negligent retention and supervision claims is not warranted. However, UPS cannot be held vicariously liable for its employee's assault, since the tort was not committed in furtherance of UPS's interests but was personal in nature (*see Kawoya v Pet Pantry Warehouse*, 3 AD3d 368, 369 [2004], *appeal dismissed* 2 NY3d 752 [2004]; *Adams v New York City Tr. Auth.*, 211 AD2d 285, 294 [1995], *affd* 88 NY2d 116 [1996]). The agreement between UPS and Pitt provides that Pitt shall indemnify UPS for "any and all claims . . . of any kind or nature whatsoever related to the Work hereunder," and for "any claims . . . arising . . . out of or in consequence of the work hereunder . . . *and any injury suffered by any employee of [Pitt]*, . . . except [for] losses . . . arising out of the sole negligence of UPS" (emphasis

added). Since plaintiff was performing his work as a security guard employed by Pitt when he sustained his injuries, the claim against UPS arises from, and is related to, Pitt's work and falls within the agreement's broad indemnification provision (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Sovereign Constr. Co. v Wachtel, Dukauer & Fein*, 55 NY2d 627 [1981]).

The Decision and Order of this Court entered herein on January 29, 2013 is hereby recalled and vacated (see M-1204, M-1230 and M-1597, decided simultaneously herewith).

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10888-
10889 Index 602303/09

RSB Bedford Associates LLC,
Plaintiff-Respondent-Appellant,

-against-

Ricky's Williamsburg, Inc., etc., et al.,
Defendants-Appellants-Respondents.

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Santamarina & Associates, New York (Gill Santamarina of counsel), for appellants-respondents.

Gallagher, Harnett & Lagalante LLP, New York (Brian K. Gallagher of counsel), for respondent-appellant.

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Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered July 20, 2012, awarding plaintiff $1,048,708.97, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about May 11, 2012, which confirmed in part and rejected in part the Special Referee's report and recommendation as to damages, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

This Court previously held that plaintiff's ability to close on the contract for purchase of the subject building was frustrated by defendants' repudiation of their agreement to lease space therein. As such, defendants cannot claim that closing was a condition precedent to plaintiff's recovery of contract damages since a party causing the failure of a condition is not permitted

assert it as a defense (91 AD3d 16, 23 [1st Dept 2011], citing *Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 270 [1st Dept 1995]). However, as we noted, while the propriety of damages was not then before us, the issue of whether defendants "caused" the transaction to fail is immaterial to any determination of the amount of damages (*id.* at 22-23).

The evidence that plaintiff's purchase of the building was not consummated and that the seller retained the security deposit is sufficient to support the Referee's finding that the transaction did not close (*see Poster v Poster*, 4 AD3d 145 [1st Dept 2004], *lv denied* 3 NY3d 605 [2004]). The plain language of the parties' side-letter agreement made clear that plaintiff could not proceed with the purchase of the property if defendants did not proceed with the lease for space in the building. However, the Referee did not err in finding that rent due under the lease was unrecoverable because it was not sufficiently foreseeable that defendants would be held liable for lost rent at the time the parties entered into their agreement (*Hadley v Baxendale*, 9 Exch 341, 156 Eng Rep 145 [1854]). Moreover, it would be unjust to award plaintiff the gross amount of rent due under the lease without deducting the operating costs attributable to the leased premises, which are unknowable (*see American List Corp. v U.S. News & World Report*, 75 NY2d 38 [1989]

[alleged lost future profits incapable of proof with reasonable certainty]).

Likewise, there is no indication that, as a consequence of the breach, plaintiff would not only be unable to purchase the building but would also face a foreseeable loss of a hypothetical opportunity to sell it several years later. Lost profits from the sale of the building, which plaintiff never owned, at some point in the indefinite future to an unknown purchaser are patently speculative (*see id.*; *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 193 [2008]). Plaintiff is nevertheless entitled to recover expenses incurred for renovations necessary to create a "pop-up" store because the parties' agreement expressly makes those costs the responsibility of defendants.

While recovery of attorneys' fees by "the successful party" is provided for in the lease, the Referee properly reduced the amount sought by plaintiff to reflect that while it was the prevailing party (*see Board of Mgrs. of 55 Walker St. Condominium v Walker St.*, 6 AD3d 279, 280 [lst Dept 2004]; *cf. Walentas v Johnes*, 257 AD2d 352 [lst Dept 1999]), it did not prevail on all of its claims, particularly those seeking "expectancy" (extraordinary) damages (*see Duane Reade v 405 Lexington, L.L.C.*,

19 AD3d 179, 180 [lst Dept 2005]; *Matter of Rahmey v Blum*, 95 AD2d 294, 304 [2d Dept 1983]; *Nestor v Britt*, 16 Misc 3d 368, 380 [Civ Ct, NY County 2007], *affd* 19 Misc 3d 142[A], 2008 NY Slip Op 51042 [U] [App Term 2008]).

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

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

11018 Jean Hines, Index 150239/11
Plaintiff-Appellant,

-against-

New York City Transit
Authority, et al.,
Defendants-Respondents.

Blank & Star, PLLC, Brooklyn (Helene Blank of counsel), for appellant.

Landman Corsi Ballaine & Ford P.C., New York (James T. Dougherty of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered November 16, 2012, which, to the extent appealable, denied plaintiff's second motion for partial summary judgment on the issue of liability, unanimously modified, to grant the motion as to defendants New York City Transit Authority and Atlantic Paratrans of NYC, Inc., and otherwise affirmed, without costs.

Plaintiff's motion is properly considered one for renewal, since she submitted a properly notarized affidavit of a nonparty witness, thereby correcting an error in the original papers (*see Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; CPLR 2221[e]). The court has discretion to relax the requirement that a motion to renew be based on newly discovered evidence or evidence not previously available, and to grant such a motion in the interest

of justice, absent prejudice to the opposing party resulting from any delay (*see Mejia v Nanni*, 307 AD2d at 871; *Shaw v Looking Glass Assoc., LP*, 8 AD3d 100, 102 [1st Dept 2004]).

Plaintiff established entitlement to judgment on liability as a matter of law by submitting evidence demonstrating that she was crossing the street, within the crosswalk, with a "walk" sign in her favor, when defendants' vehicle, which was making a left turn, struck her (*see Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489, 490 [1st Dept 2013]). The affidavits from the nonparty eyewitnesses and the police report confirm plaintiff's version of the accident.

Defendants, in turn, failed to raise a triable issue of fact as to comparative negligence. Plaintiff averred that she looked both ways before entering the intersection and continued to look for traffic as she crossed the street, and that she could not have avoided the accident because she only noticed defendants' vehicle, which was moving quickly, a "split second" prior to being struck. Contrary to the assertion of defendant driver, the position of plaintiff's body after impact is not probative as to whether she was walking in the cross-walk prior to being struck.

The motion was properly denied as to defendant Metropolitan Transit Authority since plaintiff's motion to renew did not challenge the motion court's finding in the order denying summary

judgment that she failed to demonstrate the MTA's alleged ownership of the subject vehicle.

We have considered and rejected defendants' further arguments.

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11077 The People of the State of New York, Dkt. 10679C/11
Respondent,

-against-

Toussant Dent,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (William McGuire, J.), rendered August 5, 2011, convicting defendant, upon his plea of guilty, of possession of an imitation pistol, and sentencing him to a conditional discharge, unanimously affirmed.

The information was not jurisdictionally defective. "[A]s a matter of common sense and reasonable pleading" (*People v Davis,* 13 NY3d 17, 31 [2009]), the allegation that the imitation pistol was "all black in color," sufficiently negated both the permissible-colors exception set forth in Administrative Code of

City of NY § 10-131(g)(1)(a) and the transparent/translucent materials exception set forth in § 10-131(g)(1)(b) (*see People v Delarosa*, 27 Misc 3d 1209[A], 2010 NY Slip Op 50636[U], *4-*5 [Crim Ct, NY County 2010]).

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11198 In re New York City Asbestos Litigation — Index 190149/11

- - - - -

Gail Herlihy, etc.,
Plaintiff-Respondent,

-against-

A.F. Supply Corp., et al.,
Defendants,

Munaco Packing & Rubber Co., Inc., of South Carolina,
Defendant-Appellant.

_____

Steven L. Keats, Mineola, for appellant.

Wilentz, Goldman & Spitzer, P.A., New York (Kush Shukla of counsel), for respondent.

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Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered January 7, 2013, which denied defendant Munaco Packing & Rubber Co., Inc., of South Carolina's motion to dismiss the complaint and all cross-claims against it for lack of personal jurisdiction, and granted plaintiffs' request for jurisdictional discovery, unanimously affirmed, without costs.

Plaintiff's decedent allegedly was injured during his employment in New York by his exposure to asbestos materials produced by a New York corporation that was the predecessor in interest to defendant Munaco, a South Carolina corporation (Munaco SC). The record contains sufficient evidence to support

a finding that Munaco SC may be subject to successor jurisdiction (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-245 [1983]). Further, we find that jurisdictional discovery is not necessary given our decision (*see* CPLR 3211[d]).

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Feinman, JJ.

11327 Cecil Hall, Index 305039/10
Plaintiff-Appellant,

-against-

United Founders, Ltd.,
Defendant-Respondent,

C. Hope, Inc., et al.,
Defendants.

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Belovin & Franzblau, LLP, Bronx (David Karlin of counsel), for appellant.

Law Office of Steven G. Fauth, LLC, New York (Gregory P. Day of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered January 14, 2013, which, to the extent appealed from as limited by the briefs, granted defendant United Founders, Ltd.'s motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff seeks damages for injuries he allegedly sustained in an attack by a dog being kept by the night watchman at a construction site. Defendant United Founders, a general contractor, was constructing buildings on two adjacent properties, and had hired the night watchman and given him permission to keep the dog at the premises. The dog apparently

escaped from the premises, and it and another dog attacked plaintiff on a public sidewalk near the site.

The owner or a party in control of premises may be held liable for injuries resulting from a dog bite that occurred off the premises if it had knowledge of the vicious propensities of the dog and had control of the premises and the capability to remove or confine the animal (*see Joe v Orbit Indus.*, 269 AD2d 121 [1st Dept 2000]; *Cronin v Chrosniak*, 145 AD2d 905, 906 [4th Dept 1988]). Defendant established prima facie that it was unaware of the dog's vicious propensities, through its owner's testimony that he had never received any complaints about the dog and was not aware of any previous incidents involving the dog, and that the dog appeared friendly and well trained when he observed it. However, plaintiff raised an issue of fact through the testimony of a nonparty witness that he had seen the dog bite an electrician working at the construction site approximately one

month before the subject incident occurred and was present when defendant's foreman called the owner and told him what had happened (*see Champ-Doran v Lewis*, 69 AD3d 1101 [3d Dept 2010]).

