SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

----------X

PETER COLLINS,

Plaintiff-Appellant,

-against-

Docket No's.:
2014-05900
2015-01208

7-11 CORPORATION, 1056 MOTOR PARKWAY ASSOCIATES, LLC., and ZENITH MANAGEMENT, LLC.,

Defendants-Respondents.

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REPLY BRIEF FOR PLAINTIFF-APPELLANT PETER COLLINS

INTRODUCTION

This Reply Brief is submitted in opposition to the Brief for Defendants-Respondents (hereafter referred to as Respondents) and in further support of the Brief for Plaintiff-Appellant (hereafter referred to as Appellant). It is submitted that both the Judgment and Order appealed from should be reversed, and the jury verdict vacated and set aside for the reasons stated in Plaintiff-Appellant's main Brief.

BACKGROUND, TRIAL AND POST-JUDGMENT PROCEEDINGS

For a statement of Background, Trial Appellant and Post-Judgment proceedings, the attention of the Court is respectfully referred to the Brief of Plaintiff-Appellant. A brief statement of the background of this case appears at pp. 4 and 5 of said Brief.

Discussion of the Trial in the Brief occurred in the following pages: Appellant's case as to the causation issue is recounted in his Brief at pp. 6 – 16. The wording of the Verdict Form as presented to the Jury appears at pp. 17 – 19. After both Counsels' summations and the Court's Charge to the Jury, the Verdict is set forth on pp. 19 – 21. Discussion of the Post-Judgment Proceedings in the Court below commenced on page 21 of Appellant's Brief, and continued with his motion to set aside the verdict on pp. 22 – 24, Respondents' opposition papers on pp. 25 – 27, Appellant's reply papers on pp. 27 and 28, and Respondents' sur-reply papers discussed on page 28.

The decision of the Court below as to Appellant's post-judgment motion is discussed at pp. 28 – 29 of his Brief. Appellant also explained to the Court below that after the verdict, when his trial attorney discussed the case with two of the jurors, the attorney discovered that one item in the Court's charge to the jury caused confusion during the jury's deliberations

that inured to Appellant's detriment. Accordingly, this issue is also being raised on appeal (See Brief of Plaintiff-Appellant, pp. 29 – 30).

QUESTIONS PRESENTED

1. Whether the decision of the Court below should be permitted to stand where its denial of Appellant's application to read the deposition transcript of non-party non-testifying eye-witness Patrick Coberg to the trial jury clearly deprived Appellant of his right to a fair trial?

Appellant submits that the question should be answered in the negative.

2. Whether the Court below abused its discretion by failing to recognize that Appellant, in his post-trial motion, established that his right to a fair trial had been extinguished by juror misconduct during that body's deliberations?

Appellant submits that the question should be answered in the affirmative.

POINT I

THE DECISION OF THE COURT BELOW SHOULD NOT BE PERMITTED TO STAND, WHERE ITS DENIAL OF APPELLANT'S APPLICATION TO READ THE CLEARLY IMPEACHING SWORN DEPOSITION TRANSCRIPT OF NON-PARTY NON-TESTIFYING EYE-WITNESS PATRICK COBERG TO THE TRIAL JURY CLEARLY DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL (Answering the Brief for Defendants-Respondents at Point I, pp. 8-9; Point II, pp. 10-12; and Point III, pp. 13-14; and further supporting the Brief for Plaintiff-Appellant, pp. 31-44).

On appeal, Respondents contend disingenuously that the Court below was entirely justified in denying Appellant's motion to have the deposition transcript of non-party eye-witness Patrick Coberg read to the trial jury, or alternatively, if the denial of this motion was erroneous, the error was harmless. In so arguing, Respondents are wrong and know their argument is without merit.

The reasons why Respondents are wrong are set forth in Appellant's main brief, at Point I, thereof, on pp. 31–44. To summarize, the Appellant urged the Court to hear Plaintiff on "due diligence". The Court refused and applied an erroneous standard, citing a case that had nothing to do with the case on trial.

