# NEW YORK COUNTY LAWYERS ASSOCIATION

## DAY OF EVIDENCE 2010

### EVIDENCE TO WIN: PLAINTIFF’S EVIDENCE MANUAL

*(Abridged Edition)*

By Sherri Sonin and Robert J. Genis

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*Biographies of Authors*                                             321  

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**Key Statutes**

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- CPLR 104 – Construction – liberally construed to secure the just, speedy and inexpensive determination
- CPLR 2001 – at any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected
- CPLR 2004 – the court may extend the time fixed by any statute
- CPLR 2005 – law office failure
- CPLR 3117 – use of deposition
- **New statute CPLR § 3119. Uniform interstate depositions and discovery**
- Gen. Mun. Law 50-h – use of hearing transcript
- CPLR 3123 – Notice to Admit
- CPLR 3122-a – certification of business records
- CPLR 4511 – judicial notice of law
- CPLR 4512 – competency of interested witness or spouse
- CPLR 4513 – competency of person convicted of crime
- CPLR 4514 - impeachment by prior inconsistent statement
• CPLR 4515 - form of expert opinion
• CPLR 4516 – proof of age of child
• CPLR 4517 – prior testimony in a civil action
• CPLR 4518 – business records
• CPLR 4519 – Dead Man’s statute (and mentally ill)
• CPLR 4520 - certificate or affidavit of public officer
• CPLR 4522 – maps & surveys
• CPLR 4523 – search by title/abstract company
• CPLR 4524 – conveyance of real property without the state
• CPLR 4525 – copies of UCC statements
• CPLR 4526 – marriage certificate
• CPLR 4527 – death or status of missing person
• CPLR 4528 – weather records
• CPLR 4529 – inspection certificate USDA
• CPLR 4530 – certificate of population
• CPLR 4531 – affidavit of posting notice unavailable person
• CPLR 4532 – self-authentication of newspapers
• CPLR 4532-a – admissibility of graphic, numerical, symbolic or pictorial representations of medical or diagnostic tests
• CPLR 4533 – market reports
• CPLR 4533-a – prima facie proof of damages bills/invoice
• CPLR 4533-b – proof of payment by joint tort-feasor
• CPLR 4534 – standard of measurement by surveyor
• CPLR 4536 – proof of handwriting by comparison
• CPLR 4537 – proof of writing subscribed by witness
• CPLR 4538 – acknowledged, proved or certified writing; conveyance of real property without the state
• CPLR 4539 – reproductions of originals
• CPLR 4540 – authentication of official record of court of government office of US
• CPLR 4541 – proof of proceeding before justice of the peace
• CPLR 4542 – proof of foreign records
• CPLR 4543 - proof of facts or writings allowed by common law; not limited to statute
• CPLR 4544 – contracts in small print
• CPLR 4545 – admissibility of collateral source
• CPLR 4546 – loss of earnings in medical, dental or podiatric malpractice
• CPLR 4547 – offer to compromise
• CPLR 4548 – privileged communication still privileged even though transmitted electronically

Privileges/Confidential

• CPLR 4501 – self incrimination
• CPLR 4502 – spouse
• CPLR 4503 – attorney
• CPLR 4504 – physician, dentist, podiatrist, chiropractor and nurse
• CPLR 4505 – clergy
- CPLR 4507 – psychologist
- CPLR 4508 – social worker
- CPLR 4506 – eavesdropping
- CPLR 4509 – users of library
- CPLR 4510 – rape crisis counselor

**Subpoenas**

Trial Subpoenas – CPLR 2301 was amended and requires that a “trial subpoena ducès tecum shall state on its face that all papers or other items delivered to the court pursuant to such subpoena shall be accompanied by a copy of such subpoena.” This amendment has been in effect since January 1, 2002.

Effective January 1, 2008: CPLR § 2303-a provides “Where the attendance at trial of a party or person within the party’s control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with subdivision (b) of rule 2103 to the party’s attorney of record.”

Under existing law, the attendance of a party’s employee located outside the state can be compelled by service of a subpoena on the employer within the state. See, Standard Fruit and Steamship Co. v. Waterfront Commission of New York Harbor, 43 N.Y.2d 11 (1977); Communications Corp. v. General Motors Corp., 172 Misc. 2d 821 (NY 1977). This provision only modifies the method of service of the subpoena.

In Matter of American Express Prop. Cas. Co. v Vinci, 63 AD3d 1055 (2nd Dept. 2009), in the context of judicial review of a compulsory Article 75 arbitration, the Supreme Court properly determined that the subpoena ducès tecum served by the appellant was **facially defective because it neither contained nor was accompanied by a notice stating the "circumstances or reasons such disclosure is . . . required"** (CPLR 3101 [a] [4]; see Wolf v Wolf, 300 AD2d 473 [2002]; Lazzaro v County of
Moreover, the subpoena duces tecum was improperly issued merely for purposes of
discovery or to ascertain the possible existence of evidence after the Supreme Court
had resolved the motions to vacate and confirm the arbitration award (see Matter of
Terry D., 81 NY2d 1042, 1044 [1993]; Garnot v LaDue, 45 AD3d 1080, 1083 [2007];
Matter of Board of Educ. of City of N.Y. v Hankins, 294 AD2d 360 [2002]). Accordingly,
the Supreme Court properly granted the respondent's motion to quash the subpoena
duces tecum.

In Westphal v. Greyhound, 14 Misc. 3d 1231A, 836 N.Y.S.2d 496 (Sup. Queens
2007), the court quashed subpoenas served by the defendant that were improperly used
for the purpose of ascertaining the existence of evidence as a subterfuge for discovery.

Non-party records

In 2003, a number of legislative changes were made with respect to subpoenas.
The most sweeping changes have been with respect to obtaining records belonging to
non-parties. These changes are amendments to CPLR 2305 (subpoenas), 3120
(product of records) and 3122 (objection to disclosure), and new section CPLR 3122-
a, which act in conjunction with one another, and all of which are effective on September
1, 2003.

Until September 1, 2003, a party seeking discovery from a non-party must make a
motion pursuant to CPLR 3120(b). Such a motion requires that the motion be served on
notice to all adverse parties, and that the non-party shall be served with notice on motion
in the same manner as a summons. If the movant fails to serve the non-party parent(s)
and/or sibling(s) in an appropriate manner, the court will lack jurisdiction over the matter
and will not be able to entertain the motion for the relief requested.1

1 See e.g., Carrasquillo v. Netslosh Realty Corp., 279 A.D.2d 334, 335 (1st Dept. 2001); Nieves v. 1845 7th
Avenue Realty Associates, 184 Misc. 2d 639, 642 (Sup. NY 2000); Van Epps v. County of Albany, 184
Misc. 2d 159, 163 (Sup. Albany 2000); See, Blake v. LP 591 Ocean Realty, 237 A.D.2d 554 (2nd Dept.
1997).
However, CPLR 3120 was also amended. The amendment deletes the provision for a motion to be made against a non-party, and instead provides for a *subpoena duces tecum* to be utilized. The amended version of CPLR 3120 (3) provides (in part): “The party issuing a subpoena duces tecum as provided hereinabove shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection.”

The amendment prevents a defendant from secretly subpoenaing a non-party’s records concerning the plaintiff; the defendant must give notice to the plaintiff and the plaintiff has an opportunity to object or move to quash the subpoena. The objecting party must state with reasonable particularity the reasons for each objection. Similarly, the non-party whose records are being sought may give notice to the party seeking the records that one or more documents are being withheld and the grounds for doing so.

Moreover, to prevent abuse, “[A] medical provider served with a subpoena duces tecum requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous boldfaced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient.” A Court will not “So Order” the subpoena without a HIPPA compliant authorization being annexed to it. *Campos v. Payne*, 2 Misc. 3d 921 (Civ. Richmond 2003).
The interplay of these amendments is discussed in Velez v. Hunts Point Multi-
Service Center, Inc., 29 A.D.3d 104, 111-112 (1st Dept. 2006):

Accordingly, we now reach the question and hold that the CPLR 3101 (a) (4) notice requirement applicable to subpoenas duces tecum issued pursuant to CPLR 3111 is equally applicable to nonparty subpoenas issued pursuant to CPLR 3120. Nevertheless, although the better practice, indeed the mandatory requirement of CPLR 3101 (a) (4), is to include the requisite notice on the face of the subpoena or in a notice accompanying it, given the evidence presented by Hunts Point in opposition, the motions to quash the subpoenas should have been denied (cf. Matter of Stevens Imports v Lack, 52 AD2d 928 [1976], affd 41 NY2d 939 [1977]). The motion court's findings, that Hunts Point's papers articulated the need for the discovery sought and that "the majority of the items sought are relevant to the defense of the litigation herein" and are "not so voluminous so as to constitute an undue burden on the custodians of said documents," were sufficient to grant such relief absent any apparent prejudice to the nonparties served.

As to the court's concern with the lack of notice to the nonparties from whom discovery is sought, if such nonparties, who have the burden of delineating any specific reasons why the requirement in CPLR 3101 (a) (4) is not satisfied, do not object and the disclosure goes forward, such extra requirement is, in effect, waived (see Connors, Practice Commentaries, CPLR C3101:23). Likewise, plaintiff and third-party defendant have failed in their burden of showing lack of relevance and that part of their motion seeking to quash the subpoenas served on South Bronx, Bronx Computing and Don Pancho, seeking records of payments made to Mr. Issurdatt and Mr. Velez's family members, should also have been denied.

It is well settled that the purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding (see Matter of Terry D., 81 NY2d 1042, 1044 [1993]). It is equally well settled that a motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to any proper inquiry (see New Hampshire Ins. Co. v Varda, Inc., 261 AD2d 135 [1999]; Matter of Reuters Ltd. v Dow Jones Telerate, 231 AD2d 337, 341 [1997]). "Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed" (Gertz v Richards, 233 AD2d 366, 366 [1996]).

What are records?

What are records? As of July 23, 2002, assuming sufficient foundation has been established and other hearsay problems do not exist, computer generated records may be entered into evidence. Federal Express Corp. v. Federal Jeans, Inc., 14 A.D.3d 424 (1st Dept. 2005). CPLR 4518(a) has been amended to include “an electronic record” as

CPLR 4518 (a) now reads as follows:

Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. \textit{An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.}

\(\text{Counsel should also be aware of New York State Technology Law ("N.Y.S.T.L."), entitled "Admissibility into evidence", which states:}\)

"In any legal proceeding where the provisions of the civil practice law and rules are applicable, an electronic record or electronic signature may be admitted into evidence pursuant to the provisions of article forty-five of the civil practice law and rules including, but not limited to section four thousand five hundred thirty-nine of such law and rules." [C.P.L.R. § 4539, entitled "Reproductions of original"].

According to the Arts & Cultural Affairs Law (57.05) and State Government Archives and Records Management Regulations (8 NYCRR, Part 188.2(h)), "records" are defined as:

all books, papers, microforms, computer-readable tapes, discs or other media, maps, photographs, film, video and sound recordings, or other documentary materials regardless of physical form or characteristics, made or received by a State agency or the judiciary in pursuance of law or in connection with the transaction of public business, and retained by that agency or its legitimate successor as evidence of the organization, function, policies, decisions, procedures, operations, or other activities, or because of the information contained therein.

**Statute of Frauds**

Pursuant to GOL 5-701(b)(1):

1. An agreement, promise, undertaking or contract, which is valid in other respects and is otherwise enforceable, is not void for lack of a note, memorandum or other writing and is enforceable by way of action or defense provided that such agreement, promise, undertaking or contract is a qualified financial contract as defined in paragraph two of this subdivision and (a) there is, as provided in paragraph three of this subdivision, sufficient evidence to indicate that a contract has been made, or (b) the parties thereto, by means of a prior or subsequent written contract, have agreed to be bound by the terms of such qualified financial contract from the time they reach agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms.

Pursuant to GOL 5-701(d)(4):

4. For purposes of this subdivision, the tangible written text produced by telex, telefacsimile, computer retrieval or other process by which electronic signals are transmitted by telephone or otherwise shall constitute a writing and any symbol executed or adopted by a party with the present intention to authenticate a writing shall constitute a signing. The confirmation and notice of objection referred to in subparagraph (b) of paragraph three of this subdivision may be communicated by means of telex, telefacsimile, computer or other similar process by which electronic signals are transmitted by telephone or
otherwise, provided that a party claiming to have communicated in such a manner shall, unless the parties have otherwise agreed in writing, have the burden of establishing actual or constructive receipt by the other party as set forth in subparagraph (b) of paragraph three of this subdivision.

**Documentary Evidence (or not)**

In *Fontanetta v John Doe I*, 73 AD3d 78 (2nd Dept. 2010)

A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted only if the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD3d at 84) AD2d 383, 383 [2002] [internal quotation marks omitted]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Martin v New York Hosp. Med. Ctr. of Queens*, 34 AD3d 650 [2006]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]). "[I]f the court does not find [their] submissions 'documentary', it will have to deny the motion" (Siegel, Practice Commentaries, [*4*] McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 22). **Since the printed materials relied on by the defendants do not qualify as such,** we affirm the denial of that branch of the defendants' motion which was to dismiss the complaint pursuant to CPLR 3211 (a) (1).

**The History and Development of CPLR 3211 (a) (1)**

CPLR 3211, including subdivision (a) (1), [*5*] appears to have had its genesis in the 1957 First Preliminary Report of the Advisory Committee on Practice and Procedure (1957 NY Legis Doc No. 6 [b] [hereinafter the Report]). According to that Report, the purpose of CPLR 3211 (a) (5) was to cover the most common affirmative defenses founded upon documentary evidence, specifically, estoppel, arbitration and award, and discharge in bankruptcy, whereas section 3211 (a) (1) was enacted to "cover all others that may arise as for example, a written modification or any defense based on the terms of a written contract" (*id.* at 85). **To some extent, "documentary evidence" is a "fuzzy" term, and what is documentary evidence for one purpose might not be documentary evidence for another.** [*4*]

As Professor Siegel has noted in his commentary to CPLR 3211, there is "a paucity of case law" as to what is considered "'documentary' under [CPLR 3211 (a) (1)]" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). From the cases that exist, it is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as "documentary evidence" in the proper case (*id.; see 2 Commercial Litigation in New York State Courts § 7:60 [3 West's NY Prac Series 2d edl]. For example, in *Matter of Casamassima v Casamassima* (30 AD3d 596 [2006]), this Court held that a trust agreement qualified as "documentary evidence" in a dispute between cotrustees.
In *Bronxville Knolls v Webster Town Ctr. Partnership* (221 AD2d 248 [1995]), the Appellate Division, First Department, found that an integrated mortgage and note, which unambiguously made the property itself the plaintiffs' sole recourse, constituted "documentary evidence." In *Crepin v Fogarty* (59 AD3d 837, 839 [2009]), the Appellate Division, Third Department, found that a deed qualified as "documentary evidence" where it conclusively established the validity of the disputed easement.

Along the same lines, in *150 Broadway N.Y. Assoc., L.P. v Bodner* (14 AD3d 1, 7 [2004]), the Appellate Division, First Department, found that a lease which unambiguously contradicted the allegations supporting the plaintiff's cause of action alleging breach of contract constituted "documentary evidence" under CPLR 3211 (a) (1). The Court noted that this lease represented a clear and complete written agreement between sophisticated, counseled business people negotiating at arm's length (*id.* at 8).