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11392 The People of the State of New York, Ind. 5321/10
Respondent,

-against-

Jamal Mack, Jr.,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz 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 (Roger Hayes, J.), rendered on or about May 26, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

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

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11393 In re Salvador Gonzalez, Index 104132/12
Petitioner,

-against-

New York City Housing Authority,
Respondent.

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John Ciurcina, Attorney At Law, LLC, Garden City (John Ciurcina of counsel), for petitioner.

Kelly D. MacNeal, New York (Maria Termini of counsel), for respondent.

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Determination of respondent New York City Housing Authority (NYCHA), dated July 3, 2012, which approved a Hearing Officer's decision to deny petitioner's grievance seeking succession rights as a remaining family member to the tenancy of his late mother, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia Kern, J.], entered February 1, 2013), dismissed, without costs.

Substantial evidence supports the determination that petitioner is not entitled to succession rights as a remaining family member (RFM) (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The record establishes that petitioner's occupancy of the subject apartment was not pursuant to NYCHA's written permission (*see*

Matter of Rahjou v Rhea, 101 AD3d 422 [1st Dept 2012]; *Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]), and there exists no basis to disturb the Hearing Officer's finding that petitioner's mother never sought or obtained the agency's written permission to add petitioner to her household (*see Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 [1st Dept 2007]). Contrary to petitioner's contention, he is not entitled to RFM status on the ground that the agency had implicit knowledge of his alleged long-term occupancy of the apartment (*see Adler* at 695).

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

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11394 In re Francini C.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Yasmin P.,
Respondent-Appellant,

New York City Administration
Children's Services,
Petitioner-Respondent.

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Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

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Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about April 10, 2012, which, after a hearing, determined that respondent mother abused the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's determination that respondent abused her daughter (Family Court Act § 1046[b][i]). The child's out-of-court statements that her mother hit and choked her with a belt were corroborated by the medical records and the testimony of an expert in pediatric medicine, who, after evaluating the child and reviewing her medical records, concluded that she had been abused (*see Matter*

of Alexis Marie P., 45 AD3d 458 [1st Dept 2007], *lv denied* 10 NY3d 705 [2008]). The child's statements were further corroborated by the caseworker's testimony as to marks on the child (*see Matter of Maria Raquel L.*, 36 AD3d 425 [1st Dept 2007]).

There is no basis to disturb the court's determination to discredit respondent's explanation of her daughter's injuries. Respondent's account was not corroborated by the evidence and was inconsistent with the findings set forth in the child's medical records (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

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

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11395 Craig B. Massey, Index 107935/10
Plaintiff-Respondent,

-against-

Christopher W. Byrne, et al.,
Defendants-Appellants.

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Law Offices Of Tedd S. Levine, LLC, Garden City (Tedd S. Levine of counsel), for appellants.

The Kurland Group, New York (Erica T. Kagan of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 18, 2013, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the first, second, third and fourth causes of action, unanimously modified, on the law, to grant the motion as to the third and fourth causes of action, and otherwise affirmed, without costs.

The fourth cause of action, which alleges breach of contract, is barred by the statute of frauds. It is undisputed that no agreement exists in writing, signed by defendant Byrne, to convey half of the interest in the condominium to plaintiff (General Obligations Law § 5-703). Similarly, while plaintiff acknowledges that he and Byrne never entered into a common-law marriage or otherwise were married, he asserts that he and Byrne were involved in a 10-year romantic and business relationship and

that they entered into an "oral agreement to share equally in the assets and resources they gained in their partnership." Plaintiff testified that he expected this agreement to last for his lifetime. Thus, the agreement was required to be in writing (General Obligations Law § 5-701[a][1]; *see Melwani v Jain*, 281 AD2d 276 [1st Dept 2001]). Plaintiff is correct that the statute of frauds does not apply to partnerships or joint ventures created at will (*Foster v Kovner*, 44 AD3d 23, 27 [1st Dept 2007]). However, contrary to his assertions, there is no evidence here of a joint venture or partnership in which the parties shared control, profits, and losses (*see Langer v Dadabhoy*, 44 AD3d 425 [1st Dept 2007], *lv denied* 10 NY3d 712 [2008]). Plaintiff describes an amorphous partnership amongst himself, Byrne, and defendant Byrne Communications. However, he stated that Byrne alone controlled the financial management of Byrne Communications, including his salary and expenses, thereby establishing that he had no control over the company. Nor did he file tax forms that would demonstrate that a partnership or joint venture of any kind existed during the relevant time period.

The third cause of action alleges fraudulent inducement and is duplicative because it is based on the same alleged promise as underlies the breach of contract claim (*Fairway Prime Estate Mgt., LLC v First Am. Intl. Bank*, 99 AD3d 554, 557 [1st Dept

2012]). Plaintiff cannot avoid the statute of frauds by calling the breach of contract claim a fraud claim (*Gora v Drizin*, 300 AD2d 139 [1st Dept 2002]).

Triable issues of fact exist regarding the constructive trust and unjust enrichment claims. Among other things, plaintiff presented evidence that he moved to New York from Louisiana and sacrificed his time and other professional opportunities for the benefit of the business, thereby demonstrating that he made a transfer in reliance on Byrne's alleged promise, as required for imposition of a constructive trust (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473-474 [1st Dept 2010]). He also alleged enough facts to raise the inference that defendants were unjustly enriched on this basis, i.e. that they unjustly benefitted at his expense (*id.* at 473).

Triable issues of fact also exist whether the constructive trust and unjust enrichment claims are barred by the six-year statute of limitations (CPLR 213[1]). Plaintiff presented sufficient evidence to raise, at the very least, triable issues of fact whether the claim accrued only in August 2007, when his

and Byrne's relationship ended and Byrne denied him the one-half share of the property at issue, or when Byrne initially acquired the property (*see Tornheim v Tornheim*, 67 AD3d 775, 776 [2d Dept 2009]; *Kaufman v Cohen*, 307 AD2d 113, 127 [1st Dept 2003]).

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11396 Richard Aviles, Index 300107/10
Plaintiff-Appellant,

-against-

Katty Villapando, et al.,
Defendants-Respondents.

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Stillman & Stillman, P.C., Bronx (Robert A. Birnbaum of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Linda Meisler of counsel), for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered April 5, 2012, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants established prima facie through the affirmed reports of their expert physician and radiologist that the 25-year-old plaintiff had fully recovered from any sprains or strains sustained to his cervical and lumbar spine as a result of the accident, and that the MRI films of the allegedly injured body parts revealed a chronic preexisting condition and no radiographic evidence of trauma or causally related injury. The MRI reports prepared by plaintiff's radiologist following the

accident confirmed the presence of diffuse degenerative disc disease, as well as bulging discs.

However, in opposition, plaintiff raised an issue of fact by submitting affirmations by the chiropractor who treated him after his accident and a radiologist. The chiropractor stated that plaintiff had significant measurable limitations in range of motion shortly after the accident, and upon recent examination. Regarding the evidence of plaintiff's preexisting degenerative changes, the chiropractor concluded that plaintiff was asymptomatic before the accident and, based on his examination of plaintiff and review of his medical records, that plaintiff's injuries were significant, and causally related to the accident,

and not merely a preexisting, degenerative condition (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *McIntosh v Sisters Servants of Mary*, 105 AD3d 672 [1st Dept 2013]). Plaintiff's radiologist concurred that the MRIs showed degenerative changes that may occur as a result of aging, but disagreed that there was no radiographic evidence of traumatic injury.

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11397 The People of the State of New York, Respondent, Ind. 570/08 4069/07

-against-

Luis Febles, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy 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, Bronx County (William Mogulescu, J.), rendered on or about April 9, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

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

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11398 In re Deime Zechariah Luke M., And Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Sharon Tiffany M.,
Respondent-Appellant,

Cardinal McCloskey Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Patricia L. Moreno, Bronx, attorney for the children.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about November 26, 2012, which terminated respondent mother's parental rights to the subject children upon a finding of permanent neglect and transferred custody and guardianship of the children to Cardinal McCloskey Services and the Commissioner of Social Services of the City of New York for the purposes of adoption, unanimously affirmed, without costs.

Throughout the relevant period, the mother was incarcerated and subject to an eight-year order of protection precluding contact with the children, following her guilty plea to an

assault charge related to the underlying neglect proceedings. Nevertheless, the agency established by clear and convincing evidence that it made diligent efforts to strengthen the parent-child relationship, including developing an appropriate service plan tailored to the situation, regularly updating the mother on the children's progress and continually reminding her to comply with the requirements of the service plan. Despite the agency's efforts, however, the mother failed to comply with critical components of the service plan, including her failure to request and obtain a mental health evaluation during her incarceration despite being advised to do so, to provide documentation of completion of services through the WINGS program, and to provide alternate resources for the care of the children in light of her incarceration (*see Matter of Adaliz Marie R. [Natividad G.]*, 78 AD3d 409 [1st Dept 2010]; *Matter of Antwone Lee S.*, 49 AD3d 276 [1st Dept 2008]).

The mother also lacked insight into her behavior and failed to accept any responsibility for the severe physical abuse of one of the subject children, which affected the other children who were present, and led to their removal and to her incarceration (*see Matter of Irene C. [Reina M.]*, 68 AD3d 416 [1st Dept 2009]).

Moreover, the court properly drew a negative inference from the mother's failure to testify or to present evidence to rebut

the agency's case (*see Matter of Jeremy H. [Logann K.]*, 100 AD3d 518 [1st Dept 2012]). According deference to the Family Court's findings as to the credibility, character, and temperament of the mother and other witnesses, we find that the evidence adduced at the fact-finding hearing supports the Family Court's finding of permanent neglect (*see Matter of Marie J.*, 307 AD2d 265 [2d Dept 2003]).

At a dispositional hearing after a finding of permanent neglect, the Family Court must make its determination based on the best interests of the children (*see* Family Ct Act § 631). The mother contends that the Family Court should have suspended judgment for one year pursuant to Family Court Act § 633 to prepare her to be reunited with the children (*see Matter of Michael B.*, 80 NY2d 299, 311 [1992]). Here, however, notwithstanding the mother's recent efforts to avail herself of certain services offered to her since her release from prison, she has failed to demonstrate any progress toward gaining insight into the needs or care of the children, and failed to accept any responsibility for her behavior which led to their removal, such that returning the children to her would be a risk to their well-being.

