



but extended near the entranceway. Defendant's principal conceded that employees would shake the flowers to remove excess water, albeit inside the refrigerator, and that sometimes spills occurred. In addition, the employees were instructed to mop up any spills right away. The deposition testimony of both plaintiff and defendant's principal thus permits the inference that defendant's employees created the wet condition that caused plaintiff's accident (see *Kesselman v Lever House Rest.*, 29 AD3d 302 [2006]). There are also triable issues of fact as to whether defendant had sufficient notice to remedy the hazardous condition, given that the water was on the floor for at least 15 minutes and several employees were working in the area of the spill.

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

ENTERED: JANUARY 5, 2010

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Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1631 Alberto Osorio, Jr., etc., et al., Index 6924/03  
Plaintiffs-Respondents,

-against-

Thomas Balsley Associates,  
Defendant-Appellant,

The City of New York, et al.,  
Defendants.

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Gogick, Byrne & O'Neill, LLP, New York (Elaine C. Gangel of  
counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of  
counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.),  
entered September 22, 2008, which denied defendant-appellant's  
motion for summary judgment dismissing the complaint, unanimously  
reversed, on the law, without costs, the motion granted, and the  
complaint dismissed as to appellant. The Clerk is directed to  
enter judgment accordingly.

The 12-year-old plaintiff was injured when, while playing  
tag with his friends, he climbed onto a "ballet bar" or  
"stretching bar" in the adult fitness area of a municipally-owned  
park, and fell over an adjacent perimeter fence, dropping  
approximately nine feet to the sidewalk outside the park.  
Plaintiff sued two municipal defendants, who are not parties to  
this appeal, and Thomas Balsley Associates, the landscape  
architectural firm which designed the playground.

The floor of the fitness area underneath the stretching bar is rubberized, and is located five feet higher than the outside sidewalk. Separating the fitness area from the sidewalk is a five-foot retaining wall, and a four-foot wrought iron fence on top of a two-inch-high concrete curb, which itself rests on the retaining wall. The perimeter fence is located 18 inches from the stretching bar.

The infant plaintiff testified at a hearing pursuant to General Municipal Law § 50-h that he and four of his friends were playing the game of tag, and that he climbed onto the bar. After he climbed onto the bar, he fell off, and his chest came into contact with the fence next to it. He then fell over the fence.

Balsley moved for summary judgment dismissing the complaint on the theory that plaintiff had assumed the risk of potential consequences of his play activity, and actually created the risk of injury by climbing onto the bar. In opposition, plaintiff argued that the doctrine of assumption of the risk does not bar recovery in its entirety, but merely permits a jury to reduce damages after apportionment.

The court denied the motion, finding that an issue of fact existed as to whether the infant plaintiff engaged in the game of tag in the location with the full understanding of the harm; i.e., whether he knew that if he played on the stretching bar he was putting himself in danger, because, inter alia, there were no

warning signs or fences restricting children from the adult fitness area.

We reverse. The threshold issue is not whether plaintiff assumed a dangerous risk, but whether he, in fact, created one. In the absence of any indication that there had been prior incidents involving the stretching bar's improper use, the fact that it could be used for a purpose other than its intended use did not render its availability foreseeably dangerous (*Barretto v City of New York*, 229 AD2d 214, 220 [1997], *lv denied* 90 NY2d 805 [1997]). The circumstances presented here establish that, regardless of the location of the perimeter fence, the sole proximate cause of the incident was plaintiff's voluntary decision to use the stretching bar for climbing (see *Ascher v Scarsdale School Dist.*, 267 AD2d 339 [1999]; *Matter of Banks v City School Dist.*, 257 AD2d 723 [1999]). Since he has failed to prove that any consequent risk of his intentional misuse of the bar was concealed, Balsley's motion should have been granted.

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

ENTERED: JANUARY 5, 2010

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Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

653 Yun Tung Chow, et al., Index 7851/04  
Plaintiffs-Appellants, 84556/05  
84906/05

-against-

Reckitt & Colman, Inc., et al.,  
Defendants-Respondents,

55<sup>th</sup> Realty Inc.,  
Defendant.

[And Other Actions]

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Ronemus & Vilensky, New York (Lisa M. Comeau of counsel), for appellants.

Ahmuty, Demers & McManus, Albertson (Christopher Kendric of counsel), for Reckitt & Colman, Inc. and Reckitt & Benckiser, Inc., respondents.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for Malco Products, Inc., respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered March 14, 2008, which, to the extent appealed from, as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

Plaintiff Yun Tung Chow sustained an eye injury while using defendants' product, crystalline sodium hydroxide, packaged as a drain cleaner called "Lewis Red Devil Lye." When injured, Chow was attempting to use the lye to unclog a floor drain in the kitchen of the restaurant where he worked. A warning printed on the label of the bottle stated that the lye should be used only as directed. The warning also advised users to "[k]eep face away

from can and drain at all times" and that "[m]isuse may result in splash back and serious injury." The label's directions called for the insertion of only one tablespoon of lye directly into a drain. Despite the warning and directions, Chow mixed three spoonfuls of lye with three cups of water in an aluminum can. Without using eye protection, another precaution directed by the label, Chow bent over and poured the mixture into the drain. At that point, caustic liquid splashed back into Chow's face, causing the injury. The relevant negligence and strict liability causes of action are based on theories of inadequate warning and design defect. The court properly dismissed the inadequate warning claims. Chow testified that he made no attempt to read or to obtain assistance in reading the label; accordingly, any purported inadequacies in the product's labeling were not a substantial factor in bringing about the injury (*see Perez v Radar Realty*, 34 AD3d 305, 306 [2006]; *Sosna v American Home Prods.*, 298 AD2d 158 [2002]; *Guadalupe v Drackett Prods. Co.*, 253 AD2d 378 [1998]).<sup>1</sup>