The main thrust of Respondents' argument in this appeal is that

Appellant supposedly had failed to make a showing of "due diligence" in producing eye-witness Patrick Coberg's appearance at trial. Yet in their Brief, Respondents failed to rebut the arguments by Appellant's Counsel that this effort – albeit unsuccessful – was performed with due diligence.

Had Appellant been permitted to be heard, he would have met the strictest of criteria in establishing "due diligence." Indeed, despite the reticence of the Court in addressing the "due diligence" issue, Appellant submits that, given the state of the Record, his attorney, albeit with an absence of detail, made Appellant's case that his effort was sufficient to meet the "due diligence" standard However, since the trial judge misapplied a case that required no such examination into "due diligence", Appellant's entreaties to further examine and establish same were rejected.

Significantly in this appeal, Respondents' Brief is barren of any cognizable argument in rebuttal of Appellant's "due diligence" contentions either in at trial or as made in his Brief in Point I thereof, at pp. 32, 35-37, 38. They choose to ignore it, as they have no retort—not even a poor one. Appellant's contentions that he met what was required of him as to "due diligence" requirements in this matter still, at this late stage of appellate proceedings, stand unrebutted by Respondents in two levels of the Court system.

Indeed, during the proceedings in the Court below, the Court treated "due diligence" issue as already established, but incorrectly placed upon Appellant an additional extra-judicial requirement that his attorney concluded was logistically impossible to effectuate. Because of the trial Judge's misapprehension of the law, he suggested counsel try the case while simultaneously making a motion --- that would take months to decide. This is basically brushing Appellant's application "under the rug" as if the trial court could not be trifled with this complication.

This is in sharp contrast to what Respondents' falsely claim in their Brief at the outset of their Point II, at pp. 10-12, thereof. Respondents contended in their Point II that the Court below somehow "denied [Appellant's] application based on the fact that [he] did not make the diligent effort to procure the witness's [*sic!*] attendance pursuant to CPLR § 3117(a)(3)(iv)." (Respondents' Brief, at p. 10). This is completely and utterly disingenuous and Respondents knows it.

The problem with Respondents' counsel advancing this claim is that, as counsel is aware, it simply did not happen. The trial transcript does not contain any finding by the Court below that Appellant had failed to exercise "due diligence" in the effort to secure Coberg's attendance in Court. Indeed, neither on page 10 if Respondents' Brief, nor any place else

in that document, has said counsel identified the page in the trial transcript where this supposed judicial finding has occurred.

Appellant, by contrast, has pointed to the record to demonstrate what actually occurred at trial. First of all, Appellant's attorney acted in complete compliance with the provisions of CPLR § 3117. During colloquy with the Court, Appellant's counsel specifically stated (Appendix at page A-379) that he was proceeding under the terms of said statute, and accordingly, he was calling his retained private investigator to testify and establish that the "due diligence" requirements under the statute had been met.

Appellant's attorney also made statements as to what he intended to prove and in substantial part what the investigator would testify to as and for his effort to obtain the missing witness' appearance in Court. Counsel had his investigator and process from R/D Travelers standing by. This firm's office was in Carle Place, a mere half (.5) mile from the Nassau County Supreme Court building. The firm was on phone standby and were aware that they may have to come to the Courthouse to testify as to their effort to produce Mr. Coberg in Court.

Rather than convene an evidentiary hearing to confirm the efforts of Appellant's retained private investigator, the Court abruptly interrupted its

colloquy with counsel and announced that it was taking a recess to "consult the statute a bit further" (page A-384 of the Appendix). Then, as stated in Appellant's main Brief, on Page 38, thereof:

> Apparently, a short time later the Court returned to the bench and stated that it believed a case entitled *Miller v. Daub*, 128 Misc.2d 1060 (Cv.Ct., N.Y.Co., 1985), was "controlling authority." In fact, the case was entirely inapposite and misled the Court below into committing reversible error in the following manner:
>
> Rather than making an evaluation of whether Appellant had made "diligent efforts" pursuant to *Daughtery*, *Nazito, McNerney* and *Nedball* to warrant a reading of Coberg's deposition testimony to the jury, the Court, following its perception of *Miller*, instructed Appellant's Attorney "to move formally to punish [Coberg] for contempt, and that would proceed by way of Order to Show Cause" (Appendix at page A-385). Hearing this instruction bemused Counsel.