Moreover, the children have not resided with the mother since 2008, and have bonded with their respective foster families

and homes, where they are well cared for and wish to remain. In addition, the children, all of whom have special needs, are receiving necessary therapy, services and medication in their foster homes. On the other hand, the evidence demonstrated that the mother lacked knowledge, insight and understanding into the respective needs and care of the children. Thus, the finding that termination of the mother's parental rights is in the children's best interests is supported by a preponderance of the evidence (*see Matter of Ibrahim B.*, 57 AD3d 382 [1st Dept 2008]).

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11400 Pamela B. Rodman, Index: 350282/99
Plaintiff-Respondent,

-against-

Robert H. Friedman,
Defendant-Appellant.

_____

Robert H. Friedman, appellant pro se.

Fersch Petitti LLC, New York (Patricia Ann Fersch of counsel), for respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered April 16, 2013, which denied defendant's motion to suspend his child support obligation and to enforce payment by plaintiff of self-executing fines for missed parenting time, unanimously modified, on the law and the facts, to grant the motion to the extent of suspending defendant's child support obligations until regular visits with the child are resumed, and otherwise affirmed, without costs.

Plaintiff's "deliberate frustration" of and "active interference" with defendant's visitation rights warrant the suspension of child support payments (*see Ledgin v Ledgin*, 36 AD3d 669, 670 [2d Dept 2007]; Domestic Relations Law § 241). On a prior appeal, we affirmed Supreme Court's finding that plaintiff had alienated the child from defendant (33 AD3d 400

[1st Dept 2006], *lv dismissed* 8 NY3d 895 [2007]). On the instant motion, the court found, based on plaintiff's own submissions, that "alienation ha[d] continued unabated" and that "[p]laintiff's conduct remains unchanged: she persists in her denigration of [d]efendant as a parent and as a person and refuses to accept responsibility for the escalating damage being inflicted on her daughter." Under the circumstances, suspension of defendant's child support obligation is necessary to enforce defendant's reasonable rights of visitation.

Defendant's argument that the court should have declared the child constructively emancipated was improperly raised for the first time on appeal (*see Matter of Matthew Niko M. [Niko M.]*, 85 AD3d 544 [1st Dept 2011]). In any event, at the time of defendant's motion, the child was not of an "employable age," being only 15 years old, so her abandonment of defendant could not be deemed to constitute constructive emancipation (*see Matter of Dobies v Brefka*, 83 AD3d 1148, 1152 [3d Dept 2011] [internal quotation marks omitted]).

The court properly declined to enforce the self-executing fines for missed visitation time, since the part of the court's 2006 order directing plaintiff to pay those fines was held in abeyance in March 2007, pending the determination of the parties' motions. In May 2007, the court explicitly instructed defendant

to renew his application for any relief that had been held in abeyance, which defendant failed to do until 2012. Defendant's assertions that he has been "tracking" every visit with the child by the hour and that fines for missed visitation from 2006 until 2011 have reached $134,775 are unsubstantiated.

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11401 The People of the State of New York, Ind. 3210/09
Respondent,

-against-

Ramon Rivera,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.), rendered November 15, 2011, convicting defendant, after a nonjury trial, of assault in the second degree, menacing in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of six months concurrent with five years' probation, 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 credibility determinations. The evidence supports inferences that defendant used a dangerous instrument, and that he had the intent to injure the victim.

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11402 In re Nakia C.,
Petitioner-Appellant,

-against-

Johnny F.R.,
Respondent-Respondent.

George E. Reed, Jr., White Plains, for appellant.

Steven N. Feinman, White Plains, for respondent.

Order, Family Court, Bronx County (David B. Cohen, J.), entered on or about January 15, 2013, insofar as it denied petitioner's request that the order of protection remain in effect for five years and that respondent be required to participate in individual counseling and a batterer's program, unanimously modified, on the law, the matter remanded for reconsideration of the duration of the order of protection in accordance herewith, and otherwise affirmed, without costs.

The court's finding that respondent committed the family offense of reckless endangerment in the second degree is undisputed and in any event supported by the record. After threatening violence against petitioner over the telephone, respondent showed up near her home and, when she drove away with her boyfriend and one of the parties' children, engaged in a high-speed car chase in which he recklessly cut off her car,

thereby "creat[ing] a substantial risk of serious physical injury to another person" (Penal Law § 120.20).

The court erred in concluding that there were no aggravating circumstances that would permit it to impose longer than a two-year duration in the order of protection, based on its finding that respondent did not use his car as a dangerous instrument because he did not intend to make or threaten dangerous contact using the car (*see* Family Court Act §§ 842; 827[a][vii]). A dangerous instrument is "any instrument, article or substance, including a 'vehicle' as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00[13]). There is no requirement that the person using the instrument intend to cause serious physical injury.

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

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11403 The People of the State of New York, Respondent, Ind. 3944/07

-against-

Michael Lewis, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Cassandra M. Mullen, J.), rendered January 8, 2010, convicting defendant, after a jury trial, of criminal mischief in the fourth degree (two counts), possession of burglar's tools and resisting arrest, and sentencing him to an aggregate term of one year, 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]). Defendant's guilt was established

through compelling circumstantial evidence that lacked any reasonable innocent explanation.

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11405N GS Plasticos Limitada, Index 650242/09
Plaintiff-Appellant,

-against-

Bureau Veritas Consumer
Products Services, Inc.,
Defendant-Respondent.

_____

Abduljaami, PLLC, New York (Saboor H. Abduljaami of counsel), for appellant.

Kilpatrick Townsend & Stockton LLP, New York (Jonathan E. Polonsky of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered August 13, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motions to compel disclosure in response to document request numbers 1, 15, 20, 26, and 28 of plaintiff's Third Notice of Discovery and Inspection, document request number 16 of its First Notice of Discovery and Inspection, and numbers 1 through 17 of its Fifth Set of Interrogatories, unanimously affirmed, without costs.

In this case alleging tortious interference with existing contractual relations, plaintiff, a Brazilian manufacturer of toy premiums for the promotional market, alleges that between August and October of 2006, defendant, a provider of testing and inspection services for consumer products, intentionally issued

false reports to plaintiff's client indicating that plaintiff's stamps were unsafe, causing the client to terminate the contract.

On this record, we conclude that the Supreme Court, which has managed a long and contentious discovery process and is intimately familiar with this litigation, providently exercised its discretion in denying nearly all of the discovery demands at issue here, largely upon its findings, supported in the record, that defendant had already sufficiently responded to most of them, and that they otherwise sought irrelevant information for which plaintiff had laid an insufficient factual predicate (*see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740 [2000]).

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11406N Brian Flores-Vasquez, etc., et al., Index 13863/07
Plaintiffs-Respondents,

-against-

The New York City Health & Hospitals Corporation (Jacobi Medical Center),
Defendant-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for appellant.

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for respondents.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 10, 2012, which granted plaintiffs' motion for leave to file a late notice of claim to the extent of granting infant plaintiff leave to file a new notice of claim within 30 days of entry of the order, unanimously affirmed, without costs.

In determining if leave should be granted, the court must consider "whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense" (*Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept

2003]). Here, the motion court exercised its discretion in a provident manner in granting plaintiffs' motion (*id.*).

The record shows that infant plaintiff was born at defendant hospital in June 2004 and that plaintiffs' allegations of medical malpractice are based on the hospital's treatment of plaintiff mother and the child both before and after delivery. Plaintiffs did not serve a notice of claim on defendant until September 2006 and did not move to deem the notice timely or for leave to file a late notice of claim until June 2010.

Although plaintiffs failed to proffer a reasonable excuse for the delay, "the lack of a reasonable excuse is not, standing by itself, sufficient to deny an application for leave to serve and file a late notice of claim" (*Matter of Ansong v City of New York*, 308 AD2d 333, 334 [1st Dept 2003]). Plaintiffs submitted expert affidavits showing that defendant had actual knowledge of the facts underlying their theory of a departure from the accepted standard of pediatric care with regard to the diagnosis and treatment of the child's fetal distress and the existence of a causally related injury, and their opinions are not refuted by defendant's pediatric defense expert (*see Alvarez v New York City Health & Hosps. Corp. [North Cent. Bronx Hosp.]*, 101 AD3d 464 [1st Dept 2012]; *Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448 [1st Dept 2011]). Moreover, defendant is not

substantially prejudiced by the delay as infant plaintiff's injury was apparent at his birth and documented in the medical records, which have been in the hospital's possession since the time of the alleged malpractice (*see Bayo v Burnside Mews Assoc.*, 45 AD3d 495 [1st Dept 2007]).

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11407N SLG 625 Lessee, LLC, Index 100893/11
Petitioner-Appellant,

-against-

The Neiman Marcus Group, Inc.,
Respondent-Respondent.

_____

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant.

Baker Botts L.L.P., New York (Richard B. Harper of counsel), for respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 18, 2012, which granted the petition seeking to vacate an arbitration award to the extent of extending petitioner landlord's compliance period to 45 days from the date of service of the order with notice of entry, and otherwise confirmed the award, unanimously affirmed, without costs.

Absent action taken by the arbitrator contrary to a provision in a parties' arbitration agreement, or which could constitute action taken in violation of public policy, the arbitrator is accorded "unfettered discretion" in matters submitted to him or her by consent of the parties (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 630 [1979]). Here, the relevant lease provision determined a tenant's share of the building's escalating operating expenses; that provision was to be read in

conjunction with an arbitration provision governing potential disputes arising from the landlord's allocation of increased annual building expenses to the tenant. Specifically, the arbitration provision stated, "The arbitrator conducting any arbitration shall be bound by the provisions of this lease and shall not have the power to add to, subtract from, or otherwise modify such provisions. Landlord and Tenant agree to sign all documents and to do all other things necessary to submit any such matter to arbitration further and agree to, and hereby do, waive any and all rights they or either of them may at any time have to revoke their agreement hereunder to submit to arbitration and to abide by the decision rendered hereunder." Thus, the arbitration provision authorized the arbitrator to enforce the broad discovery allowed the tenant -- namely, the landlord's operating books and records that were relevant to the tenant's challenge to specified annual operating statements. Such an interpretative finding by the arbitrator will not be disturbed (*see Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368 [1st Dept 2004]).

