To be Argued by:
VANNESSA M. CORCHIA
(Time Requested: 15 Minutes)

APL-2018-00101
Bronx County Clerk's Index No. 260242/16

Court of Appeals

of the

State of New York

In the Matter of the Application of

WAYNE SEON,

Petitioner-Respondent,

For an Order Pursuant to Article 78 of the
Civil Practice Law and Rules,

– against –

THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, THERESA L. EGAN, as Executrix Deputy Commissioner of NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES TRAFFIC VIOLATIONS BUREAU, THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES ADMINISTRATIVE ADJUDICATIONS BUREAU, and THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD,

Respondents-Appellants.

BRIEF FOR PETITIONER-RESPONDENT

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Date completed: July 19, 2019

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PRELIMINARY STATEMENT

This Article 78 proceeding was commenced by petitioner-respondent, Wayne Seon, in the Supreme Court, Bronx County seeking, *inter alia*, to annul the patently erroneous determination of the New York State Department of Motor Vehicles that Mr. Seon had violated Vehicle and Traffic Law ("VTL") §1146(c) while in the course of his employment as a bus operator for the New York City Transit Authority, for which a monetary fine was imposed and his driver's license suspended for an indeterminate period of time.

The evidence adduced at the hearing conducted by the Traffic Violations Bureau revealed that on the evening of November 13, 2014, while in the process of making a right turn from East 174th Street onto Vyse Avenue in the County of Bronx, a contact occurred between the public bus operated by Mr. Seon and a pedestrian who, it appears, was intending to cross Vyse Avenue. Heavy rain was falling and there was "very poor lighting" at the accident location. Further, as was later noted, the pedestrian was wearing dark clothes and a hoodie over his head and carrying a big umbrella. *Without contradiction*, Mr. Seon testified that when he began the right turn no pedestrians were in the intersection.

Mr. Seon had the green light and in making the right turn he continually scanned the intersection on the lookout for moving vehicles, for pedestrians, and to

avoid the cars that were parked on both sides of Vyse Avenue, which roadway was described as a narrow one-way street, with a single lane for moving traffic. It was while he was in the process of making the turn that Mr. Seon heard a thump (noise) by the right front door of the bus whereupon he immediately stopped the bus, opened the door, and saw a pedestrian on the ground by the front door area. This was his first observation of the pedestrian. Notably, the bus had been travelling less than one mile per hour and the front tires had already passed through the crosswalk before the contact.

The only witness to testify on behalf of the people was Police Officer Charlie Viera, who was not a responding officer, but had commenced his investigation almost one month post-accident. P.O. Viera admitted that according to 911 callers that the bus had the green light, and that none were able to state whether or not the pedestrian actually had a green walk signal at the time of the accident. On cross-examination, P.O. Viera admitted the possibility that the pedestrian could have walked into the bus.

As to the injuries sustained by the pedestrian, P.O. Viera quite frankly admitted that at the time of the accident such injuries "were not considered life threatening." Despite his "investigation" all he knew was that the pedestrian injured one or both legs but was concededly unaware of the nature of the injury or whether the foot or entire leg was injured. He acknowledged the obvious, that is,

that a foot injury is not generally life threatening. While P.O. Viera stated that the pedestrian's death about a month later "was determined complication from the collision of the accident," he did not know what the supposed complications were, nor had he read any of the pedestrian's medical records. Notably, no medical records whatsoever were introduced as evidence at the administrative hearing; nor, even a death certificate.

A violation of VTL §1146(c) as was found by the Administrative Law Judge ("ADL") of the Traffic Violations Bureau is statutorily required to have been supported by clear and convincing evidence both that the bus operator failed to exercise due care in his operation of the bus, and, that any such failure to have used due care resulted in a "serious physical injury" to the pedestrian, as that term is defined in Penal Law §10.00(10), which definition includes, but is not limited to, a consequential death or a substantial risk of death.

While in his decision the ALJ specifically stated that he found that Mr. Seon had "failed to exercise due care," and that Mr. Seon had violated VTL §1146(c), the ALJ did not specify the consequential "serious physical injury" which the people were required to establish in order to sustain a conviction for a violation of VTL §1146(c). Nevertheless, the record is clear and undisputed, that the only reason that Mr. Seon had been issued a summons, was because of the claim that the pedestrian had died within a month of the subject accident. In this

regard P.O. Viera's testimony began with his acknowledgement that, "This summons was issued after a provisional investigation of a *fatal* accident." Moreover, in fashioning the penalty the ALJ pronounced that Mr. Seon's license would be suspended for "75 days as per statute" (evidentally referring to VTL §510.2(xv) which provides for a 75 day suspension on a first time conviction of a traffic infraction under Article 26 where the commission of such violation "*caused the death of another person*"); moreover, in further discussing the penalty, the ALJ emphasized that, "I'm putting that there was a death. I'm putting in the fact that there's a fatality. There's a death, okay."

In challenging the finding made by the ALJ that there was a violation of VTL §1146(c), petitioner-respondent consistently argued in the administrative appeal and in this Article 78 proceeding that there was an insufficient evidentiary basis for both the finding of a lack of due care and the finding (implicit or otherwise) that there was a consequential death or substantial risk of death to the pedestrian. While in opposing the Petition, Respondents-Appellants argued to the contrary, it is significant that at no time in the courts below did Respondents-Appellants take the position that the violation of VTL §1146(c) could be sustained in this case even in the *absence of proof of a causally related death* by reference to an alternative definition of "serious physical injury" set forth in Penal Law §10.00(10), that is, a "protracted impairment of health."

By a 3/2 split the Appellate Division, First Department granted the Article 78 petition, annulled and vacated the determination of the DMV and reinstated petitioner's driver's license. Below, the parties had disagreed on a threshold matter, that is, the applicable standard to be utilized by the appellate court in reviewing the propriety of the determination that had been made by the administrative agency. On this issue the Appellate Division, First Department was unanimous in its agreement with petitioner, that although the standard is "substantial evidence" that whether such exists must be assessed in light of the standard required to have been employed by the administrative body in the first place, in this case, the DMV, whose findings are statutorily required to be premised on "clear and convincing evidence" pursuant to VTL 227. In this regard the majority declared that "the Appellate Division is not required to ignore the underlying standard of evidence when conducting a substantial evidence review pursuant to CPLR 7804(g)." The majority explained that "while the appellate standard of review of substantial evidence requires great deference to findings that a hearing officer makes based on the evidence placed before it, it still calls for the reviewing court to ensure that such findings are not made in the absence of evidence that could, again with the proper amount of deference, reasonably be called clear and convincing." The dissent explicitly approved of the analysis of the majority on this issue in stating "I agree with the majority's discussion of the

interplay between our standard of review on appeal and the underlying clear and convincing standard in the DMV proceeding…"

Both the majority and dissent found that there was substantial evidence to support the finding of an absence of due care on the part of the bus operator. The panel diverged, however, in its assessment as to whether substantial evidence supported a finding that the lack of due care resulted in the death of the pedestrian almost one month later.

In finding no substantial evidence on this issue, the First Department majority noted that "the DMV presented no evidence at all tying the pedestrian's death to the injuries suffered by him in the accident, not even a death certificate". The majority criticized the lack of any medical evidence, and the lack of any knowledge on the part of P.O. Viera as to the nature of the leg injuries sustained by the pedestrian and also found significant the concession of the officer that at the scene of the accident the injuries, whatever they were, had <u>not</u> been considered life threatening. The majority ultimately concluded that on this record, a finding of "serious physical injury", specifically the category under Penal Law §10.00(10) of a causally related death, which was the *only* category on which the ALJ had arguably premised its decision, was speculation.

The dissent, on the other hand, was of the opinion that the lack of any medical evidence was "inconsequential" and that since the pedestrian was elderly it

could logically be inferred that he had sustained "serious physical injury." The dissent focused on an alternative definition of "serious physical injury" under Penal Law §10.00(10), that is, that the violation could be sustained on the basis that the pedestrian suffered a "protracted impairment of health or protracted loss or impairment of the function of any bodily organ." This, however, ignored the legion of authority that an agency determination may not be upheld on grounds *different than* those found by the administrative agency.

Indeed, as is set forth herein, this court is without power to sustain a violation on grounds *different than* that which was determined by the administrative tribunal; nor, may a violation be sustained on a non-preserved issue. Thus, to the extent the DMV now argues to this court that the violation can be sustained on the basis that an absence of due care resulted in a "protracted impairment of health" (apparently taking its cue from the dissent below), such argument may not be considered.

Moreover, the majority of the First Department was correct in its assessment that there was no substantial evidence to support a finding that clear and convincing evidence existed to correlate the subject accident with the death of the pedestrian. Indeed, on this record, there is no evidence as to the nature of the leg injury sustained by the pedestrian, nor of the supposed complications.

The appellate division majority got it right in this regard, and the granting of

the Article 78 petition and concomitant annulment and vacatur of the findings of the DMV should therefore be affirmed.

As an alternate ground for affirmance, it remains the position of petitioner that there was no absence of due care in the operation of the bus. The evidence proffered before the DMV clearly demonstrated that petitioner operated the bus diligently despite heavy rain falling and the dim lighting on the narrow roadway.