Plaintiffs base their design defect claim upon lye's propensity to cause splashback. "[A] defectively designed product is one which, at the time it leaves the seller's hands,

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<sup>1</sup>Defendants also argue that the inadequate warning claims are precluded by the Federal Hazardous Substances Act (FHSA) (15 USCA § 1261 *et seq.*). We decline to consider this argument inasmuch as it is made for the first time on appeal (*see Omansky v Whitacre*, 55 AD3d 373, 374 [2008]).

is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983] [citation and internal quotation marks omitted]).

On a summary judgment motion in a products liability case, "if a defendant comes forward with any evidence that the accident was not necessarily attributable to a defect, the plaintiff must then produce direct evidence of a defect" (*Sideris v Simon A. Rented Servs.*, 254 AD2d 408, 409 [1998] [citation and internal quotation marks omitted]). In a design defect case, the evidence a plaintiff is required to produce must establish "that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner" (*Voss* at 108). Defendants have met their burden by making a prima facie showing that Chow's failure to heed the product warning was the sole proximate cause of the accident (*see e.g. Guadalupe*, 253 AD2d at 378; *Sabbatino v Rosin & Sons Hardware & Paint*, 253 AD2d 417 [1998], *lv denied* 93 NY2d 817 [1999]).

To meet their own burden, plaintiffs rely upon the affidavit of Meyer Rosen, a chemist and chemical engineer, who opines that Red Devil Lye is unreasonably dangerous and has known propensity

to cause splashback. Rosen next posits that nothing Chow did caused his injury. This aspect of Rosen's opinion lacks probative value because it omits critical discussion of Chow's use of more than the recommended one tablespoon of lye as well as his failure to keep his face away from the drain per the label's instructions. The omission is significant because a manufacturer need not incorporate safety features into its product so as to guarantee that no harm will come to every user no matter how careless or reckless (see *Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 481 [1980] [citations omitted]). Rosen also opines that a safer alternative to the product can be created by diluting it to a three to five percent sodium hydroxide composition. How he arrived at these percentages is unexplained. Also, without citing a basis for his opinion, Rosen simply concludes that his recommended dilution of the product would provide drain cleaning power strong enough to open clogged drains although it would take "somewhat longer to do the job." Similarly unsupported is Rosen's postulation that bottling lye in a water-based solution would not change its chemical composition or render it ineffective. In considering the feasibility of a safer alternative design, "it must be recognized that two differently designed products that . . . are generally similar in function, may nonetheless yield results so different in quality as to make it impossible to characterize the design of the safer

product as a feasible alternative to the design of the more hazardous product" (see *Rose v Brown & Williamson Tobacco Corp.*, 53 AD3d 80, 84 [2008], *affd sub nom. Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545 [2008], *cert denied* \_\_ US \_\_, 130 S Ct 197 [2009]). Rosen's affidavit is insufficient to raise a triable issue of fact because it does not set forth the foundation for his conclusion that his suggested alternatives are feasible (*cf. David v County of Suffolk*, 1 NY3d 525 [2003]). As such, the affidavit falls short of explaining how the product can feasibly be made safer, as required by *Wegenroth v Formula Equip. Leasing, Inc.* (11 AD3d 677, 680 [2004]), a case cited by the dissent.

Rosen's choice of source materials is also dubious. Rosen cites a 1970 proposal by the Food and Drug Administration for an amendment of the FHSA so as to have liquid drain cleaners consisting of 10% or more of sodium hydroxide listed as banned hazardous substances. By its own terms, however, the proposal was not aimed at preventing splashback. Its purpose was to curb "serious injuries and some deaths following accidental ingestion" of liquid drain cleaners by children under five years of age. Rosen also cites a 1989 letter to the Consumer Product Safety Commission from The Association of Trial Lawyers of America. It should go without saying that in the field of chemistry, a letter from a bar association would not fall within the "professional

reliability" exception to the rule that an expert's opinion must be based upon facts in the record or personally known to the expert (see e.g. *Hamsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984]). We have considered plaintiffs' remaining contentions and find them without merit.

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

FREEDMAN, J. (dissenting)

I would reverse and deny summary judgment to defendants because plaintiffs have raised an issue of fact whether defendants' drain cleaning product, Lewis Red Devil Lye, was defectively designed.