The aforementioned lease provisions did not contain any language that would preclude the arbitrator from including a provision in the award that would resolve escalating expense issues against the landlord where the landlord failed to comply

with the specified discovery outlined in the award. "An arbitrator's paramount responsibility is to reach an equitable result, and the courts will not assume the role of overseers to mold the award to conform to their sense of justice" (*Sprinzen* at 629). The arbitrator, in view of the landlord's stonewalling of discovery, fashioned an award to ensure the landlord's compliance with the award's discovery directives. The arbitrator's award rationally placed the ultimate burden upon the landlord to explain any failure on its part to produce relevant documents or information relative to its operation of its property.

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11408N Glenda Garcia, Index 307608/09
Plaintiff-Appellant,

-against-

Riverbay Corporation,
Defendant-Respondent.

_____

Mallilo & Grossman, Flushing (Francesco Pomara, Jr. of counsel), for appellant.

Malapero & Prisco, LLP, New York (Dan Quart of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered August 14, 2012, which, in an action for personal injuries, denied plaintiff's motion to vacate a prior order granting defendant's motion for summary judgment upon plaintiff's default, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in denying the motion to vacate the default. Plaintiff failed to offer a reasonable excuse for the default, as her counsel made only conclusory assertions of having been engaged in another trial, without any support and without naming the time and dates of such engagement, the court, the judge or any other details (*see Polanco v City of New York*, 78 AD3d 617 [1st Dept 2010]; 22 NYCRR 125.1). Nor did counsel's conclusory statement that he was "under the impression" that plaintiff's ex parte motion for an

adjournment had been granted constitute a reasonable excuse (*see Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1s Dept 2012]).

Moreover, plaintiff lacks a meritorious cause of action.

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, Clark, JJ.

11409N Samar Shah, et al., Index 651500/11
Plaintiffs-Appellants,

-against-

Juan Ortiz, et al.,
Defendants-Respondents.

_____

Law Offices of Edward Weissman, New York (Edward Weissman of counsel), for appellants.

Cohen Law Group, P.C., New York (Brian S. Cohen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 23, 2013, which denied plaintiffs' motion to disqualify Jeffrey P. Shapiro, Esq. from serving as defendants' co-counsel, unanimously affirmed, with costs.

The motion court providently exercised its discretion in denying plaintiffs' motion to disqualify defendants' co-counsel. Plaintiffs failed to meet their burden of showing that they had a prior attorney-client relationship with Mr. Shapiro which is fatal to a motion to disqualify under 22 NYCRR 1200.0 (Rules of Professional Conduct) Rule 1.7(b) (*see Solow v Grace & Co.*, 83 NY2d 303, 308 [1994]; *Campbell v McKeon*, 75 AD3d 479 [1st Dept 2010]). Contrary to plaintiff's argument, defendants' counsel did not previously represent the plaintiffs in this action, rather, he represented defendant A-Data Technology of Latin America.

We also find that counsel's testimony in this action is unessential and would be cumulative. Accordingly, disqualification is not warranted under the advocate-witness rule (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7; *see Campbell*, 75 AD3d at 481).

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

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK

Tom, J.P., Acosta, Saxe, Freedman, Feinman, JJ.

9655-
9655A Index 150416/07

Bruce Kershaw,
Plaintiff-Respondent-Appellant,

-against-

Hospital for Special Surgery, et al.,
Defendants-Appellants-Respondents,

New York University Medical Center
Hospital for Joint Diseases,
Defendant-Respondent,

Joshua Steinvurzel,
Defendant.

_____

Peltz & Walker, New York (Bhalinder L. Rikhye of counsel), for appellants-respondents.

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

McAloon & Friedman, New York (Gina Bernardi Di Folco of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered July 16, 2012, affirmed, without costs. Judgment, same court and Justice, entered August 20, 2012, affirmed, without costs.

Opinion by Feinman, J. All concur except Tom, J.P. and Freedman, J. who dissent in part in an Opinion by Tom, J.P.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
David B. Saxe
Helen E. Freedman
Paul G. Feinman, JJ.

9655-
9655A
Index 150416/07

_____x

Bruce Kershaw,
Plaintiff-Respondent-Appellant,

-against-

Hospital for Special Surgery, et al.,
Defendants-Appellants-Respondents,

New York University Medical Center
Hospital for Joint Diseases,
Defendant-Respondent,

Joshua Steinvurzel,
Defendant.

_____x

Cross appeals from the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 16, 2012, which, insofar as appealed from as limited by the briefs, granted the summary judgment motion of defendants Hospital for Special Surgery, Peter Frelinghuysen, and Federico Pablo Girardi (collectively HSS) only to the extent of dismissing plaintiff's claim of lack of informed consent, and otherwise denied the motion, and from the judgment of the same court and Justice, entered August 20, 2012, dismissing the complaint as against defendant New York University Medical Center Hospital for Joint Diseases.

Peltz & Walker, New York (Bhalinder L. Rikhye

of counsel), for appellants-respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), and Shoshana T. Bookson, New York, for respondent-appellant.

McAloon & Friedman, New York (Gina Bernardi Di Folco of counsel), for respondent.

FEINMAN, J.

Although raised in the context of a purported "cross motion," resolution of this appeal requires us to once again revisit the issue of untimely summary judgment motions. As defendant Hospital for Special Surgery (together with codefendants Frelinghuysen and Girardi, HSS) concedes, its cross motion was untimely, and it did not allege any good cause for its delay. Accordingly, the cross motion was properly denied, regardless of its merits.

In 1994, when plaintiff was 53 years old, he underwent spinal surgery at defendant Hospital for Special Surgery, to address multilevel cervical stenosis with myelopathy and radiculopathy, which, over the course of five years, had led to progressive weakness in his left shoulder and upper extremities. After surgery, he was pain-free but did not recover a full range of motion in his upper left arm.

About eight years later, in March 2002, plaintiff returned to HSS complaining of lower back pain and severe left leg pain; he was treated with a course of steroid injections. In April 2003, plaintiff again returned because he was experiencing increased weakness in his right upper arm. He was found to have "significant" cervical stenosis and compression of his spinal cord, as well as cord signal change especially at C3-4 and C4-5.

Plaintiff had "significant C-5 weakness of the right upper extremity." The clinic notes indicated that plaintiff "need[ed] a decompression at C3-4, C4-5 and C6-7," that "probably" this would be done in an anterior approach, and that "surgery will be booked in the near future." At a follow-up visit in June 2003, he was told that he might not fully recover his right arm motor loss; he was "somewhat disappointed" but acknowledged that his 1994 surgery had a similar result as to his left side. The clinic notes also indicate that plaintiff told the examining physician that he had recently secured a job and was not interested "whatsoever" in immediate surgery; plaintiff disputes this and says he was not working at that time.

Plaintiff returned to HSS in June 2004 complaining of increasing right shoulder dysfunction and neck pain, and decreasing balance. He was no longer working and was receiving social security disability benefits. The clinic notes of June 11, 2004 indicate that his "symptoms have progressed with increased right shoulder atrophy"; a new round of studies was scheduled. On October 1, 2004, plaintiff first met with defendants Peter Frelinghuysen, M.D. and Federico Pablo Girardi, M.D., both orthopedic surgeons at HSS. According to the clinic notes, the doctors advised plaintiff that surgery would likely not result in the return of muscle function, but that there was

"a slight chance" of improvement.

He met with another HSS doctor on October 22, 2004, who wrote that the plan was to have plaintiff return in November to see Frelinghuysen "for booking of his anterior disc fusion surgery." At his next visit on November 12, 2004, a different doctor indicated in the clinic notes that Frelinghuysen and Girardi had recommended "what sounds like a two-level anterior cervical decompression and fusion," and that plaintiff would follow up in one week "to discuss surgery" with Frelinghuysen.[1] The notes also indicate that this doctor explained to plaintiff that the reason to do surgery would be to prevent worsening of his symptoms. The doctor also noted that plaintiff's "only option" might be a future shoulder arthrodesis "to allow him to have a more functional lifestyle." On November 19, 2004, the clinic notes indicate that Frelinghuysen planned to review the patient films with Girardi and "we will plan for an anterior cervical decompression and fusion at a later date." According to plaintiff, he understood that surgery would be performed in late December, and he began obtaining the necessary medical clearances.

[1]Girardi testified that the notation that he and Frelinghuysen had recommended any particular surgery was "incorrect."

Plaintiff testified that on his third visit with Frelinghuysen in December 2004, the doctor told him that they could not do the surgery, but did not give him "a reason that made any sense." In Frelinghuysen's words, he and Girardi decided that surgery "would not help." According to Girardi, after viewing the films, in his opinion the severity of plaintiff's spinal disease and the low prospect of improvement did not warrant the risks of surgery. If the issue had been compression, surgery would have been performed to prevent further progression, but due to the degeneration of the spinal cord, decompressive laminectomies would have done little or nothing to address plaintiff's upper extremity issues.

In February 2005, plaintiff sought treatment at defendant New York University Medical Center Hospital for Joint Diseases (HJD). According to the patient notes, the examining physician found severe upper extremity atrophy. After review of the MRI, he determined that no further surgery for the cervical spine was indicated and that there should be no lumbar spine surgery "at this time." Physical therapy, pain management and treatment in HJD's neurology, hand and shoulder clinics were recommended. Plaintiff undertook these programs through HJD's clinic, and was treated continuously until September of 2005. An MRI taken of his right shoulder in May 2005 showed "severe atrophy" of certain

muscles and "mild atrophy" of other muscles, "likely due to the patient's cervical myelomalacia." An MRI of his cervical spine taken the same day found "severe central canal and severe neural foraminal stenosis," resulting in "severe myelomalacia of the spinal cord" from C3 to mid-C5 level.

While continuing at HJD, plaintiff also sought treatment at Mt. Sinai, where he was first seen in the orthopedic clinic on April 21, 2005. The progress notes from June 25, 2005 indicate, in part, that he had "marked stenosis throughout spine," and "marked atrophy at both shoulder girdles." In July 2005, he was examined by an orthopedic surgeon who determined that plaintiff needed surgery to prevent his condition from worsening, not in order to regain function. Plaintiff underwent a two-stage cervical spine surgery in December 2005. Post-operatively, in February and April 2006, plaintiff indicated that he felt returning strength in his right arm although not his left, and a general "slow improvement." The Mt. Sinai orthopedic surgeon observed that he did not "see a substantial neurologic improvement on [his] objective testing, but the patient does feel subjectively like he is improving."