Relying on the same reasoning, the Appellate Division, Third Department, in *Ozdemir v Caithness Corp.* (285 AD2d 961 [2001]), held that a contract constituted "documentary evidence" in a dispute regarding the payment of a finder's fee.

On the other hand, the case law is somewhat more abundant as to what is not "documentary evidence." As this Court held in *Berger v Temple Beth-El of Great Neck* (303 AD2d 346, 347 [2003]), affidavit are not documentary evidence (to the same effect, see *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007], and Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10). In *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.* (10 AD3d 267, 271 [2004]), the Appellate Division, First Department, reversed the trial court's dismissal [*5]pursuant to CPLR 3211 (a) (1), finding that e-mails and deposition and trial testimony were not the types of documents contemplated by the Legislature when it enacted this provision.

In *Frenchman v Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP* (24 Misc 3d 486, 495 n 2 [2009]), the Supreme Court, {**73 AD3d at 86} New York County, held that affidavits and letters did not constitute documentary evidence under CPLR 3211 (a) (1) so as to prove that a lawyer-client relationship had been terminated. Also, in *Holman v City of New York* (19 Misc 3d 600, 602 [2008]), the Supreme Court, Kings County, found that medical records containing the notes of a doctor were not "documentary evidence," as they raised issues of credibility that are for a jury to decide.

Similarly, in *Webster v State of New York* (2003 NY Slip Op 50590[U], *5 [2003]), the Court of Claims held that records maintained by the New York State and United States Departments of Transportation, which provided detailed information about the railroad crossing at issue, were not "documents" within the meaning of CPLR 3211 (a) (1). The court reasoned that those records contain information in a summary form and, thus, are not "essentially undeniable."

In sum, to be considered "documentary," evidence must be unambiguous and of undisputed authenticity (see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22).
It must be pointed out that some of the confusion as to what constitutes documentary evidence pursuant to CPLR 3211 (a) (1) stems from the fact that various courts appear to refer to any printed materials as "documentary evidence," particularly in cases not involving CPLR 3211 (a) (1). For example, in *Gray v South Colonie Cent. School Dist. (64 AD3d 1125 [2009])**, the Appellate Division, Third Department, referred to deposition testimony as "documentary evidence" in discussing a motion for summary judgment. In addressing a motion to change venue in *Garced v Clinton Arms Assoc. (58 AD3d 506, 509 [2009])**, the Appellate Division, First Department, referred to affidavits as "documentary evidence." However, it is clear that affidavits and deposition testimony are not "documentary evidence" within the intendment of a CPLR 3211 (a) (1) motion to dismiss.

We reject the defendants' position. Their printed materials (with the above-noted possible exception of the clearly insufficient attendance reports) can best be characterized as letters, summaries, opinions, and/or conclusions of the defendants and/or the Hospital's agents and employees. They clearly do not reflect an out-of-court transaction and are not "essentially undeniable" (*see* Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C3211:10, at 22). Thus, they are not "documentary evidence" within the intendment of CPLR 3211 (a) (1).

Since the defendants' printed materials were not "documentary evidence" and they made this motion exclusively under CPLR 3211 (a) (1), their submissions were insufficient as a matter of law to grant their motion. In light of that determination, we need not address the parties' remaining contentions.

**Objections**

The failure to make a prompt and specific objection, and then following through with appropriate curative instructions, and never moving for a mistrial can be fatal. In *Ritz v. Lee*, 273 A.D.d.2d 291, 709 N.Y.S.2d 846 (2nd Dept. 2000). “The plaintiffs contend that they are entitled to a new trial because the respondent’s attorney improperly made a brief reference on summation to certain deposition testimony which had not been admitted into evidence. However, the plaintiffs failed to object when the improper reference was made, did not request curative instructions when the matter came to the court’s attention during jury deliberations, and never moved for a mistrial. Accordingly, the plaintiff’s contention is unpreserved for appellate review….”
“In any event, reversal is not warranted, as this isolated instance of misconduct ‘did not divert the jurors’ attention from the issues to be determined with respect to liability’ or deprive the plaintiffs of a fair trial (Torrado v. Lutheran Med. Ctr., 198 A.D.2d 346, 347, 603 N.Y.S.2d 325).” *Id.*

In *Doyle v. Nusser*, 288 A.D.2d 176, 733 N.Y.S.2d 84 (2nd Dept. 2001), the defendant’s argument that the Supreme Court erred in giving a curative instruction to the jury to disregard the injured plaintiff’s testimony that he “lost his house”, since it only served to emphasize that testimony. “Since the defendants failed to object to the curative instruction as given, this issue is also unpreserved for appellate review….”

**Certification**

In *Green v Fairway Operating Corp.*, 72 AD3d 613 (1st Dept. 2010)

In order to establish a meritorious cause of action, the affidavit of her nonparty witness who accompanied her to the supermarket was essential. The affidavit of plaintiff's witness, purportedly sworn to in the Dominican Republic, lacks the certificate of conformity (Real Property Law § 301-a) required by CPLR 2309 (c), and therefore is not properly before the Court (see Matter of Elizabeth R.E. v Doundley A.E., 44 AD3d 332 [2007]).

In *Niazov v Corlean Cab Corp.*, 71 AD3d 749 (2nd Dept. 2010)

In support of their motion, the defendants relied upon, inter alia, the report of an orthopedic surgeon who examined the plaintiff. The report was without any probative value since he failed to affirm the contents of his report under the penalties of perjury, as required by CPLR 2106 (see *Magro v He Yin Huang*, 8 AD3d 245 [2004]; *Slavin v Associates Leasing*, 273 AD2d 372 [2000]; *Baron v Murray*, 268 AD2d 495 [2000]; *Cwiekala v Siddon*, 267 AD2d 193 [1999]). Without the report, the defendants could not meet their burden on the motion.

**CPLR 3122-a**

A very significant change in the CPLR is the addition of section 3122-a, which permits certification of business records. It provides:
“(a) Business records produced pursuant to a subpoena duces tecum under rule 3120 shall be accompanied by a certification, sworn in the form of an affidavit and subscribed by the custodian or other qualified witness charged with responsibility of maintaining the records, stating in substance each of the following:
   1. The affiant is the duly authorized custodian or other qualified witness and has authority to make the certification;
   2. To the best of the affiant's knowledge, after reasonable inquiry, the records or copies thereof are accurate versions of the documents described in the subpoena duces tecum that are in the possession, custody, or control of the person receiving the subpoena;
   3. To the best of the affiant's knowledge, after reasonable inquiry, the records or copies produced represent all the documents described in the subpoena duces tecum, or if they do not represent a complete set of the documents subpoenaed, an explanation of which documents are missing and a reason for their absence is provided; and
   4. The records or copies produced were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, at the time of the act, transaction, occurrence or event recorded therein, or within a reasonable time thereafter, and that it was the regular course of business to make such records.

(b) A certification made in compliance with subdivision (a) is admissible as to the matters set forth therein and as to such matters shall be presumed true. When more than one person has knowledge of the facts, more than one certification may be made.

(c) A party intending to offer at a trial or hearing business records authenticated by certification subscribed pursuant to this rule shall, at least thirty days before the trial or hearing, give notice of such intent and specify the place where such records may be inspected at reasonable times. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the offer of business records by certification stating the grounds for the objection. Such objection may be asserted in any instance and shall not be subject to imposition of any penalty or sanction. Unless objection is made pursuant to this subdivision, or is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for objection otherwise required by this subdivision, business records certified in accordance with this rule shall be deemed to have satisfied the requirements of subdivision (a) of rule 4518. Notwithstanding the issuance of such notice or objection to same, a party may subpoena the custodian to appear and testify and require the production of original business records at the trial or hearing.”

This new section of the CPLR may be used by counsel to admit into evidence the business records of a physician or health care provider without having to produce a witness in court to establish foundation. As stated in Campos v. Payne, 2 Misc. 3d 921, 924-925 (Civ. Richmond 2003):

The amendments to the CPLR were designed to expedite the discovery process with respect to nonparty witnesses and the production of their records and "simplify
methods for obtaining discovery of documents, particularly routine business records . . . and procuring their admission into evidence" and "alleviate burdens upon the litigants, non-party witnesses and the courts" (Mem of Off of Ct Admin, 2002 McKinney's Session Laws of NY, at 2153 ["Civil Practice Law and Rules--Production of Non-Party Business Records"]).

In White v. Kim, 29 A.D.3d 685 (2nd Dept. 2006), the appellate court noted that “while the Supreme Court erred in determining that the letters of the plaintiff's treating physicians were admissible pursuant to CPLR 3122 (a), the error did not prejudice a substantial right (see CPLR 2002).”

However, in Zweng v. DeBellis & Semmens, 22 A.D.3d 845 (2nd Dept. 2005), the Appellate Division held that the Supreme Court properly denied the plaintiffs' motion to strike the objection of the defendants to their offer to admit business records pursuant to CPLR 3122-a. The records made available for inspection were neither subpoenaed nor certified before the defendants were given an opportunity to inspect them and interpose objections pursuant to CPLR 3122-a (a) (3).

In Warnock v. Warnock, 2006 N.Y. Misc. LEXIS 2898 (Sup. Westchester 2006), the trial court did not allow records into evidence because the certification of the records was not in the form of an affidavit because the signature of the custodian of the records was not notarized.

Counsel should review CPLR 3122-a as well as CPLR 4518 and all other relevant statutes when attempting to enter records into evidence. CPLR 4518 may also be used to avoid producing multiple witnesses to offer cumulative testimony. See, Xanboo, Inc. v. Ring, ___ A.D.3d ___, ___ N.Y.S.2d ___, NY Slip Op. 04629, 2007 WL 1558838 (2nd Dept. 2007).

**CPLR 4518**
A complete copy of CPLR 4518 b-g follows to assist counsel [Subsection (a) is provided above].

(b) Hospital bills. A hospital bill is admissible in evidence under this rule and is prima facie evidence of the facts contained, provided it bears a certification by the head of the hospital or by a responsible employee in the controller's or accounting office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. This subdivision shall not apply to any proceeding in a surrogate's court nor in any action instituted by or on behalf of a hospital to recover payment for accommodations or supplies furnished or for services rendered by or in such hospital, except that in a proceeding pursuant to section one hundred eighty-nine of the lien law to determine the validity and extent of the lien of a hospital, such certified hospital bills are prima facie evidence of the fact of services and of the reasonableness of any charges which do not exceed the comparable charges made by the hospital in the care of workmen's compensation patients.

(c) Other records. All records, writings and other things referred to in sections 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician. Where a hospital record is in the custody of a warehouse, or "warehouseman" as that term is defined by paragraph (h) of subdivision one of section 7-102 of the uniform commercial code, pursuant to a plan approved in writing by the state commissioner of health, admissibility under this subdivision may be established by a certification made by the manager of the warehouse that sets forth (i) the authority by which the record is held, including but not limited to a court order, order of the commissioner, or order or resolution of the governing body or official of the hospital, and (ii) that the record has been in the exclusive custody of such warehouse or warehousemen since its receipt from the hospital or, if another has had access to it, the name and address of such person and the date on which and the circumstances under which such access was had. Any warehouseman providing a certification as required by this subdivision shall have no liability for acts or omissions relating thereto, except for intentional misconduct, and the warehouseman is authorized to assess and collect a reasonable charge for providing the certification described by this subdivision.

(d) Any records or reports relating to the administration and analysis of a genetic marker or DNA test, including records or reports of the costs of such tests, administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law are admissible in evidence under this rule and are prima facie evidence of the facts contained therein provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee delegated for that purpose, or by a qualified physician. If such record or report relating to the administration and analysis of a genetic marker test or DNA test or tests administered pursuant to
sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law indicates at least a ninety-five percent probability of paternity, the admission of such record or report shall create a rebuttable presumption of paternity, and shall, if unrebutted, establish the paternity of and liability for the support of a child pursuant to articles four and five of the family court act.

(e) Notwithstanding any other provision of law, a record or report relating to the administration and analysis of a genetic marker test or DNA test certified in accordance with subdivision (d) of this rule and administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law is admissible in evidence under this rule without the need for foundation testimony or further proof of authenticity or accuracy unless objections to the record or report are made in writing no later than twenty days before a hearing at which the record or report may be introduced into evidence or thirty days after receipt of the test results, whichever is earlier.

(f) Notwithstanding any other provision of law, records or reports of support payments and disbursements maintained pursuant to title six-A of article three of the social services law by the department of social services or the fiscal agent under contract to the department for the provision of centralized collection and disbursement functions are admissible in evidence under this rule, provided that they bear a certification by an official of a social services district attesting to the accuracy of the content of the record or report of support payments and that in attesting to the accuracy of the record or report such official has received confirmation from the department of social services or the fiscal agent under contract to the department for the provision of centralized collection and disbursement functions pursuant to section one hundred eleven-h of the social services law that the record or report of support payments reflects the processing of all support payments in the possession of the department or the fiscal agent as of a specified date, and that the document is a record or report of support payments maintained pursuant to title six-A of article three of the social services law. If so certified, such record or report shall be admitted into evidence under this rule without the need for additional foundation testimony. Such records shall be the basis for a permissive inference of the facts contained therein unless the trier of fact finds good cause not to draw such inference.

(g) Pregnancy and childbirth costs. Any hospital bills or records relating to the costs of pregnancy or birth of a child for whom proceedings to establish paternity, pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law have been or are being undertaken, are admissible in evidence under this rule and are prima facie evidence of the facts contained therein, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee designated for that purpose, or by a qualified physician.

Judicial Notice

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In Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13 (2nd Dept. 2009)

CPLR 4511 (b) provides that upon request of a party, a court may take judicial notice of federal, state, and foreign government acts, resolutions, ordinances, and regulations, including those of their officers, agencies, and governmental subdivisions. While the concept of judicial notice is elastic (see Richardson, Evidence § 52 [Prince 10th ed]) and applicable to a wide range of subject matter, official promulgations of government appear to be particularly appropriate for judicial notice, given the manner that CPLR 4511 expressly singles them out for such treatment.