Appellant's attorney was so surprised at this turn in the trial proceedings that he asked to "reserve decision" on accepting the Court's proposition until the next day of trial (See Appendix, page 385, line 22).

The following day, Appellant's attorney argued to the Court that the New York City Civil Court case that the Court believed applicable to the situation before it was, in fact, entirely inapposite. As this argument and its discussion has already been set forth in detail in Appellant's main Brief at pp. 38-44 in its entirety, there is no reason to recount that argument here. Appellant requests that said pp. 38-44 of Appellant's main Brief be

deemed rewritten here, as if set forth in its entirety.

It therefore appears that the Court below misunderstood what it was called upon to do with Appellant's application to have the missing Mr. Coberg's deposition testimony read to the jury. This is because the trial court misapprehended the law and misread a case that had no bearing on the case on trial. It bears restating that the Court should have held a hearing to determine whether Appellant had properly exercised "due diligence" in obtaining Mr. Coberg's presence in Court in order to confirm the statements made in this regard by his counsel.

Appellant's counsel was certainly prepared to go forward with an evidentiary hearing. This effort by Appellant at trial was abruptly cut off when the Court unexpectedly called a recess to "consult the statute a bit further" (page A-384 of the Appendix). During the recess, the Court became so "distracted" by its discovery of *Miller v. Daub*, 128 Misc.2d 1060 (Cv.Ct., N.Y.Co., 1985), that it lost sight of its need to hold a hearing on the missing witness-due diligence issue.

As a result of the Court's infatuation with the *Miller* case, the Court believed that in order for the transcript of Coberg's testimony to be read to the jury, Appellant was obligated to move to hold Coberg in contempt of Court. Respondents' counsel either does not realize, or seeks to conceal

from this Court, the implication that if a Court acts under the *Miller* case to direct trial counsel to bring on a motion to hold the missing witness in contempt, there necessarily is a finding that said counsel acted in "due diligence" to seeking to secure the missing witness' attendance in Court.

Miller is absolutely inapplicable to this controversy – for the reasons stated by Appellant's attorney to the Court below (Appendix, pp. A-399 to A-402, A404). A doctor who is a party and is absolutely essential to Plaintiff's medical malpractice case ---coupled with the ire of the jurist that clearly wanted the doctor to appear, has little or nothing in common with this matter. Clearly, Coberg is a true missing witness. From the colloquies among counsel and the Court, Appellant's agents performed sufficiently to make out a sufficient showing of "due diligence" in the effort to secure his attendance in Court. And, Coberg never made any indication that he would refuse to testify in Court in this matter, which meant that on the state of the Record in this case, there was no need for a motion to hold the man in contempt at this point in the trial proceedings.

Although the evidentiary hearing was not held, it is submitted that what was developed during the two days of colloquy on this issue among both counsel and the Court, was sufficient to demonstrate that Appellant had made a sufficient showing of "due diligence" to warrant granting his

motion to read Coberg's testimony to the jury or at the very least, he should have had an opportunity to do so. However, where the court did not know the standard for the admissibility of a non-party deposition and misapprehended the law, no such inquiry into due diligence was made.

Indeed, given the state of the Record, Appellant has no quarrel with the proposition stated in Respondents' Brief, Point II, page 11:

> New York Courts have construed CPLR 3117(a)(3)(iv) to permit depositions of nonparty witnesses to be read into evidence when diligent efforts fail to locate the witness even though the witness is presumed to be within the jurisdiction of the court.

This statement of the law made by Respondents' counsel in Respondents' Brief is not only correct, but fits Appellant's argument on this point clearly and well.

It must be pointed out that Coberg is a non-party witness, who answered questions at a deposition, having been called by *Respondents*. Furthermore, Coberg is presumed to be within the jurisdiction of the Court below. Finally, Coberg cannot be located at present despite diligent efforts by Appellant, his counsel and investigators. This situation is exactly what the statute, CPLR 3117 was intended to address.