Ten months after the surgery at Mt. Sinai, in October 2006, plaintiff returned to HJD's neurology clinic, reporting a lack of improvement in upper extremity strength, and some pain and

numbness on the right arm and hand. Electrical studies performed on October 26, 2006 revealed no significant change from those done in 2005 although there was evidence of fibrotic changes; the studies showed the presence of moderate right and mild left carpal tunnel syndrome.

Plaintiff commenced his lawsuit in May 2007, claiming medical malpractice and failure to secure informed consent. The gravamen of his claim is that HSS and HJD failed to timely perform surgery upon him, leaving him with neurological and muscular damage that would not have occurred had the surgery been performed earlier.

HJD timely moved for summary judgment on November 11, 2011. Its motion papers included an affidavit of a medical expert who discussed plaintiff's medical history as seen in the records. In the opinion of HJD's expert, surgery would have been an "unjustifiable and extraordinarily risky and aggressive treatment option," as no surgery would have been able to reverse plaintiff's "significant" neurological deficits that had existed for many years. The best that surgery could do was stop the myelopathy, but there was risk of permanent paralysis or death, "well beyond the standard for such risks for cervical spine cases." He further opined that there was no identifiable injury sustained in the four-month period between plaintiff's first

visit at HJD and when he first went to Mt. Sinai.

By notice of cross motion dated January 10, 2012, HSS moved for summary judgment and dismissal, relying on HJD's expert's affidavit and that of defendant Girardi. HSS also argued that the claim of lack of informed consent should be dismissed, given that no procedure requiring consent had been performed. HSS admitted that its motion seeking summary judgment and dismissal of the complaint as against it was filed nearly two months after the court-imposed deadline for making dispositive motions,[2] but argued that it should be considered because it sought relief on the same issues raised in codefendant HJD's timely motion.

Plaintiff opposed defendants' motions for summary judgment, although he did not address the claim of lack of informed consent. He submitted the affidavit of his medical expert, Michael J. Murphy, M.D., an orthopedic surgeon practicing in Connecticut. According to the affidavit, Murphy reviewed the medical records and opined that surgery for plaintiff was "indicated as early as June 2003 when the diagnosis of cervical spondylitic myelopathy was made," and from that time until

[2] Supreme Court's extension of the time to file dispositive motions had given the parties a total of 82 days after the filing of the note of issue on August 24, 2011. As a point of reference, the statutory 120-day maximum expired on December 22, 2011.

December 2005 when surgery was performed, plaintiff's neurological condition deteriorated. He further opined that had the surgery been performed in 2003, plaintiff's "final outcome would have been substantially improved and he would not have sustained such a severe degree of weakness and loss of function of his right upper extremity." Dr. Murphy stated that the delays were a departure from the standards of good medical practice.

The motion court granted HJD's motion and denied the motion of HSS. As to HJD, the court found that, "without any doubt, [its] moving papers, primarily through the thorough opinions expressed by [its expert], [made] out a prima facie case for the relief sought." In opposition, Murphy's opinions were "somewhat conclusory." He did not separate the claims plaintiff made against HJD and HSS, and did not address the opinions of HJD's expert regarding causation. Thus, plaintiff failed to rebut HJD's prima facie entitlement to summary judgment.

As to HSS, the court clearly held that because the cross motion was filed impermissibly late with no reason offered for the lateness, it should be denied. The court then went on to comment in dicta that if its merits were examined, summary dismissal should be denied as there are substantial questions of

fact, barring summary resolution. It wrote,

> "The question remains whether HSS should remain a viable defendant in this case. The answer is yes. First of all, under the authority of *Brill* [2 NY3d 648 (2004)], the cross[]motion was clearly untimely without any explanation, and counsel is simply wrong when he argues that the cross[]motion raises the same issues as the motion timely made by [HJD]. Differences necessarily exist because [plaintiff] was a patient at HSS for an extended time before he came to [HJD]. At [HJD] he was a patient from only February 2005 to September 2005, and he was also a patient at Mt. Sinai for much of that time. Therefore, the motion must be denied as untimely."

Thus, the rationale for the court's denial was articulated as being that the "cross motion" was untimely.

HSS appealed from the denial of its "cross motion" and plaintiff cross-appealed from the grant of HJD's motion.

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mktg., Inc. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light

most favorable to the one moved against (*see Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]; *Bielat v Montrose*, 272 AD2d 251, 251 [1st Dept 2000]).

The motion court properly dismissed the case as against HJD. HJD met its burden of showing prima facie entitlement to summary judgment, proffering evidence that plaintiff was not caused to suffer any injury between February 2005 when HJD found that surgery was not indicated, and April 2005 when he first consulted with Mt. Sinai. In opposition plaintiff's expert did not offer an opinion as to what specific injury plaintiff endured as a result of HJD's decision not to perform surgery and made only broad conjectures which were insufficient to defeat HJD's motion (*see Foster-Sturrup v Long*, 95 AD3d 726 [1st Dept 2012]; *Callistro v Bebbington*, 94 AD3d 408 [1st Dept 2012], *affd* 20 NY3d 945 [2012]). In addition, the motion court correctly dismissed the second cause of action alleging lack of informed consent as plaintiff's papers did not address this claim.

The motion court also correctly denied summary judgment to HSS because its motion was untimely made without any explanation for its untimeliness, let alone good cause (*see* CPLR 3212[a]).

Plaintiff filed his note of issue on August 24, 2011. Thereafter, the motion court issued an order which provided that "[t]he time for the various defendants to move for summary

judgment is extended through November 14, 2011." On November 11, 2011, HJD moved for summary judgment, making its motion returnable on December 14, 2011. On January 10, 2012, well after the deadline for dispositive motions had passed, HSS "cross-moved" for summary judgment without providing any explanation whatsoever for its delay. HSS argued to the motion court, as it does to this Court, that its motion should be considered on the merits because it merely presents the same arguments made by HJD. In opposing the "cross motion," the plaintiff argued that it was untimely, and, secondarily, that it was devoid of merit.

Brill v City of New York (2 NY3d 648 [2004]) addressed the "recurring scenario" of litigants filing late summary judgment motions, in effect "ignor[ing] statutory law, disrupt[ing] trial calendars, and undermin[ing] the goals of orderliness and efficiency in state court practice" (2 NY3d at 650). *Brill* holds that to rein in these late motions, brought as late as shortly before trial, CPLR 3212(a) requires that motions for summary judgment must be brought within 120 days of the filing of the note of issue or the time established by the court; where a motion is untimely, the movant must show good cause for the delay, otherwise the late motion will not be addressed (*see Isolabella v Sapir*, 96 AD3d 427, 427 [1st Dept 2012]). In *Brill*, the City of New York moved for summary judgment on the basis that

it never had notice of the defect and therefore could not be liable for the plaintiff's personal injuries by law. Quite likely, the City's legal argument would have been dispositive. However, the City gave no explanation for why its motion was made close to a year after the trial calendar papers were filed. Accordingly, the Court of Appeals refused to address the motion on its merits, pursuant to CPLR 3212(a).

Brill draws a bright line based on the two elements of CPLR 3212(a): the statutorily imposed or court-imposed deadlines for filing summary judgment motions, and the showing of good cause by a late movant in order for its motion to be considered. In *Brill* the Court of Appeals indicated that late-filed summary judgment motions are "*another example* of sloppy practice threatening our judicial system" (2 NY3d at 652, emphasis added), and pointed to its earlier decision, *Kihl v Pfeffer* (94 NY2d 118 [1999]), which affirmed dismissal of the complaint because the plaintiff failed to respond to a court order within the court-ordered time frame. *Brill* reiterates *Kihl*'s statement that, "'[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity'" (2 NY3d at 652-653, quoting *Kihl* at 123).

While the *Brill* rule may have caused some practitioners and courts to wince at its bright line, by the time the motions at

issue in this case were made, the Court of Appeals had already reiterated on more than one occasion, and in varying contexts, that it meant what it said (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010], citing *Brill* [dismissal after repeated failures to serve bill of particulars and noncompliance with enforcement order]; *Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects and Landscape Architects, P.C. [Habiterra Assocs.]*, 5 NY3d 514 [2005], citing *Brill* [dismissal after ongoing failure to comply with discovery orders]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004], citing *Brill* [denying untimely filed summary judgment motion because although the plaintiff argued she had meritorious case, no reasonable excuse was provided as to the motion's late filing]; *see also Casas v Consolidated Edison Co. of N.Y., Inc.*, 105 AD3d 471 [1st Dept 2013] [upholding order striking answer where the defendant offered no reasonable excuse for its failure to comply with discovery order and provide a meritorious defense]).[3]

[3] In *Cadichon v Facelle* (18 NY3d 230 [2011]), the Court reversed a "ministerial" dismissal based on the failure to timely file the note of issue because the trial court did not provide notice to the parties or issue a formal order; the decision notes that the record showed that neither set of parties acted "with expediency in moving the case forward," and that deadlines must not be disregarded (*id.* at 236, citing *Andrea*, *Miceli*, *Brill*, and *Kihl*).

As most recently articulated in *Gibbs*:

> "The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well" (16 NY3d at 81).

The dissent considers our application of *Brill* in this instance to be "rote," and that our interpretation is antithetical to that decision's policy considerations of preventing eve-of-trial summary judgment motions. It contends that in the interest of judicial economy we should not depart from "prior authority" that affords the court discretion to entertain a "marginally late filing" when there is merit to the application and no prejudice has been demonstrated, citing *Burns v Gonzalez* (307 AD2d 863 [1st Dept 2003]), and *Garrison v City of New York* (300 AD2d 14 [1st Dept 2002], *lv denied* 99 NY2d 510 [2003]). The dissent would seemingly limit the reach of *Brill* to those actions where a party files a motion for summary judgment long after the deadline for dispositive motions and the matter is

on the trial calendar. In our view, *Brill* expresses the Court's overall desire to curb "sloppy" litigation practices, one of them being late summary judgment motions. The dissent's approach of judging a motion's merits without consideration of why it was untimely, can only lead to uncertainty and additional litigation as motions clearly barred by *Brill* become arguably permissible because one of the litigants perceives the motion to have merit and perceives no prejudice to the other side. But most importantly, the dissent's approach is in derogation of CPLR 3212(a).