Plaintiff Yun Tung Chow was seriously burned and blinded in one eye after Red Devil Lye splashed back onto his face while he was using it to clean a clogged floor drain at a restaurant where he was employed. Red Devil Lye was a powdered substance made of 100% sodium hydroxide, which is a powerful caustic agent capable of dissolving organic tissue by chemical action. Chow, who had immigrated to this country 11 years earlier and could not read English, testified that he had used Red Devil Lye numerous times before, but was unable to read the directions and warnings on its label, which instructed users to pour one tablespoon of Red Devil Lye directly into the clogged drain. Instead, since only about three spoonfuls of Red Devil Lye were left in the container, Chow put the remainder into an aluminum can, mixed in about three cups of water, and poured the mixture down the drain. When Chow bent over the drain to examine it, the contents spouted back onto his face and injured him.

I agree with the majority that the motion court properly dismissed plaintiffs' products liability claim based on the theory of inadequate warning. The Red Devil Lye container was

labeled "poison," bore a picture of a skull and crossbones, and warned users to wear eye protection when using the product. The label warned of the risk of splashback if Red Devil Lye was used improperly, and that physical contact with the product could cause burning or blindness. Since Chow testified that he did not read the label or ask another person to read it to him, any purported inadequacies in the product's labeling were not a substantial factor in bringing about the injury (see *Perez v Radar Realty*, 34 AD3d 305, 306 [2006]; *Sosna v American Home Prods.*, 298 AD2d 158 [2002]; *Guadalupe v Drackett Prods. Co.*, 253 AD2d 378 [1998]).

While defendants did not meet their burden of demonstrating that the labeling on the can complied with the Federal Hazardous Substances Act (15 USC § 1261 *et seq.*) so as to preclude a State law improper labeling claim (see *Guadalupe* at 378), additional labeling would not have prevented Chow's injury.

However, plaintiffs raised a triable issue of fact with respect to their strict products liability claim based on defective design, by introducing expert testimony that Red Devil Lye was too dangerous to be marketed for use by general consumers rather than professionals. To establish a prima facie case for a defective design claim, the plaintiff must show that the manufacturer marketed a product that was not "reasonably safe" because of its defective design, and that the defective design

was a substantial factor in causing injury (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107-109 [1983]). A defectively designed product is deemed not to be reasonably safe where a reasonable person, knowing at the time of manufacture about the defect, would conclude that the inherent risk of introducing the product into the stream of commerce outweighed its utility (see *id.* at 108). A plaintiff can proffer expert testimony to establish that a product was defectively designed (see *Warnke v Warner-Lambert Co.*, 21 AD3d 654, 656 [2005]). The risk-utility analysis may also involve a determination as to whether there is a feasible alternative design that would make the product safer. "Where . . . a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that it is feasible to do so, it is usually for the jury to make the required risk-utility analysis" whether the product was reasonably safe (*Wengenroth v Formula Equip. Leasing, Inc.*, 11 AD3d 677, 680 [2004]).

Plaintiffs' expert Meyer R. Rosen, a chemical engineer and chemist, as well as a Fellow of both the American Institute of Chemists and the Royal Society of Chemistry, opined that Red Devil Lye was unreasonably dangerous and had a known propensity to react explosively with water within a clogged drain and cause splashbacks. He averred that pouring the mixture of Red Devil Lye and water down the drain caused a chemical reaction that

generated enough heat to boil the water and produce steam pressure, which rapidly expanded the caustic solution and other drain contents. Since the drain remained clogged, Rosen stated, the contents expanded "explosively" out of the drain onto Chow. He explained that ordinarily Mr. Chow would have seen bubbling in the aluminum container in which he mixed the lye with water, which would have alerted him to a potential danger, but this did not happen. Thus, Rosen concluded that it was the pressure from the steam pipe and not the failure to follow the specific directions concerning either the amount of the product used or direct insertion into the drain that caused the injury.

While Rosen mentions the two 1970 FDA proposals to ban such substances and the 1989 letter to the Consumer Product Safety Commission, he does not, as the majority suggests, rely upon them for his opinion. Rather he sets forth what appear to be a clear explanation for the chemical reaction that occurred and recommendations for plausible alternatives, some of which are similar to products on the market. To characterize the utility of the suggested alternatives as "unsupported" or "conclusory" is unsound, because such products either exist or may be easily manufactured.

Rosen acknowledged that Red Devil Lye was an effective drain cleaner, but added that "the risk far outweighs its utility," since "the chemical and toxicological properties of [sodium

hydroxide] make it among the most dangerous chemicals known." He further opined that defendants could have made a safer alternative by diluting the sodium hydroxide to a 3 to 5% lye solution, and that this solution "would still be strong enough to open clogged drains, albeit taking somewhat longer to do the job." As another alternative, Rosen suggested selling a premade lye and water solution, which "would not change the chemical and . . . would still be as effective."<sup>1</sup> He concluded that in his opinion, Red Devil Lye was too dangerous to be marketed for use by lay people.<sup>2</sup>

Defendants claim that the diluted sodium hydroxide products that plaintiffs' expert proposed as alternatives are not reasonably equivalent to Red Devil Lye because they would take longer to unclog drains. As support for their position,

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<sup>1</sup>As a final alternative, Rosen proposed that defendants sell Red Devil Lye, safety goggles, a face shield and rubber gloves packaged together as a single product. However, a product that included those safety items would cost so much more than Red Devil Lye alone that the two cannot be deemed functional equivalents.