Judicial notice has never been strictly limited to the constitutions, resolutions, ordinances, and regulations of government, but has been applied by case law to other public documents that are generated in a manner which assures their reliability. Thus, the concept has been applied to census data (see Affronti v Crosson, 95 NY2d 713, 720 [2001]; Buffalo Retired Teachers 91-94 Alliance v Board of Educ. for City School Dist. of City of Buffalo, 261 AD2d 824, 827 [1999]; Mackston v State of New York, 126 AD2d 710 [1987]), agency policies (see Matter of Albano v Kirby, 36 NY2d 526, 532 [1975]), certificates of corporate dissolution maintained by the Secretary of State (see Brades Meat Corp. v Cromer, 146 AD2d 666, 667 [1989]), the resignation of public officials (see Matter of Soronen v Comptroller of State of N.Y., 248 AD2d 789, 791 [1998]; Matter of Maidman, 42 AD2d 44, 47 [1973]), legislative proceedings (see Outlet Embroidery Co. v Derwent Mills, 254 NY 179, 183 [1930]), legislative journals (see Browne v City of New York, 213 App Div 206, 233 [1925]), the consumer price index (see Sommers v Sommers, 203 *20 AD2d 975, 976 [1994]; City of Hope v Fisk Bldg. Assoc., 63 AD2d 946, 947 [1978]), the location of real property recorded with a clerk (see Andy Assoc. v Bankers Trust Co., 49 NY2d 13, 23-24 [1979]), death certificates maintained by the Department of Health (see Matter of Reinhardt, 202 Misc 424, 426 [1952]), and undisputed court records and files (see e.g. Perez v New York City Hous. Auth., 47 AD3d 505 [2008]; Walker v City of New York, 46 AD3d 278, 282 [2007]; Matter of Khatibi v Weill, 8 AD3d 485 [2004]; Matter of Allen v Strough, 301 AD2d 11, 18 [2002]). Even material derived from official government Web sites may be the subject of judicial notice (see Munaron v Munaron, 21 Misc 3d 295 [Sup Ct, Westchester County 2008]; Parrino v Russo, 19 Misc 3d 1127[A], 2008 NY Slip Op 50925 [U] [Civ Ct, Kings County 2008]; Nairne v Perkins, 14 Misc 3d 1237[A], 2007 NY Slip Op 50336[U] [Civ Ct, Kings County 2007]; Proscan Radiology of Buffalo v Progressive Cas. Ins. Co., 12 Misc 3d 1176[A], 2006 NY Slip Op 51242[U] [Buffalo City Ct 2006]).

We hold, therefore, that the diagnosis and procedure codes key published by the United States Government on its HHS Web site may properly be given judicial notice (see CPLR 4511 [b]), as the key is reliably sourced and its accuracy not contested.
Using the codes key in evidence, the appellant, Allstate, accurately deciphered for the Supreme Court the medical diagnoses and treatments administered by White Plains Hospital to Hafford during the course of Hafford's hospital stay.

**Injuries**

While not new cases or statutes, the following may be helpful.

**Traumatic Brain Injury** Cases:

**Public Health Law 2741**

§ 2741. Definitions. As used in this article, the term "traumatic brain injury" means an acquired injury to the brain caused by an external physical force resulting in total or partial disability or impairment and shall include but not be limited to damage to the central nervous system from anoxic/hypoxic episodes or damage to the central nervous system from allergic conditions, toxic substances and other acute medical/clinical incidents. Such term shall include, but not be limited to, open and closed brain injuries that may result in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem-solving, sensory perceptual and motor abilities, psycho-social behavior, physical functions, information processing and speech. Such term shall not include progressive dementias and other mentally impairing conditions, depression and psychiatric disorders in which there is no known or obvious central nervous system damage, neurological, metabolic and other medical conditions of chronic, congenital or degenerative nature or brain injuries induced by birth trauma.


For those with RSD cases, see **Public Health Law 2799-b**.

**Governmental Websites**

In *Oak Tree Realty Co., LLC v. Board of Assessors*, 71 A.D.3d 1027 92nd Dept. 2010)

A review of the information on the New York State Unified Court System E-Courts public Web site, of which we take judicial notice (see *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 20 [2009]), reveals that when the original proceeding appeared on the trial calendar in 2002, the Supreme Court marked the case “settled before trial.” Accordingly, the original proceeding was not marked “off” or
stricken from the trial calendar pursuant to CPLR 3404 (see Long-Waithe v Kings Apparel Inc., 10 AD3d 413, 414 [2004]; Baez v Kayantas, 298 AD2d 416 [2002]; Basetti v Nour, 287 AD2d 126 [2001]). For the reasons set forth in our determination on a companion appeal (see Matter of Transtechnology Corp. v Assessor, 71 AD3d 1034 [2010] [decided herewith]), the Supreme Court correctly granted Oak Tree's motion to restore the original proceeding to the trial calendar and, in effect, to restore the subsequent related proceedings to active status.

In Miriam Osborn Memorial Home Assoc. v. Assessor of the City of Rye, 9 Misc. 3d 1019 (Sup. Westchester 2005), the Court details how data downloaded from a municipal website may be admissible. While the Court would not take judicial notice of the facts contained in the records, and found that under CPLR 4520 (Public Records exception to hearsay rule) the records the records were not admissible, but that under the common law the public documents were admissible once they were authenticated were admissible under CPLR 4518(a) and N.Y.S.T.L. 306. The court discussed how once the prerequisites of CPLR 4520 was met, the records are prima facie evidence of the truth of the matters asserted therein, and authentication may be met under CPLR 4540 (self-authentication). In Miriam Osborn Memorial Home Assoc. v. Assessor of the City of Rye, 11 Misc. 3d 1059(A), 815 N.Y.S.2d 495 (Sup. Westchester 2006), the same court held that an attorney working for trial counsel may testify as to the manner in which the records were searched and retrieved/downloaded and converted into tangible evidence, and were properly entered into evidence.

In Tener Consulting Services, LLC v. FSA Main Street, LLC, 23 Misc.3d 1120(A), 2009 WL 1218891 (N.Y.Sup.), 2009 N.Y. Slip Op. 50857(U) (sup. Westchester 2009), the court addressed judicial notice of records obtained via the internet.

At least one other court has been faced with the issue presented in this motion -- namely, whether a printout from DOS's website “is admissible, and, if so, whether it is sufficient to prove [defendant's principal place of business]” (Brown v SMR Gateway 1, LLC and GMRI, Inc. d/b/a Red Lobster Restaurants, 2009 NY Slip Op 50516[U] at * 3,
In that case, the court noted that pursuant to State Technology Law § 306, in any proceeding in which the CPLR is applicable, “an electronic record ... may be admitted into evidence pursuant to the provisions of article forty-five of the [CPLR] ... including, but not limited to [CPLR § 4539] ...” (id. at *2). In holding that the printout from DOS's website was admissible as “an exception to the hearsay rule under CPLR 4518(a), business records exception and under State Technology Law § 306,” (id. at *4), the court found that defendants had satisfied their burden of showing that Kings County was not defendant's county of residence since the web document indicated that defendant's county of residence was New York.

This Court is somewhat hesitant to allow the printout to suffice as the only evidence of Plaintiff's county of residence when Defendants could have readily obtained and provided to this Court a certified copy of Plaintiff's Articles of Organization from DOS. On the other hand, there are specific exceptions to the hearsay rules with regard to documents maintained by governmental agencies given the inherent reliability of such documents. It would seem that the fact that these documents were obtained by downloading them from the government's website rather than through the physical receipt of them from the governmental agency itself is somewhat of a distinction without a difference. In this regard, the Court notes that the Appellate Division, Second Department, has recently cited with approval a number of cases in which trial courts have taken judicial notice of documents that the courts themselves have downloaded from government websites (see Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co., 2009 NY Slip Op 000351, 871 NYS2d 680 [2d Dept 2009], citing Munaron v Munaron, 21 Misc 3d 295 [Sup Ct Westchester County 2008]; Parrino v Russo, 19 Misc 3d 1127[A], 2008 WL 1915133 [Civ Ct Kings County 2008]; Nairne v Perkins, 14 Misc 3d 1237[A], 2007 WL 656301 [Civ Ct Kings County 2007]; Proscan Radiology of Buffalo v Progressive Cas. Ins. Co., 12 Misc 3d 1176 [A], 2006 WL 1815210 [Buffalo City Ct. 2006]; see also Bernstein v City of New York, 2007 NY Slip Op 50162[U], 14 Misc 3d 1225[A] [Sup Ct Kings County 2007]; Miriam Osborn Memorial Home Assn. v Assessor of City of Rye, 9 Misc 3d 1019 [Sup Ct Westchester County 2005]). There is every *8 reason to believe that the information that appears on governmental websites is a reasonably reliable reflection of what the hard copies on file with the government show.

It is, of course, important that a party seeking to rely upon information found on a website provide the Court with an affidavit that would establish a proper evidentiary foundation. It is the website that reflects the information; providing the Court with a printout of such information is, it would seem, the functional equivalent of providing a photograph that depicts a particular condition. But a photograph is not admissible without proper authentication. Here, the purportedly downloaded information is not authenticated.

While Court could deny the present motion, without prejudice to renewal upon a proper foundation for these printouts, the Court, rather than invite the delay and additional expense inherent in such a course, has taken it upon itself to check the website and now verifies that the printouts are identical to the documents as they appear on DOS's website. Thus, the evidence before the Court is that Plaintiff's principal place of business

22 Misc 3d 1139[A] [Sup Ct Kings County 2009]).
as described in its Articles of Organization is in New York County, as that is what the
Department of State indicates, contrary to Mr. Tener's self-serving assertion (which he
has not supported by providing a copy of the Articles of Organization to the Court).
Further evidence that Plaintiff's principal place of business is in New York County is that
all of the invoices annexed to the Amended Complaint have Plaintiff's address as 166
Fifth Avenue, New York, New York 10010.

**E-Evidence**

In *Shon v State of New York* (2010 NY Slip Op 06274) (3rd Dept), the claimant
successfully used e-mails to prove his case.

The Court of Claims rejected the testimony of Jan Meilhede, an engineer with DOT
during the relevant time period, that it was "impossible" to get hot mix asphalt at that
time of the year. Although Meilhede testified that asphalt plants only produce the hot mix
during the construction season, which begins in late April, and that DOT planned on
repairing the surface once the hot mix became available, there is support in this record
— particularly e-mail correspondence among DOT personnel — for the court's
finding that hot mix asphalt was obtainable in the weeks prior to the accident. In e-
mails authored by Meilhede within three weeks of the accident, Meilhede expressly
directed that hot mix asphalt be used to ameliorate the condition if it continued to
worsen. Furthermore, an e-mail compiled four days prior to the accident indicates that
DOT intended on layering the surface with hot mix asphalt as soon as it could get money
and arrange for a paver, and that some hot mix may have been available at that time.
Indeed, none of the correspondence contains any indication that attempts to obtain hot
asphalt were unsuccessful or that the mix was otherwise unavailable at that time.
Meilhede testified only that the asphalt is generally available beginning in late April, and
conceded that, in prior years, DOT has made hot asphalt repairs as early as April 4.
Significantly, despite Meilhede's testimony regarding the impossibility of obtaining the
hot mix asphalt prior to the accident, the surface of the roadway at issue was repaved
with the hot mix just five days after the accident. In addition, contrary to defendant's
assertions regarding the availability of funding to [*3]effectuate the required repairs, the
evidence established that emergency contract funds could be used to make temporary,
short-term repairs and that asphalt could be obtained on a promise of future payment
without a specific allocation.

In *Williamson v. Delsener*, 59 A.D.3d 291 (1st Dept. 2009),

the e-mails exchanged between counsel, which contained their printed names at the
end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds
(see *Stevens v Publicis S.A.*, 50 AD3d 253, 255-256 [2008], lv dismissed 10 NY3d 930
[2008]), and entitle plaintiff to judgment (CPLR 5003-a [e]). The agreement to settle at
60% of the amount demanded was sufficiently clear and concrete to constitute an
enforceable contract (see *Hostcentric Tech., Inc. v Republic Thunderbolt, LLC*, 2005 WL
Delsener's subsequent refusal to execute form releases and a stipulation of discontinuance did not invalidate the agreement (see Wronka v GEM Community Mgt., 49 AD3d 869 [2008]; Cole v Macklowe, 40 AD3d 396 [2007]).

The e-mail communications indicate that Delsener was aware of and consented to the settlement; the record contains no indication to the contrary, or that counsel was without authority to enter into the settlement (see Hallock v State of New York, 64 NY2d 224 [1984]; cf. Katzen v Twin Pines Fuel Corp., 16 AD3d 133 [2005]). To the contrary, the record supports only the conclusion that counsel at least had apparent authority.

In People v. Pierre, 41 A.D.3d 289 (1st Dept. 2007),

*The court properly received, as an admission, an Internet instant message* in which defendant told the victim's cousin that he did not want the victim's baby. *Although the witness did not save or print the message, and there was no Internet service provider evidence or other technical evidence in this regard, the instant message was properly authenticated, through circumstantial evidence, as emanating from defendant* (see United States v Siddiqui, 235 F.3d 1318, 1322-23 [11th Cir 2000], cert. denied 533 U.S. 940, 121 S. Ct. 2573, 150 L. Ed. 2d 737 [2001]; cf. People v Lynes, 49 N.Y.2d 286, 291-293, 401 N.E.2d 405, 425 N.Y.S.2d 295 [1980]; People v Hamilton, 3 AD3d 405, 771 N.Y.S.2d 104 [2004], mod on other grounds 4 NY3d 654, 830 N.E.2d 306, 797 N.Y.S.2d 408 [2005]). The accomplice witness, who was defendant's close friend, testified to defendant's screen name. The cousin testified that she sent an instant message to that same screen name, and received a reply, the content of which made no sense unless it was sent by defendant. Furthermore, there was no evidence that anyone had a motive, or opportunity, to impersonate defendant by using his screen name.

Defendant did not preserve his challenges to the authentication of another instant message, and to a message left by the defendant on the victim's phone, each of which threatened to harm the victim in the event the victim revealed her pregnancy to defendant's family, and we decline to review them in the interest of justice. Were we to review these claims, *we would find that the second instant message was sufficiently authenticated by the same type of circumstantial evidence as the first instant message*, and that the phone message was sufficiently authenticated by testimony that the witness who heard the message recognized defendant's voice (see People v Lynes, 49 N.Y.2d at 291).

Similarly, in People v Clevenstine, 68 A.D.3d 1448, 1450-1451 (3rd Dept. 2009),

Next, we consider defendant's contention that the computer disk containing the electronic communications that occurred between him and the victims via instant message was improperly admitted into evidence. Defendant objected to this evidence at trial upon the ground that it had not been properly authenticated. “[A]uthenticity is established by proof that the offered evidence is genuine and that there has been no
tampering with it,” and “[t]he foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted” (People v McGee, 49 NY2d 48, 59 [1979]; see Prince, Richardson on Evidence § 4-203 [Farrell 11th ed]). Here, both victims testified that they had engaged in instant messaging about sexual activities with defendant through the social networking site MySpace, an investigator from the computer crime unit of the State Police related that he had retrieved such conversations from the hard drive of the computer used by the victims, a legal compliance officer for MySpace explained that the messages on the computer disk had been exchanged by users of accounts created by defendant and the victims, and defendant's wife recalled the sexually explicit conversations she viewed in defendant's MySpace account while on their computer. Such testimony provided ample authentication for admission of this evidence (see People v Lynes, 49 NY2d 286, 291-293 [1980]; People v Pierre, 41 AD3d 289, 291 [2007], lv denied 9 NY3d 880 [2007]; see generally Zitter, Annotation, Authentication of Electronically Stored Evidence, Including Text Messages and E-mail, 34 ALR6th 253). Although, as defendant suggested at trial, it was possible that someone else accessed his MySpace account and sent messages under his user name, County Court properly concluded that, under the facts of this case, the likelihood of such a scenario presented a factual issue for the jury (see People v Lynes, 49 NY2d at 293).

Similarly, in People v Roberts 66 A.D.3d 1135, 1137-1138 (3rd Dept. 2009), County Court did not err in declining to admit into evidence a Microsoft Word printout of an instant message allegedly between defendant and the victim on the ground that it lacked sufficient authenticity and reliability (see People v Givans, 45 AD3d 1460, 1461-1462 [2007]; compare People v Pierre, 41 AD3d 289, 291-292 [2007], lv denied 9 NY3d 880 [2007]).