Of course a properly recorded statement of a non-party witness having relevant information about notice and proximate cause --- in this

case, Coberg, certainly should be admissible and available. Coberg testified at a deposition, under oath, pursuant to subpoena and with a certified court reporter taking down his testimony. All the conditions precedent to having it come into evidence were present.

Indeed, what happened in this case was that the sworn testimony of an uninterested eyewitness, who actually witnessed the accident and, thereby, was arguably more reliable than the parties or experts, was barred from the matter for some odd reason. This makes little or no sense and unjustifiably prejudiced Appellant, depriving him of his day in court.

Turning elsewhere in Respondents' Brief, the cases cited by Respondent in support of its arguments do not cause Appellant any distress as the several cases that are pertinent to the issues raised by Appellant on appeal are either readily distinguishable, or actually support his contentions on appeal.

In *McNerney v. New York Polyclinic Hospital*, 18 A.D.2d 210 (1st Dept., 1963), movant failed to make a showing to warrant the grant of the motion. This was because the only effort movant made to locate the missing witness, Nurse Rivon West was to look for his name in the telephone books in all boroughs of the City of New York, as well as the 'phone books in Nassau, Suffolk and Westchester Counties. The First

Department called this effort "scanty," and certainly far short of what "due diligence" requires.

In *Nedball v. Telefsen*, 102 Misc.2d 589 (S.Ct., Queens Co., 1980), the movant sought out the missing witness in the case by making a telephone call to the last known address of the person sought. There, an unknown woman advised that the person in question had moved leaving no forwarding address. The Court described the movant's effort as "meager" and found that the "due diligence" standard had not been met.

It is unclear why Respondents' attorney cited *Dailey v. Keith*, 306 A.D.2d 815 (4th Dept., 2003) to this Court for any proposition pertinent to legal argument in this matter. The case is entirely inapposite to this matter, as it involved a different subdivision of CPLR, to wit § (a)(3)(11). *Dailey* involved the attempt to read the deposition transcript of a "missing witness" who was none other than a party in the matter, a defendant. This defendant claimed that her absence from the trial was by compulsion, due to a change of employment that cause her to move to Texas. She also had a fear of flying. The Court found compulsion not to lie in the case and denied the defense's motion to read this defendant's deposition testimony into the Recored *in lieu* of testimony. Clearly, the legal issues in *Dailey* are nowhere near any legal proposition raised by either side in this matter.

Feldsberg v. Nitschke, 49 N.Y.2d 636 (1980) states the obvious: "CPLR 3117 does not establish an absolute and unqualified right to use a transcript during the course of a trial as such matters rest with the sound discretion of the trial judge." *See* Brief for Defendants-Respondents, at 11.

Yet, Appellant has never contended anything to the contrary. As far as Appellant is concerned, Keith Kane, the proprietor of the Seven-11 store gave testimony at the trial denigrating the size of the hole where Appellant fell, and otherwise disparaged Appellant's case. The missing witness, Mr. Coberg, was initially proffered by Respondents' attorney as an eye-witness whose testimony would confirm Respondents' contentions in the litigation and be fatal to Appellant's case. Mr. Coberg's deposition testimony did no such things.

It turned out that Respondents' insurance investigators had fooled Coberg – who was only marginally literate – into signing a statement that was totally false. The written statement that Respondents falsely attributed to Coberg, is reproduced in the Appendix at page A-805. Coberg's complete repudiation of the written statement appears in his deposition transcript, appearing in the Appendix at pp. A-738 to A-804.

The conduct by Respondents' investigators in falsifying Coberg's written statement was purely fraudulent. The conduct of Respondent's

counsel in its cover-up and attempt at diminution of the extent of the fraud at trial and in Respondents' Brief perpetuated the fraud. Under such circumstances, even under *Feldsberg v. Nitschke*, 49 N.Y.2d 636 (1980), *supra*, it would be erroneous for a Court, viewing clear fraud on the part of one party, to deny the other, defrauded party, here Appellant, the opportunity to address and rebut that fraud. *Cf. People v. Ramistella,* 306 N.Y. 379 at 384 (1954).