Finally, in the event this court finds that substantial evidence supported the ALJ determination *in toto*, then this action must nevertheless be remanded for a disposition of the due process arguments raised by petitioner and the challenge to the excessive and unconstitutionally vague penalty which were not decided at *nisi prius* or by the First Department.

COUNTER-QUESTIONS PRESENTED

QUESTION #1: Was the Appellate Division, First Department correct in granting the Article 78 Petition and in annulling and vacating the determination of the Administrative Law Judge ("ALJ") of the Adjudication Bureau of the New York State Department of Motor Vehicles ("DMV") (Traffic Violations Bureau) that the motorist had violated Vehicle and Traffic Law ("VTL") §1146(c) in his operation of his bus on the date of the subject accident?

ANSWER: Yes. The Appellate Division, First Department was correct in granting the Article 78 Petition and in annulling and vacating the administrative determination of the DMV that the motorist had violated VTL §1146(c). A violation of VTL §1146(c) requires a finding both that the motorist failed to use due care in the operation of a motor vehicle and a finding that consequent to such failure, that a pedestrian sustained "serious physical injury" as that term is defined in Penal Law §10.00(10). The First Department majority correctly determined that there was no substantial evidence that the administrative tribunal – the Traffic Violations Bureau - had clear and convincing evidence before it to warrant a finding that the contact between the bus and the pedestrian resulted in "serious physical injury," to wit, the pedestrian's death almost one month later (one of the

definitions of "serious physical injury" found in Penal Law §10.00(10)).

QUESTION #2: May the finding necessary to imposition of liability under VTL §1146(c), that a pedestrian have sustained "serious physical injury," be upheld on an alternate basis, that is, that the pedestrian suffered a consequential "protracted impairment of health" (another of the definitions of "serious physical injury" found in Penal Law §10.00(10))?

ANSWER: No. Since no finding of "protracted impairment of health" was made by the administrative tribunal, the violation of VTL §1146(c) by the ALJ cannot be sustained on a basis *different than* that found by the ALJ. Moreover, such issue is not preserved as the DMV did not make such argument below.

QUESTION #3: Did the First Department err in determining that substantial evidence existed that clear and convincing proof supports the determination of the ALJ that the bus operator failed to exercise due care in his operation of the bus?

ANSWER: Yes, the First Department erred in determining that substantial evidence existed that clear and convincing proof supports the determination of the ALJ that the bus operator failed to exercise due care in his operation of the bus.

The evidence was uncontradicted that the motorist had the green light when he was making a left turn; that when he began the turn no pedestrians were in the intersection; that he continually scanned for pedestrians and vehicles; that he was travelling less than one mile per hour; that it was night time, heavy rain was falling, and the area was poorly lit; that the front wheels of the bus had already passed the crosswalk before contact occurred to the front right-side door of the bus; and, that the pedestrian was wearing dark clothing and a hoodie over his head and carrying a large umbrella. Under these circumstances there was no failure to exercise due care on the part of the motorist and therefore the violation of VTL §1146(c) cannot be sustained. By reason of the lack of substantial evidence that clear and convincing evidence supports the ALJ determination that the motorist failed to exercise due care, such constitutes an alternate ground for affirmance of the granting of the Article 78 petition and the concomitant annulment and vacatur of the ALJ determination.

COUNTER-STATEMENT OF FACTS

Administrative proceedings were commenced by Respondent-Appellant, New York State Department of Motor Vehicles, against Petitioner-Respondent, Wayne Seon, to investigate a motor vehicle accident, which occurred on November 13, 2014, while Mr. Seon was operating a New York City Transit Authority Bus in Bronx County during the scope of his employment (R. 63-64)[1]. although the motor vehicle accident occurred on November 13, 2014, the bus operator, Wayne Seon, was issued a traffic ticket by P.O. Charlie Viera on July 22, 2015, eight months *after* the alleged accident (R.46-47). The traffic ticket charged Petitioner-Respondent with purportedly violating §1146(c) of the Vehicle and Traffic Law[2] for "failure to exercise due care to pedestrian" (R.46). Mr. Seon plead "not guilty" (R.47), and, as a consequence, a hearing was thereafter scheduled by the N.Y.S Department of Motor Vehicles to take place at the Bronx Traffic Violations Bureau on October 8, 2015, at which Mr. Seon was directed to appear (R.48).

[1] References to the Record on Appeal are denoted herein as "R._".

[2] §1146(c) of the Vehicle and Traffic Law permits the punishment, by either fine, imprisonment, or both, of a driver of a motor vehicle who causes *serious physical injury* as defined in article ten of the penal law to a pedestrian or bicyclist while failing to exercise due care.

Hearing before the Administrative Law Judge

On October 8, 2015, a hearing was held before the Administrative Adjudication Bureau (Traffic Violations Bureau) of the New York State Department of Motor Vehicles ("DMV") (R.49). The only witness to testify on behalf of the people was Police Officer Charlie Viera (hereinafter as "P.O. Viera") (R.50, 58) who had issued a traffic ticket/summons to petitioner on 7/22/15 (R.46) (eight months *after* the fact) charging him with the purported violation of Vehicle and Traffic Law ("VTL") §1146(c) (R.48-79). Notably, P.O. Viera had not responded to the scene, and did not commence his investigation on the subject accident until [December 11, 2014] one month *after* its occurrence (R.51, line 25 – R.52, lines 1-2). He testified that "this summons was issued after a provisional investigation of a fatal accident." (R.51)

P.O. Viera did not have any personal knowledge of the subject accident, and, for the most part his testimony consisted of reading two police reports and a witness statement taken from the motorist Wayne Seon into the record. In fact, only three exhibits in total were tendered by the people at the hearing, described in the transcript as an informational report (marked as Exhibit 1), an accident report

(marked as Exhibit 2), and a witness statement (marked as Exhibit 3).[3]

P.O. Viera gave the following testimony in connection with the "informational report":

> THE COURT: Petitioner, Officer Viera, Petitioner 1, Officer Viera 1 is an informational report, general investigation.
>
> [Whereupon Petitioner's Exhibit 1 is admitted into evidence][4]
>
> Q: You're going to, you want to read this into the record?
>
> A: Yes, sir.
>
> Q: Okay. Go ahead.
>
> * * *
>
> A: Okay. *On December 11th, 2014 at approximately 1200 hours I opened an investigation into the collision which occurred on November 13, 2014*

[3] None of the exhibits were furnished to Petitioner at any time prior to or during the hearing for a sufficient challenge to be made. Rather, Petitioner only for the first time obtained and saw the exhibits that were used as the basis of the ALJ's determination against same, as they were attached as an exhibit in Respondents' Verified Answer to the Article 78 Petition (R.261-268). A due process challenge was made but neither the trial court nor the Appellate Division reached the issue.

[4] The ALJ appears to have designated P.O. Viera as the Petitioner.

> between 0140 hours in the confines of the 42 Precinct. The location was Vyse Avenue and East 174th Street. And it involved a [inaudible: 1 second] and a New York City MTA bus. A passenger [*sic* – should be pedestrian] was injured and was admitted to St. Barnabas Hospital who [inaudible: 2 seconds] to his injuries. [inaudible: 2 seconds] my course to respond to the scene at the time of the collision *who said there were no, that the injuries were not considered life threatening*.

(R. 51-52).

As reflected from the above, there is no dispute that whatever injuries the pedestrian may have sustained on November 13, 2014, that such were, in the words of P.O. Viera, "not considered life threatening" (R.52, line 9).

P.O. Viera continued reading that the pedestrian "was pronounced dead by Dr. Carazzo at 0845 hours on December 7th, 2014" (R.52, lines 10 - 11).

Elsewhere, P.O. Viera testified that "The pedestrian received *a* leg injury and a [*sic*], and was transported by EMS to St. Barnabas Hospital where he later died as a result of his injuries" (R.54, lines 4-6). Thus, from this testimony, it appears that only one leg was injured consequent to the subject accident.

It was clear from admissions made by P.O. Viera on cross-examination that

he did not know what part of the pedestrian's leg (or legs) were injured, and that he had not read any medical reports. In this regard, upon cross-examination, P.O. Viera testified as follows:

> Q: Do you know what part of his [the pedestrian's] body was injured from this accident?
>
> A: The lower extremities.
>
> Q: When you say lower extremities, what do you mean by that?
>
> A: The legs.
>
> Q: Was it entire leg or just a portion of the leg? Was it the foot or the entire leg?
>
> A: *The, they all [referring to the exhibits he proffered at the hearing] just say the legs.*
>
> Q: Legs.
>
> A: The lower extremities.
>
> Q: Okay. That's all it says. But you don't know whether that was just a foot or the entire, entire leg?

A: *No*.

Q: You you would agree, Officer, that obviously a foot injury generally is not a life threatening injury?

A: Correct.

Q: Okay. *And you didn't read the medical reports yourself did you?*

A: No.

Q: *Okay. So you don't know whether or not there was other, just in general, other medical complications that caused him to expire, you don't know that?*

A: *No*.

(R.60-61).

As to any connection between the accident and the death of the pedestrian approximately one month later, P.O. Viera could not supply any additional information except to state, that "It was determined complication form the collision of the accident" (R.60).