However, in Karim v. Natural Stone Industries, Inc., 19 Misc.3d 353, 855 N.Y.S.2d 845 (Sup. Queens 2008), the court did not permit the defendant to discovery of the plaintiff’s computer in a personal injury case.

As noted, the remaining issue concerns third-party defendant's request to examine plaintiff's computer. In its cross motion, third-party defendant seeks an order to compel plaintiff to provide a “clone” of the hard drive from plaintiff's computer. According to Star Structural, plaintiff has indicated that he has a computer in his bedroom and that he is capable of using it for certain purposes including scanning a photograph and sending an e-mail. Star Structural claims that the hard drive clone would provide highly relevant information regarding plaintiff's employability, which is critical to the question of whether plaintiff is “gravely injured.” Plaintiff opposes providing such discovery since plaintiff and his mother testified extensively at their depositions regarding the use of the computer; in fact, plaintiff has acknowledged using it and accessing the Internet.

3 While unrelated to the subject of this lecture, this decision gives good language for a party seeking to exclude videotapes.
Moreover, plaintiff's mother stated that she and other members of the household, other than plaintiff, also use the computer on a regular basis and are the prime users of the computer. Consequently, plaintiff argues, in essence, that the clone would not provide material necessary for the defense of this action.

**Hearsay**

In Hochhauser v. Elec. Ins. Co., 46 A.D3d 174 (2nd Dept. 2007), the court gave a thorough analysis of hearsay. The case involves a seemingly simple issue, but as often the case, nothing is simple.

These appeals present a novel issue as to whether an insured's statement in an insurance investigation report, as well as testimony regarding the statement, are admissible at a hearing under the business records exception to the hearsay rule. *We hold that, since an insured lacks a business duty, as opposed to a contractual duty, to report to his or her insurer in the course of its investigation regarding insurance coverage, neither the insured's statement nor testimony regarding such a statement is admissible pursuant to the business records exception to the hearsay rule.*

To reach this conclusion, an extensive discussion of hearsay was made.

*As often defined, "[h]earsay is a statement made out of court . . . offered for the truth of the fact asserted in the statement"* (People v Goldstein, 6 NY3d 119, 127, 843 N.E.2d 727, 810 N.Y.S.2d 100, cert denied 126 S. Ct. 2293, 164 L. Ed. 2d 834, quoting People v Romero, 78 NY2d 355, 361, 581 N.E.2d 1048, 575 N.Y.S.2d 802; see Gelpi v 37th Ave. Realty Corp., 281 AD2d 392, 392, 721 N.Y.S.2d 380). *Such a statement "may be received in evidence only if [it] fall[s] within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable"* (Nucci v Proper, 95 NY2d 597, 602, 744 N.E.2d 128, 721 N.Y.S.2d 593, quoting People v Brensic, 70 NY2d 9, 14, 509 N.E.2d 1226, 517 N.Y.S.2d 120). Further, *in assessing reliability, "a court must decide whether the declaration was spoken under circumstances which render . . . it highly probable that it is truthful"* (Nucci v Proper, 95 NY2d at 602, quoting People v Brensic, 70 NY2d at 14-15).

The business records exception to the hearsay rule provides:
"Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter"
The basis of the business records exception to the hearsay rule is the trustworthiness of the document (see 5 Wigmore, Evidence § 1522, at 442 [Chadbourn rev 1974]; Barker and Alexander, Evidence in New York State and Federal Courts § 8:41, at 875; Frumer and Biskind, 6 Bender's New York Evidence CPLR § 19.04, at 19-71). "The essence of the business records exception to the hearsay rule is that records systematically made for the conduct of a business as a business are inherently trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for the purposes of the conduct of the enterprise" (Prince, Richardson on Evidence § 8-301 [Farrell 11th ed.], citing People v Kennedy, 68 NY2d 569, 578-579, 503 N.E.2d 501, 510 N.Y.S.2d 853).

Further, the concern relating to trustworthiness extends to "each participant in the chain producing the [business] record, from the initial declarant to the final entrant" (see Matter of Leon RR, 48 NY2d 117, 122, 397 N.E.2d 374, 421 N.Y.S.2d 863). As one treatise explains:

"In the leading case of Johnson v Lutz (253 NY 124, 170 N.E. 517) the Court of Appeals read into the business records statute a qualification which, though not traceable to the language of the statute itself, is not controverted as a sound interpretation of the statute's intent. The effect of Johnson v Lutz and its progeny is a refusal by the courts to admit into evidence, solely on the strength of the business records statute, those entries in business records which, though otherwise qualified under the statute, are based on information supplied by a person who was outside of the enterprise and who was not therefore communicating the information under the compulsion of a business duty" (Frumer and Biskind, 6 Bender's New York Evidence CPLR, § 19.04[4], at 19-104 [emphasis in original]; see Prince, Richardson on Evidence § 8-307).

In Matter of Leon RR, relied upon by the plaintiff, the Court of Appeals explained that "each participant in the chain producing the [business] record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception" (id. at 122). Thus, the Court of Appeals noted, "not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant as well" (id. at 122). The Court of Appeals further explained that the "reason underlying the business records exception fails and, hence, the statement is inadmissible hearsay if any of the participants in the chain is acting outside the scope of a business duty" (id. at 123; see Johnson v Lutz, 253 NY 124, 128, 170 N.E. 517).

Generally, however, the trend has been to prohibit the admission of a business record or a statement within such a record where the declarant is outside the business enterprise because the statement lacks the inherent trustworthiness or indicia of reliability to except it from the general prohibition against admitting an out-of-court
statement asserted for the truth of the statement (see generally Frumer and Biskind, 6 Bender's New York Evidence CPLR § 19.04 [4], at 19-106 [noting "if the supplier of information was not acting under a business duty to communicate accurately the assurance of accuracy that underlies the business records exception does not guarantee the truth of the information supplied even though it may have been scrupulously recorded"]).

What prompted this analysis was an objection to the hearsay.

We reject the insurer's contention that the plaintiff failed to object to Quinn's testimony on hearsay grounds. CPLR 4017 provides:

"Formal exceptions to rulings of the court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. Failure to so make known objections, as prescribed in this section . . . may restrict review upon appeal"

(see Horton v Smith, 51 NY2d 798, 799, 412 N.E.2d 1318, 433 N.Y.S.2d 92). Further, "[a]n objection must be clear enough to apprise the court of the nature of the objection" (Gallegos v Elite Model Mgmt. Corp., 28 A.D.3d 50, 59, 807 N.Y.S.2d 44). Here, the plaintiff lodged a general objection based on hearsay prior to Quinn's testimony but did not object to Quinn's specific testimony that constituted the hearsay. Since the general objection to both the testimony and the business record apprised the Judicial Hearing Officer that the plaintiff objected on the grounds of hearsay, the plaintiff preserved the issue for appellate review (see CPLR 4107; Gallegos v Elite Model Mgmt. Corp., 28 A.D.3d 50, 807 N.Y.S.2d 44).

Here, undisputedly, the insured was outside the insurer's enterprise. Thus, under the rationale presented in both Johnson v Lutz and Matter of Leon RR, as well as their progeny, and the policy underlying the business records hearsay exception, the insured's statement regarding the plaintiff's residence and Quinn's testimony regarding that statement are inadmissible hearsay. The insurer, however, argues that the insured had a duty to speak with the insurance investigator based on the underlying contractual duty which requires all insureds to cooperate with their insurer during an insurance investigation.

As the insurer correctly notes, generally an insured has a duty to cooperate in an insurance investigation by its insurer. In fact, typically, an insurer may disclaim coverage where an insured deliberately fails to cooperate with its insurer as required by an insurance policy (see City of New York v Continental Cas. Co., 27 AD3d 28, 31-32, 805 N.Y.S.2d 391; Utica Mut. Ins. Co. v Gruzlewski, 217 A.D.2d 903, 903-904, 630 N.Y.S.2d 826; State Farm Fire & Cas. Co. v Imeri, 182 AD2d 683, 683, 582 N.Y.S.2d 463). The insurer, however, fails to support this argument with any case law holding that the duty to cooperate with an insurer equates to a business duty to report
information during an insurance investigation, thereby affording a statement given by
an insured during the course of such an investigation the requisite reliability or
trustworthiness to fall within the business records exception to the hearsay rule.
Here, notwithstanding the insured's contractual relationship with the insurer, the
insured was outside of the insurer's enterprise. Therefore, the insured was not
communicating information regarding the plaintiff's residence to the insurer under the
compulsion of a business duty (see generally, Matter of Leon RR, 48 NY2d 117, 397
N.E.2d 374, 421 N.Y.S.2d 863; Johnson v Lutz, 253 NY 124, 170 N.E. 517; Matter of
Loren B. v Heather] A., 13 AD3d 998, 788 N.Y.S.2d 215; People v Cruz, 283 AD2d
295, 728 N.Y.S.2d 1; People v Edmonds, 251 AD2d 197, 674 N.Y.S.2d 361). Rather, the
insured was acting pursuant to the terms of his contractual relationship with the
insurer which requires cooperation in providing requested information during an
insurance investigation. Under such circumstances, an insured is acting in his or her
own interest and not necessarily in the interest of the insurance enterprise (cf. People v
Cratsley, 86 NY2d 81, 653 N.E.2d 1162, 629 N.Y.S.2d 992; Chubb & Son v Riverside
Tower Parking Corp., 267 AD2d 128, 700 N.Y.S.2d 153; Lopez v Ford Motor Credit Co.,
238 AD2d 211, 656 N.Y.S.2d 257). In other words, despite potential consequences which
may befall an insured who fails to provide accurate and truthful information to, or to
cooperate with, an insurer, the insured's statement to the insurance investigator regarding
the plaintiff's residence was not made under circumstances which create a high
probability that the statement was truthful. The insured's statement within the insurance
investigator's report is not, therefore, inherently trustworthy the very foundation of the
business records exception to the hearsay rule (see generally Frumer and Biskind, 6
Bender's New York Evidence CPLR § 19.04 [4], at 19-106). The contractual
relationship between the insured and the insurer is, thus, insufficient to cloak the
insured's statement with the needed trustworthiness to except it from the general rule
prohibiting the admission of hearsay statements into evidence (accord People v
Edmonds, 251 AD2d 197, 674 N.Y.S.2d 361; Romanian Am. Interests v Scher, 94 AD2d
549, 464 N.Y.S.2d 821). Accordingly, we hold that the insured's statement and
testimony regarding that statement lack the requisite indicia of reliability or
trustworthiness necessary to allow them into evidence under the business records
exception to the hearsay rule (see Matter of Leon RR., 48 NY2d 117, 397 N.E.2d 374,

Without the benefit of the business records exception to the hearsay rule, both Quinn's
testimony regarding the insured's statement and the statement itself in the subject
business record equate to impermissible hearsay, unless an independent basis for their
admission exists (see Taft v New York City Tr. Auth., 193 AD2d 503, 504, 597 N.Y.S.2d
374; Toll v State of New York, 32 AD2d 47, 50, 299 N.Y.S.2d 589). Here, no such
independent basis exists. Contrary to the holding of the Supreme Court, the insured's
statement is not admissible as a statement against interest (see Kelleher v F.M.E. Auto
Leasing Corp., 192 AD2d 581, 583, 596 N.Y.S.2d 136; Basile v Huntington Util. Fuel
Corp., 60 A.D.2d 616, 617, 400 N.Y.S.2d 150; Jamison v Walker, 48 AD2d 320, 323,
369 N.Y.S.2d 469).
In *Kaufman v Quickway, Inc.*, 14 NY3d 907 (2010), the Court of Appeals reversed the Appellate Division. Apparently they listened to Decisions last year.

In this Dram Shop Act action involving a convenience store's allegedly illegal sale of alcohol to a visibly intoxicated customer who later caused a fatal traffic accident, the Appellate Division reversed Supreme Court's order denying defendants' motion for summary judgment, granted the motion, and dismissed the complaint. The Appellate Division held that the store clerk's out-of-court statements to a State Trooper investigating the accident were not admissible under the hearsay exception for prior inconsistent statements to rebut her later deposition testimony (*see Letendre v Hartford Acc. & Indem. Co.*, 21 NY2d 518, 524 [1968]; *cf. Nucci v Proper*, 95 NY2d 597, 603 [2001]). We disagree. The supporting deposition prepared by the Trooper and signed by the witness under penalty of perjury contained numerous indicia of reliability justifying its admissibility under *Letendre*. And, as in *Letendre*, the store clerk was available for cross-examination. In addition, the statement was sufficient to create a triable issue regarding whether the driver was visibly intoxicated at the time of the alcohol sale (*see Alcoholic Beverage Control Law § 65 [2]; General Obligations Law § 11-101*).

**Admissions**

In *Benedikt v Certified Lbr. Corp.*, 60 AD3d 798 (2nd Dept. 2009)

The plaintiffs established a prima facie case for summary judgment in their favor on the issue of liability by demonstrating that the defendant driver failed to yield the right of way to the injured plaintiff, Adina Benedikt, who was crossing the street within the crosswalk with the pedestrian "WALK" signal in her favor (*see Zabusky v Cochran*, 234 AD2d 542; *Jermin v APA Truck Leasing Co.*, 237 AD2d 255). The plaintiffs submitted an affidavit by the injured plaintiff to that effect, which was supported by copies of the police accident reports and the MV-104 report signed by the defendant driver, containing that defendant's admission against interest that he did not see the injured plaintiff before he struck her (*see Niyazov v Bradford*, 13 AD3d 501; *Vaden v Rose*, 4 AD3d 468; *Kemenyash v McGoey*, 306 AD2d 516; *Guevara v Zaharakis*, 303 AD2d 555). The affidavit of the defendant driver, submitted in opposition to the motion, merely raised feigned issues of fact, which are insufficient to defeat a motion for summary judgment (*see Capraro v Staten Is. Univ. Hosp.*, 245 AD2d 256; *Miller v City of New York*, 214 AD2d 657; *Garvin v Rosenberg*, 204 AD2d 388), and the defendants failed to demonstrate that further discovery was warranted (*see Lopez v WS Distrib., Inc.*, 34 AD3d 759).


In opposition to the motion, plaintiff submitted an affidavit from a private investigator
who averred that the president of the Alpha defendants acknowledged that three or four of his employees were working on the staircase on the day of plaintiff's injury. The president informed the private investigator that his employees were doing "grinding and polishing work" with tools that required electrical power. Plaintiff also submitted evidence that only one contractor worked on the staircase at a given time, that the Alpha defendants and Sackett were the only contractors who performed work on the staircase, and that none of plaintiff's coworkers was working on the stairs on the day in question. In our view, that evidence is sufficient to raise an issue of fact whether an employee of the Alpha defendants left the cord or cable on the stairway and thereby created a dangerous condition that caused plaintiff's injuries.


Judicial Admissions

What an attorney says can also be a judicial admission against interest.

In Morel v Schenker (2009 NY Slip Op 05605) the First Department reminded us the danger of an attorneys admission, even in a discovery response.

However, admissions made by counsel on behalf of their clients are binding (see Matter of Union Indem. Ins. Co. of N.Y., 89 NY2d 94, 103 [1996]), and Holding's discovery responses create issues of fact as to whether work or repairs made by its employees may have caused plaintiffs' injuries.