The just cited *People v. Ramistella, supra*, stands for the proposition that a Court may not deprive a party of the right to inquire into matters "directly relevant to the principal issues of the case against him." *See* Brief for Defendants-Respondents, page 12.

Clearly, the shape and size of the asphalt defect into which Appellant fell, and Respondents' attempt to fraudulently falsify and actually hide relevant testimony confirming Appellant's contentions concerning that asphalt defect, by no means can be considered to be "a collateral matter" or "unnecessarily repetitive examination." *Id*.

Viewed in this light, Respondents' contentions in Point III of their Brief, claiming the applicability of the "harmless error" doctrine is ludicrous. Respondents in their Point III characterize the fraud that their agents committed, and their attorneys covered up, or at least tried to cover

up, as "harmless error." None of the instances of harmless error committed by the successful parties in the quartet of cases cited by Respondents in Point III of their Brief, at page 13, thereof, come anywhere near the venality of the fraudulent behavior of Respondents' investigators that Respondents' attorneys have attempted to "hush up" in two levels of the Court system.

Certainly, Respondents counsel should be ashamed of themselves for arguing that even if Coberg's testimony would have been read at the trial, its outcome would not have been altered. The result assuredly would have been different, and the matter would have proceeded to the damages stage of trial.

Had Coberg's testimony been read to the jury, it cannot be disputed that Kenneth Kane's contention that the situs of Appellant's injury was a small defect would have been properly placed into perspective. The reading of Coberg's testimony would have made it clear that to the jury the defect was as large as Appellant testified it was, that it was there for a long time, years, in fact, and that Respondents caused it to be repaired subsequent to Appellant's accident, and indisputably in response to the present litigation.

Moreover, Respondents' contention on page 14 of their Brief that

the evidence in Mr. Coberg's deposition testimony could be split into two parts – notice and proximate cause – is *unheard of*. Contending that the deposition at issue went to the issue of notice, but not proximate cause defies not only the facts that occurred, but also *the laws of physics*.

Finally, Respondents' contention in Point I of their Brief that Appellant cannot bring to this Court's attention and judicial review the falsely produced written statement and the deposition repudiating that written statement on the grounds that the two items were not placed into evidence at trial, is equally unavailing to them.

The two items are part and parcel of the *Court's record* in the trial. The Record in the Court below is sufficient for this Court to take into due consideration both Coberg's falsely attributed written statement and his sworn deposition testimony repudiating the false statement.

Respondents themselves have admitted that in the Court below there was extensive colloquy as to this issue as memorialized in the Appendix at pp. A-94 to A-99, A-102 to A-110 and A-144, and have also conceded that the false statement was entered into the Record as Court Exhibit III for identification. *See* Brief for Defendants-Respondents at 9.

However, Respondents wrongly argued that this Court is without jurisdiction to consider either the false statement, because Court Exhibit III

was marked for Identification without being moved into evidence, while Coberg's deposition testimony does not formally appear at trial as an Exhibit either for identification or in evidence. In so arguing, counsel for Respondents demonstrate examples of intellectual dishonesty and sophism rarely encountered.

It is sufficient for the two items to be identified in the Record during colloquy for this Court to be able to take notice of them and give them due weight in consideration. The false statement was accorded a Court Exhibit number, Roman numeral III. (Appendix, at page A-144). But this was not the end of the colloquy among counsel for both sides and the Court.

On the very same page of the trial transcript, the Court below stated the following Appendix at A-144 to A-145):

> Additionally, in considering the application I had asked that a copy of Mr. Coberg's deposition be supplied to me for examination, *which was done with the consent of both counsel*; is that correct, Mr. Panetta [Appellant's attorney]?
>
> MR. PANETTA: Yes, your Honor. That was my copy.
>
> MS. RECH [Respondents' attorney]: *Yes, your Honor.* (Emphases supplied)

As the Court below clearly and unequivocally stated that it was taking into account the Coberg deposition in determining the issue. It is submitted accordingly, that is the end of the discussion of whether this

Court has the power to review the false statement and the deposition repudiating that statement. The best that can be stated for the case law presented by Respondents in Point I of their Brief, is that while some of the cases are museum pieces, they are all inapposite to the issues presented in this appeal.