As is evident from his testimony, P.O. Viera did not have any first hand or

specific knowledge regarding the exact nature of the pedestrian's alleged injuries or the severity thereof; nor do we know from this record whether one or both legs were implicated. No medical report, testimony, or account was proffered at the hearing to support P.O. Viera's conclusion that the pedestrian suffered a serious injury to his leg (or legs) or that he died as a result thereof.

As to the circumstances surrounding the accident, such occurred in the evening during a heavy rainfall and in poor lighting conditions (R.59). According to Mr. Seon, he was driving the NYCTA bus on East 174th Street, and the accident occurred while he was in the process of making a right turn onto Vyse Avenue (R.64-65). East 174th Street is a two-way street (R.52, 64). Vyse Avenue is a narrow one-way street, with one lane for moving traffic. (R.52, 64), and cars were parked on both sides of Vyse Avenue (R.65).

Mr. Seon had a green light in his favor while making the turn (R.263), as confirmed by P.O. Viera's canvassing of 911 caller accounts (R.55). When Mr. Seon began the turn, there were no pedestrians crossing the street (R.65). He testified to his vigilance in making the turn, explaining:

> A: As I'm making my right turn off of 174th Street onto the on[e]-way which Vyse Avenue, *I'm scanning my mirrors onto my left side and I'm scanning my mirrors on the right side to make sure that there's no, making sure that I don't hit any, any of the parked vehicles and making sure there's no pedestrians in my way.*
>
> Q: Okay. How about the right rear of your bus, are your

scanning that area as well?

A: Yes. I, yes. I'm scanning the left side, right side, and my rear.

Q: Okay. *Tell us why you are scanning the right rear*.

A: *To make sure that there's no pedestrians and making sure that I don't swipe any vehicles*

(R.65).

While in the course of making the right turn, Mr. Seon heard a thump towards the front of the bus by the door (R.66). He had been travelling less than one mile per hour (R.57, 267), and he immediately secured and stopped the bus (R.66). The front wheels of the bus had already passed the crosswalk prior to the contact (R.263).

Mr. Seon exited the bus and saw a male lying on the side of the tire, just behind the tire itself (R.67). This individual was wearing a black hoodie over his head and a large black umbrella was on the ground (R.67).

Importantly, even P.O. Viera acknowledged that, given all the conditions, it may very well have been that contact occurred because the pedestrian walked into the bus and not due to any lack of due care by petitioner. Specifically, on cross-examination, P.O. Viera gave the following answers to the following questions:

Q: Officer Viera, were you able to determine the weather condition on the date when this incident occurred?

A: I believe speaking to the motorist that it was a dark, rainy day, yes.

Q: So was that, is that nighttime?

A: *It was nighttime and it was raining*.

Q: Okay. And it was raining heavily?

A: Yes.

Q: Okay. And how, the lighting condition in that particular area?

A: *It's very poor*.

Q: *It's very poor lighting?*

A: *Mm-hmm*.

(R.58-59).

* * * *

Q: … *You said that the bus struck the gentleman. Is it possible that the gentleman could have walked into the side of the bus?*

A: *It could be possible*.

Q: Okay. Do you know what the gentleman was wearing on the date of the accident, the pedestrian?

A: No, I don't.

Q: Okay. Do you know if he was carrying an umbrella on that date?

A: *Yes. He was carrying an umbrella*. According to one of the witnesses, the 911 callers.

Q: Right. He was carrying it, like, carrying or he was

using an umbrella?

A: *Yes, using an umbrella*.

Q: Okay. Do you know if he was wearing a hoodie on that day?

A: No, I don't.

Q: Okay. Would you agree that if someone is, say assuming he was using a hoodie, had the hoodie on and wearing [sic – should be "carrying"] an umbrella, that could have obstructed his vision as to what's going on?

A: Sure.

(R.61-62).

Significantly, P.O. Viera also agreed that the point of contact between the bus and the pedestrian could have been by the front door of the bus (R.61). In this regard P.O. Viera gave the following answers to the following questions:

Q…were you able to determine what portion of the front of the bus that contact was made?

A: No.

Q: Okay. Could contact have been made to the right side of the bus?

A: It would have to be the right above the front tire, maybe the right side of the bumper.

Q: Okay. Well, you said above the front tire. Well, how about the right side of the door? Do you know if the door is in front of the tire or behind the tire?

A: It's in front of the tire.

Q: The door. *So could contact have been made on the right side by the door?*

A: *Sure.*

Q: It could have been made that way?

A: Yes.

(R.59-60).

After cross-examination was completed, upon inquiry from the court, P.O. Viera speculated that as between the possible scenarios, it was his *belief* that the bus had struck the pedestrian as indicated in this exchange:

> THE COURT: Officer Viera, did you, you said it was possible that the pedestrian walked into the bus, you said that at one point.
>
> A: I said it's a possibility the pedestrian could walk into the side of a, he's walking and the bus is coming, it's either or. Either the bus hits him or he walks into the bus. That's just how it's one or the other one. If he stands still and the bus hits him then the bus hits him. But if he's moving and the bus is moving, they clearly could both hit each other
>
> THE COURT: Okay. Based on your review of the facts and reports, the witnesses, *which do you believe occurred?*
>
> A: I *believe* the bus struck the, struck the pedestrian.

(R.71).

Determination of the Administrative Law Judge

The Administrative Law Judge ("ALJ") rendered his decision orally from the bench as follows: "I find the charge established by clear and convincing evidence that the motorist has failed to exercise due care and violated §1146(c) of the Vehicle and Traffic Law" (R.76).

In assessing the effect of the contact between the bus and the pedestrian, and in fashioning the penalty the ALJ noted, "I'm, putting that there was a death. I'm putting in the fact that there's a fatality. There's a death, okay" (R. 78).[5]

The ALJ imposed a monetary fine and determined that Mr. Seon's license would be suspended for "75 days as per statute"[6] (R.78).

Later, Mr. Seon received an "Order of Suspension or Revocation" from the DMV which instead stated, without explanation, that the duration of his license suspension would be <u>six months</u> (R.81). This order further cautioned: "YOU ARE NOT ELIGIBLE FOR A RESTRICTED USE LICENSE/PRIVILEGE BECAUSE THIS CONVICTION, ADJUDICATION, AND/OR FINDING INVOLVES A

[5] Thus, it was *apparently* the finding of the ALJ that the contact between the bus and the pedestrian resulted in the death of the pedestrian. Accordingly, this was the issue that was appealed. <u>Notably, the DMV never argued below that the finding of the ALJ could be sustained by reason of "protracted impairment of health", which is what the DMV now argues for the first time on appeal to this court.</u>

[6] The statute to which the ALJ apparently referred is VTL §510.2(xv) which provides a suspension "for a period of seventy-five days where the holder is convicted of a traffic infraction for a first violation of article twenty-six of this chapter and the commission of such violation <u>caused the death of another person</u>" (emphasis added).

FATAL ACCIDENT" (R.81-caps in original).[7]

Appeal of the Administrative Law Judge's Decision to the Traffic Violations Bureau Appeals Board

Thereafter, a timely appeal was taken by Mr. Seon to the Traffic Violations Bureau Appeals Board. He argued the lack of substantial evidence supporting ALJ's determination that he had failed to exercise due care and the lack of substantial evidence of a causally related "serious physical injury" within the meaning of Penal Law §10.00(10) (in this case death) to the pedestrian, which findings are both necessary to establish a violation of VTL §1146(c). He also argued that the hearing was fundamentally unfair by reason that the exhibits had not been made available to petitioner, and challenged the propriety and vagaries of the penalty.

During the pendency of the administrative appeal, the DMV granted a stay of the suspension of Mr. Seon's driver's license based on his showing of hardship (R.106).

By the Notice of Appeals Board Decision dated March 28, 2016, the Appeals Board affirmed the conviction which constituted a "final administrative determination" of the DMV (R.107), thereby exhausting petitioner's administrative remedies.

[7] Clearly, Mr. Seon was penalized in accordance with the finding that the accident resulted in a fatality, as opposed to a "protracted impairment of health."

Accordingly, by order dated March 31, 2016, the DMV reinstated Mr. Seon's license suspension, arbitrarily modifying its duration to an indeterminate term of "*at least* 177 days" which period was to commence on April 29, 2016 (R.108). Again Mr. Seon was cautioned "You are not eligible for a restricted use license/privilege because this conviction, adjudication and/or finding involved a *fatal accident"* (R.108).

Article 78 Proceeding before the Supreme Court, Bronx County

On April 28, 2016 petitioner-respondent commenced the Article 78 proceeding in the Supreme Court, Bronx County, seeking, *inter alia*, an order annulling, vacating and reversing the determination of the Administrative Law Judge (as affirmed by the New York State Department of Motor Vehicles Appeals Board) that petitioner had violated VTL §1146(c), and requesting a stay of the license suspension/revocation (R. 4-7). On signing the Order to Show Cause, the trial court (Hon. Kenneth L. Thompson, Jr.) granted an immediate stay of the suspension of Mr. Seon's license which was to continue during the pendency of the Article 78 proceeding on the showing by petitioner that such was necessary to avoid irreparable economic and personal harm to petitioner in his occupation as a bus operator and

in disruption to his household (R.6-7).[8]

Petitioner argued that substantial evidence did not support the finding by the Administrative Law Judge that there was clear and convincing evidence that petitioner had violated VTL §1146(c). Through a review of the evidence it was argued that the finding that Mr. Seon failed to exercise due care could not be sustained, since the evidence showed that the subject accident occurred despite Mr. Seon's vigilance under adverse conditions. Petitioner further argued the insufficiency of any evidence correlating the subject accident with the pedestrian's death almost one month later (which was the only category of "serious physical injury" as defined in Penal Law §10.00(10) that could arguably have been found by the ALJ).