As to the proposed amendment to the complaint to add additional defendants, a claim asserted against a new party will relate back to the date upon which plaintiffs' claim was previously interposed against the original named defendant, despite the fact that the new party was not named in the originally served process, but only if (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is "united in interest" with the original defendant and thus can be charged with notice of the initiation of the action without being prejudiced in maintaining his defense on the merits, and (3) the new party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well (Brock v Bua, 83 AD2d 61, 69 [1981]). Here, defendant and the proposed defendants produced the deposition testimony of the superintendent of the subject premises,
who stated that he was an employee of COB Holding, one of the proposed
defendants. This testimony directly contradicted a discovery response on August 17,
2005, in which Holding conceded that the employee "was the superintendent on the
alleged date of loss, 2/23/03 and is still currently employed by . . . Holding . . . as
superintendent." Further, the proposed defendants, along with Holding, were
identified as named insureds on the same general insurance policy applicable to the
subject premises. Holding shared the same address with the proposed defendants.
Under the circumstances, we find that plaintiffs have provided sufficient evidence
entitling them to amend their complaint.

In Rahman v. Smith, 40 A.D.3d 613 (2nd Dept. 2007), a defense attorney’s
words on summation almost cost the defendant a defense verdict, and the court
defined what constitutes a judicial admission:

Contrary to the plaintiffs' contention, defense counsel's statement in summation that he
believed the jury would find liability on both sides was not a judicial admission. In order to constitute a judicial admission, the statement must be one of fact (see 5
Bender's NY Evidence § 16.06[1]; Prince, Richardson on Evidence §§ 8-215, 8-219
[Farrell 11th ed]). Counsel's argument or opinion cannot constitute a judicial
admission (see Wheeler v Citizens Telecoms. Co. of N.Y., Inc., 18 AD3d 1002, 1005,
795 N.Y.S.2d 370). Further, the statement must be made with sufficient formality
and conclusiveness, that is, it must be deliberate, clear, and unequivocal (see State
ex rel. H. v P., 90 A.D.2d 434, 439, 457 N.Y.S.2d 488 n 4; see also Matter of Corland
Corp., 967 F.2d 1069, 1074; 29A Am Jur 2d Evidence § 770). Here, defense counsel's
statement was not one of fact, nor was it made with sufficient formality and
conclusiveness. Instead, counsel merely presented his opinion as to what he believed
the evidence had showed. Consistent with the instructions the Supreme Court provided
to the jury (see PJI 1:5), the jurors were free to adopt or reject counsel's view.
Accordingly, the Supreme Court properly denied the plaintiffs' motion to set aside the
verdict.

In People v. Johnson, 46 A.D.3d 276 (1st Dept. 2007),

the trial court properly permitted the prosecutor to impeach defendant by way of
statements made by her attorney at the bail hearing as it is a reasonable inference
that such statements were attributable to defendant, and they significantly
contradicted her trial testimony (see People v Gary, 44 AD3d 416, 843 NYS2d 66
[2007]; People v Kallamni, 14 AD3d 316, 787 N.Y.S.2d 1 [2005], lv denied 4 NY3d
854, 830 N.E.2d 327, 797 N.Y.S.2d 428 [2005]).

Ownership of Vehicle

In Zegarowicz v Ripatti, 67 AD3d 672 (2nd Dept. 2009)
In his amended complaint, the plaintiff alleged that the defendant HVT, Inc. (hereinafter HVT), was the owner of the vehicle operated by the defendant Pertti Ripatti, and that it was vicariously liable for Ripatti's negligence under Vehicle and Traffic Law § 388. In its answer to the amended complaint, HVT denied these allegations, except to admit that it had leased the vehicle to Ripatti, and was identified as the owner on the certificate of title; HVT nonetheless denied that it was an "owner" as defined by Vehicle and Traffic Law §§ 128 and 388, referring all questions of law to the court.

Facts admitted by a party's pleadings constitute formal judicial admissions (see Falkowski v 81 & 3 of Watertown., 288 AD2d 890, 891 [2001]; Prince, Richardson on Evidence § 8-215, at 523-524 [Farrell 11th ed]). Formal judicial admissions are conclusive of the facts admitted in the action in which they are made (see Coffin v Grand Rapids Hydraulic Co., 136 NY 655 [1893]).

Here, HVT made a formal judicial admission that it was listed as owner on the certificate of title. A certificate of title is prima facie evidence of ownership (see Vehicle and Traffic Law § 2108 [c]; Switzer v Aldrich, 307 NY 56 [1954]; Corrigan v DiGuardia, 166 AD2d 408 [1990]; Salisbury v Smith, 115 AD2d 840 [1985]). Although this presumption of ownership is not conclusive, and may be rebutted by evidence which demonstrates that another individual owned the vehicle in question (see Aronov v Bruins Transp., 294 AD2d 523 [2002]; Dorizas v Island Insulation Corp., 254 AD2d 246 [1998]), there was no evidence in the record to rebut that presumption. "In reviewing a determination made after a nonjury trial, the power of this Court is as broad as that of the trial court, and this Court may render the judgment it finds 'warranted by the facts,' bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses" (Stevens v State of New York, 47 AD3d 624, 624-625 [2008], quoting Northern Westchester Professional Park Assoc. v Town of Bedford, 60 NY2d 492, 499 [1983]). Based on our review of the evidence, judgment in favor of the plaintiff and against HVT on the issue of liability is warranted.

**Interviewing Party Employees**

In Muriel Siebert & Co. v. Intuit, Inc., 8 N.Y.3d 506 (2007) the Court of Appeal held that an attorney may conduct an ex parte interview with a former employee of a party that held a high level position. See, Niesig v. Team I, 76 N.Y.2d 363 (1990).

The Court of Appeals also held that a plaintiff may be compelled to furnish a HIPAA compliant authorization permitting the plaintiff’s treating physician to be interviewed by defense counsel. Arons v. Jutkowitz, 9 N.Y.3d 393 (2007).

In Radder v CSX Transp., Inc., 68 AD3d 1743 (4th Dept. 2009)
Plaintiff commenced this action pursuant to the Federal Employers' Liability Act ([FELA] 45 USC § 51 et seq.) seeking damages for injuries he sustained during the course of his employment with defendant, CSX Transportation, Inc. (CSX). Plaintiff retained the law firm of Kantor & Godwin, PLLC (K&G) to represent him in the action. While plaintiff's action was pending, a second CSX employee, William Pauley, was injured at work and he too retained K&G to represent him in a personal injury action against CSX. Shortly before plaintiff's action went to trial and without notice to or the consent of CSX, K&G interviewed Pauley concerning plaintiff's case. During the course of that interview, Pauley disclosed to K&G, as he previously had disclosed to the attorneys for CSX, that on the day of plaintiff's accident he had forged an inspection report related to the piece of equipment that had caused plaintiff's injuries. Before Pauley was called as a witness at trial, CSX moved to preclude his testimony, contending that K&G had violated the attorney disciplinary rules then in effect by interviewing Pauley. Supreme Court denied that motion, as well as a subsequent motion for a mistrial and the post-trial motion of CSX seeking a new trial and, inter alia, suppression of the information that allegedly was improperly obtained by plaintiff's attorneys. The jury returned a verdict in favor of plaintiff, awarding him damages of, inter alia, $550,000 for past pain and suffering and $1 million for future pain and suffering, to cover a period of 24.1 years. The court granted that part of the post-trial motion of CSX to set aside the award for future pain and suffering and, upon the stipulation of plaintiff, the court reduced that award to $650,000.

CSX contends on appeal that K&G violated Code of Professional Responsibility former DR 7-104 (a) (1) (22 NYCRR 1200.35 [a] [1]) and former DR 5-105 (b) through (d) (22 NYCRR 1200.24 [b]-[d]), and that those violations warranted suppression of the information improperly obtained by plaintiff's attorneys. We reject that contention. Generally, "absent some constitutional, statutory, or decisional authority mandating the suppression of otherwise valid evidence, such evidence will be admissible [in a civil action] even if procured by unethical means" (Heimanson v Farkas, 292 AD2d 421, 422 [2002]; see Nordhauser v New York City Health & Hosps. Corp., 176 AD2d 787, 791 [1991]; see generally Sackler v Sackler, 15 NY2d 40, 43-44 [1964]). Here, there is no constitutional, statutory or case law authority mandating the suppression of Pauley's otherwise valid testimony, and thus the only basis for suppression of that testimony would be CPLR 3103 (c), which permits the suppression of "any disclosure under [article 31 that] has been improperly or irregularly obtained so that a substantial right of a party is prejudiced."

Contrary to the contention of plaintiff, our review is not limited to whether the court abused its discretion. It is well settled that, where discretionary determinations concerning discovery and CPLR article 31 are at issue, this Court "is vested with the same power and discretion as [Supreme Court, and thus] the Appellate Division may also substitute its own discretion even in the absence of abuse" (Brady v Ottaway Newspapers, 63 NY2d 1031, 1032 [1984] [emphasis added]; see Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 745 [2000]). Here, however, we conclude that there was neither an abuse nor an improvident exercise of discretion.
Former DR 7-104 (a) provided in relevant part that "[d]uring the course of the representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized to do so." We conclude that, at the time of plaintiff's accident, Pauley was an employee deemed to be a party represented by the attorneys for CSX (see Niesig v Team I, 76 NY2d 363, 374 [1990]), but that at the time he was interviewed by K&G he was not. Indeed, by then, Pauley was no longer an employee of CSX (see Muriel Siebert & Co., Inc. v Intuit Inc., 8 NY3d 506, 511 [2007]; see also Labor Law § 2 [5]). When he was interviewed by K&G, Pauley had been on long-term illness status for over three years, he was receiving disability benefits instead of wages, and his benefits were being paid by the Railroad Retirement Board, not by CSX (cf. Rostocki v Consolidated Rail Corp., 19 F3d 104, 106 [1994]).

Based on our determination that Pauley was not a current employee of CSX when he was interviewed by K&G, we conclude that there was no violation of former DR 7-104 (a) (1), and thus there is no need to address plaintiff's contention that the interview was otherwise authorized by FELA (see 45 USC § 60).

CSX further contends that K&G violated former DR 5-105 (b) through (d) because it was representing two clients with differing interests. We reject that contention as well. When K&G initially began to represent both plaintiff and Pauley, there was no apparent conflict. After Pauley disclosed that he forged a document that was critical to plaintiff's case, however, K&G was placed in a position in which it was required to impugn Pauley's credibility in order to strengthen plaintiff's case. Doing so necessarily affected the credibility of Pauley in his own personal injury action. "[A]ttorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests" (Greene v Greene, 47 NY2d 447, 451 [1979]). Nevertheless, even assuming that K&G had an impermissible conflict of interest, we conclude that any breach of duty would be to K&G's clients (see e.g. Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1, 9-10 [2008]), and the remedy for the breach of that duty would be an award of damages to the clients (see id. at 10; see also Tabner v Drake, 9 AD3d 606, 610 [2004]), or disqualification of counsel (see e.g. Greene, 47 NY2d at 450; Applehead Pictures LLC v Perelman, 55 AD3d 348 [2008]). Neither remedy was sought in this action.

In any event, even assuming that there was evidence that was "improperly or irregularly obtained," we conclude that no substantial right of CSX was prejudiced (CPLR 3103 [c]). The evidence of Pauley's forgery was previously known to the attorneys for CSX, it was not privileged and it could have been exposed in the normal course of discovery (see e.g. Levy v Grandone, 8 [*3]AD3d 630 [2004], lv dismissed 5 NY3d 746 [2005], rearg denied 5 NY3d 850 [2005]; Gutierrez v Dudock, 276 AD2d 746 [2000]; cf. Lipin v Bender, 84 NY2d 562, 568-569 [1994], rearg denied 84 NY2d 1027 [1995]). Thus, the court properly denied the motions of CSX to
preclude Pauley's testimony, to declare a mistrial, and to set aside the verdict and for a new trial in which the improperly obtained evidence would be suppressed.

However, an interview that is obtained without appropriate authorization may cause a retrial. Straub v Yalamanchili, 2009 NY Slip Op 00291 (3rd Dept. 2009).

In May 2000, defendant performed spinal surgery on plaintiff William Straub (hereinafter plaintiff). Thereafter, plaintiff's condition allegedly worsened and he and his wife, derivatively, commenced the instant medical malpractice action against defendant. A jury trial was held in July 2007, resulting in a verdict in defendant's favor. During the trial, defense counsel had ex parte communications with two of plaintiff's treating physicians without obtaining plaintiff's authorization under the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d et seq. [hereinafter HIPAA]). As a result, plaintiffs' counsel made a posttrial motion pursuant to CPLR 4404 (a) to set aside the verdict and for a new trial. Supreme Court granted the motion and ordered a new trial. Defendant now appeals.

We affirm. CPLR 4404 (a) provides that the trial court may set aside the jury's verdict "upon the motion of any party or upon its own initiative . . . in the interest of justice." "The authority to grant a new trial is discretionary in nature and is vested in the trial court 'predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein'" (Zimmer v Chemung County Performing Arts, 130 AD2d 857, 858 [1987], quoting Micallef v Miehle Co., Div. of Miehle-Goss Dexter, 39 NY2d 376, 381 [1976]; see Galioto v Lakeside Hosp., 123 AD2d 421, 422 [1986]). Notably, Supreme Court's decision in this regard will not be disturbed absent an abuse of discretion (see Packard v State Farm Gen. Ins. Co., 268 AD2d 821, 822 [1986]).

During the course of the trial here, defense counsel had ex parte conversations with Anthony Sanito and Lowell Garner, both of whom treated plaintiff, without obtaining plaintiff's authorization under HIPAA. This was in clear violation of the law in effect at the time of trial (see Kish v Graham, 40 AD3d 118 [2007], revd 9 NY3d 393 [2007]; Arons v Jutkowitz, 37 AD3d 94 [2006], revd 9 NY3d 393 [2007]) and plaintiffs' counsel did not discover it until that time.

Through these conversations, defense counsel obtained information that he otherwise did not have, which enabled him to elicit testimony that was not only favorable to his client, but that came as a complete surprise to plaintiffs and which they were unprepared to rebut. For example, plaintiffs' counsel sought to establish that the blood loss suffered by plaintiff during the surgical procedure was substantial, and counsel subpoenaed Garner, the anesthesiologist present during surgery, for this purpose. On cross-examination, however, Garner opined that the amount of blood loss was not uncommon for this procedure. Plaintiffs' counsel also subpoenaed Sanito, the physician who treated plaintiff for pain management both before and after the surgery, to testify concerning the worsening of plaintiff's condition after the surgery. However, he testified that he could not recall if plaintiff's condition had worsened and further stated that he had referred many patients to defendant, whom he regarded as a good surgeon. Inasmuch as such testimony was clearly prejudicial to plaintiffs' case, we do not find that
Supreme Court abused its discretion in setting aside the verdict and ordering a new trial in the interest of justice (see e.g., Tehozol v Anand Realty Corp., 41 AD3d 151 [2007]; Van Dusen v McMaster, 28 AD3d 1057 [2006]).