<sup>2</sup> As further support for their claim, plaintiffs also offered a 1989 letter from the Association of Trial Lawyers of America to the United States Consumer Product Safety Commission stating that the Association knew of 21 instances in which the use of Red Devil Lye had caused serious injuries from splash backs, and that many safer drain cleaners were on the market. The letter requested that the Safety Commission remove Red Devil Lye from consumer markets and issue a recall.

defendants cite to *Felix v Akzo Nobel Coatings* (262 AD2d 447 [1999]), and *Adamo v Brown & Williamson Tobacco Corp.* (11 NY3d 545 [2008], cert denied \_\_ US \_\_, 130 S Ct 197 [2009]), in which proposed alternatives to a defective product were found not to be equivalents. Both cases are distinguishable. The product in question in *Felix* was a solvent-based, quick-drying lacquer floor sealer that was highly flammable.<sup>3</sup> The plaintiff argued that a safer, water-based lacquer sealer could have been substituted, but the Court held that the water-based sealer was a functionally different product from solvent-based lacquer because it took hours longer to dry, differed greatly in price, and produced results that did not match solvent-based lacquer in the appearance, hardness, and scratch-resistance of the finish (262 AD2d at 448-449). In this case, the functional difference between Red Devil Lye and the safer dilutions would be minimal. The dilutions would be as effective at accomplishing Red Devil Lye's essential purpose of unclogging drains, and would at most take somewhat longer to work.

In *Adamo*, the Court of Appeals held that "light" cigarettes are functionally different products from regular cigarettes containing higher levels of nicotine because it found that the function of cigarettes is to give pleasure to smokers, and that

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<sup>3</sup>This Court cited *Felix* with approval in *Perez v Radar Realty* (34 AD3d 305, 306 [2005]), which also involved a lacquer-based sealer.

light cigarettes are less satisfying to smokers than regular cigarettes. *Adamo* is similarly inapposite because dilutions would not impair Red Devil Lye's function of unclogging drains. Moreover, although cigarettes may cause harm over a long period of time, they do not present the immediate type of danger present here.

Accordingly, I would reinstate plaintiffs' claim sounding in strict products liability and let the finder of fact determine whether Red Devil Lye's utility outweighed its inherent danger.

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

ENTERED: JANUARY 5, 2010

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Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1465-

1466-

1467N

1467NA Cindy Ocasio-Gary, etc.,  
Plaintiff-Respondent,

Index 6229/99  
86084/07

-against-

Lawrence Hospital, et al.,  
Defendants-Appellants,

St. Barnabas Hospital, et al.,  
Defendants.

[And a Third-Party Action]

- - - - -

Cindy Ocasio-Gary, etc.,  
Plaintiff-Appellant,

-against-

St. Barnabas Hospital,  
Defendant-Respondent,

Lawrence Hospital, et al.,  
Defendants.

[And a Third-Party Action]

- - - - -

Cindy Ocasio-Gary, etc.,  
Plaintiff-Respondent,

-against-

Lawrence Hospital, et al.,  
Defendants,

Gary B. Orin,  
Defendant-Appellant.

[And a Third-Party Action]

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Pilkington & Leggett, P.C., White Plains (Michael N. Romano of  
counsel), for Lawrence Hospital, appellant.

Kanterman, O'Leary & Soscia, LLP, White Plains (Thomas J. Miller of counsel), for Leona D. Borchert, Nasir Rizvi, Brad Dworkin and Westchester County Health Care Corporation, appellants.

Pollack, Pollack, Isaac & DeCiccio, New York (Brian J. Isaac of counsel), for Cindy Ocasio-Gary, respondent/appellant/respondent.

Lewis Johs Avallone Aviles, LLP, Riverhead (Brian J. Greenwood of counsel), for Gary B. Orin, appellant.

Garbarini & Scher, P.C. New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

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Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 29, 2008, dismissing the complaint against defendant St. Barnabas Hospital, unanimously reversed, on the law, without costs, and the complaint reinstated. Appeal from order, same court and Justice, entered April 18, 2008, which granted defendant St. Barnabas Hospital's motion for summary judgment, unanimously dismissed, without costs, as subsumed in appeal from the judgment. Order, same court and Justice, entered October 16, 2008, which, to the extent appealed from, denied the motion by defendant Lawrence Hospital and renewal of a prior motion by third-party defendant Westchester County Medical Center on behalf of itself and defendants Burchart, Rizvi and Dworkin, for change of venue, and granted plaintiff's cross motion to retain venue in Bronx County, unanimously affirmed, without costs. Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered June 17, 2008, which, to the extent appealed from, denied defendant Orin's cross motion to vacate the note of issue and

certificate of readiness and to extend his time to serve a motion for summary judgment, unanimously affirmed, without costs.