Petitioner also argued that his due process rights were violated by the withholding of the documentary exhibits tendered to the ALJ which prevented effective cross-examination. Petitioner also raised the fact that the license suspension/revocation was inexplicably and improperly increased from the 75 days imposed by the ALJ, then to six months, and then, after the administrative appeal was taken, to an unconstitutionally vague indeterminate period of "*at least 177 days*" in violation of §510 of the Vehicle and Traffic Law (R.113-136).

[8] As Mr. Seon is a bus operator, his employment as such necessarily requires a valid driver's license. Moreover, Mr. Seon attested to the personal hardship a suspension would cost to his family.

Notably, the DMV did not argue to the Supreme Court that the violation of VTL §1146(c) could be sustained on a finding that the pedestrian sustained a "protracted impairment of health" (one of the other categories of "serious physical injury" as that term is defined in Penal Law §10.00(10)).

Judge Thompson ordered that this Article 78 proceeding be transferred to the Appellate Division, First Department for disposition on the basis that it raised an issue as to whether the DMV's finding that petitioner violated VTL §1146(c) was supported by substantial evidence (R.2-3).[9]

Determination by Appellate Division, First Department

On transfer to the Appellate Division, First Department, petitioner continued to argue that there was no substantial evidence that the finding by the Administrative Law Judge was supported by "clear and convincing evidence" and that the ALJ's determination that petitioner violated VTL §1146(c) must therefore be vacated and annulled. Petitioner continued to argue the insufficiency of the evidence of the absence of due care on the part of the bus operator, and the insufficiency of the evidence that the purported lack of due care had resulted in the death of the pedestrian almost one month later. Petitioner also raised the due process challenge and the objection to the varying lengths of the license suspension imposed.

[9] The due process issues and petitioner's challenge to the penalty were not decided either by the Supreme Court or the First Department.

Notably, the DMV did not argue to the First Department that the violation of VTL §1146(c) could be sustained on a finding that the pedestrian sustained a "protracted impairment of health" (one of the other categories of "serious physical injury" as that term is defined in Penal Law §10.00(10)).

By a 3/2 split the Appellate Division, First Department annulled the determination of the ALJ. While all the justices agreed with petitioner that the appropriate standard of review was whether there was substantial evidence in the record to support a finding that the ALJ had clear and convincing evidence before it to convict Mr. Seon of violating VTL §1146(c), there was a disagreement as to whether such standard was met. The majority was of the opinion that notwithstanding the conflicting evidence on the issue, that there was adequate evidence in the record to support the ALJ's finding that the bus operator failed to exercise due care, but *no evidence at all* in the record to support any causal connection between the accident and the pedestrian's death one month later. Since a violation of VTL §1146(c) requires a finding both of the absence of due care and a proximately related "serious physical injury" (as that term is defined in Penal Law §10.00(10)), the majority was of the opinion that there was an insufficient showing to sustain a violation of VTL §1146(c) and so the court granted the petition and annulled and vacated the ALJ Decision/Order dated October 8, 2015 (R.341-353).

The dissent on the other hand, found there was adequate evidence of a causally

related "serious physical injury" and so would have affirmed the ALJ's finding that VTL §1146(c) was violated.

The court first had determined the correct standard of review to be applied. Statutorily, the Administrative Law Judge's finding was required to have been based on "clear and convincing" evidence. In this regard, according to Vehicle and Traffic Law §227, in an adjudication of alleged traffic infractions, "[t]he burden of proof shall be upon the people, and no charge may be established except by clear and convincing evidence*"*.

Although the majority noted that the "substantial evidence" review standard requires the Appellate Division to give great deference to the ALJ's findings, the majority agreed with petitioner that such standard still requires the "reviewing court to ensure that such findings are not made in the absence of evidence that could . . . reasonably called clear and convincing" (R.348).

The majority outlined the evidence as to both the issue of whether Mr. Seon failed to exercise due care, and, whether there was a causally related "serious physical injury" in order to determine whether there was substantial evidence to support the Administrative Law Judge's findings of a violation of Section 1146(c) of the Vehicle and Traffic Law, through the requisite clear and convincing standard of proof.

On the issue of lack of due care, the First Department majority notes that

"petitioner posits that the evidence was not clear and convincing that he failed to exercise due care, because it was equally plausible that the pedestrian, considering the lighting, the weather, and the hoodie and umbrella that may have obstructed his view, walked into the side of the bus." The majority rejected this position finding that, "Under the substantial evidence standard of review, so long as there was some evidence that the Administrative Law Judge could have reasonably deemed to be clear and convincing proof that petitioner should have seen the pedestrian, we may not disturb the administrative finding." The majority determined that based on the fact that the pedestrian had the right of way and the opinion of the testifying officer, P.O. Viera, that Mr. Seon should have seen said pedestrian when turning, the ALJ had ample evidence that Mr. Seon failed to exercise due care under the requisite standard. Petitioner disagrees with this finding and on this preserved issue urges reversal as an alternate ground for affirmance of the appellate division's finding that Mr. Seon did not violate VTL §1146(c).

On the other hand, the majority agreed with petitioner that there was absolutely no evidence whatsoever proffered before the ALJ to establish that the pedestrian sustained a "serious physical injury" as defined under the Penal Law or that he was caused to die as a result thereof one month later. In this regard the majority observed that "the DMV presented no evidence at all tying the pedestrian's death to the injuries suffered by him in the accident, not even a death

certificate. Moreover, the only witness presented by the DMV, P.O. Viera, presented no medical evidence whatsoever. He never stated that anyone medically qualified to do so told him that the pedestrian died because of this injuries, he merely stated that this was "determined", but not by whom. The majority also pointed to defense counsel's cross-examination of P.O. Viera at the hearing, in which P.O. Viera admitted that he did not know what part of the pedestrian's leg was impacted by the bus, that it could possibly have been his foot, and acknowledged that generally, injury to a foot is not life threatening.

The majority held that there was no substantial evidence in the record that the ALJ's findings were supported by clear and convincing evidence that the subject accident resulted in the pedestrian's death. To hold otherwise, the majority determined, would be to call for speculation. The majority opined that "Given that standard [i.e. of clear and convincing evidence] and the remarkable lack of compelling evidence before us, we would be abdicating our role were we simply to defer to the conclusions drawn by the Administrative Law Judge, and raising a serious question as to the very purpose of having any appellate review in this matter" (R.353).

Since not only the failure of due care, but also a proximately caused "serious physical injury" resulting therefrom is required to sustain a violation of VTL §1146(c), the absence of evidence of the latter was the basis for annulment of the

ALJ decision.

The court did not reach the remainder of petitioner's arguments, which were whether the proceedings before the ALJ violated Mr. Seon's rights to due process and whether the DMV abused its discretion for imposing an indeterminate suspension penalty of "at least 177 days".[10]

Dissenters agree with the standard of review utilized by the majority but disagree with its application

The two-justice dissent agreed with the majority concerning the appropriate standard of review to be applied by the appellate division. In this regard, the dissenting opinion begins, "I agree with the majority's discussion of the interplay between our standard of review on appeal and the underlying clear and convincing standard in the DMV proceeding…" (R.354) The dissent, however, differs as to whether there was substantial evidence of clear and convincing evidence that the pedestrian sustained proximally related "serious physical injury" as that term is defined in section 10 of the Penal Law.

Penal Law §10.00(10) sets forth the definition of *"serious physical injury"* as follows:

> 10. "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of

[10] Accordingly, should there be a reversal, a remand would be necessary for consideration of the arguments that were not reached by either the trial court or the appellate division.

the function of any bodily organ.

The dissent focused on the fact that the definition of "serious physical injury" under the Penal Law is not confined to death, but rather, as framed in the dissenting opinion, also includes "that which causes death or serious and protracted disfigurement or protracted impairment of the health". The dissent criticizes the majority for limiting its discussion as to whether there was evidence of a proximately caused fatal injury.[11]

The dissenting judges were of the opinion that there was ample evidence of "serious physical injury" before the Administrative Law Judge and points out that under appellate authority, even hearsay evidence can be the basis for a determination by an administrative agency. The dissent also states that, "There is no requirement that a particular form of medical proof is needed to sustain a finding of a serious injury …" and so finds it *"inconsequential"* that no actual medical evidence or medical reports were submitted to the ALJ.

Rather, the dissent finds that there was "ample" evidence of "serious physical injury" making reference to (1) the accident report of P.O. Casey which was admitted into evidence which states that the pedestrian was "pinned under the passenger side body of the bus behind the front wheel," (2) the testimony of P.O.

[11] Notably, however, it was the finding of the ALJ that the subject accident had caused the *death* of the pedestrian. Thus, what the appellate division was charged to review, was the propriety of such finding, and therefore this was the issue the majority evaluated.

