APL-2019-00071

To be argued by:
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15 minutes requested

Court of Appeals
State of New York

WILFREDO COLON and RAMONA CORDERO,

Plaintiffs-Appellants,

against

WILLIE MARTIN, JR., NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE CITY OF NEW YORK,

Defendants-Respondents.

BRIEF FOR RESPONDENTS

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PRELIMINARY STATEMENT

The issue in this appeal is whether a claimant is entitled to refuse to submit to pre-suit examination by a municipality—a statutorily mandated precondition to suit—unless a co-claimant is permitted to observe the examination.

Wilfredo Colon and Ramona Cordero served a notice of claim on the City of New York, asserting that a City-owned vehicle rear-ended them. To investigate the claims prior to suit, the City scheduled separate oral examinations of Colon and Cordero under General Municipal Law § 50-h. But Colon and Cordero refused to proceed unless each could observe the other's testimony. Because the City would not agree, plaintiffs never submitted to the mandated examinations.

But they filed suit anyway. Supreme Court, Richmond County (Aliotta, J.) dismissed the case on the ground that Colon and Cordero failed to satisfy the statutory precondition to suit under GML § 50-h. The Appellate Division, Second Department, affirmed, with two justices dissenting. The majority held that the statute permits co-claimants' sequestration and that Supreme

Court properly dismissed the complaint based on the failure to sit for oral examinations. This Court should affirm.

Colon and Cordero did not have the right to condition their willingness to submit to the required oral pre-suit examination on being allowed to observe the other's examination. Their argument to the contrary misreads and distorts the statute; read correctly, the statute excludes the right they claim. And given the statute's aim of facilitating a prompt and effective pre-suit investigation of a claim by a municipality, it is reasonable for a municipality to seek to examine co-claimants separately, so that they cannot coordinate or adjust their testimony.

QUESTION PRESENTED

Does General Municipal Law § 50-h entitle claimants to sue a municipality without submitting to the mandated pre-suit oral examination, where the claimants refused to submit to the examination unless their co-claimant was allowed to attend?

STATEMENT OF THE CASE

A. A tort claimant's statutory obligation to submit to an examination prior to filing suit against a municipality

This appeal involves an important question about the rights granted to municipalities by General Municipal Law § 50-h, a 61-year-old statute intended to allow localities within New York State to investigate the merits of potential claims against them—and possibly settle them—prior to litigation.

Until the mid-20th century, state law authorized only villages to conduct a pre-complaint examination of claimants who had filed a notice of claim against the village. *See* Village Law § 341-c (repealed 1958). Because this "method of operation" had "done much to accelerate the disposition of claims" against villages, the Legislature in 1958 expanded the same rights to all municipal corporations. Mem. of Conference of Mayors and Other Municipal Officials (Mar. 24, 1958), *reprinted in* Governor's Bill Jacket for Ch. 393 (1958) (*see* Compendium ("C") 12).[1] Accordingly,

[1] Pursuant to this Court's rules, respondents filed a Compendium containing the bill jackets for the legislative history cited in this brief.

to provide all "cities, counties, towns, villages and school districts" with the ability to best "determine the merits of a claim, pass on it before litigation has been initiated, and thus eliminate the necessity for litigation in many cases," the Legislature repealed the relevant Village Law provision and added section 50-h to the General Municipal Law. *See* Mem. of Joint Legislative Committee on Municipal Tort Liability, at 2, *reprinted in* Governor's Bill Jacket for Ch. 393 (1958) (C19).

Under § 50-h, once a claimant files a notice of claim, the relevant governmental body has "the right to demand an examination of the claimant" regarding the "occurrence and extent of the injuries or damages." GML § 50-h(1). The examination under § 50-h is to be "upon oral questions" unless otherwise agreed to and "may include" a physical examination by a qualified physician. *Id.* To give teeth to this right of examination, the law bars claimants from commencing an "action" unless the claimant has "complied" with the examination demand, or if the governmental body has not timely exercised its right to an examination. *Id.* § 50-h(5).

As the statute was originally enacted, its second sentence provided: "[i]f the party to be examined is a female she shall, if she desires, be entitled to have such examination in the presence of her own personal physician and such relative or other person as she may elect." *See* Ch. 393 § 2(1) (1958) (C5). Two decades later, when the Legislature amended that clause to give male claimants the same right to bring their own physician, relative, or "other person," lawmakers confirmed that this right was limited to the *physical* examination.