**Speaking Authority**

On Aquino v. Kuczinski, Villa & Assoc., P.C., 39 A.D.3d 216 (1st Dept. 2007), Contrary to the motion court's ruling, we find that these statements were offered for the truth of the matter asserted therein, as there would be no other reason to offer these statements other than to prove that the security guard acted negligently by instructing plaintiff in this manner. Notably, however, plaintiff made no attempt to meet her burden of establishing that the security guard was authorized to speak on the casino's behalf, and thus, the security guard's statement was not admissible under the speaking-agent exception to the hearsay rule (Tyrrell v Wal-Mart Stores, 97 N.Y.2d 650, 652, 762 N.E.2d 921, 737 N.Y.S.2d 43 [2001]; Alvarez v First Natl. Supermarkets, 11 A.D.3d 572, 573-574, 783 N.Y.S.2d 62 [2004]). Hearsay alone is insufficient to defeat summary judgment (Navedo v 250 Willis Ave., 290 A.D.2d 246, 247, 735 N.Y.S.2d 132 [2002]), and plaintiff has failed to show by admissible evidence that she would have prevailed in holding the casino liable for the security guard's alleged negligence.

Conduct may create a question of fact as to corporate responsibility. There are numerous cases dealing with apparent agency, apparent authority, agency by estoppel, ostensible agency/authority. In Anikushina v Moodie, 2009 NY Slip Op 00239 (1st Dept. 2009) a similar fact issue was created.

The evidence presents a triable issue whether the corporate defendants exercised sufficient control over defendant Moodie's work to potentially render them liable for injuries plaintiff suffered when she was struck by a delivery van driven by Moodie (see Carrion v Orbit Messenger, 82 NY2d 742 [1993]). Moodie performed delivery services only for Olympic Courier Systems, Inc., a subsidiary of CD & L Inc., during the years in which he worked for CD & L pursuant to an independent contractor's agreement with Olympic; he used CD & L forms; he made deliveries and pick-ups at times specified by CD & L; his whereabouts were tracked by CD & L by means of a prepared schedule and regular contact through a CD & L computer and CD & L dispatchers; he was paid 57% of the gross billing receipts for work performed; he was obligated to procure insurance in an amount dictated by the independent contractor's agreement; he always wore a shirt bearing defendants' logo (see id; Devlin v City of New York, 254 AD2d 16 [1998]).

**Privilege**
In **Lue v Finkelstein & Partners, LLP**, 67 AD3d 1187 (3rd Dept. 2009)

Appeal from an order of the Supreme Court (Catena, J.), entered January 12, 2009 in Montgomery County, which, among other things, denied defendants' motion to compel the deposition of plaintiff.

Plaintiff fell from a scissor lift while working for his employer, an electrical contractor, at a warehouse owned by K-Mart Corporation. He retained defendant Finkelstein & Partners, LLP, and that law firm allegedly failed to properly preserve his personal injury claim against K-Mart during the company's chapter 11 bankruptcy proceeding. Thereafter, plaintiff's new attorneys, Wein, Young, Fenton & Kelsey, P.C. (hereinafter Wein), commenced an action alleging, among other things, a Labor Law § 240 claim against K-Mart and claims of products liability and negligence against United Rentals, Inc., the lessor of the scissor lift. The Labor Law § 240 claim (an absolute liability cause of action) against K-Mart was dismissed on the grounds of collateral estoppel and res judicata as a result of the failure to preserve the claim in the bankruptcy proceeding. The claim against United Rentals survived and was settled on the eve of trial for $235,000. [*2]

Plaintiff, represented by Wein, brought this malpractice action against defendants with regard to the dismissed Labor Law claim. He asserted that he settled for an amount that did not fully compensate him because of the loss of the absolute liability cause of action. During the deposition upon oral questions of plaintiff, defendants sought to question him regarding his discussions with Wein regarding the settlement of the action against United Rentals. Plaintiff asserted the attorney-client privilege as to those conversations. Defendants moved to, among other things, compel plaintiff to answer questions regarding communications between himself and Wein regarding settlement of the claim against United Rentals. Supreme Court held that plaintiff had not waived the attorney-client privilege and thus denied defendants' request for disclosure of the settlement communications. Defendants appeal.

Defendants contend that plaintiff's duty to mitigate his damages and the fact that he settled his claim against United Rentals for less than the total available insurance coverage creates a situation where his discussions with his attorney regarding that settlement should be disclosed in this malpractice action. "Trial courts are granted broad discretion in overseeing the disclosure process, and appellate courts will not intervene absent a clear abuse of that discretion" (**Wilson v Metalcraft of Mayville, Inc.,** 13 AD3d 794, 795 [2004] [citation omitted]; **Ruthman, Mercadante & Hadjis v Nardiello,** 288 AD2d 593, 594 [2001]; **Saratoga Harness Racing v Roemer,** 274 AD2d 887, 888 [2000]).

There is no dispute that plaintiff's discussions with Wein regarding settlement of the action against United Rentals fall within the scope of the attorney-client privilege and, as such, are not subject to disclosure unless the privilege was waived by plaintiff (see CPLR 4503 [a] [1]; **Raphael v Clune White & Nelson,** 146 AD2d 762, 763 [1989]; **Jakobleff v Cerrato, Sweeney & Cohn,** 97 AD2d 834, 835 [1983]). In a case similar to this one involving an effort to obtain confidential information between a client and the attorneys who had obtained a settlement that allegedly was inadequate because of the prior attorneys' malpractice, the Second Department held that "[b]y commencing suit...
against his former attorneys, the plaintiff has not placed in issue privileged communications with his . . . attorneys" who represented him in the settlement (Raphael v Clune White & Nelson, 146 AD2d at 763). We are unpersuaded that the presence of a settlement for less than the full amount of insurance, or any of the other circumstances asserted by defendants, compels a contrary conclusion in this case.

**Dead Man’s Statute**

CPLR 4519 governs, and precludes testimony of a conversation between an “interested” witness and the deceased. It is for the protection of the deceased, so as to avoid fabricated and fraudulent conversations that the deceased cannot rebut. The protection of the Statute can be waived by the deceased. In re Estate of Lamparelli, 6 A.D.3d 1218, 776 N.Y.S.2d 665 (4th Dept. 2004); Papa v. Sarnataro, 17 A.D.3d 430, 729 N.Y.S.2d 613 (2nd Dept. 2005).

The parent of a party is not a “person interested in the event” within the meaning of the Statute. In re Washington v. Fields, 281 A.D.2d 552, 722 N.Y.S.2d 247 (2nd Dept. 2001). A brother is not “interested in the event”. “The test of the interest of a witness is whether the witness will gain or lose by the direct legal operation and effect of the judgment or that the record will be legal evidence for or against the witness in some other action (citations omitted).” Smith v. Kuhn, 221 A.D.2d 620, 634 N.Y.S.2d 167 (2nd Dept. 1995). Any general interest that the plaintiff’s brother may have in the outcome of the case would go to his credibility but would not preclude testimony about his conversation with the deceased. Id.

In a medical malpractice case, the trial court will properly deny the plaintiff’s request to impeach the deceased defendant with a book partially authored by him. “It is well settled that a deceased witness whose prior testimony is admitted at trial may not be impeached by a posthumous showing of allegedly contradictory or inconsistent


In Matter of Zalk, 10 N.Y.3d 669 (2008), the Court of Appeals addressed the “Dead Man’s Statute”.

"The rule of evidence popularly referred to as the Dead Man's Statute" was enacted by the New York Legislature in 1851, and is "widely considered to be the last vestige of the common-law rule which made all interested persons and parties incompetent to testify. After the general rule barring testimony from interested persons was abolished, a new rule was adopted to prevent the living from testifying to certain 'personal transactions' with the dead. One of the main purposes of the rule was to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court" (Matter of Wood, 52 NY2d 139, 143-144, 418 N.E.2d 365, 436 N.Y.S.2d 850 [1981] [internal citations omitted]).

“…the Dead Man's Statute only applies to testimony "against the executor, administrator or survivor" of the deceased. It does not foreclose testimony that potentially cuts against these parties' interests in a contingent future proceeding.”

Similarly, in Cinquemani v. Lazio, 37 A.D3d 882 (3rd Dept. 2007), the Dead Man's Statute (see CPLR 4519) presented no bar because the testimony was not offered against anyone who had derived a property interest from, through or under the deceased.

Adverse Witness

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“The Supreme Court also erred in refusing to permit the defendant driver to be treated as a hostile witness. Where, as here, ‘an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross examination by the use of leading questions’ (citations omitted). Moreover, the general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior statements made either under oath or in writing (citations omitted).” Fox v. Tedesco, 15 A.D.3d 538, 789 A.D.2d 742 (2nd Dept. 2005). See, Cammarota v. Drake, 285 A.D.2d 919, 920-921, 727 N.Y.S.2d 809, 810-811 (3rd Dept. 2001); Wiliams v. Brosnahan, 295 A.D.2d 971, 972, 746 N.Y.S.2d 219, 221 (4th Dept. 2002).

“The Supreme Court erred in finding that the MV-104 motor vehicle accident report filed by the defendant Rosemary Tedesco … was not admissible in evidence. The accident report was properly certified, and should have been received into evidence as an admission by the defendant driver….” Id.

In Loschiavo v. DeBruyn, 6 A.D.3d 1113, 776 N.Y.S.2d 416 (4th Dept. 2004), the trial court did not abuse its discretion by granting the cross motion of a defendant for a protective order pursuant to CPLR 3103 precluding the plaintiff from using Weed’s (a now deceased defendant) deposition against a newly added defendant, where the newly added defendant did not have the opportunity to be present at the taking of Weed’s deposition.

In Lanrz v. Consolidated Rail Corp., 258 A.D.2d 940, 685 N.Y.S.2d 540, 541 (4th Dept. 1999), the court properly noted that a witness may not be impeached with the failure to volunteer unsolicited information during an examination before trial.

An audiotape offered by plaintiff to impeach the testimony of a defense witness was properly received in evidence. The testimony of plaintiff’s investigator, who made the tape and participated in the conversation recorded on it, to the effect that the tape completely and accurately reproduced the conversation and had not been altered, provided the necessary foundation for the admission of the tape. Lipton v. N.Y.C.T.A., 11 A.D.3d 201, 782 N.Y.S.2d 269 (1st Dept. 2004).

**Cross-Examination**
In Spatz v. Riverdale Greentree Restaurant, Inc., 256 A.D.2d 207, 682 N.Y.S.2d 370 (1st Dept. 1998), a Dram Shop Act case, it was held to be an abuse of discretion for the trial court to preclude plaintiff from conducting a re-cross-examination of a witness for a defendant restaurant, whose testimony was taken out of turn, before plaintiff had rested. After the witness’s direct examination and plaintiff’s cross-examination, counsel for the restaurant waived any re-direct. At that point, co-defendant’s counsel conducted his cross-examination. Plaintiff’s counsel should have been permitted to re-cross-examine the witness to inquire into a matter raised for the first time in the cross-examination by co-defendant’s counsel.

In Strader v Ashley, 61 AD3d 1244 (3rd Dept. 2009), a jury verdict in favor of the plaintiff was upheld.

A jury is "free to weigh and discredit the testimony of any factual witness, even in the absence of direct proof contradicting such witness's version of events" (Dobies v Brefka, 45 AD3d 999, 1000 [2007]). Here, the jury apparently credited the testimony of plaintiff and his witnesses that he did not steal screws from Ashley over the testimony of defendants. [FN4] Inasmuch as the jury's determinations of credibility are to be accorded great deference (see Whitmore v Rowe, 245 AD2d 669, 670 [1997]), and we cannot say that its findings could not have been reached on any fair interpretation of the evidence, we find that the jury's verdict on the first cause of action is not against the weight of the evidence.

In Torres v Ashmawy, 24 Misc 3d 506 (Sup. Orange 2009), the court gave a detailed analysis about the admissibility of both administrative determinations by the OPMC, and a criminal conviction of a doctor.

However, keeping in mind "the elementary premise that impeachment is a particular form of cross-examination whose purpose is, in part, to discredit the witness and to persuade the fact finder that the witness is not being truthful" (People v Walker, 83 NY2d 455, 461 [1994], citing Fisch, New York Evidence § 447 [2d ed]), the court concludes that, upon cross-examination of Mayer, reference may be made to the administrative proceedings, findings and determination of the Board to the extent said administrative proceedings, findings and determination relate to the sustained findings of fraudulent practice (Education Law § 6530 [2]) as were sustained in
connection with the 11th and 12th specifications of the Board's determination. More particularly, as to specification 11, the Board found that, with the purpose of attempting to reduce his own responsibility, Mayer falsely represented to other medical personnel that a patient had been referred to him by another doctor so as to have hospital medical staff believe that he had come upon the patient when she was already in distress, rather than having to take the responsibility for the truth of his actions. As to specification 12, the Board found that Mayer represented to hospital medical staff that a sonogram had been performed on a patient, when he knew that such was not true in an attempt to reduce his culpability.

" '[P]racticing the profession fraudulently' involves the intentional misrepresentation or concealment of a known fact{**24 Misc 3d at 512} without the requirement that the fraud caused an injury to a patient or a benefit to the doctor" (Matter of Mayer v Novello, 303 AD3d at 910, citing Matter of Schwalben v DeBuono, 265 AD2d 609, 611 [3d Dept 1999]; Matter of Sung Ho Kim v Board of Regents of Univ. of State of N.Y., 172 AD2d 880, 881-882 [3d Dept 1991], lv denied 78 NY2d 856 [1991]). Whether or not the sustained findings of fraudulent practice constitute prior immoral, vicious or criminal conduct bearing on credibility, they may properly be used for impeachment purposes since, at the very least, they demonstrate an untruthful bent or willingness or disposition on Mayer's part to voluntarily place his own self-interest and advancement ahead of principle or the interests of society (People v Walker at 461, citing People v Coleman, 56 NY2d 269, 273 [1982] and People v Sandoval, 34 NY2d 371, 377 [1974]). "[T]he commission of crimes involving individual dishonesty, such as theft, fraud and forgery demonstrate [one's] ... willingness to place [his] own interests ahead of the interests of society, thereby impacting directly upon the issue of . . . credibility" (People v Young, 178 AD2d 571, 571-572 [2d Dept 1991] [internal quotation marks omitted], quoting People v Ortiz, 143 AD2d 107 [2d Dept 1988]). The Board's sustained finding against Mayer of fraudulent practice is no different.

Any consideration of the passage of time since the 2000 administrative proceedings, findings and determination and/or the 1995 to 1997 commission of the facts thereunder are sufficiently outweighed by the seriousness and relevancy of the upheld specifications and their proximity in time to the acts herein alleged.

The court now turns its attention to the one remaining question: whether and to what extent Mayer's conviction for attempted unauthorized practice of medicine and/or the facts thereunder may be employed at trial.

For the reasons that follow, the court concludes that Mayer may be cross-examined with respect to the existence of his conviction upon his plea of guilty for attempted unauthorized practice of medicine and the underlying facts thereof.

In contrast to early common law under which the testimony of a convicted criminal was rendered incompetent, CPLR 4513 provides as follows:

"A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-
examination, upon {**24 Misc 3d at 513} which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer."