Veira that the bus "struck the pedestrian with the front side of the bus, running over the legs of the pedestrian with the front passenger's side tire" (3) a statement in the investigative report that the pedestrian "died as a result of his injuries, pronounced by Dr. Carazas", (4) and the fact that the pedestrian was elderly.

According to the dissent, because of plaintiff's advanced age, *it logically follows* that being struck by a bus would necessarily result in serious physical injury. In fact the dissent goes so far as to state, "A person of such advanced age would most likely sustain a serious injury even by an accidental fall without the impact of a city bus striking and running over him."

Accordingly, the dissent found that there was substantial evidence in the record to support the ALJ's determination that clear and convincing evidence existed that the accident caused serious physical injuries to the pedestrian and would have confirmed such finding.

This court's sua sponte jurisdictional inquiry

Respondent filed a Notice of Appeal to this court citing as authority CPLR §5601(a) (which permits appeals as of right to this court from an order of the Appellate Division where there is finality and a dissent by at least two justices on a *question of law* in favor of the party taking such appeal). However, the dissenting judges were in full accord with the majority on the *question of law* that was presented, that is, the appropriate standard of review to be applied by the appellate

division. In this regard, the dissenting opinion is prefaced by Justice Tom with this statement, "I agree with the majority's discussion of the interplay between our standard of review on appeal and the underlying clear and convincing standard in the DMV proceeding…" (R.354). The disagreement is with the application of that standard to the evidence (or lack thereof) as to causation between the accident and the death, within one month later, of the pedestrian.

This court *sua sponte* questioned the jurisdiction of the court under these circumstances. After submission of position papers, the parties were thereafter notified that this court had terminated its jurisdictional inquiry.

POINT I

A DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE OF THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES MAY NOT BE SUSTAINED BY THE REVIEWING COURT ABSENT SUBSTANTIAL EVIDENCE THAT SUCH DETERMINATION WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

The appropriate standard of a judicial review of the determination of the Administrative Law Judge ("ALJ") of the New York State Department of Motor Vehicles, as unanimously agreed upon by the First Department, requires an assessment of whether or not there was substantial evidence that the agency determination was supported by clear and convincing evidence.

Put another way, as the ALJ's determination is statutorily required to be founded on "clear and convincing evidence." (VTL §227), such must be taken into consideration in applying the "substantial evidence" analysis.

In this regard, CPLR §7803 authorizes a petitioner to commence a special proceeding challenging an administrative "determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, [if it was un]supported by substantial evidence." In accordance with this provision, "[s]ubstantial evidence has been defined as such relevant proof

as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" and cannot be based on "mere surmise, conjecture, or speculation." Fernald v. Johnson, 305 A.D.2d 503, 503 (2nd Dept. 2003); *see also* 300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 180 (1978) ("it means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" whereby the "[e]ssential attributes are relevance and a probative character").

Indeed, there is no doubt that judicial review of an agency determination by a reviewing court is "a genuine judicial function and that review is more than a 'rubber stamp' of an agency's determination." Hazen v. Hill Betts & Nash, LLP, 92 A.D.3d 162, 168 (1st Dept. 2012).

Importantly, the test necessarily incorporates the applicable evidentiary standard that was required to be applied at the hearing and which party had the burden of proof. *See* Fernald v. Johnson, 305 A.D.2d at 503; FMC Corp. v. Unmack, 92 N.Y.2d 179, 188 (1998) (determining that a "[reviewing] court must weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the evidence that its property has been overvalued."); King v. N.Y. State Dep't of Health, 295 A.D.2d 743 (3rd Dept. 2002) (in determining the standard of proof to be applied, the court held that its review "is limited to whether the determination

[based on] a preponderance of the evidence is fully supported by substantial evidence in the record").

As relates to the hearing conducted by the DMV Traffic Violations Bureau, Vehicle and Traffic Law §227 prescribes the quantum of proof necessary to sustain a traffic infraction, mandating that, "[t]he burden of proof shall be upon the people, and no charge may be established except by clear and convincing evidence*". See also* Rosenthal v. Hartnett, 36 N.Y.2d 269, 273 (1975).

Inarguably, this is a high standard of proof, as the ramifications of a disposition have a significant impact on the motorist. In fact, the clear and convincing evidence standard has continuously been defined by New York courts, including all four judicial departments, as requiring a "quantum of proof that is greater than a preponderance of evidence but less than proof beyond a reasonable doubt." Kihl v. Pfeffer, 47 A.D.3d 154, 164 (2nd Dept. 2007); *see also* Ruby v. Budget Rent A Car Corp., 23 A.D.3d 257 (1st Dept. 2005); Sternfeld v. Forcier, 248 A.D.2d 14 (3rd Dept. 1998); Caruso v. Russell P. Le Frois Builders, 217 A.D.2d 256 (4th Dept. 1995).

In fact, in citing to the New York Court of Appeals, the Second Department again reiterated the distinction of the clear and convincing evidence standard as being a "higher, more demanding standard than the preponderance of the evidence standard." Ausch v. St. Paul Fire & Marine Ins. Co., 125 A.D.2d 43, 45 (2nd Dept.

1987) (citing Simcuski v. Saeli, 44 N.Y.2d 442, 452 (1978)); see also, Solomon v. State, 146 A.D.2d 439 (1st Dept. 1989).

Therefore to meet the clear and convincing standard, a respondent must show "that the evidence is neither equivocal nor open to opposing presumptions" and such evidence "makes it highly probable that what is claimed actually happened." Matter of Gail R. (Barron), 67 A.D.3d 808, 812 (2nd Dept. 2009) (cited by the First Department majority in the case *sub judice* at R. 353-353); Ausch, 125 A.D.2d at 45; *see also* George Backer Mgmt. Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 220 (1978) (holding the evidentiary requirement for the clear and convincing standard "operates as a weighty caution upon the minds of all judges, and it forbids relief when the evidence is loose, equivocal or contradictory").

The First Department, in Reape v. Adduci, 151 A.D.2d 290, 293 (1st Dept. 1989) notes that, "[w]hile the judicial review function with respect to administrative determinations is an extremely limited one, that limitation has not yet reached the point where the court is required to abandon all reason and common sense and experience in order to uphold a patently erroneous determination" premised solely on the testimony of a police officer. Rather, as delineated above, "substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact

may be extracted reasonably -- probatively and logically." *Id.*

Accordingly, it is implausible for a reviewing court to make a determination regarding the presence of substantial evidence in the record without considering whether the applicable evidentiary standard before the ALJ was actually satisfied. In other words, if the requisite standard before the ALJ was clear and convincing evidence, as was the case here, then the reviewing court may affirm the ALJ's determination *only* if there is substantial evidence in the record which establishes that the ALJ satisfied the requisite standard before him.

Courts have consistently made a determination of whether there is substantial evidence in the record through necessarily assessing whether the administrative agency met its evidentiary standard in the first place when ruling against the petitioner. For example, in King v. N.Y. State Dep't of Health, 295 A.D.2d 743 (3rd Dept. 2002), the Appellate Division determined that the standard of proof to be applied for its review "is limited to whether the determination based on a preponderance of the evidence is fully supported by substantial evidence in the record." See also Bhagoji v. Wing, 251 A.D.2d 133 (1st Dept. 1998) (holding that "respondent evaluated the report of abuse under the required fair preponderance of the evidence standard and, *upon review, we too find that the report is supported by a fair preponderance of the evidence*."); Matter of Spring v. N.Y. State Dep't of Health, 147 A.D.3d 1318, 1319 (4th Dept. 2017) (holding that

"[o]ur review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted a hearing, is limited to the issue whether the determination, based upon a preponderance of the evidence, is supported by substantial evidence"); Fernald v. Johnson, 305 A.D.2d 503, 504 (2nd Dept. 2003) (holding that "there is substantial evidence to support the determination of the respondent Commissioner of the New York State Office of Children and Family Services that, at the hearing, it was proven by a preponderance of the evidence that the petitioner committed the acts of maltreatment").

Accordingly, in reviewing the record, as a whole, the reviewing court must determine whether the administrative agency satisfied its evidentiary standard. Where the administrative agency fails to satisfy its requisite evidentiary standard, any adverse decision against the petitioner must be annulled. See Lee TT v. Dowling, 87 N.Y.2d 699, 710 (1996) (affirming grant of article 78 petition where administrative determination was premised on standard of proof lower than constitutionally required); Deutsch v. Catherwood, 31 N.Y.2d 487, 489 (1973) (holding that"[a]bsent findings and conclusions, a proper basis for a determination as to whether there was substantial evidence to support a recovery, would rest on pure speculation"); Whitten v. Martinez, 24 A.D.3d 285, 289 (1st Dept. 2005) (McGuire, J., dissenting) (holding that "the existence of substantial evidence for an

essential finding that was not made cannot have any legitimate claim on this Court.")

Thus, in the case *sub judice*, while the majority noted that the "substantial evidence" review standard requires the Appellate Division to give great deference to the ALJ's findings, the majority agreed with petitioner that such standard still requires the "reviewing court to ensure that such findings are not made in the absence of evidence that could . . . reasonably called clear and convincing" (R.348).

So too, the dissent manifested concurrence declaring, "I agree with the majority's discussion of the interplay between our standard of review on appeal and the underlying clear and convincing standard in the DMV proceeding…" (R.354).