Indeed, in describing the 1976 amendment's "[p]urpose," the Law Revision Commission said that it would "extend to male claimants … the right to have their own physician and relative present at *physical examinations*" conducted under § 50-h. *See* Mem. of the Law Revision Commission, "Purpose of the Bill," *reprinted in* Governor's Bill Jacket for Ch. 22 (1976) (emphasis added) (C93); Ch. 22, § 1 (1976) (C85). That clause of § 50-h now reads, "[i]f the party to be examined desires, he or she is entitled to have such examination in the presence of his or her own

personal physician and such relative or other person as he or she may elect." GML § 50-h(1).

The Legislature drafted § 50-h "with careful attention to safeguarding the rights of the claimant." Mem. of Joint Legislative Committee on Municipal Tort Liability, at 3 (C20). Thus, lawmakers explicitly included several provisions that would "adequately insure the fairness of the examination." *Id.* These provisions laid out "the contents and the time and manner of service of the demand" for examination, provided a claimant with the right to be represented by counsel, and gave a claimant the right to a transcript of the testimony taken at the oral examination and a copy of the physician's report when there had been a physical examination. *Id.*; *see also* GML §§ 50-h(2)-(3) (providing for those rights). Other than those and a few other relatively minor provisions, however, the Legislature provided no express limitations upon the examining entity, and gave claimants no other explicit rights.

B. Colon's and Cordero's refusals to submit to pre-claim examinations unless they were allowed to sit in while the other was questioned

In February 2015, Wilfredo Colon and Ramona Cordero served a joint notice of claim upon the City of New York, the Department of Environmental Protection, and a DEP employee, Willie Martin, Jr. (Record on Appeal ("R") 77-79). The notice of claim alleged that Colon, listed as "Claimant #1," and Cordero, listed as "Claimant #2," each were injured the previous month due to Martin's negligence while he was driving a DEP vehicle (*id.*). The notice stated that Martin rear-ended Colon's vehicle while Colon was driving on the Staten Island Expressway with Cordero in the passenger seat (*id.*).

The notice of claim attached a police report, which contained Martin's explanation of the accident. Martin claimed that while he was driving in "heavy stop and go traffic," the vehicle in front of him "stopped short," that he attempted to swerve to avoid a collision, but that he was unable to do so (R80). A photograph attached to the notice of claim showed a slightly damaged bumper

on the DEP vehicle, but no observable damage to Cordero's vehicle (R83).

Despite the apparent low-speed nature of the accident, Colon and Cordero's notice of claim stated that they suffered "serious bodily injuries," that they continued to require "extensive medical treatment" and experienced "pain and suffering," and that they "sustained lost earnings" (R79).

To gather further information on these claims, the City sought to conduct pre-suit oral examinations pursuant to GML § 50-h. In March 2015, the City informed the attorney who represented both Colon and Cordero that they should appear for § 50-h oral examinations on a specified date the following month (R86-89). Each claimant received separate notifications, because each had made individual claims against the City (*id.*)—indeed their notice of claim identified Colon as claimant "#1" and Cordero as claimant "#2" (R77). Cordero's examination was scheduled for 11 a.m.; Colon's was scheduled for noon on the same date. (R86, 88). On claimants' counsel's request, the examinations were adjourned two months, again scheduled back-to-back on the same

date, and the City again sent separate notifications and scheduled the hearings of each claimant for separate times (R90-92). The day before the scheduled examinations, the City confirmed with claimants' counsel that they would be conducted separately at different times (R109).

Despite these various advance notices about how the City intended to conduct the examinations, when Colon and Cordero appeared, their counsel insisted for the first time that each individual be allowed to remain in the room while the other was examined (R95). Counsel refused to proceed with either hearing unless the City agreed to this demand (R96-97). The City explained that it was permitted to examine Cordero and Colon separately without the other present (R96-98).

The parties each made statements on the record regarding the impasse. Counsel for the City specifically warned that Colon and Cordero's participation in the § 50-h examinations was a condition precedent for filing suit (R97), that the City would assert non-compliance as an affirmative defense (R98), and that claimants risked dismissal of their action if they insisted on their

conditions (R105). Colon and Cordero, through their counsel, asserted an unqualified "right to participate in every single proceeding of other multiple parties" (R99). Their counsel insisted that unless the City went forward under his conditions either that day, or within 30 days, he would consider the City to have waived its right to the examinations (R100).