The dissent expresses concern about an extra burden to the courts and litigants if we strictly enforce *Brill* "without taking into consideration the circumstances of the case." It reasons that because *Brill* emphasizes the advantages of summary judgment, with which we of course agree, those advantages outweigh a consistent application of the statute. However, bending the rule results in the practical elimination of the "good cause shown" aspect of CPLR 3212(a), and the clear intent of *Brill*.

Unlike the dissent, we do not find that a straightforward interpretation of the statute, or *Brill*, leads to "absurd and unintended consequences," especially as the Court of Appeals acknowledges in *Brill* that if the strictures of CPLR 3212(a) are applied "as written and intended," there may be situations where

a meritorious summary judgment motion may be denied, "burdening the litigants and trial calendar with a case that in fact leaves nothing to try" as was the result in *Brill* (2 NY3d at 653). However, the solution, the Court of Appeals explains, is not for the courts to overlook or bend CPLR 3212(a) to fit the particular circumstances, but for "practitioners [to] move for summary judgment within the prescribed time period or offer a legitimate reason for the delay" (*id.*). In other words, *Brill* calls on the courts to lead by enforcing the words of the statute, rather than let attorney practice slowly eat away at the integrity of our judicial system. When the courts consistently "refus[e] to countenance" violation of statutory time frames, there will be fewer instances of untimely, improperly labeled motions, because "movants will develop a habit of compliance" with the statutory and court-ordered time frames, and late motions will include a good cause reason for the delay (*id.*).

We do not hold that when a summary judgment motion is filed past the deadline, the court must automatically reject it. Rather, we enforce the law as written by the legislature, and as explained in *Brill*. It is up to the litigant to show the court why the rule should be flexible in the particular circumstances, or, in the words of the statute, that there is "good cause shown" for the delay. Indeed, in our view, the dissent wrongly

interprets the statute by claiming that the "good cause shown" prong is not always a part of the CPLR 3212(a) analysis. There is nothing in the language of the statute to suggest this and it opens the door to abuse; once one movant has timely filed, any other party can argue that its motion, no matter when filed, should be addressed. The value of enforcing the terms of the statute as written is that attorneys will make sure their motions are timely filed or that there is a good reason for the lateness. Nonmovants will suffer no prejudice. The courts will no longer have to address the kinds of questions we address here. The result will be judicial economy, as well as lawyerly economy.

In the case at bar, HSS relies on *Lapin v Atlantic Realty Apts. Co., LLC* (48 AD3d 337 [1st Dept 2008]), for the principle that there is an exception to *Brill* for cases where a late motion or cross motion is essentially duplicative of a timely motion. However, the Court of Appeals intended no such exception, and to the extent this Court has created one, it did so, whether knowingly or unwittingly, by relying on precedents which predate *Brill* and which, if followed, will continue to perpetuate a culture of delay. This is clear by tracing *Lapin*'s antecedents.

Lapin is one in a line of cases holding that an untimely cross motion may be considered on its merits when it and the timely motion address essentially the same issues. *Lapin* relied

on *Altschuler v Gramatan Mgt., Inc.* (27 AD3d 304 [1st Dept 2006]), which held it proper to consider the untimely "cross motion," in particular because it was "largely based" on the same arguments raised in the timely motion for summary judgment, and the same findings would apply for both it and the timely motion. *Altschuler,* in turn, relied on a *pre-Brill decision*, *James v Jamie Towers Hous. Co.* (294 AD2d 268, 272 [1st Dept 2002], *affd* 99 NY2d 639 [2003]). In *James*, the defendant moved for summary judgment and the codefendant served its cross motion late but before the original motion had been decided; *James* held that the untimely cross motion should have been considered as the original motion was still pending and both could have been decided together.

James, in turn, relied on *Rosa v R.H. Macy Co.* (272 AD2d 87 [1st Dept 2000]), where Macy moved for summary judgment and two other defendants untimely cross-moved against it for indemnity; the motion and another timely cross motion were still pending, and we held that the untimely cross motions should have been considered. In sum, an outdated, pre-*Brill* interpretation of the amended CPLR 3212(a) continued to hold sway in *Lapin*.

It is true that since *Brill* was decided, this Court has held, on many occasions, that an untimely *but correctly labeled* cross motion may be considered at least as to the issues that are

the same in both it and the motion, without needing to show good cause (*see e.g. Palomo v 175th St. Realty Corp.,* 101 AD3d 579 [1st Dept 2012]; *Conklin v Triborough Bridge and Tunnel Auth.,* 49 AD3d 320 [1st Dept 2008]; *Filannino v Triborough Bridge & Tunnnel Auth.,* 34 AD3d 280, 281-282 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]; *Osario v BRF Constr. Corp.*, 23 AD3d 202, 203 [1st Dept 2005]). Some decisions also reason that because CPLR 3212(b) gives the court the power to search the record and grant summary judgment to any party without the necessity of a cross motion, the court may address an untimely cross motion at least as to the causes of action or issues that are the subject of the timely motion (*see Filannino,* 34 AD3d at 281, citing *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429 [1996]). The problem in the case at bar is that HSS's motion, in addition to being untimely, is not a true cross motion.

A cross motion is "merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2215:1; *see* CPLR 2215). A cross motion offers several advantages to the movant. There is a shorter minimum notice requirement, three or seven days, as compared with the minimum eight-day notice requirement in CPLR 2214(b). The cross movant may rely on the

papers submitted with the main motion to support the relief sought. By making a cross motion, the party saves an extra day in court, and quite possibly the time and trouble of amassing fresh proof, if it happens that all or part of the evidentiary foundation on which the cross motion is based has already been produced for consideration (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2215:1, 2215:2).

To the extent HSS's motion was directed at the complaint, as opposed to any cross claims by HJD, and was not made returnable the same day as the original motion, it was not a cross motion as defined in CPLR 2215. The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party (*Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843 [2d Dept 1986]). While courts have deemed this mislabeling a "technical" defect which will be disregarded, particularly where the nonmovant does not object and it results in no prejudice to the nonmoving party (*see Sheehan v Marshall*, 9 AD3d 403, 404 [2d Dept 2004]), in this case the nature of nonmovant plaintiff's opposition is that there was prejudice because to the extent the court deems HSS's motion a cross motion, the *Brill* rule is ignored.

Allowing movants to file untimely, mislabeled "cross

motions" without good cause shown for the delay, affords them an unfair and improper advantage. Were the motions properly labeled they would not be judicially considered without an explanation for the delay. Moreover, the exception discussed in *Filannino* allowing the courts to consider proper but untimely cross motions, at least as to issues shared with the original motion, addresses the dissent's concern that a cross-moving party might be caused to file its motion late because it had insufficient time before the deadline occurred. Of course, it must be pointed out that the cross-movant would have good cause for its late motion in that situation, and the cross motion would be evaluated on its merits (*see e.g. Parker v LIJMC-Satellite Dialysis Facility*, 92 AD3d 740, 741-742 [2d Dept 2012] [failure to receive significant outstanding discovery before the deadline for making motion for summary judgment provides good cause for allowing a late-filed motion for summary judgment]; *see also Kase v H.E.E. Co.*, 95 AD3d 568, 560 [1st Dept 2012] [court's clerical error, explained through an affidavit of the paralegal, provided good cause for granting the motion seeking renewal of the motion for summary judgment]).

The argument that HSS's motion should be considered on the merits because it "sought relief on the same issues raised in HJD's timely motion," ignores the distinction in the CPLR between

motions and cross motions and perpetuates an increasingly played end run around the Court of Appeals' bright line rule in *Brill*. Even if we were to find that the Court of Appeals intended for an exception to be carved out of *Brill* for incorrectly labeled "me too cross motions," that is, motions relying on the arguments and evidence of the originally filed motions, to the extent HSS's motion against a nonmoving party can be properly considered such a motion, the motion court correctly found that it is not merely a duplication of HJD's timely motion. HSS did not merely rely on the papers amassed by HJD, and as the motion court correctly noted, "[d]ifferences [in the factual record] necessarily exist because [plaintiff] was a patient at HSS for an extended time before he came to [HJD]" and he was "a patient [at HJD] from only February 2005 to September 2005."[4] There are sufficient discrepancies in the record and in the experts' opinions that raise questions of fact regarding HSS's course of treatment beginning in 2004, if not earlier. In particular, the records suggest that HSS believed surgery was appropriate and helpful in as early as 2003, surgery is repeatedly mentioned in the records of 2004, and plaintiff believed that surgery had been scheduled. Plaintiff was a patient a much longer time at HSS than at HJD,

[4] The dissent overlooks the very different lengths of treatment offered to plaintiff by HSS and HJD.

surgery was positively discussed by the HSS defendants, and thus there are factual differences between the two defendants' treatments. This is also reflected in their individual motion papers. The HSS "cross motion," which runs from page 842 to page 1002 of the record on appeal, is comprised of many items not contained in the HJD motion papers, not the least of which is additional medical records not submitted by HJD. In short, the HSS "cross motion" was more than a late "me too" motion and should not have been considered on its merits.

Nor is this court's recent holding in *Levinson v Mollah* (105 AD3d 644 [1st Dept 2013]) on point. In *Levinson* we held that there was no reason to address whether one of the "cross motions" was untimely because the moving defendants' timely motion had put plaintiff on notice that he needed to rebut the prima facie showing that he had not met the serious injury threshold; when the plaintiff in *Levinson* failed to do this, the complaint was correctly dismissed as to all codefendants. Here, however, because HSS and HJD have different treatment histories with plaintiff, HJD's timely motion did not clearly put plaintiff on notice of the need to gather evidence in opposition to the arguments ultimately proffered by the HSS defendants.

We are concerned that the respect for court orders and statutory mandates and the authoritative voice of the Court of Appeals are undermined each time an untimely motion is considered simply by labeling it a "cross motion" notwithstanding the absence of a reasonable explanation for its untimeliness. We therefore affirm the branch of the motion court's order which denied HSS summary judgment as untimely made without consideration of its merits.

Finally, we note the dissent's concern that allowing this litigation to proceed based on plaintiff's particular theory of negligence could result in placing surgeons in an impossible situation either of performing a procedure that is deemed ill-advised and being subject to any liability for aggravation of a condition, or declining and being subject to liability for refusing to assume the risk that the surgery entails. Our decision is not one on the merits of plaintiff's claim, and it is therefore premature to bemoan that we have opened a Pandora's box for surgeons. Rather, it will be for a trial court and a jury to hear plaintiff's case, and should plaintiff prevail, then, assuming a timely appeal is taken and perfected, and only then, will we have occasion to consider the merits of the claim against HSS.