POINT II

THE COURT BELOW ABUSED ITS DISCRETION BY FAILING TO RECOGNIZE THAT APPELLANT, IN HIS POST-TRIAL MOTION, ESTABLISHED THAT HIS RIGHT TO A FAIR TRIAL HAD BEEN EXTINGUISHED BY JUROR MISCONDUCT DURING THAT BODY'S DELIBERATIONS (Answering the Brief for Defendants-Respondents, Point IV, pp. 15-22); and further supporting the Brief for Plaintiff-Appellant, Point II, pp. 45-50).

It cannot be disputed that juror misconduct also extinguished Appellant's right to a fair trial, in addition to the issue of the missing witness' deposition testimony not having been read to the jury.

Clearly what occurred during the jury's deliberations cannot be condoned. The "outside influences" that are referred to in *Moisakis v. Allied Building Products Corp.*, 265 A.D.2d 457 (2d Dept., 1999) wrongfully played a significant role in the jury deliberations at issue here.

People v. Brown, 38 N.Y.2d 388 (1979); *Martinez v. Te*, 75 A.D.3d (1st Dept., 2010).

The outside influences were, as stated in Appellant's main Brief, the following:

1. Some of the jurors wanted to evade their oaths to the litigants to decide the matter on its merits in this partitioned case, and rule arbitrarily for the Defendants on the causation issue, in order to avoid hearing and deciding the damages portion of the trial.

2. Some of the jurors voiced bias against police officers in general, which was to be directly applied against Appellant, a Nassau County Police Officer.

3. Some jurors discussed totally irrelevant current newspaper articles from *Newsday* concerning Long Island Railroad workers who "cheated the system" by improperly receiving pensions as a result of alleging fraudulent injuries. The cases of fraud committed by LIRR workers was a daily topic in Newsday.

4. Some jurors then speculated as to whether Appellant had retired from the Police Department and had possibly fraudulently obtained an accident disability pension (commonly referred to as a "three-quarters" pension).

5. Some jurors also speculated as to the ethnic background of Appellant's Attorney, himself, and disparaged it.

Similarly to their tactics in responding to Appellant's argument with respect to the deposition testimony issue, above, Respondents have failed in their Brief to directly address the issues Appellant raised in his post-trial motion. Instead, Respondents continue to give general discourses on the law, without providing specifics as to whether Appellant is correct in the specific points he is raising on appeal.

In this context, Respondents throwing the *Moisiakis* case into the discussion without proper context is in keeping with their general approach to answering the arguments made in Appellant's Brief. *Moisiakis* is utilized by Respondents for the proposition that absent exceptional circumstances, a jury cannot impeach its own verdict. In the absence of "outside influences," unless there are certain specific exceptions that would be permit jurors to impeach their verdict.

Respondents them examine at certain length what those exceptions are, and explain how Appellant's case cannot be fitted into those exceptions. Yet, as a general proposition, Appellant has not claimed that his case fits into the exceptions, except as indicated below. Certainly, Appellant does not claim that there was a "ministerial" mistake in the

verdict. Rather, Appellant contends on appeal that the jury verdict was unduly affected by *outside influences*, as indicated above following the outset of this Point.

Respondents, as is their habitual course of conduct in this litigation, have chosen to denigrate Appellant's arguments, rather than to address them directly, with a view of refuting them. Respondents ignore the circumstance that two of the deliberating jurors *immediately* reported their fellow juror's misconduct to Appellant's counsel right after the verdict had been rendered. The substance of their affidavits involving the misconduct of some of the other jurors reflected what the two jurors told Appellant's attorney immediately after the verdict was rendered.

Rather, in their Brief at pp. 17-18, Respondents launched entirely unwarranted attacks on the two jurors, *suggesting that they waited for two months* before making known their dissatisfaction with the deliberation process, and *then colluded with each other* to formulate (or "rehash," in the words of Respondents' counsel) their complaints as to the process.