Four days after refusing to allow his clients to be examined, claimants' attorney sent the City a letter reiterating that he would not let his clients be examined unless they could attend each other's examinations, and that he would give the City 30 days to comply (R128). Because Cordero and Colon refused to alter their conditions, the City was unable to hold the hearings.

C. The complaint and the parties' subsequent motions to dismiss and for summary judgment

Colon and Cordero subsequently filed a verified complaint against Martin, DEP, and the City, alleging that Martin negligently caused the accident with Colon's vehicle (R22-28). As they had indicated they would do, defendants asserted non-compliance with § 50-h as an affirmative defense (R36-37).

Shortly after defendants answered the complaint and asserted their affirmative defenses, Colon and Cordero served a bill of particulars. Both plaintiffs claimed that as a result of the apparent fender-bender, they had been "confined" to their "bed, couch and house" for a significant amount of time—Colon was purportedly "confined" to his house for six-and-a-half months following the accident, and Cordero for seven-and-a-half months (R46). These periods included the date that their § 50-h hearings had been scheduled (R86-92).

The parties agreed on a discovery schedule, including setting dates for depositions (R53-54). But prior to their scheduled depositions, which would have been defendants' first opportunity to probe plaintiffs' allegations, plaintiffs moved for summary judgment on the issue of liability (R7). As part of their motion, Colon and Cordero submitted separate but near-identical affidavits. For example, using virtually the exact same words, each described identical weather on the day of the accident; stated that neither of them did anything to contribute to the accident; and identically estimated that Colon's vehicle was stopped in

traffic "for at least 20 seconds" before the rear impact occurred (A61; A63-64).

Defendants opposed the motion for summary judgment and cross-moved to dismiss the complaint due to plaintiffs' failure to submit to the § 50-h examinations (R65). As part of that opposition, Martin submitted an affidavit stating that prior to the accident he was driving in "stop-and-go" traffic no faster than 10 miles an hour (R115). He explained that he had been driving behind Colon's vehicle for several minutes before the accident, and that just before the accident, he saw Colon and Cordero engaged in what appeared to be a dispute after Colon touched Cordero (*id.*). During this apparent dispute, Martin explained, Colon's car suddenly stopped. Martin attempted to swerve to avoid contact with Colon's vehicle, but he could not avoid it (*id.*).

In opposing defendants' cross-motion to dismiss, plaintiffs argued that the City had waived its right to examine them by not proceeding under their conditions (R125). Plaintiffs did not request, in the alternative, that they should be given the chance to

belatedly sit for the examinations if the City was in fact correct on the law (R117-27).

D. Supreme Court's decision and order dismissing plaintiffs' complaint

Supreme Court granted defendants' motion to dismiss the complaint and denied as moot plaintiffs' motion for summary judgment (R3-6). The court concluded that "[i]n the absence of" anything in § 50-h specifically allowing claimants to observe each other's examinations, the City was entitled to "exclude" each co-claimant (R5). The court also noted that although the Civil Practice Law and Rules (CPLR) has been interpreted to allow parties to observe the depositions of other parties, the CPLR is "not applicable" to an examination conducted under § 50-h (*id.*). Colon and Cordero's refusal to participate in the § 50-h examinations thus meant that their complaint should be dismissed (*id.*).

E. The Appellate Division's split decision affirming the dismissal

The Appellate Division, Second Department, affirmed the dismissal in a 3-2 decision (Riii-ix). The court rejected plaintiffs'

claim that § 50-h gave them the right to "be present at or to observe another claimant's oral examination" (Rv). The court understood § 50-h to set out distinct types of examinations: an oral one and a physical one. Only at the physical examination did a claimant have a right to include "his or her own personal physician" and "such relative or other person" that the claimant chose (*id.*). Thus, because Colon and Cordero had no right to demand that they be present for each other's oral examinations, their failure to comply with the requests for examination barred their claims. Moreover, the court confirmed the reasonableness of sequestration in the § 50-h context, recognizing that as a matter of human nature, it is "much easier" for a witness who observes other testimony to "deliberately tailor" testimony (Rv-vi).

The dissent, in contrast, held that the City could not exclude claimants from each other's examinations because § 50-h did not explicitly contain a "provision authorizing" the City to do so (Rvii). The dissent also understood the portion of § 50-h allowing a claimant to include "such relative or other person as he or she may elect" to be referring to *either* the physical examination or the oral

examination (Rviii). The dissent did not explain how it made sense to give a claimant the right to have his or her own physician present when the examination was to be only oral.