Accordingly, the substantial evidence assessment must be made in light of the clear and convincing standard that was required to be employed by the ALJ.

POINT II

THE APPELLATE DIVISION'S MARCH 27, 2018 ORDER SHOULD BE AFFIRMED AS THAT COURT CORRECTLY DETERMINED THAT THERE WAS NO SUBSTANTIAL EVIDENCE THAT THE ALJ HAD CLEAR AND CONVINCING EVIDENCE THAT THE SUBJECT MOTOR VEHICLE ACCIDENT RESULTED IN THE DEATH OF THE PEDESTRIAN AND THEREFORE NO VIOLATION OF VTL §1146(c) OCCURRED

As the majority of the court below recognized, there was a wholesale failure of the DMV to connect the alleged motor vehicle accident in which an indeterminate leg injury was allegedly sustained with the reported death of the pedestrian one month later.

Vehicle and Traffic Law §1146(c)(1), which the Administrative Law Judge found was violated, provides as follows:

> A driver of a motor vehicle who causes *serious physical injury* as *defined in article ten of the penal law* to a pedestrian or bicyclist while failing to exercise due care in violation of subdivision (a) of this section, shall be guilty of a traffic infraction punishable by a fine of not more than seven hundred fifty dollars or by imprisonment for not more than fifteen days or by required participation in a motor vehicle accident prevention course pursuant to paragraph (e-1) of subdivision two of section 65.10 of the penal law or by any combination of such fine, imprisonment or course, and by suspension of a license or registration pursuant to subparagraph (xiv) or (xv) of paragraph b of subdivision

> two of section five hundred ten of this chapter. [emphasis added].

Accordingly, in order for petitioner to have been found to have violated this provision, it was necessary that clear and convincing evidence had been proffered to the ALJ showing that a failure of the motorist to use "due care" resulted in *"serious physical injury"* to another person. As to amplification of the term *"serious physical injury,"* VTL §1146(c)(1) incorporates Penal Law §10.00(10) which defines *"serious physical injury"* as follows:

> 10. "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

As indicated by use of "or", there are *alternative* findings that can support the definition of "serious physical injury". In this case the ALJ implicitly and/or explicitly determined that the subject motor vehicle accident resulted in the death of the pedestrian. This is evident by the fact that the only reason that Mr. Seon had been issued a summons in the first place was because of the claim that the pedestrian had died within a month of the subject accident. In this regard P.O. Viera's testimony began with his acknowledgement that, "This summons was issued after a provisional investigation of a *fatal* accident" (R.51). Thus, the agency proceedings were premised from the inception on the presumption that

there had been a "*fatal accident."*

Moreover, in fashioning the penalty the ALJ pronounced that Mr. Seon's license would be suspended for "75 days as per statute" (R.78) (evidentally referring to VTL §510.2(xv) which provides for a 75 day suspension on a first time conviction of a traffic infraction under Article 26 where the commission of such violation "*caused the death of another person*"); moreover, in further discussing the penalty, the ALJ emphasized that, "I'm putting that there was a death. I'm putting in the fact that there's a fatality. There's a death, okay" (R.78). Indeed, when petitioner was notified of the commencement of his suspension, the DMV cautioned: "YOU ARE NOT ELIGIBLE FOR A RESTRICTED USE LICENSE/PRIVILEGE BECAUSE THIS CONVICTION, ADJUDICATION, AND/OR FINDING INVOLVES A FATAL ACCIDENT" (R.81-caps in original). Further, after the affirmance of the ALJ's determination by the Appeals Board, and upon reinstatement of the suspension, petitioner was again cautioned that he would not be able to obtain a restricted use license because the conviction "involves a fatal accident" (R.108). It is therefore patently obvious that Mr. Seon's conviction under VTL §1146(c) rested on a finding by the ALJ that the accident resulted in the death of the pedestrian.

However, no proof whatsoever was submitted to the ALJ to demonstrate that any contact between the bus and the pedestrian either caused the death of the

pedestrian one month later, or that the alleged leg injury created a "substantial risk of death" to the pedestrian.

From his testimony, it is apparent that P.O. Viera was requested to conduct an investigation one month after the alleged accident. The bulk of P.O. Viera's testimony was comprised of his reading of primarily what he described as an "informational report". It is also clear that P.O. Viera had no personal knowledge of any of the events in question. His "testimony" which, in actuality was the reading of certain reports, was rank hearsay. Significantly, P.O. Viera testified point blank that at the time of the accident "the injuries were not considered life threatening" (R.52). Such concession is self-defeating to a claim that the accident resulted in the death of the pedestrian.

Indeed, no medical evidence at all was submitted to establish the requisite causation. Rather, what emerged from P.O. Viera's continued reading of the undisclosed "informational report" was that someone contacted someone else at the police department informing them that the pedestrian had died on December 7, 2014, which is one month after the accident (R.52). From this "informational report", P.O. Viera read into the record that the pedestrian had sustained a leg injury (R.54). That this did not afford a basis for a conclusion that the leg injury created a substantial risk of *or* had caused the death of the pedestrian is further underscored by the concession by P.O. Viera that *a leg injury is not considered life*

threatening.

In this regard, P.O. Viera was cross-examined as follows;

> Q: Do you know what part of his [the pedestrian's] body was injured from this accident?
>
> A: The lower extremities.
>
> Q: When you say lower extremities, what do you mean by that?
>
> A: The legs.
>
> Q: Was it entire leg or just a portion of the leg? Was it the foot or the entire leg?
>
> A: The, they all [referring to the police reports he read] just say the leg.
>
> Q: Legs.
>
> A: The lower extremities.
>
> Q: Okay. That's all it says. But you don't know whether that was just a foot or the entire, entire leg?
>
> A: No.
>
> Q: *You you would agree, Officer, that obviously a foot injury generally is not a life threatening injury?*
>
> *A: Correct.*
>
> *Q: Okay. So you don't know whether or not there was other, just in general, other medical complications that caused him to expire, you don't know that?*
>
> A: No.

(R.60-61).

It is therefore apparent that all that was actually derived from some unknown source and then repeated by P.O. Viera who himself had no personal knowledge of same, is that some kind of leg injury was sustained by the pedestrian, which at the scene was *not considered life threatening*, and which P.O. Viera, conceded would not generally be considered life threatening. No medical evidence whatsoever was tendered to the ALJ as to the actual cause of death of the pedestrian; no medical records were reviewed by P.O. Viera, much less furnished to the ALJ, nor was an autopsy report (if indeed an autopsy was performed) or a death certificate provided. No medical witness was called to establish causation. We are left with no information as to the nature of the leg injury, or whether it involved one or both legs, or whether it involved all or only a portion of a leg. These facts inarguably remain unknown after the hearing.

Thus, there was no substantial evidence that the agency's determination that Mr. Seon violated VTL §1146(c) was supported by substantial evidence.

Indeed, the First Department majority found:

> With regard to the requirement that DMV establish serious physical injury, however, we find that there is not substantial evidence in the record to support the Administrative Law Judge's implicit finding that clear and convincing evidence existed that the accident caused the pedestrian's death…[I]t is a recognition that the DMV presented no evidence at all tying the pedestrian's death to the injuries suffered by him in the accident, not even a death certificate. Viera, the only witness presented by DMV, presented no medical evidence

> whatsoever. He never stated that anyone medically qualified to do so told him that the pedestrian did because of his injuries, he merely stated that this was "determined." The only reference to a doctor in the investigative report he prepared merely states that a Dr. Carazas at St. Barnabas Hospital pronounced the pedestrian dead.

(R.50).

The dissent makes much of the fact that the Police Accident Report prepared by a P.O. Casey at the scene *appears* to state that the pedestrian was "*pinned* under the passenger side [body or door?] of the bus behind the front wheel" (R.263-264). As the majority points out, "The narrative is handwritten and the word is admittedly not readily discernable" (R.351, fn1).

P.O. Casey, the actual responding officer, was not called to testify and therefore it is debatable as to what his report actually states.

However, even if the word *"pinned"* is correct, this does not mean that the bus ran over the pedestrian's legs. Indeed, none of the three reports tendered by P.O. Viera state that the bus ran over the pedestrian's legs! The dissent proceeds on the *assumption* that the bus ran over the pedestrian's legs, and that it logically follows that there was a "serious physical injury" but such is rank speculation that cannot support the finding of the ALJ (implicit or otherwise) that the pedestrian died as a result of the injuries sustained in the subject accident.

Therefore the determination of the Appellate Division, First Department

annulling and vacating the determination of the ALJ based on the lack of substantial evidence must be affirmed.

POINT III

JUDICIAL REVIEW OF AN ADMINISTRATIVE DETERMINATION IS LIMITED TO THE GROUNDS INVOKED BY THE AGENCY; THEREFORE, SINCE THE ALJ OSTENSIBLY DETERMINED THAT VTL §1146(c) WAS VIOLATED BY REASON THAT THE SUBJECT MOTOR VEHICLE ACCIDENT RESULTED IN A FATALITY, THE DETERMINATION THAT VTL §1146(c) WAS VIOLATED CANNOT NOW BE SUSTAINED ON DIFFERENT GROUNDS, THAT IS, THAT THE ACCIDENT RESULTED IN A "PROTRACTED IMPAIRMENT OF HEALTH" OF THE PEDESTRIAN

In the case *sub judice*, the ALJ determined that Vehicle and Traffic Law §1146(c) was violated ostensibly on the basis that the pedestrian died within a month after the subject motor vehicle accident. Appellants now argue that the violation can be sustained on a different basis, that is, that the accident resulted in a "protracted impairment of health" of the pedestrian. The law is clear, however, that judicial review is limited solely to the grounds invoked by the administrative agency in rendering its decision.