As also has become altogether too common in this litigation, Respondents have failed to refrain from Accusing Appellant's attorney from baseless accusations. According to Respondents, Appellant's

attorney given the two jurors with "extra judicial [*sic!*] communications" at unspecified times which were "*influences of the most prejudicial sort."*

Frankly, the use of such rhetoric by one attorney toward another should not be countenanced. It is one thing for an attorney to zealously represent one's client. It is quite another for an attorney to attack without any foundation an adversary and anyone else who appears to be providing that adversary with evidentiary material to assist the adversary's client. It is quite another thing to lie about evidentiary materials and to provide a Court with misleading case law, as this adversary has consistently done in her Brief.

The adversary suggests that Appellant's attorney had provided the two jurors who contributed Affidavits to Appellant's post-judgment motion extra judicial communications that were influences of the most prejudicial sort. It is significant that the adversary has utterly failed to provide an example of such a "communication." It is submitted that this statement is a lie, along with all of the other lies that this adversary has uttered during the course of this litigation.

It cannot be denied that the undersigned experienced a defendants' verdict in this case. All plaintiff's lawyers have experienced this. However, what is an attorney to do when, after the verdict he is confronted

by two jurors who make the complaints as indicated at the outset of this point heading? Walk away and forget about what was told to him? A reasonable attorney would not do so, it is submitted. If Respondents' attorney is annoyed at responding to motions to renew and reargue and appeals to the Appellate Division, she should realize that it is all part of being part of this wonderful profession.

In Appellant's main Brief at Point II, it is apparent that the jurors complained to Appellant's attorney about the misconduct of their fellow jurors that brought about the jury verdict. Appellant submits that the level of that misconduct operated to prejudice his right to a fair trial. The very type of misconduct as set forth above calls for intervention by a Court, either the Court below or this Court.

Respondents cited the *Moisiakis* case at the beginning of their Point IV, at page 15, thereof, for the proposition that unless jurors are subjected to "outside influence," jurors may not impeach their own verdicts. Yet, the five examples of juror misconduct enumerated at the outset of this Point are all examples of "outside influences" that prejudiced this jury.

It is submitted that, for example, if members of a jury, in the course of their deliberations, speculated that Appellant, a Suffolk County Police Officer, as they did, has already been awarded an accident disability

pension paying him three-quarters of his latest salary tax-free, as he did not, and therefore conclude that he is undeserving of a plaintiff's verdict in this case, they have permitted an "outside influence" to affect their deliberative process *to Appellant's prejudice*.

The five instances of jury misconduct described above are clearly "outside influences" that the jurors at issue acquired before they entered the jury chamber to deliberate on Appellant's case. That the jurors at issue revealed their prejudices during the deliberative process, did not render those prejudices any lesser type of impropriety that the "outside influences" as described by *Moisiakis*.

Appellant will rely upon his main Brief for any other reply necessary to be made to Respondents' Brief, with a single exception. Appellant's attorney is mindful of the circumstance that the jury rendered a verdict that found the a defendant was guilty of negligence in the case, but that somehow that negligence was not a substantial factor in causing the accident at issue. Appellant's attorney is also mindful that he acquiesced in the jury verdict form that asked the jury to make a finding as to the concept of "substantial factor" within the context of the verdict.

Upon speaking to the two jurors, Appellant's attorney ascertained that the "substantial factor" issue did, in fact, cause a great deal of

confusion in the jury deliberation process. It is for this reason that Appellant has taken issue with the "substantial factor" charge. Appellant would appreciate this Court reviewing the "substantial factor" problem during its consideration of this matter.

CONCLUSION

Both the Judgment and post-judgment Order appealed from should be reversed, the jury verdict and the post-judgment Order vacated, and the matter should be remanded to the Supreme Court, Nassau County for further proceedings, including a new trial, with costs.

Dated: Mineola, New York
July 2. 2015

Yours, etc.,

MASSIMO & PANETTA, P,C,

By:_____
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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR Section 670.10.3(f) that the foregoing brief was prepared on a computer.

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To be argued by:
Frank Panetta
(15 minutes)

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