ARGUMENT

SUPREME COURT PROPERLY DISMISSED THE COMPLAINT BASED ON PLAINTIFFS' REFUSAL TO PARTICIPATE IN PRE-SUIT § 50-H EXAMINATIONS

The Second Department correctly held that a claimant is not entitled to refuse to submit to an oral examination held under General Municipal Law § 50-h unless his or her co-claimant is permitted to attend. Contrary to plaintiffs' reading of § 50-h, the Legislature did not give a claimant the right to bring a "personal physician and such relative or other person" to the municipality's *oral* examination. Rather, a plain-meaning and common-sense reading of the statute, confirmed by the legislative history, shows that lawmakers limited that right to situations where the municipality conducts a *physical* examination. And because § 50-h specifically authorizes the presence of individuals other than a claimant's attorney at *physical* examinations, but not *oral*

examinations, standard principles of statutory interpretation demonstrate that the Legislature did not intend to authorize the presence of a co-claimant at an oral examination.

That conclusion comports with § 50-h's purpose, which is to afford a municipality the opportunity for early investigation and potentially settlement of claims against it before any suit is even brought. Separate oral examinations of co-claimants facilitate this fact-finding function and reduce the potential for intentionally or unintentionally tailored testimony. The facts of this case illustrate the wisdom of the Legislature's judgment. Throughout this litigation, plaintiffs have demonstrated a pattern of providing mirror-image written assertions of fact on both mundane and material factual issues. There is every reason to believe that plaintiffs' insistence on observing each other's § 50-h examinations was in furtherance of this proclivity for synchronization.

Because the City was permitted to examine co-claimants separately, without each being present for the other's testimony, Colon and Cordero's refusal to participate in the § 50-h examinations necessarily resulted in the dismissal of their

complaint. *See* GML § 50-h(5). Supreme Court did not err in enforcing § 50-h's requirements, particularly as plaintiffs never even requested that they be given a chance to belatedly comply with the statute. This Court should affirm.

A. Section 50-h's text and legislative history confirm that co-claimants have no right to insist on attending each other's oral examinations.

1. The right to include any "other person" applies only to a physical examination.

Plaintiffs' primary textual argument is that the City may not exclude a claimant from a co-claimant's oral examination because, in their view, when § 50-h(1) states that a claimant may "elect" to have any "other person" present, this right applies to both physical and oral examinations (Appellants' ("App.") Br. 10-11). This reading is wrong on the plain text of the statute and as a matter of common sense, and it directly conflicts with the provision's legislative history. A correct understanding of the statute shows that a claimant may insist on having a "personal physician," "relative," or "other person" only at the physical examination; no such right exists for the oral examination.

The analysis begins with the statute's text. *People v. Francis*, 30 N.Y.3d 737, 740 (2018). Section 50-h(1)'s first sentence allows for "an examination" of the claimant, which "shall be upon oral questions unless the parties otherwise stipulate and may include a physical examination … by a duly qualified physician." GML § 50-h(1). This sentence thus refers to two types of "examination"—an oral one executed by the municipality's designee (typically an attorney), and a physical one performed by a duly qualified physician of the municipality's choosing. The following sentence then states that "[i]f the party to be examined" desires, he or she may have "such examination in the presence of his or her own personal physician and such relative or other person as he or she may elect." *Id.*

While some surface confusion may result from the statute's use of "examination" to refer to two different types of inquiry, it is dispelled by basic principles of statutory construction, which demonstrate that the statute's reference to "personal physician and such relative or other person" applies only to a physical examination and not to both a physical examination and an oral

examination. The first key principle is the "last antecedent rule." Under that rule, "relative and qualifying words or clauses in a statute are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote." *Matter of T-Mobile Northeast, LLC v. DeBellis*, 32 N.Y.3d 594, 608 (2018) (citation, brackets, and quotation marks omitted). In particular, in the statutory phrase "such examination," the word "such" "must … refer to some antecedent," and it is "generally" understood "to refer to the last antecedent in the context." McKinney's Cons. Laws of N.Y., Book 1, Statutes § 254. The last antecedent in "context" here is the "physical examination" mentioned at the end of the preceding sentence in the statute.