As this court recognized in Trump-Equitable Fifth Ave. Co. v. Gliedman, 57 N.Y.2d 588, 593 (1982) "A fundamental principle of administrative law long accepted by this court limits judicial review of an administrative determination solely to the grounds invoked by the agency, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by substituting

what it deems a more appropriate or proper basis." Accordingly, this court is without the power to sustain the determination of the Administrative Law Judge on a finding that the subject motor vehicle accident resulted in a "protracted impairment of health."

Likewise, the Appellate Division was constrained to limit its inquiry *only* to the grounds on which the administrative agency based its decision, and is powerless to uphold a determination on a different rationale. Ryder Truck Rental, Inc. v. Parking Violations Bureau of Transp. Admin., 62 N.Y.2d 667 (1984); In re Vargas, 18 A.D.3d 994 (3rd Dept. 2008).

In the case *sub judice*, the majority properly so constrained its inquiry, while the dissenters did not. Thus the dissenters erred in their belief that, "To sustain the Administrative Law Judge's finding we do not need to conclude that there was clear and convincing evidence before the agency that the collision caused the pedestrian's death or a substantial risk of death. Rather, under the statutory definition, it suffices where there is clear and convincing proof of the "protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (R.355). On appellate review, the court is without power to justify or sustain an administrative determination on different grounds. Indeed the majority below pointed out that the ALJ determination could not be sustained on the basis proposed by the dissent since, "This, of course, ignores, that DMV, at the hearing

did not proceed on the theory, much less offer any medical proof that the pedestrian sustained 'serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ'" (R.351).

Nor did the DMV even raise this argument below. Therefore, the DMV's failure to preserve such argument additionally forecloses review by this court. People v. Passino, 12 N.Y.3d 748 (2009); People v. Carter, 86 N.Y.2d 721 (1995).

POINT IV

ASSUMING ARGUENDO THIS COURT HAS THE POWER TO AFFIRM THE ALJ FINDING ON A BASIS NOT FOUND BY THE AGENCY, AND DESPITE NON-PRESERVATION OF THE ISSUE, NEVERTHELESS THERE WAS NO SUBSTANTIAL EVIDENCE THAT THE PEDESTRIAN SUFFERED A "PROTRACTED IMPAIRMENT OF HEALTH"

Even if this court had the authority to reach such issue, there was no substantial evidence tendered to the ALJ that whatever leg injury was sustained by the pedestrian, that it caused a "protracted impairment of health" within the meaning of Penal Law §10.00(10).

Thus, for example, in People v. Marshall, 162 A.D.3d 110 (3rd Dept. 2018), the court found that a verdict was against the weight of the evidence and did not sustain a finding that a gunshot victim suffered a "protracted impairment of health" as that term is used in Penal Law §10.00(10). In People v. Marshall the record evidence established that a gunshot wound shattered the victim's tibia bone which required surgical insertion of pins, yet did not satisfy the statutory definition of "protracted impairment of health" in the absence of evidence of the long term effects. The court noted:

> By the time of trial, which was less than six months after the shooting, the victim stated that he had "a little limp," but was nonetheless able to walk. The victim was also

> undergoing "rehab" but he did not state for how long. When asked whether he could continue to play arena football, he merely responded, "Not at this time" and did not state that his injury to his leg prohibited him from playing in the future. Finally, as discussed, the victim stated that the pain had subsided once the pins were removed. Accordingly, although the victim's testimony and the photographs show a significant injury immediately following the shooting, there was no corresponding proof regarding its long-term effects.

This court's disposition of People v. Garland, 32 N.Y.3d 1094 (2018), cited by appellants, does not warrant a different result. In that case, this court affirmed the disposition of the First Department that a shooting victim has sustained a "protracted impairment of health" within the meaning of Penal Law §10.00(10) on evidence of a four year duration of pain consequent to the shooting victim's leg injury in finding that there was a "protracted impairment of health." Evidence was adduced in that case that bullet fragments were lodged in the victim's leg for which removal was contraindicated on the following medical evidence:

> The bullet fragments were never removed from the victim's leg. Medical records indicated that the injury was close to the victim's femoral artery—a "big blood vessel"—and, as a medical expert testified at trial, "where a bullet enters an extremity, we don't take the bullet out in the trauma situations" because "going after a bullet like this can cause further injury." In particular, where a bullet is "lodged near a blood vessel . . . , actually taking it out can cause injury to that blood vessel and near around it," resulting in "bleeding," "neurological deficit," "numbness," "tingling," and "weakness." The expert

> further noted that, had "the femoral artery had been struck with a bullet," possible medical complications could include "exsanguinating, bleeding, excessive bleeding" and "possibly loss of limb."

As to the long term effects of the embedded bullet fragments some four years later, this court describes the evidence as this:

> The victim testified that he can still "feel [the bullet] poking out," and that he continues to endure the effects "of the metal inside [his] leg." Even four years after the shooting, the victim noted that the injury still "disturbs" him at times, and that "something is wrong with [his] leg." The victim stated that, because the bullet "didn't come out of [his] leg," his "life" had been "tampered with." For instance, he can no longer participate in competitive sports, as the injury would present a "very, very, very, very big risk." The medical expert further testified that there are "many repercussions" of the type of muscle damage that the victim sustained: "Muscle damage can cause long-term injuries to the kidneys from leakage of chemicals from the muscle, toxic to the kidneys, can cause pain and weakness, difficulty walking."

So too, the First Department in People v. Garland, 155 A.D.3d 527 (1st Dept. 2017), which this court affirmed, had determined that, "The element of serious physical injury (Penal Law §10.00 [10]) required for the assault convictions (Penal Law §120.10[1], [3]) was established by evidence showing that four years after the complainant was struck by a bullet, he still felt pain and the bullet fragments in his leg and could not engage in sports at the same level as before the incident. This proof sufficiently shows a protracted impairment of health or protracted

impairment of the function of a bodily organ to support a finding of serious physical injury (see Penal Law §10.00 [10]).” 155 A.D.3d at 528.

In citing this court’s disposition in People v. Garland, Appellants’ Brief at page 22, top, intimates in a parenthetical that this case stands for the proposition that the fact the victim was on “crutches for two months” satisfies the statutory standard of “protracted impairment of health.” Such is clearly *not* a fair or accurate reading of this court’s opinion in People v. Garland.

Nor do appellants set forth an accurate account of the disposition of the appellate division in People v. Pittman, 253 A.D.2d 694 (1st Dept. 1998) lv denied, 92 N.Y.2d 1052 (1999) on which appellants also rely. In that case the defendant failed to preserve a challenge on whether the evidence was legally sufficient to establish a “serious physical injury” under the Penal Law, so there is no precedent whatsoever to be derived from that case. In this regard the First Department in People v. Pittman holds, “Defendant's challenge to the sufficiency of the evidence supporting the element of serious physical injury (Penal Law §10.00 [10]) is unpreserved and we decline to review it in the interest of justice.” Id. Yet, the First Department continues in *dicta* to make this non-binding assertion[12], “Were we to

[12] More than a century ago, this court in Colonial City Traction Co. v. Kingston C.R. Co., 154 N.Y. 493 (1897) recognized that only issues central to a decision are binding, but, “[i]f, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official

review this claim, we would find that evidence that the complainant sustained a 4 to 5 inch "incomplete fracture" to her leg and a 4 1/2 inch laceration resulting in a permanent scar, that she required crutches for two weeks after the incident, and that she suffered from pain in her left leg for months as a result of injuries she sustained after defendant struck her on her leg numerous times with a pipe as she lay prone on the basement floor in his apartment building, was sufficient to demonstrate that she suffered "'protracted impairment of health' " Id. Notably, in synthesizing the *dicta* set forth in People v. Pittman, supra, in its parenthetical on page 22 of Appellants' Brief, Appellants omit the temporal aspect of the injury set forth in the court's opinion – that is, the duration of the pain – which in People v. Pittman was over a period of an indeterminate number of *months*. The point being - it cannot be ignored that the statutory definition requires the impairment/injury to be "protracted."

Thus, in People v. Marquez, 49 A.D.3d 451, 853 N.Y.S.2d 553 (1st Dept. 2008), which appellants cite in a footnote on page 22 of its brief, does not support its position. There the court found that the evidence sufficed as to whether the victim had sustained a "protracted impairment of health" as defined in the Penal Law on the basis that, "The fractured bones in the victim's foot, which evidently

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utterance." See also, Mayorga v. Tate, 302 A.D.2d 11 (2nd Dept. 2002) ("[D]icta are not binding as a matter of law.")

failed to heal properly, required him to use crutches for two months *and continued to cause him difficulty in standing and walking two years later*." 49 A.D.3d at 451 (emphasis added).