The affirmation of St. Barnabas's medical expert fails to establish prima facie that the treatment of plaintiff's decedent in the emergency room of St. Barnabas Hospital comported with good and accepted practice. The record shows that the decedent was brought to the emergency room by ambulance with complaints of headache, nausea, palpitations and of having an anxiety attack that was not relieved by medications that had been previously prescribed by his private physicians. The expert opines that the decedent was appropriately evaluated and appeared to respond favorably and that the evaluation was well within the standard of care for emergency medicine. However, the expert does not specify in what way the decedent was evaluated and he does not elucidate the standard of care for emergency medicine other than to state that emergency room staff has the limited role of determining whether a patient has a life-threatening or serious illness. While the expert opines that the decedent did not require a urine test, blood test, CT-scan, MRI or x-ray, he does not explain "what defendant did and why" (*Wasserman v Carella*, 307 AD2d 225, 226 [2003]). This conclusory affidavit is

insufficient to establish St. Barnabas's entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Even had St. Barnabas met its initial burden, plaintiff's expert's submission raises triable issues of fact regarding the hospital's negligence (see *DaRonco v White Plains Hosp. Ctr.*, 215 AD2d 339 [1995]). The trial court should not have rejected the expert's opinion on the ground that the expert failed to expressly state that he or she possessed the requisite background and knowledge in emergency medicine to render an opinion. The expert, who is board certified in internal medicine, is qualified to render an opinion as to diagnosis and treatment with respect to the symptoms presented by the decedent. In contrast, the expert's affirmation in *Browder v New York City Health & Hosps. Corp.* (37 AD3d 375 [2007]), cited by the trial court, failed to indicate either the expert's specialty or that he or she possessed the requisite knowledge to furnish a reliable opinion.

Venue should be retained in Bronx County. The only ground for the motion to change venue was the dismissal of the complaint against St. Barnabas, and the complaint has been reinstated.

The motion to vacate plaintiff's note of issue, served more than 20 days after service of that note, was properly denied as untimely (see 22 NYCRR 202.21[e]), "no showing of special circumstances or adequate reason for the delay having been

offered" (*Arnold v New York City Hous. Auth.*, 282 AD2d 378 [2001]). Nor did the court err in finding that defendant Orin failed to demonstrate good cause for an extension of time in which to file his motion for summary judgment (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

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

ENTERED: JANUARY 5, 2010

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while the prosecutor should not have referred to defense counsel as a "male attorney" or stated a fact not in evidence, in each instance the court took suitable curative action and no further remedy was necessary. Rather than expressing the prosecutor's personal beliefs, the comments that defendant characterizes as vouching for witnesses generally constituted record-based arguments as to why the witnesses should be believed, made in proper response to defendant's attacks on the witnesses' credibility (see *People v Dais*, 47 AD3d 421, 422 [2008], *lv denied* 10 NY3d 809 [2008]; *People v Overlee*, 236 AD2d 133, 144 [1997], *lv denied* 91 NY2d 976 [1998]).

By cross-examining a detective about the absence of police documentation relating to this case, and by specifically eliciting the existence of a complaint report, defendant opened the door to the introduction by the People of a portion of that report giving the first name of the assailant. In any event, regardless of whether the court erred in receiving alleged hearsay evidence, any error was harmless (see *People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: JANUARY 5, 2010

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CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1922           In re Christian G.,

A Person Alleged to be  
a Juvenile Delinquent,  
Appellant.

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Presentment Agency

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Howard M. Simms, New York, for appellant.

Michel A. Cardozo, Corporation Counsel, New York (Norman  
Corenthal of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E.  
Bednar, J.), entered on or about January 8, 2009, which  
adjudicated appellant a juvenile delinquent, upon his admission  
that he committed an act which, if committed by an adult, would  
constitute the crime of criminal use of drug paraphernalia in the  
second degree, and placed him with the Office of Children and  
Family Services for a period of 12 months, unanimously affirmed,  
without costs.

The court properly denied appellant's suppression motion.  
There was probable cause for appellant's arrest based on an  
officer's observations of behavior warranting a reasonable  
inference that appellant acted as a steerer and lookout in a drug  
transaction. We note that conduct of the type observed by the  
officer has been held to establish a legally sufficient case of

accessorial liability (see e.g. *People v Eduardo*, 11 NY3d 484, 493 [2008]), a higher standard than probable cause.

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

ENTERED: JANUARY 5, 2010

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CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1924 Avivith Oppenheim, et al., Index 602408/06  
Plaintiffs-Appellants-Respondents,

-against-

Mojo-Stumer Associates Architects, P.C., etc., et al.,  
Defendants-Respondents-Appellants,

Joseph Viscuso,  
Defendant.

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Braverman & Associates, P.C., New York (Jon Kolbrener of  
counsel), for appellants-respondents.

Zetlin & DeChiara, LLP, New York (Michael S. Zetlin and Jaimee L.  
Nardiello of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Charles E. Ramos,  
J.), entered on or about April 23, 2009, which, to the extent  
appealed from, granted the Mojo-Stumer defendants' motion for  
spoliation sanctions but declined to strike the complaint, denied  
plaintiffs' cross motion for summary judgment to dismiss the  
counterclaim for wrongful termination of contract, and granted  
said defendants' motion for a protective order, unanimously  
modified, on the law, plaintiffs' expert's report precluded, but  
he is permitted to testify solely as a fact witness, the cross  
motion granted and the counterclaim for wrongful termination  
dismissed, and otherwise affirmed, without costs.