Accordingly, the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 16, 2012, which, insofar as appealed from as limited by the briefs, granted the summary judgment motion of defendants Hospital for Special Surgery, Peter Frelinghuysen, and Federico Pablo Girardi (collectively HSS) only to the extent of dismissing plaintiff's claim of lack of informed consent, and otherwise denied the motion, should be affirmed, without costs; the judgment of the same court and Justice, entered August 20, 2012, dismissing the complaint as against defendant New York University Medical Center Hospital for Joint Diseases, should be affirmed, without costs.

Opinion by Feinman, J. All concur except Tom, J.P. and Freedman, J. who dissent in part in an Opinion by Tom, J.P.

TOM, J.P. (dissenting in part)

I respectfully disagree with the majority's holding and would dismiss plaintiff's claim of medical malpractice against defendants Hospital for Special Surgery and its physicians (collectively, HSS).

Plaintiff had a history of severe cervical disc disease going back to 1989. In December 1994, plaintiff had surgery at HSS to address multilevel cervical stenosis with myelopathy and radiculopathy, a condition that existed for a period of time which caused plaintiff continuous weakness of his upper extremities including left shoulder. The surgery consisted of a decompressive laminoplasty at C3-C7, bone graft reconstruction at C3-C6, and halo vest application.

In March of 2002, plaintiff returned to HSS with complaints of pain in his lower back and left leg. He underwent a course of steroid injections. Plaintiff continued to complain of cervical and lumbar discomfort and worsening of the pre-existing weakness in his right upper extremity. On April 11, 2003, an MRI revealed a narrowing of the spinal canal and the neural foramen with disc protrusions. Plaintiff did not return to HSS for slightly over one year after this visit. In June 2004, plaintiff returned to HSS with continuing complaints of progressive right shoulder weakness, increased neck pain and decreased balance.

On October 1, 2004, plaintiff saw defendant Dr. Peter Frelinghuysen, an orthopaedic surgeon at HSS, who noted that he was "very concerned" that there was only a small chance that surgery would improve plaintiff's condition. Dr. Frelinghuysen testified that, in or about December 2004, after he reviewed plaintiff's film with Dr. Frederico Girardi, another HSS orthopaedic surgeon, he decided that surgery was not an option for treating plaintiff because it would expose plaintiff to myriad risks, and not improve his condition. It was also Dr. Girardi's opinion that, given plaintiff's extensive spinal disease and the prospect of low improvement, the risk of surgery including quadriplegia or even death, was clearly not warranted. Moreover, "because of a phenomenon called rebound myelopathy, an operation . . . with the kind of degeneration of the spinal cord [plaintiff] had, risk[ed] creating symptoms in the hands or feet."

In February 2005, plaintiff began treatment at defendant New York University Medical Center Hospital for Joint Disease (HJD). Dr. Anthony Petrizzo of HJD examined plaintiff on February 11, 2005, finding severe upper extremity atrophy, with deltoid strength at 1/5, and 2/5 strength to the biceps. Plaintiff's MRI was reviewed and it was determined that surgery was not indicated. Dr. Petrizzo testified that the overwhelming

majority of patients with cervical myelopathy do not regain function after decompression surgery. Since surgery carried serious risks and would likely not benefit the patient, conservative management with physical therapy and pain management would be more appropriate. Plaintiff was referred for pain management and to HJD's neurology and hand clinics, with the notation that "no further surgery for the cervical spine [was] indicated."

In July, 2005, plaintiff saw orthopaedic surgeon Dr. Andrew Hecht of Mt. Sinai where plaintiff later underwent a two stage revision cervical laminectomy with fusion. After surgery, Dr. Hecht observed that he did not "see a substantial neurologic improvement on [his] objective testing, but the patient does feel subjectively like he is improving." In October, 2006, plaintiff returned to HJD again complaining of continued lack of strength in upper extremity and numbness and pain in the right arm and hand. Electronic tests revealed that plaintiff's cervical condition was significantly the same as in 2005 which supported Dr. Hecht's post surgical findings.

Plaintiff commenced this action against HSS and HJD claiming, in essence, that defendant hospitals were negligent in declining to timely perform the surgery he sought, particularly, that their delay caused him to sustain injury that otherwise

might have been avoided.

The motion court granted defendant HJD's motion for summary judgment and denied HSS's motion for the same relief. As to HSS, the court noted that the motion was clearly untimely, without explanation. However, disregarding the untimeliness of HSS's motion, the court held that issues of fact precluded HSS from being granted summary judgment. The court noted that Dr. Girardi at HSS "explained clearly that he believed that the cord was so damaged that the surgery would not have improved anything" and Dr. Hecht, who performed the surgery, acknowledged that plaintiff did not have any objective improvement. Nevertheless, the court observed that plaintiff's expert Dr. Michael J. Murphy clearly opined that the surgery was necessary, not so much to improve plaintiffs's condition, but to prevent it from worsening. Thus, there were issues of fact raised "as to the advisability of surgery ... sufficient to defeat the motion for summary judgment on the merits."

The majority concludes that plaintiff failed to demonstrate any injury sustained as a result of the delay in surgery and upholds the dismissal of the complaint as against HJD on this ground – a result in which I wholly concur. However, for reasons bereft of any sound basis in law or judicial policy, it refuses, primarily on procedural grounds, to apply the same reasoning to

dismiss the complaint as against HSS.

On the merits, discounting the supporting opinion of plaintiff's expert as conclusory, the majority finds that the evidence demonstrates that plaintiff suffered no injury as a result of HJD's February 2005 determination that surgical intervention was unwarranted. Logically, if plaintiff did not sustain injury as a result of HJD's February 2005 decision, it follows that he did not sustain injury as a result of the similar December 2004 determination, approximately 2 months earlier, by HSS physicians to forego surgery, especially in light of plaintiff's long history of cervical disc disease.

While defendants have not raised the question of whether the complaint is actionable, the issue should nevertheless be decided preliminarily. As this Court recently noted in *Williams v New York City Tr. Auth.* (108 AD3d 403, 404 [1st Dept 2013])

> "It is well settled that 'the duty owed by one member of society to another is a legal issue for the courts' (*Eiseman v State of New York*, 70 NY2d 175, 187 [1987]). Only after the extent of a duty has been established as a matter of law may a jury resolve – as a question of fact – whether a particular defendant has breached that duty with respect to a particular plaintiff" (citing *Kimmell v Schaefer*, 89 NY2d 257, 264 [1996])."

Before this matter may proceed to trial, it will be necessary to decide, as a matter of law, whether a doctor has a duty to

perform a surgical procedure requested by a patient despite, in the professional opinion of the doctor, the high risk and absence of benefit that such surgery entails.

This is an aberrant medical malpractice action brought against two hospitals for declining to provide additional surgical treatment to plaintiff because, in their estimation, further surgical intervention presented an unjustifiable risk of quadriplegia or death and offered little to no prospect of relieving his symptomatology. Plaintiff subsequently underwent the subject procedure at nonparty Mt. Sinai Hospital in December 2005, with no objective sign of improvement in physical function after over 10 months, according to his surgeon's report and tests taken at HJD's neurology clinic in October, 2006. Plaintiff cites no precedent for imposing liability under these circumstances, and no comparable New York case has been located. To lend legal support to plaintiff's theory would place the surgeon in an impossible situation – perform a procedure that is deemed to be ill-advised, taking into consideration the individual physician's experience and the available hospital facilities, and be subject to liability for any aggravation of the patient's condition or decline to operate and face liability for refusing to assume the substantial risk that surgery entails. The course adopted by plaintiff of locating a medical team

possessing the requisite skills at a hospital equipped with the appropriate facilities represents a seemingly optimal outcome which, as a matter of policy, should not be compromised by the threat of litigation.

The majority sustained the action as against HSS as a result of the hospital's submission of its summary judgment motion after the date set by the trial court pursuant to CPLR 3212(a). The majority concludes that summary disposition is precluded by the Court of Appeals' decision in *Brill v City of New York* (2 NY3d 648 [2004]), without reference to the judicial policy espoused in the opinion. Because of the particular procedural posture of this matter, the order directing that it proceed to trial is ultimately futile, but application of the majority's rationale will unnecessarily burden both courts and litigants.

As to the procedural issue raised, the majority has devised a solution to a problem recognized neither by the Legislature nor the Court of Appeals. We are in agreement that this action was properly dismissed as against HJD; however, a procedural bar is perceived by the majority to prevent this Court from summarily disposing of the action as against HSS. Particularly, the majority holds that the summary judgment motion interposed by HSS was untimely and beyond the motion court's power to entertain pursuant to *Brill*. Under the circumstances presented by this

matter, this view constitutes an unnecessarily rigid application of CPLR 3212(a), contravening the sound policy considerations underlying the decision and the intent expressed by the Legislature in amending the statute.

The practice sought to be deterred in *Brill* is delay occasioned by the submission of a summary judgment motion on the eve of trial, thereby staying proceedings to the prejudice of litigants who have applied their resources in preparation for trial of the issues (*Brill*, 2 NY3d at 651). Here, at the time HSS submitted its untimely motion for summary judgment, the proceedings were already stayed by the concededly timely summary judgment motion brought by HJD. Thus, the primary objective of *Brill* to discourage dilatory conduct is not implicated (*see Fofana v 41 W. 34th St., LLC*, 71 AD3d 445, 448 [1st Dept 2010], *lv denied* 14 NY3d 713 [2010]). Granted, the HSS motion is not a cross motion, as denominated, and as such it is untimely (CPLR 2215). But to reject the motion on that ground, under the facts herein, ignores the adverse consequences of imposing an overly restrictive rule, specifically, consequences that are especially adverse to the courts.

The motion by HJD was submitted on November 11, 2011, three days before the deadline of November 14, 2011 imposed by the motion court under CPLR 3212(a). The motion by HSS was submitted

shortly after the end of the holiday season on January 10, 2012, and the respective motions were finally decided by the motion court on July 16, 2012, over seven months later. Neither the motion court nor the majority identifies any prejudice that was incurred by any party due to HSS's motion that might warrant requiring HSS to forfeit summary determination. Particularly absent from the discourse is any consideration of the significant burden to be imposed on the court in presiding over a trial against HSS as opposed to proceeding summarily by way of motion.