The authority granted to a civil litigant under CPLR 4513 to use an adverse witness' criminal convictions to impeach his or her credibility is "broad" (Vernon v New York City Health & Hosps. Corp., 167 AD2d 252 [1st Dept 1990], citing Able Cycle Engines v Allstate Ins. Co., 84 AD2d 140, 142-143 [1981], lv denied 57 NY2d 607 [1982]). "Under CPLR 4513, [both the] conviction of a crime and the underlying facts of the criminal acts may be used to impeach the credibility of a witness at a civil trial" (Dance v Town of Southampton, 95 AD2d 442, 452-453 [2d Dept 1983], citing Moore v Leventhal, 303 NY 534 [1952] and Able Cycle Engines v Allstate Ins. Co., supra). "While the nature and extent of such cross-examination is discretionary with the trial court . . . , the inquiry must have some tendency to show moral turpitude to be relevant on the credibility issue" (Badr v Hogan, 75 NY2d 629, 634 [1990], citing Langley v Wadsworth, 99 NY 61, 63-64 [1885], People v Montlake, 184 App Div 578, 583 [2d Dept 1918], Richardson, Evidence § 499 [Prince 10th ed] and Fisch, New York Evidence § 455 [2d ed]; see also Acunto v Conklin, 260 AD2d 787, 789-790 [3d Dept 1999] [within the sound discretion of Supreme Court to control the manner of presentation of proof at trial especially when dealing with matters affecting a witness' credibility and accuracy]). Certainly, one's status as a physician is of no moment (see Spanier v New York City Tr. Auth., 222 AD2d 219, 220 [1st Dept 1995] [proper for trial court to allow defense to ask plaintiff's treating physician about prior allegations of improper billing, and other misconduct, since those allegations had a bearing on the doctor's credibility]).

Subdivision (1) of section 6512 of the Education Law provides, in pertinent part:

"Anyone not authorized to practice under this title who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts, or who practices any profession as an exempt person during the time when his professional license is suspended, revoked or annulled . . . shall be guilty of a class E felony."

Mayer's conviction for attempted unauthorized practice of medicine, an unclassified misdemeanor, and the facts thereunder {**24 Misc 3d at 514} are highly relevant on the issue of Mayer's credibility and sufficiently demonstrate his "willingness to deliberately further his self-interest at the expense of society" (People v McAleavey, 159 AD2d 646, 646 [2d Dept 1990]). In addition, the conviction is not so remote in time as to be precluded.

The rulings herein made will necessarily be the subject of limiting instructions to the jury as to how they relate to Mayer and/or the other defendants including Dr. Ashmawy.

In McNeill v. LaSalle Partners, 52 A.D.3d 407 (1st Dept. 2008),

At trial, the main thrust of appellants' defense on the issue of liability was to question the credibility of plaintiff's uncorroborated account of his accident. Appellants also questioned the credibility of plaintiff's testimony about the severity of his injury and
its causation. Nonetheless, the court refused to permit appellants to impeach plaintiff's credibility by questioning him, on cross-examination, as to the reason he lost the job he held at the time of the accident. Although plaintiff testified at his deposition that he was laid off for economic reasons, the record reflects that appellants obtained documentation indicating that plaintiff was terminated for having defrauded his employer through the submission of fraudulent reimbursement slips. Such dishonest conduct (assuming plaintiff engaged in it) plainly falls within the category of prior immoral, vicious or criminal acts having a direct bearing on the witness's credibility, inasmuch as "it demonstrates an untruthful bent or significantly reveals a willingness or disposition . . . voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society" (People v Walker, 83 NY2d 455, 461, 633 N.E.2d 472, 611 N.Y.S.2d 118 [1994] [citations, internal quotations marks and brackets omitted]). Moreover, appellants sought to question plaintiff about this matter in good faith, and with a reasonable basis in fact (see People v Kass, 25 NY2d 123, 125-126, 250 N.E.2d 219, 302 N.Y.S.2d 807 [1969]).

While the reason for plaintiff's termination, as a collateral matter (since plaintiff did not seek lost-earnings damages), was not a proper subject for extrinsic proof (see Badr v Hogan, 75 NY2d 629, 634-635, 554 N.E.2d 890, 555 N.Y.S.2d 249 [1990]), under the circumstances of this case, the trial court abused its discretion as a matter of law in preventing appellants from questioning plaintiff about it during cross-examination. Since the issue of plaintiff's credibility went to the heart of appellants' defense as to both liability and damages, the error was not harmless, and a new trial is required.

The trial court also erred in precluding appellants from questioning plaintiff on cross-examination about his deposition testimony that the liquid on which he slipped might have been "encapsulate" (a milky liquid used in the abatement of asbestos) and in dismissing the third-party complaint against ETS, the project's asbestos abatement subcontractor, on that basis. At his deposition, plaintiff testified that he thought the liquid on which he slipped "could be some kind of encapsulate, but I wasn't sure." At trial, however, plaintiff testified that he had no idea what kind of liquid had caused his accident. Under these circumstances, appellants were entitled to question plaintiff about the deposition testimony in question, both for purposes of impeachment and to use the prior inconsistent testimony as evidence-in-chief that the liquid was encapsulate. In the latter regard, plaintiff's deposition testimony, which was given under oath by a declarant available for cross-examination at trial, has sufficient indicia of reliability to be considered as evidence-in-chief (see Letendre v Hartford Acc. & Indem. Co., 21 NY2d 518, 236 N.E.2d 467, 289 N.Y.S.2d 183 [1968]; Campbell v City of Elmira, 198 AD2d 736, 738, 604 N.Y.S.2d 609 [1993], affd 84 NY2d 505, 644 N.E.2d 993, 620 N.Y.S.2d 302 [1994]; cf. Nucci v Proper, 95 NY2d 597, 602, 744 N.E.2d 128, 721 N.Y.S.2d 593 [2001] [witness's prior inconsistent "unsworn oral statements" were not admissible as evidence-in-chief], affg 270 AD2d 816, 817, 705 N.Y.S.2d 144 [2000] [distinguishing Campbell on the ground that the prior inconsistent statement therein "was sworn testimony and was admissible as evidence-in-chief"]').

Given that plaintiff is subject to cross-examination at trial, the admissibility of his prior deposition testimony is not affected by the circumstance that ETS did not receive notice of the deposition by reason of its own failure (although served with process) to appear in the action as of that time.
Finally, the trial court erred in precluding appellants' expert witness, Dr. Lubliner, from testifying that the subject incident, which occurred in September 1997, was not a proximate cause of a lateral meniscus injury that first came to light in January 2004. Although Dr. Lubliner's CPLR 3101(d)(1) disclosure statement, served three years before trial, did not state that he would opine as to the proximate causation of this particular injury, the reason for this omission was that plaintiff never gave any notice prior to trial that his expert, Dr. Goldstein, would connect the lateral meniscus injury (discovered in 2004) to the subject incident (which occurred in 1997). Appellants first learned that the lateral meniscus injury would be attributed to the subject incident when Dr. Goldstein testified at trial. Under these circumstances, plaintiff could not claim to have been misled or prejudiced by appellants' expert disclosure, and fairness demanded that appellants be permitted to present expert testimony to counter plaintiff's surprise contention that the subject incident caused the late-appearing lateral meniscus injury. We note that appellants' supplemental expert disclosure, served a month before trial, advised plaintiff that Dr. Lubliner's testimony would be based on his review of the medical records and of other testimony offered at trial. Accordingly, at the trial to be held on remand, in the event plaintiff presents evidence attributing the lateral meniscus injury to the subject incident, appellants should be permitted to present testimony on that issue by Dr. Lubliner or any other expert they may subsequently identify.

However, in Davis v. McCullough, 37 A.D.3d 1121 (4th Dept. 2007):

the court did not abuse its discretion in curtailing plaintiff's cross-examination of a witness for defendant concerning his prior criminal convictions. The witness offered no relevant testimony on the issue of defendant's alleged negligence and thus his credibility was not at issue (see generally Badr v Hogan, 75 N.Y.2d 629, 634, 554 N.E.2d 890, 555 N.Y.S.2d 249).

In Grasso v. Koslowe, 38 A.D.3d 599 (2nd Dept 2007), the trial court properly precluded, during the defendant's cross-examination of the plaintiff's expert witness, the use of a deposition transcript from an unrelated case in which that expert witness previously testified (see Caserta v Levittown School Dist., 12 AD3d 549, 784 N.Y.S.2d 381; Linker v Sears Roebuck & Co., 232 A.D.2d 613, 648 N.Y.S.2d 1002; Ingebretsen v Manha, 218 A.D.2d 784, 631 N.Y.S.2d 72).

In Pryce v. Gilchrist, 51 A.D.3d 425 (1st Dept. 2008), a defendant driver was properly questioned concerning her prior accident as the intent of the questioning was to
impeach her credibility with regard to her assertion that she had no trouble operating the vehicle she was driving.

In Miller v. Galler, 45 A.D.3d 1325 (4th Dept. 2007), the court properly limited the impeachment of an adverse party called a party.

the court properly refused to allow plaintiff to impeach the credibility of defendant Marvin Galler, M.D. on direct examination by questioning him with respect to a criminal conviction. Indeed, it is well established that an adverse party or a hostile witness may not be impeached on direct examination by evidence of his or her criminal conviction (see Skerencak v Fischman, 214 AD2d 1020, 1020-1021, 626 N.Y.S.2d 337; Prince, Richardson on Evidence § 6-421 [Farrell 11th ed]; see also Hanrahan v New York Edison Co., 238 NY 194, 197-198, 144 N.E. 499).

Prior Bad Acts

In Castracane v. Campbell, 300 A.D.2d 704, 751 N.Y.S2d 121 (3rd Dept. 2002), in a case of a bicyclist struck by a car, the court allowed into evidence the stalking-type behavior of the plaintiff against the defendant, with limits, as relevant to the defense that the plaintiff intentionally put himself in harm’s way.

Agency

In Bostany v Trump Org. LLC, 73 AD3d 479 (1st Dept. 2010)

"[W]here, as here, the circumstances raise the possibility of a principal-agent relationship but no written authority of the agent has been proven, questions of agency and of its nature and scope . . . are questions of fact" (see Fogel v Hertz Intl., 141 AD2d 375, 376 [1988] [internal quotation marks and citations omitted]). The record shows, inter alia, that the premises was called "The Trump Building," that plaintiff was induced to sign the lease by an executive vice-president of defendant Trump Organization, that the lease was signed by Donald Trump (albeit on behalf of 40 Wall), at defendants' executive offices in Trump Tower on 5th Avenue, that employees of defendant Trump Organization dealt directly with plaintiff and contractors regarding issues affecting the premises, such as repairs and maintenance, and that the executive vice-president with whom plaintiff dealt authorized dispossess proceedings on Trump Organization letterhead. "If it is found that there exists an apparent or ostensible agency" between Trump Organization and 40 Wall, "this may serve as a basis for vicarious liability" on the part of Trump Organization (id. at 376-377, citing Hill v St. Clare's Hosp., 67 NY2d 72, 79 [1986]). It certainly may be found, on this record, that the acts of the putative
principal, Trump Organization, constitute a "holding out" to plaintiff and the public which would estop Trump Organization from disclaiming responsibility for the agent's torts (see *Fogel v Hertz Intl.*, 141 AD2d 375 [1988], *supra*). Thus, dismissal of all claims against Trump, as defendant Trump advocates on appeal, is not warranted.

**Excited Utterance**

In *Heer v North Moore St. Devs., L.L.C.*, 61 AD3d 617 (1st Dept. 2009), the lower court was reversed and summary judgment was granted to the plaintiff.

The lack of witnesses to the accident and plaintiff's inability to recall how the accident happened notwithstanding, plaintiff submitted sufficient admissible proof to establish prima facie that his head injury was the result of a fall from a sidewalk bridge at his work site (see e.g., *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 AD3d 264 [2008]), and it is undisputed that plaintiff had not been provided with any safety device to properly protect him from such an elevation-related hazard. A coworker's sworn statements and a site accident report prepared by defendant general contractor's foreman placed him on the sidewalk bridge just before the accident occurred. Further evidence established that there was a gap of more than three feet between the bridge and the facade of the building and no railing on the building side of the bridge. The coworker stated that he heard plaintiff's fellow bricklayers yelling that plaintiff had fallen backwards off the bridge. He rushed to plaintiff's aid and found plaintiff lying on the ground near the building, beneath the gap. Since the record affords no basis for any conclusion other than that the bricklayers' exclamations were "made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication," the exclamations were admissible as excited utterances (see *People v Johnson*, 1 NY3d 302, 305-306 [2003]). That plaintiff's head injury was due to a fall from a height was further corroborated by his expert neurologist's affirmation that the type of severe head injury indicated by plaintiff's medical records was consistent with a fall from a height. Plaintiff's coworker also stated that he received the only safety device distributed on the day that plaintiff fell. Defendants' speculation as to how plaintiff might otherwise have been injured failed to raise a material issue of fact on the claim.

In *Lee v. City of New York*, 40 A.D.3d 1048 (2nd Dept. 2007), the court did not allow into evidence a statement made to plaintiff by a co-worker because it did not meet a hearsay exception.

plaintiff's statement in his deposition that his coworker told him it was not working. Contrary to the contention of the plaintiff, *that hearsay statement was not admissible as an excited utterance because it was not made under the stress of excitement caused by an external event* (see *People v Johnson*, 1 NY3d 302, 305-306, 804
Nor is it admissible as a present sense impression because there is no evidence that the coworker was describing the alleged nonfunctioning of the pushbutton as he was perceiving it and, moreover, there was no evidence corroborating his statement (see People v Vasquez, 88 N.Y.2d 561, 574-575, 670 N.E.2d 1328, 647 N.Y.S.2d 697).

In Abre v. Sherman, 36 A.D.3d 725 (2nd Dept 2007), however, the court noted that

The plaintiff's remaining contention that the Supreme Court improperly allowed into evidence the hearsay statement of the defendant's brother is without merit. The statement was properly admitted into evidence pursuant to the excited utterance exception to the hearsay rule (see People v Fratello, 92 N.Y.2d 565, 570, 706 N.E.2d 1173, 684 N.Y.S.2d 149; People v Melendez, 296 A.D.2d 424, 424-425, 744 N.Y.S.2d 485).

In Henriques v. Kindercare Learning Center, Inc., 6 A.D.3d 220, 221 (1st Dept. 2004), even though the statement was well after the event, because of the nature of the incident/statement, it was properly admitted as a “prompt utterance”.

In People v. Diaz, 21 A.D.3d 581, 798 N.Y.S.2d 21 (1st Dept. 2005), lv. app. granted, 5 N.Y.3d 852 (2005), the Appellate Division held that the trial court’s ruling admitting identification of an attacker by a victim as an excited utterance exception to the hearsay rule does not violate a recent U.S. Supreme Court case [Crawford v. Washington, 541 U.S. 36 (2004)], that buttressed the rights of defendants under the U.S. Constitution’s confrontation clause.