Plaintiffs spoliated evidence central to their claim that  
renovations on their apartment, designed by Mojo-Stumer and to be  
performed by defendant Viscuso's general contracting firm

(Vista), were not complete when they invited a new contractor to perform substantial additional work without first permitting defendants to verify the need for such additions, warranting a sanction (see *430 Park Ave. Co. v Bank of Montreal*, 9 AD3d 320 [2004]). However, because defendants had extensive personal knowledge of the status of the job, and indeed had repeatedly certified completion of various stages of the work, they were still able to offer a meaningful defense (*id.*; see also *Kirschen v Marino*, 16 AD3d 555 [2005]). As such, the appropriate sanction was preclusion of plaintiffs' witness *as an expert*, but not as a fact witness.

The counterclaim for wrongful termination should have been dismissed in light of the individual defendants' convictions for bribery and tax evasion in connection with this renovation contract (see *Black v MTV Networks*, 172 AD2d 8 [1991], *lv dismissed* 79 NY2d 915 [1992] and *lv denied sub nom. Black v Viacom Intl.*, 80 NY2d 757 [1992]).

The court appropriately granted defendants' motion to treat discovery in this matter as confidential, which is standard in

commercial cases (see *Mann v Cooper Tire Co.*, 56 AD3d 363, 365  
[2008]).

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

ENTERED: JANUARY 5, 2010

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slipped on debris scattered around the ladder. Industrial Code (12 NYCRR) § 23-1.7(e)(2) requires that areas of floors where persons work "be kept free from accumulations of . . . debris . . . insofar as may be consistent with the work being performed." Pointing to plaintiff's statement in accident reports that he slipped on conduit debris, Switzer seeks to dismiss plaintiff's Labor Law § 241(6) claim on the ground that the debris on which he slipped was created by him and was therefore "an integral part of the work he was performing" (see *Appelbaum v 100 Church*, 6 AD3d 310 [2004] [internal quotation marks and citations omitted]). However, plaintiff's deposition testimony that there were other trades working at the same time and that the debris on which he slipped was different from any of the electrical materials he had been using raises an issue of fact whether he created the debris.

Switzer's claim of prejudice resulting from Time and 135 West 50<sup>th</sup> Owner's amendment of their answer to assert cross claims for contractual indemnification against it is belied by the fact that Time and 135 West 50<sup>th</sup> Owner demanded, on two separate occasions, a defense and indemnification under the parties' agreement. Moreover, Switzer cannot reasonably claim to be surprised by its own contractual obligations. As neither Time nor 135 West 50<sup>th</sup> Owner was negligent in connection with plaintiff's accident, the indemnification and defense clauses in

their agreement are not unenforceable and void under General Obligations Law § 5-322.1 (see *Brooks v Judlau Contr., Inc.*, 11 NY3d 204 [2008]). We have considered Switzer's remaining arguments and find them unavailing.

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

ENTERED: JANUARY 5, 2010

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CLERK



it on the merits. A debit card is defined in General Business Law § 511(9), which also defines the term for Penal Law purposes (see Penal Law § 155.00[7-a]), as "a card, plate or other similar device issued by a person to another person which may be used, without a personal identification number, code or similar identification number, code or similar identification, to purchase or lease property or services," but "does not include a credit card or a check, draft or similar instrument." Regardless of whether the term debit card is commonly associated with banking, a gift card meets the statutory definition, as it is a "card" that may be used without a "personal identification number" to "purchase property." The statute imposes no requirement that a specific person be named on the card, or that there be a business relationship between the issuer and possessor. Accordingly, "the evidence in this case satisfies the literal language of the statute" (*People v Thompson*, 99 NY2d 38, 41 [2002] [refusing to read "credit relationship" requirement into statute defining credit card]).

The court properly exercised its discretion in denying defendant's mistrial motion, made on the ground that defendant was prejudiced by evidence relating to a count that the court decided not to submit to the jury. Defendant was charged with criminal possession of credit cards, debit cards (as discussed above) and jewelry, all of which had been taken in a burglary.

The court dismissed the count involving the jewelry, based on a problem it perceived with the police chain of custody. The dismissal did not entitle defendant to a mistrial on all counts (see *People v Brown*, 83 NY2d 791, 794 [1994]; *People v Herminio B.*, 273 AD2d 58 [2000], *lv denied* 95 NY2 905 [2000]).

Defendant's remaining contentions concerning uncharged crimes are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The evidence describing the burglary was relevant to prove the credit and debit cards were stolen, and that defendant was aware of that fact, and it was not prejudicially excessive (see *People v Giles*, 11 NY3d 495 [2008]; *People v Alvino*, 71 NY2d 233, 245 [1987]). In any event, any error regarding the burglary evidence and defendant's related claims was harmless (see *People v Crimmins*, 36 NY2d 230 [1975]).

With regard to defendant's pro se arguments, the ineffective assistance claim is unreviewable on direct appeal because it involves matters outside the record, and the suppression claim is without merit.

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

ENTERED: JANUARY 5, 2010

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CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1930 Shirley Johnson,  
Plaintiff-Appellant,

Index 17424/07

-against-

Concourse Village, Inc., et al.,  
Defendants-Respondents.

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Andrew Molbert, New York, for appellant.

Margaret G. Klein & Associates, New York (Eugene Guarneri of counsel), for Concourse Village, Inc. and R.Y. Management Co., Inc., respondents.