Brill emphasizes that summary judgment is advantageous to the parties by "avoiding needless litigation cost and delay" and constitutes "a great benefit both to the parties and to the overburdened New York State trial courts" since it "may resolve the entire case" (*Brill*, 2 NY3d at 651). Thus, *Brill* cannot be said to reflect an intent to abandon the conspicuous advantages of summary judgment for the sake of procedural formalism. In that regard, the majority's disposition is antithetical, directing a party to try a case under circumstances to which *Brill* is inapposite because trial has been delayed not by an eleventh-hour summary judgment motion, but by one that is altogether timely. The majority thereby dispenses with the salutary aspects of summary disposition acknowledged in *Brill* for no apparent purpose.

An overly expansive application of *Brill* invites unintended consequences following from the Legislature's 1996 amendment of CPLR 3212(a). Rote application of the summary judgment provision, which permits the court to "set a date after which no such motion may be made," leads to the result advocated by the majority – strict rejection of the motion as untimely without taking into consideration the circumstances of the case, relegating the moving party to litigating its position at trial. However, it is a well-established rule of statutory construction that a court should avoid any interpretation that leads to absurd and unintended consequences (*see Matter of Friedman-Kien v City of New York*, 92 AD2d 827, 828-829 [1983], *affd* 61 NY2d 923 [1984], citing *Matter of Chatlos v McGoldrick*, 302 NY 380, 387-388 [1951]; McKinney's Cons Laws of NY, Book 1, Statutes, §§ 92, 145, 147). If it was indeed the Legislature's intent to preclude dilatory conduct, not to deprive a court of the ability to resolve an entire case summarily, then it falls within the observation of the United States Supreme Court in *Holy Trinity Church v United States* (143 US 457, 472 [1892]) that "however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

The undesirable practice sought to be prevented by revision

of CPLR 3212(a) is the waste of resources expended in preparation for trial as the result of a belated summary judgment motion staying the proceedings. In addressing this problem, the Court of Appeals noted that "the Legislature struck a balance, setting an outside limit on the time for filing summary judgment motions, but allowing the courts latitude to set an alternative limit or to consider untimely motions to accommodate genuine need" (*Brill*, 2 NY3d at 651). Significantly, *Brill* deals with the straightforward situation in which an initial summary judgment motion is filed well after a matter has been certified as ready for trial "in violation of legislative mandate" (*id.* at 653). In that context, where "[t]he violation is clear," the "good cause" required to obtain relief from the statutory time limit is "a satisfactory explanation for the untimeliness" in filing the motion (*id.* at 652).

Likewise, the legislative memorandum in support of the amendment to CPLR 3212(a) is concerned with the disruption to court calendars by a motion interposed on the eve of trial (Sponsor's Mem, L. 1996, ch 492 reprinted in 1996 McKinney's Session Laws of NY at 2432-2433). Furthermore, both the memorandum and *Brill* identify an adversarial party's lack of adequate time to prepare a response to the motion as the problem to be addressed. Here, HJD's submission of its moving papers a

mere three days before the final date set by the trial court contravenes the spirit of *Brill* by depriving HSS of an adequate opportunity to timely file its own application for similar relief because, at such point in time, HSS is presumed to have been devoting its resources to preparation for trial (*Brill*, 2 NY2d at 651). Unfairness to one party is not remedied by applying the statute to the detriment of another.[1]

There is no suggestion that the narrow interpretation imposed upon the term "good cause" in *Brill* is meant to apply in circumstances, such as here, where a timely motion is followed by a corresponding motion that is not. As the Court of Appeals has admonished, "'No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association'" (*Matter of Staber v Fidler*, 65 NY2d 529, 535 [1985], quoting *Dougherty v Equitable Life Assur. Socy.*, 266 NY 71, 88 [1934]). Unlike *Brill*, the circumstances presented by the instant matter do not furnish a compelling reason to depart from prior authority

[1] To reiterate, it was the timely motion by HJD that delayed trial, not the motion submitted by HSS while HJD's motion was pending, a situation addressed neither by the statute nor *Brill*. To the extent that good cause is even material under these circumstances, it is the sheer impossibility of preparing a dispositive motion during the remaining time established by the court for its submission.

affording a court discretion to entertain a marginally late filing where the party's application has merit and no prejudice has been demonstrated by an adversary (see *e.g. Burns v Gonzalez*, 307 AD2d 863, 864-865 [1st Dept 2003]; *Garrison v City of New York*, 300 AD2d 14, 15 [1st Dept 2002], *lv denied* 99 NY2d 510 [2003]). To the contrary, the compelling interest is judicial economy, which militates in favor of summary disposition of even an untimely motion made in response to one timely filed (*see Burns*, 307 AD2d at 864), especially if that "summary judgment motion may resolve the entire case" (*Brill*, 2 NY3d at 651). Given the budgetary constraints presently confronted by the court system, this is hardly a fitting time to require trial of a matter devoid of apparent merit and otherwise amenable to disposition on motion, and the "genuine need" to be accommodated is that of the court to proceed expeditiously (*id.*).

Contrary to the majority's assertion, I do not advocate limiting application "of *Brill* to those actions where a party files a motion for summary judgment long after the deadline for dispositive motions and the matter is on the trial calendar." It is a distorted analysis of my position. I simply note that *Brill* is inapposite to the facts of this matter and that both the decision and the statute it construes apply only to a party whose motion has the effect of staying and delaying trial. Since trial

of this matter was already stayed by HJD's timely motion for summary judgment at the time HSS submitted its marginally late summary judgment motion which raises the same dispositive issue as the timely motion, refusing to entertain the subsequent motion does nothing to avoid the delay of trial and waste of judicial resources, the primary purposes of *Brill*, by requiring trial of a virtually identical lawsuit ripe for summary disposition.

Strict and rigid application of *Brill* is even less understandable given the similarity of the grounds advanced by the respective hospitals in support of their summary judgment motions and the ground upon which disposition rests. A late motion filing is properly entertained when it raises nearly identical issues to one timely made (*see Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337, 337 [1st Dept 2008]; *Alexander v Gordon*, 95 AD3d 1245, 1246-1247 [2d Dept 2012]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]). Here, the modestly late motion submitted by HSS sought relief on the same issues raised in HJD's timely motion. Under the circumstances presented, the motion court was within its discretion to review HSS's motion on the merits (*see Alexander*, 95 AD3d at 1247; *Grande*, 39 AD3d at 591-529). Both seek dismissal of the complaint on the identical ground – that it was not a departure from good and accepted medical practice to forego surgery in favor of a conservative

treatment plan, i.e., based on the severity of plaintiff's existing spinal disease and the low prospect of improving his condition, the decision not to subject plaintiff to the risk of quadriplegia or death was a sound medical decision. In support of its motion, HSS even relies on the same affidavit by Dr. Olsewski submitted in support of HJD's motion.

Dr. Olsewski opined that based upon plaintiff's medical, diagnostic and surgical history, further cervical surgery would have been an "unjustifiable and extraordinarily risky and aggressive treatment option." No surgery would have been able to reverse plaintiff's neurological deficits, "which were significant by the time he presented at HJD, and had already existed for many years." According to Dr. Olsewski, the best case scenario "was to stop further progression of the cervical myelopathy"; the worst could have resulted in permanent paralysis or death, risks "well beyond the standard. . . for cervical spine cases."

As to the delay causing any injury, the doctor stated that there was no identifiable injury caused by any alleged delay during the four month period between when plaintiff was first seen at HJD and when he first went to Mt. Sinai. The doctor also noted that plaintiff did not objectively regain any strength or function after having the surgery at Mt. Sinai, and the only

change in his condition was numbness in his right arm and hand, likely due to the development of carpal tunnel syndrome. This was supported by Dr. Hecht's finding that there was no substantial neurological improvement in plaintiff's condition after his surgery at Mt. Sinai.

Both HSS and HJD established their prima facie entitlement to summary judgment, proffering evidence that plaintiff did not sustain any injury resulting from the respective institutions' independent decisions to recommend against further surgery. In response, plaintiff's expert merely averred that if the subject cervical revision surgery had been performed earlier, plaintiff's ultimate outcome would have been substantially improved and he would not have sustained such a severe degree of weakness and loss of function of his right upper extremity. However, the expert failed to support his assertion with an analysis of the multiple diagnostic tests and physical examinations conducted over the years. Dr. Murphy conclusively states that plaintiff's condition progressively deteriorated during the period of treatment at defendant hospitals, yet he points to no objective evidence supporting this statement, despite the fact that the record contains numerous diagnostic tests over that period of time. Thus, his opinion is an ambiguous statement of causation, amounting to bare conjecture, which is insufficient to defeat a

motion for summary judgment (*see Foster-Sturrup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]; *Callistro v Bebbington*, 94 AD3d 408, 410-411 [1st Dept 2012], *affd* 20 NY3d 945 [2012]).

The majority suggests that an independent basis for finding HSS to have been negligent might be found in the expert's opinion that "surgery for [plaintiff] was indicated as early as June 2003." With the advantage of hindsight, the doctor offers that "[w]hile further diagnostic studies were not inappropriate, they did not contribute any substantial information which would alter the indicated treatment." This statement concedes that HSS properly conducted further studies; that the results failed to afford any further diagnostic insight that was not predictable, and neither the tests themselves nor the time expended in conducting them are rendered improper as a result of that outcome. Moreover, while there is mention of a surgical option in the 2004 hospital records, the evidence does not show that evaluation of the attendant risks and benefits was undertaken until October 2004, culminating in the December 2004 decision that the associated risk was too great. Likewise, there is no indication that plaintiff was prepared to undergo the procedure prior to October 2004, when he first consulted with Dr. Freylinghuysen. Plaintiff's expert does not even address the question of whether, taking plaintiff's obviously compromised

physical condition into account, it was a departure from good and accepted medical practice to pursue a conservative course of treatment rather than assume the risk of surgical intervention. Again, in hindsight, he formulates a conclusory opinion that the more aggressive approach to treatment was the proper one; the competing medical factors to be considered in deciding whether to perform the surgery are simply not addressed. Finally, the majority adopts the trial court's conclusion that the expert's opinion is imprecise with respect to the nature of the alleged deterioration in plaintiff's condition and the extent to which each hospital bears responsibility. The plaintiff's expert's opinion is equally conclusory whether it is applied to the asserted negligence of either facility, and if it does not suffice to sustain the action as against HJD, it does not suffice to sustain the action as against HSS.

Accordingly, the order should be modified to the extent of granting defendant HSS's motion for summary judgment.

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

ENTERED: DECEMBER 24, 2013

DEPUTY CLERK