This reading is confirmed by other textual elements—most significantly, by the interplay between the first sentence's statement that a physical examination shall be conducted by "a duly qualified physician," and the second sentence's reference to the claimant's ability to have "*his or her own* personal physician" (as well as a relative or other person) attend. The use of the term "own personal" to describe the physician that the claimant may

bring is clearly meant as a counterpart to the "duly qualified physician" that the municipality may select to conduct the physical examination. This echo further shows that "such examination," as used in the second sentence, refers to the physical examination mentioned at the end of the sentence before.

Moreover, as a matter of common sense, the fact that the list of persons in the second sentence commences with the claimant's "own personal physician" strongly suggests that it is the physical examination being referred to. Physicians do not normally attend oral examinations. And, indeed, when the Legislature wished to authorize a suitable person's presence at both an oral and physical examination—the claimant's attorney—it made that intention clear by using the open-ended phrase "any examination." GML § 50-h(3). No similar language appears in the second sentence of § 50-h(1).

The third sentence in GML § 50-h(1) yet further shows why the Appellate Division majority's reading is correct, as it continues by addressing issues relevant only to the physical examination. The third sentence states that "[e]xercise of the right to demand a

physical examination of the claimant" shall not affect a municipality's right to later insist on a physical examination in a subsequent action brought upon the claim. *Id.* The statute's series of proximate references to physical examinations supports the understanding that § 50-h(1)'s second sentence, permitting the claimant to bring his or her "own" physician or other person to "such examination," refers to rights applicable to the physical examination, and not the oral one.

If there were any remaining doubt, the statute's legislative history would eliminate it. Legislative history "can be useful to aid in interpreting statutory language," *People v. Garson*, 6 N.Y.3d 604, 611 (2006), and "[s]ound principles of statutory interpretation generally require examination of a statute's legislative history and context to determine its meaning and scope." *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 434 (1975). Here, the legislative history closes the door to any dispute over § 50-h(1)'s meaning.

The Legislature amended § 50-h(1) in 1976 to allow male claimants to elect to have a personal physician, relative or "other

person" present. Ch. 22 § 1 (1976) (C85). This right had previously been granted only to female claimants. Ch. 393 § 2(1) (1958) (C5). When describing the "[p]urpose of the [b]ill" to amend § 50-h, the Law Revision Commission stated that the right it was equalizing applied to *physical* examinations, noting that the amendment would "extend to male claimants" the right to have the relevant individuals "present at *physical examinations* called for by the municipality." *See* Mem. of the Law Revision Commission (emphasis added) (C93). The Law Revision Commission said nothing about this right applying to oral examinations, either as the law had previously existed or as it would exist after the amendment.[2]

Thus, to the extent that the statute itself leaves open any question about which "examination" the "other person[s]" mentioned in § 50-h(1) are entitled to attend, the legislative

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[2] This understanding—that the right of a claimant to bring a physician or others applied specifically to the municipality's physical examination—was echoed by others as well. *See* Letter of Donald A. MacHarg, Counsel to State of New York Department of Health (Mar. 11, 1976), *reprinted in* Governor's Bill Jacket for Ch. 22 (1976) (C97); Letter of Werner H. Kramarksy, Commissioner of State Division of Human Rights, at 1 (Mar. 3, 1976), *reprinted in* Governor's Bill Jacket for Ch. 22 (1976) (C91).

history provides an irrefutable answer—the physical examination. There is also no other way to understand why, in the original version of the statute, only a "female" claimant was given a special right to be accompanied by a physician or other person. As explained when the law was amended, the statute originally contained this special provision because it was thought that certain "sensibilities" regarding physical examinations were "inherent only in women." *See* Recommendation of the Law Revision Commission to the 1976 Legislature, at 1, *reprinted in* Governor's Bill Jacket for Ch. 22 (1976) (C94). While this assumption was misguided, it at least provides a window into understanding that lawmakers intended that the right to bring "other person[s]" applied only to the physical examination.

2. That § 50-h expressly authorizes claimants to bring particular persons to oral and physical examinations indicates that claimants are not authorized to bring other persons not specified.

Plaintiffs argue that the City could not preclude a claimant from observing the § 50-h examination of a co-claimant because the statute "does not contain any provision authorizing" the City

to do so (App. Br. 10). As just explained, however, § 50-h expressly authorizes the presence of persons other than the claimant's attorney only at a *physical* examination. The Legislature's decision not to provide a comparable authorization for oral examinations, and instead to expressly authorize only the presence of the claimant's attorney, indicates an intent not to grant the right to have others present.