Babchik & Young, LLP, White Plains (Marisa C. DeVito of counsel), for Mainco Elevator & Electrical Corp., respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 11, 2008, which, in an action for personal injuries, granted defendants' motions to dismiss the complaint, and denied plaintiff's cross motion for an extension of time to serve the complaint pursuant to CPLR 306-b, unanimously affirmed, without costs.

Although plaintiff's counsel served her pleadings just one day after the applicable 120-day service period expired (see CPLR 306-b), and counsel offered proof that he attempted to arrange for service with eight days remaining out of the 120-day period, he nonetheless failed to show diligence in his efforts to effect service, particularly as the three-year statute of limitations (CPLR 214[5]) had already expired, and he did not follow up with the process server regarding completion of service until after

the 120-day service period had expired. There was no evidence to indicate that the corporate defendants could not be located, or that they could not be readily served through the Secretary of State. Furthermore, counsel waited until after defendants moved to dismiss before he cross-moved for an extension of the time to serve some several months later. Such evidence of lack of diligence undermines plaintiff's "good cause" argument in support of her extension request (*see generally Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]).

Nor is a grant of an extension to serve the pleadings warranted in the interest of justice. The circumstances presented, including that the statute of limitations expired, plaintiff's lack of diligence in prosecuting this action, the lack of probative evidence offered as to the claim's merit, the vague allegations of injury, the lack of notice given of the claim for more than three years and three months, the prejudice to defendants and the several month delay in moving for an extension of the time to serve, demonstrate that the dismissal of this action was appropriate (*see Slate v Schiavone Constr. Co.*, 4 NY3d 816 [2005]; *Posada v Pelaez*, 37 AD3d 168 [2007]; *compare de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312 [2004]).

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

ENTERED: JANUARY 5, 2010

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CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1931-

1932

Ulrich Suss,  
Plaintiff-Appellant,

Index 106052/08

-against-

New York Media, Inc., et al.,  
Defendants-Respondents.

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Patrick J. McAuliffe, Astoria, for appellant.

Miller Korzenik Sommers LLP, New York (David S. Korzenik of  
counsel), for respondents.

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Judgment, Supreme Court, New York County (Marylin G.  
Diamond, J.), entered December 22, 2008, dismissing the complaint  
pursuant to an order, same court and Justice, entered December  
16, 2008, which, in an action for defamation and violation of  
Civil Rights Law §§ 50 and 51 arising out of the publication of a  
photograph of plaintiff in a magazine, granted defendants' motion  
to dismiss the complaint as barred by the one-year statute of  
limitations, unanimously affirmed, without costs. Appeal from  
the above order unanimously dismissed, without costs, as subsumed  
in the appeal from the above judgment.

The offending photograph appeared in the May 7, 2007 issue  
of the magazine; defendants assert that such issue was  
distributed to newsstands in Manhattan on April 28 and April 29  
2007; the action was commenced on April 30, 2008; and it is  
undisputed that both of plaintiff's claims are governed by the

one-year statute of limitations. To prove their claim of distribution on April 28 and April 29, defendants submitted the affidavit of the magazine's officer with personal knowledge of the magazine's printing and publication practices; the affidavits of an individual who was personally involved in distributing the issue and placing covers of the issue in promotional Windows Banners at newsstands; and photographs of the Windows Banners, digitally dated April 29, taken by the distributor in the ordinary course of business, depicting covers of the issue on display at newsstands along with weekend editions of newspapers dated April 27 and other newspapers dated April 29.

We reject plaintiff's argument that such evidence fails to show, *prima facie*, that the issue first was published on April 29. The affidavits submitted by defendants were made with personal knowledge of the issue's distribution date; the distributor's affidavit was the proper vehicle for the submission of photographs taken by him and his staff (*see H.P.S. Capitol v Mobil Oil Corp.*, 186 AD2d 98, 98 [1992]); and the photographs, as enhanced and highlighted in defendants' reply, clearly depict what they are claimed to depict. In opposition, plaintiff failed to submit any evidence of a later publication.

We also reject plaintiff's argument that unless the court gives CPLR 3211(c) notice of its intention to do so, it may not consider nondocumentary evidentiary materials for fact-finding

purposes on a motion to dismiss pursuant to CPLR 3211(a)(5) (see *Alverio v New York Eye & Ear Infirmary*, 123 AD2d 568 [1986]; *Lim v Choices, Inc.*, 60 AD3d 739 [2009]).

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

ENTERED: JANUARY 5, 2010

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CLERK



is relevant to -- and potentially dispositive of -- the action. If the test is negative, the case will be subject to dismissal. If, on the other hand, it is positive, defendant will have an opportunity to prove his affirmative defenses that he did not have the virus in 2002, or was unaware that he had it or was asymptomatic at the time of alleged transmittal to plaintiff.

All concur except Andrias and McGuire, JJ.,  
who concur in a separate memorandum by  
McGuire, J. as follows:

McGUIRE, J. (concurring)

We write separately to emphasize that we express no view on the issue of whether, if the test is positive, it is admissible at trial (see *People v Scarola*, 71 NY2d 769, 777 [1988] ["(e)ven where technically relevant evidence is admissible, it may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury"]).