Accordingly, as all that can be gleaned from the record *sub judice* is that the pedestrian sustained an undisclosed and unspecified injury to one or both legs, that at the time of the accident was not considered life threatening, and the pedestrian allegedly expired within one month of the accident, such does not satisfy the statutory definition of "protracted impairment of health."

In any event, this is not the basis on which the ALJ made its determination and therefore cannot be considered by this court.

POINT V

THE ANNULLMENT OF THE ALJ DETERMINATION BY THE FIRST DEPARTMENT MAY BE SUSTAINED ON THE PRESERVED ISSUE THAT RESPONDENTS FAILED TO PROFFER CLEAR AND CONVINCING EVIDENCE THAT THE PETITIONER FAILED TO EXERCISE DUE CARE IN OPERATING THE BUS AS AN ALTERNATE GROUND FOR AFFIRMANCE

This record evinces a lack of substantial evidence to support the ALJ's conclusion that the bus operator failed to used due care in violation of VTL §1146(c). The testimony offered at the hearing was patently insufficient to sustain a finding of "clear and convincing evidence" to support the violation.

While the ALJ did not set forth his actual findings, the record at a minimum equally permits the conclusion that the pedestrian walked into the bus. Where the evidence is open to competing interpretations, then, as a matter of law, the clear and convincing standard is not met. *See* Matter of Gail R. (Barron), 67 A.D.3d at 812; Ausch, 125 A.D.2d at 45; George Backer Mgmt. Corp., 46 N.Y.2d at 220.

As to the circumstances surrounding the accident, such occurred in the evening during a heavy rainfall and in poor lighting conditions (R.59). The accident occurred while Mr. Seon was in the process of slowly making a right turn onto Vyse Avenue, which is a narrow one-way street, with one lane for moving traffic and cars were parked on both sides of Vyse Avenue (R.64-65).

Mr. Seon had a green light in his favor while making the turn (R.263), as confirmed by P.O. Viera's canvassing of 911 caller accounts (R.55). When Mr. Seon began the turn, there were no pedestrians crossing the street (R.65). He testified to his vigilance in making the turn, explaining:

> A: As I'm making my right turn off of 174th Street onto the on[e]-way which Vyse Avenue, *I'm scanning my mirrors onto my left side and I'm scanning my mirrors on the right side to make sure that there's no, making sure that I don't hit any, any of the parked vehicles and making sure there's no pedestrians in my way.*
>
> Q: Okay. How about the right rear of your bus, are your scanning that area as well?
>
> A: Yes. I, yes. I'm scanning the left side, right side, and my rear.
>
> Q: Okay. *Tell us why you are scanning the right rear*.
>
> A: *To make sure that there's no pedestrians and making sure that I don't swipe any vehicles*

(R.65).

While in the course of making the right turn, Mr. Seon heard a thump towards the front of the bus by the door (R.66). He had been travelling less than one mile per hour (R.57, 267), and he immediately secured and stopped the bus (R.66). The front wheels of the bus had already passed the crosswalk prior to the thump (R.263).

Mr. Seon exited the bus and saw a male lying on the side of the tire, just

behind the tire itself (R.67). This individual was wearing a black hoodie over his head and a large black umbrella was on the ground (R.67).

Importantly, even P.O. Viera acknowledged that, given all the conditions, it may very well have been that contact occurred because the pedestrian walked into the bus and not due to any lack of due care by the Petitioner.

P.O. Viera did not witness the accident nor conduct an investigation contemporaneous with the accident (R.50-51). Nevertheless, although he testified that the right front of the bus struck the pedestrian, he does not state the basis for same. In fact he agreed that the contact could have occurred at the right door (R.59-60), consistent with Mr. Seon's testimony (R.66). The officer admitted that on the day of the accident it was pouring rain and the pedestrian was carrying a big umbrella (R. 58-59). He also admitted that the lighting was dim at that intersection (R. 58-59). Detective Viera also admitted that the pedestrian could have walked into the right front of the bus by the front door (R. 59-60).

He was cross-examined in this regard as follows:

> Q: Officer Viera, were you able to determine the weather condition on the date when this incident occurred?
>
> A: I believe speaking to the motorist that it was a dark, rainy day, yes.
>
> Q: So was that, is that nighttime?
>
> A: *It was nighttime and it was raining*.

Q: Okay. And it was raining heavily?

A: Yes.

Q: And the light conditions in that particular area?

A: *It's very poor lighting*.

(R. 578-59).

* * * *

Q: … *You said that the bus struck the gentleman. Is it possible that the gentleman could have walked into the side of the bus?*

A: *It could be possible*.

Q: Okay. Do you know what the gentleman was wearing on the date of the accident, the pedestrian?

A: No, I don't.

Q: Okay. Do you know if he was carrying an umbrella on that date?

A: Yes. He was carrying an umbrella. According to one of the witnesses, the 911 callers.

Q: Right. He was carrying it, like, carrying or he was using an umbrella?

A: Yes, using an umbrella.

Q: Okay. Do you know if he was wearing a hoodie on that day?

A: No, I don't.

Q: Okay. Would you agree that if someone is, say assuming he was using a hoodie, had the hoodie on and wearing [sic – should be "carrying"] an umbrella, that

could have obstructed his vision as to what's going on?

A: Sure.

(R. 61-62).

Not only was there no clear and convincing evidence submitted to contradict the testimony of the bus operator, but there is also insufficient evidence supporting a finding against same.

Where the record is void of evidence sufficient to meet the standard required by the charged violation, courts have consistently annulled agency determinations on the basis of lack of substantial evidence.

For example, in Russell v. Adduci, 140 A.D.2d 844, 528 N.Y.S.2d 232 (3rd Dept. 1988), the appellate division annulled the findings of the Commissioner of the Department of Motor Vehicles, who found that the motorist who struck and killed an infant pedestrian had failed to exercise due care in violation of VTL §1146. Petitioner was unable to see the infant plaintiff by reason of sun glare, and according to petitioner's account in that case, "A thump was heard and the car was brought to a stop. Only then was it discovered that the child had been struck." In annulling the Commissioner's determination that the motorist had failed to use due care, the court explains that "While the term "due care" is not defined in the statute, the cases connote a standard of reasonableness under the circumstances." *Id.* at 845-46. Moreover, the court noted that fact of an accident does not mean

that due care had not been exercised, stating:

> *Due care is that care which is exercised by reasonably prudent drivers. It is not that degree of care which guarantees that a driver will avoid any accident no matter what the circumstances might be.*

Id. at 845-46. Accordingly, the court annulled the Commissioner's determination on the basis that the petitioner was prudent while operating his vehicle by paying attention to the road and looking ahead of him and the "evidentiary facts cited by respondents as supporting the ultimate factual determination that petitioner was inattentive either do not exist at all in the record or *are based on unduly speculative inferences*." *Id.* at 846.

An entirely analogous situation occurring here, where P.O. Viera and the Petitioner testified that it was heavily raining and it was nighttime and the lighting at the subject intersection was very poor. Accordingly, the lack of visibility caused due to harsh weather conditions, which was further amplified by the poorly lit intersection during the night hours, demonstrates that the alleged accident did not occur as a result of petitioner having failed to exercise due care when operating the bus.

In fact, the evidence before the ALJ supports a finding that the alleged accident occur as a result of the pedestrian's own failure to pay attention to where he was traversing and not due to any lack of care exercised by petitioner. The

pedestrian was wearing a hoodie over his head at night, carrying a big umbrella during the rain, causing an obstruction of his own vision as to oncoming traffic and, thus, resulting in him inadvertently walking into the front door of the bus, while the bus was in a turning maneuver. Accordingly, this accident would not in any way be the fault of the Petitioner as he operated the bus and there certainly is no "clear and convincing evidence" that the Petitioner's lack of care resulted in the accident. *See* Matter of Gail R. (Barron), 67 A.D.3d at 812; Ausch, 125 A.D.2d at 45; George Backer Mgmt. Corp., 46 N.Y.2d at 220.

Because there was no substantial evidence to support a finding that a lack of due care was shown by clear and convincing evidence, the finding that the bus operator failed to use due care is not legally sufficient. Such provides an alternate ground for affirmance of the annulment of the ALJ determination. Parochial Bus Systems, Inc. v. Board of Education, 60 N.Y.2d 539 (1983); New York City Transit Auth. v. Executive Dep't, Div. of Human Rights, 89 N.Y.2d 79 (1996).

CONCLUSION

For the reasons set forth above, the grant of the Article 78 Petition and concomitant annulment and vacatur of the ALJ determination must be affirmed.

In the event the court finds that there was substantial evidence to support the ALJ determination, then in that event, the case must be remanded for disposition of petitioner's due process claims and challenge to the suspension of his license for a period of *at least* 177 days.

Dated: New York, New York
July 19, 2019

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CERTIFICATION OF COMPLIANCE

I hereby certify pursuant to the Rules of Practice of the Court of Appeals, 22 NYCRR §500.13(c)(1) and (3) that the foregoing brief was prepared on a computer using MS Word.

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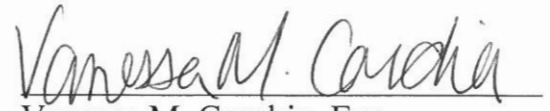
Dated: New York, New York
July 19, 2019



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