Section 50-h is clear about whom the claimant may bring to an examination. The claimant has the right to have an attorney present at "any examination." GML § 50-h(3). At the physical examination, as discussed, a claimant may also bring his or her personal physician and relative or "other person." *Id.* § 50-h(1). The statute identifies no other person that the claimant may demand to have present. Because it is a "universal principle" of statutory interpretation that "the specific mention of one person or thing implies the exclusion of other persons or thing," *see* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240, the

statute itself repudiates plaintiffs' claim that they have a right to attend each other's examinations.[3]

This principle of *expressio unius est exclusio alterius* has been "uniformly [] applied" by this Court for decades. *See Erkenbrach v. Erkenbrach*, 96 N.Y. 456, 466 (1884); *Morales v. County of Nassau*, 94 N.Y.2d 218, 224 (1999); *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549, 560 (2014). The doctrine "limit[s] the expansion of a right or exception"—exactly what plaintiffs are improperly attempting to do here. *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 72 (2013).

A claimant thus may not impose conditions on a § 50-h examination by asserting a right that the statute, by exclusion, must be read to withhold. And relatedly, returning to the legislative history, the Legislature made very clear which limited claimant "rights" were included to "insure the fairness of the examination." *See* Mem. of Joint Legislative Committee on

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[3] Plaintiffs' demand here can be contrasted with situations where the presence of another person may be necessary to effectuate the examination itself, such as where a claimant of limited English proficiency requires an interpreter or a child claimant of tender age requires the presence of a parent.

Municipal Tort Liability, at 3 (C20). These were the mandates addressing (a) "time and manner of service of the demand"; (b) the right to counsel; and (c) the right to a transcript and physician's report. *Id.* The right to observe a co-claimant's oral examination was not included.

B. A right to have a co-claimant attend an oral examination would disserve § 50-h's purpose.

1. A co-claimant's presence would undermine the fact-finding role of the oral examination.

The purported right that plaintiffs assert also works against § 50-h's purpose. *Cf. Hernandez v. Barrios-Paoli*, 93 N.Y.2d 781, 786 (1999) (noting that "the general spirit and purpose of the statute is an important aid in understanding the meaning of its words"). The Legislature enacted § 50-h because it recognized that both claimants and municipalities benefitted from a reduction in the "number of cases in which resort must be had to litigation to determine the legitimacy of a claim." *See* Mem. of Joint Legislative Committee on Municipal Tort Liability, at 1 (C18). The statute was intended to provide for "fair and reasonable procedures" that

would enable the municipality "to determine with maximum accuracy," prior to litigation, whether a claim was "just or unjust." *Id.* This new process would hopefully "eliminate the necessity for litigation in many cases" because the municipality would settle meritorious claims pre-filing. *Id.* at 2 (C19).

Thus, by allowing sequestering of co-claimants, § 50-h gives the municipality the best chance to "determine with maximum accuracy" the claimed underlying facts. For this reason, the only court to have previously addressed the issue presented here dismissed a similar challenge, finding that a locality could require sequestered examinations of multiple claimants. *See Fitzgerald v. Sanitation District No. 6 of the Town of Hempstead,* 89 Misc. 2d 1078, 1079-80 (Sup. Ct. Nassau Cnty.), *modified on other grounds*, 116 Misc. 2d 325 (App. Term, 2d Dep't 1977). As that court concluded, sequestering co-claimants was consistent with the statute's aims since § 50-h was meant to allow the municipality to "properly investigate the facts" in order to "avoid needless litigation," rather than to "make coclaimants aware of each others' testimony." *Id.*

As the Second Department correctly recognized, "human nature" leads witnesses to tailor their testimony to what they have already heard from other witnesses (Rv-vi). And in cases where there are multiple claimants, obtaining each claimant's unvarnished story is important for purposes of considering settlement—the very point of § 50-h. For instance, even when co-claimants assert injuries arising from the same event, the claimants are not necessarily equally situated. They may have distinct theories of liability, different claimed injuries, or even different memories of what occurred. The City may determine that one claimant has a meritorious claim or injury, while a co-claimant does not. By interviewing each claimant outside of the presence of a co-claimant, the City has the best opportunity to accurately understand the merits of each claimant's case and determine whether to settle with any claimant.