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

ENTERED: JANUARY 5, 2010

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CLERK



**THE FOLLOWING MOTION ORDERS**  
**WERE ENTERED AND FILED ON**  
**JANUARY 5, 2010**

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Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5671 People v White, Victor

M-5643X Canton v Queens Linden Plaza, Inc.  
(And a third-party action)

M-5644X Peterkin v Riverbay Corporation - Edwards - Bersch

M-5687X Lusardi v First Sigma Capitol, Inc. - Newmark & Company  
Real Estate, Inc.

Appeals withdrawn.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5685X 320 Owners Corp. v Harvey - Wilhelm

Appeal and cross appeal withdrawn.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5447 People v Diallo, Alpha, also known as Diallo,  
Alpha Ismael

M-5448 People v Jenkins, Willie

M-5449 People v Johnson, Kerwin

M-5450 People v Jordan, Akeem

Leave to prosecute appeals as poor persons granted,  
as indicated.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5451 People v Mompont, Romel

M-5456 People v Atkins, Michael

M-5457 People v Barbosa, Luis G., also known as Barbosa,  
Luis

M-5459 People v Childers, Darnell

M-5461 People v Johnson, Jamel

M-5462 People v Martinez, Ernesto

Leave to prosecute appeals as poor persons granted,  
as indicated.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5404 People v Gallardo, Alessandro, also known as Galiardo,  
Allesandro, also known as Galjasevic, Ziatko

Notice of appeal and order of assignment amended,  
as indicated.

Gonzalez, P.J., Tom, Sweeny, Freedman, Abdus-Salaam, JJ.

M-5361 People v Morisset, Frantzy

Extension of time to file notice of appeal and other  
relief denied.

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

M-5134 In the Matter of Sjoholm v Kelly

Time to perfect appeal enlarged to the April 2010 Term.

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

M-4061 People v Gilman, William and McKenney, Edward, also  
known as McKenney, Edward J.

Leave to hold appeal in abeyance denied.

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

M-5143 People v Chapuseaux, Woody

Appeal deemed withdrawn.

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

M-5104 Cumberbatch v Yaque Luxury Transportation, Inc.

Appeal dismissed.

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

M-5253 In the Matter of R., Camilia Crystal G. -  
Administration for Children's Services

Appeal dismissed, as indicated.

Tom, J.P., Andrias, McGuire, Richter, Manzanet-Daniels, JJ.

M-5503 de Socio v 136 East 56<sup>th</sup> Street Owners, Inc. -  
Heron Ltd.

Time to perfect appeal enlarged to the April 2010  
Term.

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

M-5304 Awards.Com, LLC v Kinko's, Inc.

Time to perfect appeal enlarged to the September 2010  
Term.

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

M-5156 People v Perez, Alejandro

Appeal dismissed.

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Román, JJ.

M-5197 In the Matter of N., Jordan - The Children's Aid Society

Dismissal of appeal denied.

Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

M-5053 Zachery v Biton

CPLR 5704(a) relief denied.

Mazzarelli, J.P., Sweeny, Catterson, Freedman, Román , JJ.

M-5247 In the Matter of P., Vincent - Seaman's Society for Children and Families; In the Matter of P., Vincent and P., Claudette - Administration for Children's Services

Stipulation with respect to previously dismissed appeal deemed filed. See order of this Court entered November 19, 2009 (M-5127).

Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

M-5475 Wilinski v 334 East 92<sup>nd</sup> Housing Development Fund Corp.  
Enlargement of record on appeal denied.

Sweeny, J.P., Catterson, Renwick, Freedman, Abdus-Salaam, JJ.

M-4935 Weems v The City of New York  
Appeal dismissed.

Mazzarelli, J.P., Saxe, Friedman, Sweeny, Nardelli, JJ.

In the Matter of Attorneys Who Are in Violation of Judiciary Law Section 468-a:

M-5528 Shirley Sugimura Archer, admitted on 4-11-1988, at a Term of the Appellate Division, First Department

Respondent reinstated as an attorney and counselor-at-law in the State of New York, effective the date hereof. No opinion. All concur.

Mazzarelli, J.P., Saxe, Friedman, Sweeny, Nardelli, JJ.

In the Matter of Attorneys Who Are in Violation  
of Judiciary Law Section 468-a:

M-5582 Arthur George Kamy, admitted on 7-1-2002,  
at a Term of the Appellate Division,  
First Department

Petition for reinstatement denied, with leave to renew,  
as indicated. No opinion. All concur.

**The following orders were entered and filed on December 29, 2009:**

Gonzalez, P.J., Mazzarelli, Saxe, Sweeny, Renwick, JJ.

M-5501 People v Ortiz, Federico

Enlargement of record on appeal denied.

Gonzalez, P.J., Mazzarelli, Saxe, Sweeny, Renwick, JJ.

M-5557 Espinoza v Federated Department Stores, Inc. - Mainco  
Services Company - Mainco Elevator & Electrical Corp. -  
Mainco Elevator Co.

Stay of trial granted.

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román , JJ.

M-5562 Wallace v Bell & Gossett Company - York International Corporation

Amicus curiae briefs deemed filed for the January 2010 Term.

Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

M-5296 The Plaza PH2001, LLC v Plaza Residential Owner LP

Stay granted on condition appeal perfected for the April 2010 Term, as indicated.