The dissent below, and plaintiffs, dispute that there is any inherent risk to factual accuracy in allowing one testifying witness to hear the other's version of events before presenting testimony (Rviii, App. Br. 16). This view is at odds with the standard

practice of requiring that trial witnesses be sequestered from the courtroom to avoid hearing testimony prior to giving their own. As the U.S. Supreme Court has recognized, this practice has the "twofold" result of "exercis[ing] a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses," as well as "aid[ing] in detecting testimony that is less than candid." *Geders v. United States*, 425 U.S. 80, 87 (1976). These overlapping principles correspond to § 50-h's goals as well.

Plaintiffs also contend that courts have "decided appeals pertaining to [§ 50-h] issues where co-claimants were present at each other's [] hearings" (App. Br. 16), presumably drawing the conclusion that this means there can be no risk of tailored testimony. But even if the cases that plaintiffs cite could be read to contain the proposed factual predicate, the cases do not undermine the generally accepted principle that a witness is less apt to coordinate a story if he or she tells it without hearing another version first.

Plaintiffs, following the dissenters in the Appellate Division, also suggest that the discovery rules that apply to post-complaint

depositions should apply to § 50-h hearings (App. Br. 16, Rix). While CPLR 3113(c) has been understood to allow parties to an action to observe depositions, *see Perez v. Time Moving & Stor.*, 28 A.D.3d 326, 328 (1st Dep't 2006), this Court has already confirmed that the CPLR provisions that govern post-complaint deposition practice have no bearing on the separate, investigatory pre-suit examinations granted by the General Municipal Law. *See Alouette Fashions, Inc. v. Consolidated Edison Co.*, 119 A.D.2d 481, 487 (1st Dep't 1986), *aff'd for reasons stated by Appellate Division*, 69 N.Y.2d 787, 791 (1987).

And just as importantly, the examination allowed by § 50-h and the deposition permitted under the CPLR serve different purposes: allowing for prompt investigation and minimizing the need for litigation, in § 50-h's case, and providing for a "broad and comprehensive method of obtaining disclosure" during litigation, in the case of the relevant CPLR provisions. *Alouette Fashions*, 119 A.D.2d at 487. Sequestration as a matter of course directly serves § 50-h's purpose, but it does not necessarily do so for depositions. Notably, however, even the CPLR allows

sequestration of co-parties at the deposition stage where, like here, the co-parties' "interests are virtually identical and each is represented by the same attorney," meaning that allowing each "to testify in the presence of the other would clearly work an unfair advantage in their favor." *Estate of Czachor*, 137 A.D.2d 915, 916 (3d Dep't 1988).

2. The facts of this case demonstrate why sequestering co-claimants promotes § 50-h's goals.

This case presents a perfect example of why it is consistent with § 50-h's purpose to examine co-claimants individually without the other present. Throughout this litigation, Colon and Cordero have made strategic choices that seem designed to prevent the City from getting information about their individualized recollections and claims. The result of these choices is that defendants have never been able to adequately probe plaintiffs' claims, even for the purpose of potential settlement. Rather, although it seems unlikely that each plaintiff could have experienced the same injuries and had the same memories of the event, plaintiffs have essentially presented their case in lockstep.

For instance, in their notice of claim, plaintiffs declined to explain how each was separately injured in the accident, instead asserting generally that *both* claimants "sustained serious bodily injuries" that continued to require "extensive medical treatment" and that they both "sustained lost earnings" (R79). Then, in their joint bill of particulars, although they separately estimated their medical expenses, plaintiffs *each* claimed that they were "confined to [their] bed, couch and house," and for almost the exact same amount of time: from "1/15/15 to 8/1/15" for Colon, and from "1/15/15 to 9/1/15" for Cordero (R46). Finally, instead of sitting for their scheduled depositions, plaintiffs decided to move for summary judgment and submit near-identical "Affidavit[s] of Merit" (R61-62, R63-64).

In these separate affidavits, both Colon and Cordero identically described the weather as "clear and dry," identically described the accident as occurring when Colon's "car was unexpectedly hit directly in the rear-end by a 2004 Ford 350 truck," and identically estimated that Colon's vehicle was "stopped for at least 20 seconds before the impact occurred" (R61, R63).

Colon and Cordero's pattern of coordination demonstrates why § 50-h allows municipalities to examine claimants separately and without the risk of testimonial synchronization, something that likely would have occurred here.

C. Supreme Court correctly dismissed the complaint rather than *sua sponte* allowing plaintiffs to belatedly comply with § 50-h.

Supreme Court's decision to dismiss plaintiffs' lawsuit based on their failure to comply with the examination requirement was consistent with § 50-h(5)'s mandate and supported by ample precedent. While plaintiffs now contend that the court committed an "abuse of judicial discretion" by not compelling them to belatedly comply with their obligations (App. Br. 3), they never asked the court for the opportunity to do so. The court cannot have abused its discretion by failing to *sua sponte* grant relief that plaintiffs never requested. And anyway, plaintiffs' failure to request this relief in Supreme Court means that they have forfeited the opportunity to obtain it here. *See Bingham v. N.Y.C. Transit Auth.*, 99 N.Y.2d 355, 359 (2003) (this Court "lack[s]

jurisdiction to review unpreserved issues in the interest of justice"). The Court need go no further.

Nonetheless, Supreme Court's determination to dismiss the case was correct. There is no question that absent exceptional circumstances, a plaintiff's failure to comply with § 50-h warrants dismissal of an action. *Palmieri v. Town of Babylon*, 139 A.D.3d 927, 927 (2d Dep't 2016); *Hymowitz v. City of New York*, 122 A.D.3d 681, 682 (2d Dep't 2014); *Taylor v. N.Y.C. Hous. Auth.*, 234 A.D.2d 52, 53 (1st Dep't 1996). The circumstances that qualify as exceptional are rare: "extreme physical or psychological incapacity" could qualify, *see Hymowitz*, 122 A.D.3d at 682, but incarceration does not, *see Zapata v. County of Suffolk*, 23 A.D.3d 553, 554 (2d Dep't 2005). Plaintiffs' incorrect understanding of the law is not an exceptional circumstance excusing them from compliance.

Nor would it have made sense to allow plaintiffs to submit to § 50-h examinations so long after their litigation had commenced. By the time Supreme Court decided the City's motion to dismiss, nearly a year had passed from when plaintiffs elected to file suit

without submitting to § 50-h hearings. It would not have served the statute's purpose—promoting efficient settlement by allowing for an early, pre-suit investigation of claims—to order plaintiffs to appear for the examinations at that time. Plaintiffs' failure to even seek this relief below was perhaps an implicit recognition that a § 50-h hearing would serve little purpose at that late stage.

Neither would considerations of equity suggest that plaintiffs should be given the mulligan they now want. Plaintiffs charted their litigation course by declining to comply with the City's request for examination, filing their lawsuit anyway as if it were business as usual, and thereby placing their case at risk of dismissal. They could have instead sat separately for the examinations and, upon commencement of their suit, sought ex post remedies, such as a protective order preventing the City from making any further use of the examinations on the ground that they were taken improperly. Alternatively, they could have sought to commence a proceeding by order to show cause and included a request for a prompt judicial ruling that the statutory condition

precedent to suit should be deemed satisfied.[4] Plaintiffs did neither, and they should not be allowed a do-over when the strategy they selected proved to be misguided. *See Garayua v. N.Y.C. Police Dep't*, 68 N.Y.2d 970, 972 (1986) (parties that had "charted their own procedural course" could not later complain about the procedure on appeal).

Plaintiffs' appellate counsel now states that trial counsel was "acting solely in the interest of his clients" (App. Br. 15). But this does not alter that when counsel refused to allow his clients to be examined, he knowingly made a strategic decision that carried enormous risk, without taking any mitigating measures. Enforcing the requirements of § 50-h(5) by dismissing plaintiffs' complaint is not, as plaintiffs claim, "tantamount" to a due process violation (*id.*)—it is the natural, foreseeable, and proper outcome of this case.

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[4] Because the dispute over the § 50-h proceeding arose in June 2015, almost 10 months before the termination of the one-year-and-90-day statute of limitations on their claims, *see* GML § 50-i, plaintiffs presumably had ample time to obtain a ruling on whether their demands had merit.

CONCLUSION

The decision and order appealed from should be affirmed.

Dated: New York, NY
August 23, 2019

Respectfully submitted,

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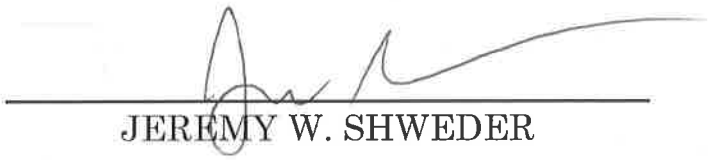
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 6,433 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.



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