In Gagliardi v. American Suzuki Motor Corp., 303 A.D.2d 718, 757 N.Y.S.2d 581, 582 (2nd Dept. 2003), given the activities of the plaintiff in the one-minute interval between the accident and her statement, which included crying hysterically, bleeding profusely, and picking glass out of her face, the trial court properly admitted into evidence the hearsay statement of the plaintiff into evidence under this exception to the hearsay rule.
State of Mind

In People v. Rose, 41 A.D.3d 742 (2nd Dept. 2007),

There is no merit to the defendant's contention that the County Court committed reversible error by permitting testimony by a prosecution witness who had been a friend of the victim's, to the effect that the victim told him to look to the defendant if anything happened to her. "[T]he mere utterance of a statement, without regard to its truth, may indicate circumstantially the state of mind of the hearer or of the declarant" (People v Stevens, 174 A.D.2d 640, 640, 571 N.Y.S.2d 102). As the County Court correctly found, the statement at issue was probative of the victim's state of mind as it related to the state of her marriage and, thus, by extrapolation, to the defendant's motive for killing her. The prejudice to the defendant from the admission of the statement, although great, was outweighed by its probative value (see People v Bierenbaum, 301 A.D.2d 119, 145-146, 748 N.Y.S.2d 563), and was ameliorated by the trial court's limiting instruction. Accordingly, the County Court properly admitted the statement under the "state-of-mind" exception to the hearsay rule.

Past Recollection Recorded & Present Sense Impression

In Phoenix Ins. v. Golanek, 50 A.D.3d 1148 (2nd Dept. 2008), the court discussed both of these doctrines.

First, the report made by the eyewitness to the police officer she encountered was not based on any present sense she had of the offending vehicle's license plate number. After she wrote that number on a piece of paper, she was no longer relying upon a present sense of the number, but was relying entirely on the contents of her own writing. Thus, the officer's memo book, and certainly the police accident report generated sometime later, did not "reflect[] a present sense impression rather than a recalled or recast description of events that were observed in the recent past" (People v Vasquez, 88 NY2d 561, 575, 670 N.E.2d 1328, 647 N.Y.S.2d 697 [emphasis in original]).

Moreover, "the key components of present sense impressions' are contemporaneity and corroboration" (id.). While the reports by the witnesses in Irizarry were "made substantially contemporaneously' with the observation" of the license plate number of the offending vehicle (Matter of Irizarry v Motor Veh. Indem. Corp., 287 AD2d at 717, quoting People v Brown, 80 NY2d 729, 734, 610 N.E.2d 369, 594 N.Y.S.2d 696), the evidence at the hearing in this case did not establish how much time elapsed between the eyewitness's observation of the license plate and her statement to the police officer, or how much additional time elapsed between that statement and the preparation of the police accident report. Furthermore, the evidence of corroboration, consisting of the eyewitness's identification of the offending vehicle as a white pickup truck, was significantly less detailed than that presented in Irizarry, where the injured party identified the specific model of the vehicle that struck him. Accordingly, the police report should not have been admitted pursuant to the present sense impression exception.
Contrary to the alternative contention of the respondents on appeal, the police accident report was not admissible pursuant to the past recollection recorded exception to the hearsay rule. A memorandum of a past recollection recorded is admissible only when, inter alia, "the witness can presently testify that the record correctly represented his knowledge and recollection when made" (People v Taylor, 80 NY2d 1, 8, 598 N.E.2d 693, 586 N.Y.S.2d 545). The eyewitness did not give, and could not have given, any such testimony regarding the police report, since she was not present when it was prepared. Although there was some evidence at the hearing that the eyewitness verified that the police officer to whom she spoke recorded the license plate number accurately in his memo book, there was no evidence as to how the information in the memo book came to appear in the police accident report. Thus, "there can be no more than supposition on the critical question of whether what was observed and [reported by the eyewitness] corresponded with what was heard by the [author of the police report] and written down" (id. at 10).

The oral statements of unidentified eyewitnesses are admissible if such statements are made “substantially contemporaneously” with the observation and such statements are “sufficiently corroborated by other evidence”. Perez v. Exel Logistics, Inc., 278 A.D.2d 213, 717 N.Y.S.2d 278 (2nd Dept. 2000). The statement of an unidentified eyewitness, immediately upon observation of the license plate number of the offending vehicle minutes after the accident, may constitute competent evidence if corroborated by “extrinsic proof”. The statements identifying the license plate number of the offending vehicle were corroborated by the petitioner’s testimony, identifying the vehicle as a white Acura. Irizarry v. M.V.A.I.C., 287 A.D.2d 716, 732 N.Y.S.2d 54 (2nd Dept. 2001).

Counsel seeking to admit such a record of a license plate number written on a police report should be aware of Jones v. Gelineau, 154 Misc. 2d 930 (Sup. Queens 1992). Of course the best way to prove the license plate number of the offending vehicle is to pick it up and put it in your trunk, even if you do not prove chain of custody. See, Am. Transit v. Wason, 50 A.D.3d 609 (1st Dept. 2008).

Rebut Recent Fabrication
In McGloin v. Golbi, 49 A.D.3d 610 (2nd Dept. 2008), the trial court erred in precluding the plaintiff from introducing her MV-104 accident report on the ground that it merely bolstered her testimony (see Pomer v Chen, 187 AD2d 497, 589 N.Y.S.2d 192). The plaintiff should have been permitted to introduce the report to counter a charge of "recent fabrication" (Lichtrule v City Sav. Bank of Brooklyn, 29 AD2d 565, 286 N.Y.S.2d 307).

Circumstantial Evidence

In Deal v. Wood, 48 A.D.3d 1093 (4th Dept. 2008), the appellate court reiterated the well-established rule of circumstantial evidence:

Plaintiffs were not required in this circumstantial evidence case to "exclude every other possible cause" of the accident but defendant's negligence . . . Rather, [their] proof [had to] render those other causes sufficiently remote' or technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (Schneider v Kings Highway Hosp. Ctr., 67 NY2d 743, 744, 490 N.E.2d 1221, 500 N.Y.S.2d 95).

Similarly, in Trenca v. Culeton, 59 AD3d 1098 (4th Dept. 2009),

Contrary to defendants' contentions, the fact that plaintiff does not recall how she fell into the trench is not dispositive. Plaintiff alleges that her injuries were caused by defendants' negligence in failing to place a barricade around the open trench (see generally Walters v Castle Vil. Owners Corp., 166 AD2d 316, 560 N.Y.S.2d 776), and defendants made no showing that they were not negligent under the common law in failing to provide such protection. Plaintiff also alleges that defendants' violation of 12 NYCRR 23-1.33 (a) (1) and 23-4.2 (h) provides some evidence of negligence (see generally Conte v Large Scale Dev. Corp., 10 NY2d 20, 29, 176 N.E.2d 53, 217 N.Y.S.2d 25; De Vivo v Dartwood Realty Co., 33 AD2d 1022, 308 N.Y.S.2d 309), and defendants failed to establish as a matter of law that those regulations are not applicable to the facts of this case.

In Cherry v. Daytop Village, Inc., 41 A.D.3d 130 (1st Dept. 2007),

Moreover, contrary to Supreme Court's rationale, plaintiff was not required, in response to a motion for summary judgment, to prove precisely which particular crack in the roadway caused her to fall. Given that numerous cracks existed in the roadway in the area where plaintiff fell, it is enough that she presented competent evidence which, if
believed, would support a reasonable juror's conclusion that one of the cracks in this area of the pavement was the cause of her fall.

Similarly, while not a recent case, Farrar v. Teicholz, 173 A.D.2d 674 (2nd Dept. 1991) is still good law.

In Cuevas v. City of New York, 32 A.D.3d 372 91st Dept. 2006),

Third parties Trinity and Cablevision have not demonstrated that dismissal of plaintiff's common-law negligence claim is warranted, since the record reflects that plaintiff did in fact identify the cause and location of his accident. While he could not recall the exact manner in which his foot became entrapped in the alleged defect, and could not describe the way it looked on the night of the accident prior to his fall, he repeatedly identified the gap/hole between the sidewalk and the depressed cable vault cover as the condition that trapped his foot and caused him to fall. Plaintiff also specifically identified, by circling and initialing on a photographic exhibit, the exact location and condition that caused his fall. This was not an accident caused by a transitory condition such as ice or a slippery liquid of nebulous nature. Here, plaintiff woke up with his leg twisted, then saw the gap, and even saw his sneaker off. As it was not his obligation to prove his claim to defeat the motion for summary judgment, he was entitled to a reasonable inference (see Pappalardo v New York Health & Racquet Club, 279 AD2d 134, 140 [2000]) that the gap caught his foot and caused him to fall (cf. Thomas v Our Lady of Mercy Med. Ctr., 289 AD2d 37 [2001]). Any inconsistency in plaintiff's testimony would merely raise a credibility issue for the trier of fact (see Yaziciyan v Blancato, 267 AD2d 152 [1999]). His deposition testimony indicated that the conditions reflected in the photographs were substantially the same as those existing on the night of the occurrence, thereby authenticating them (cf. Labella v Willis Seafood, 296 AD2d 382 [2002]).

Since Trinity's witness was unaware of whether the installation of the vault was satisfactory, and Trinity failed to produce a witness who would have had direct knowledge of such facts, Trinity failed to establish a prima facie case that it did not create the defective condition (see Bowie v 2377 Creston Realty, LLC, 14 AD3d 457, 459 [2005]). The summary judgment motion was thus properly denied regardless of the sufficiency of plaintiff's opposing papers (see Lesocovich v 180 Madison Ave. Corp., 81 NY2d 982, 985 [1993]).

In Davis v. Maloney, 49 A.D.3d 385 (1st Dept. 2008), the plaintiff dodged dismissal in a labor law case based on the circumstantial evidence of the nature of a structure.

Plaintiff sustained personal injuries while working on a barn owned by defendant and located on a parcel adjacent to that on which defendant's one-family dwelling is
located. **Conflicting evidence as to whether the two parcels were separated by a fence and whether the barn was accessible only from a neighbor's road raise an issue of fact, improperly resolved by the motion court in plaintiff's favor, as to whether the barn should be considered part of the dwelling for purposes of the homeowner's exemption** (see Mandelos v Karavasidis, 86 NY2d 767, 769, 655 N.E.2d 174, 631 N.Y.S.2d 133 [1995]). Another issue of fact, as to whether defendant intended to use the barn for commercial purposes (see id.), is raised by a tax certificate she signed certifying that she was exempt from paying sales taxes on the materials and labor used to construct the barn because it was to be used predominantly in farm production or in a commercial horse boarding operation. While the certificate does not estop defendant from denying that she intended to use the barn commercially (see Vick v Albert, 47 AD3d 482, 849 N.Y.S.2d 250, 2008 NY Slip Op 336), it does constitute some evidence of such intention (see Baje Realty Corp. v Cutler, 32 AD3d 307, 310, 820 N.Y.S.2d 57 [2006]), justifying the denial of her motion for summary judgment based on the homeowner exemption (see Lombardi v Stout, 80 NY2d 290, 297, 604 N.E.2d 117, 590 N.Y.S.2d 55 [1992]; Morgan v Rosselli, 9 AD3d 417, 780 N.Y.S.2d 629 [2004]). It does not avail defendant to assert that she and her husband ultimately decided not to follow through with the business of growing and selling hay. "[T]he use and purpose test must be employed on the basis of the homeowners' intentions at the time of the injury underlying the action ...." (Allen v Fiori, 277 AD2d 674, 675, 716 N.Y.S.2d 414 [2000];

In **Tomaino v 209 E. 84th St. Corp.**, 72 AD3d 460 (1st Dept. 2010)

We reject defendant's contention that plaintiff was required to identify at the time of the accident exactly where she fell and the precise condition that caused her to fall (see Welch v Riverbay Corp., 273 AD2d 66 [2000]; Vitanza v Growth Realities, 91 AD2d 917 [1983]; Gramm v State of New York, 28 AD2d 787, 788 [1967], affd 21 NY2d 1025 [1968]). Plaintiff identified the location of her fall in her deposition testimony and stated that she pointed this location out to an employee of defendant when he found her at the bottom of the stairs. **Although she did not know at the time that she slipped on the steps because of the worn treads, she discovered this when she returned to the scene a few weeks later** (see Seivert v Kingpin Enters., Inc., 55 AD3d 1406 [2008]; Sweeney v D & J Vending, 291 AD2d 443 [2002]). **Based on the testimony of two employees of defendant that the photographs taken two to three months after the accident accurately represented the condition of the treads on the steps before and on the day of the accident, there is no reason to believe that the condition of the treads changed significantly between the date of the accident and the date of plaintiff's return to the scene.**

In **DiBartolomeo v St. Peter's Hosp. of the City of Albany**, 73 AD3d 1326 (3rd Dept. 2010)
Amedeo DiBartolomeo fell and struck his head while attempting to descend a temporary curb ramp placed on defendant's property as part of a construction project. As a result of the fall, DiBartolomeo suffered a fractured skull and died 20 days later from complications due to an intracerebral hemorrhage. Plaintiff, DiBartolomeo's wife, commenced this action based on premises liability, alleging that DiBartolomeo's injuries and resultant death were due to the defective condition of the ramp. Defendant moved for summary judgment dismissing the complaint, asserting that plaintiff was unable to establish that any negligence of defendant was the proximate cause of DiBartolomeo's injuries or that defendant had notice of the alleged defective condition. Supreme Court denied the motion, prompting this appeal.

We affirm. Defendant's sole contention on appeal is that it is entitled to summary judgment because plaintiff is unable to provide direct evidence of the proximate cause of DiBartolomeo's fall. We disagree. Unlike at trial, where plaintiff will bear the initial burden of establishing that defendant's negligence was the proximate cause of DiBartolomeo's fall, on this motion for summary judgment, defendant bears the initial burden of demonstrating its entitlement to judgment as a matter of law by proffering evidentiary proof in admissible form (see Rothbard v Colgate Univ., 235 AD2d 675, 678 [1997]; see generally Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067-1068 [1979]). Only if that burden is met does the burden then shift to plaintiff to raise a triable issue of fact (see Friends of Animals v Associated Fur Mfrs., 46 NY2d at 1068).

However, even if defendant had met its initial burden of proof, a view of the evidence in the light most favorable to plaintiff leads to the conclusion that plaintiff raised a question of fact sufficient to defeat defendant's motion (see generally Reynolds v Sead Dev. Group, 257 AD2d 940, 941 [1999]). "As a general rule, the question of proximate cause is to be decided by the finder of fact" (Derdiarian v Felix Contr. Corp., 51 NY2d at 312). While it is true that a material issue of fact may not rest upon speculation (see Piccirillo v Beltrone-Turner, 284 AD2d 854, 855-856 [2001]), "[t]he absence of direct evidence does not require a ruling in defendant'[s] favor, for proximate cause may be inferred from the facts and circumstances surrounding the event" (see Ellis v County of Albany, 205 AD2d 1005, 1007 [1994]). Here, plaintiff testified that the surface on which she and her husband were walking just before he fell was uneven. Plaintiff also submitted evidence that there was a depression in the ramp approximately one-half-inch deep and measuring approximately 8½ inches wide by 8½ inches long and that the distance between this depression to a blood stain where DiBartolomeo's head hit the ground was the same as DiBartolomeo's height. This evidence presented a theory of liability — that DiBartolomeo lost his balance and fell when traversing the depression in the ramp — and facts in support thereof on which a jury could base a verdict (compare Kane v Estia Greek Rest., 4 AD3d 189, 190-191 [2004]; Piccirillo v Beltrone-Turner, 284 AD2d at 856). Accordingly, Supreme Court properly denied defendant's motion.
In CHASE v. OHM, LLC, 2010 NY Slip Op 06273 (3rd Dept.), an 80 year old woman that slipped and fell was not deprived of just compensation for her serious injuries because she wasn’t sure what made her fall.

Initially, defendants contend that Supreme Court erred in denying their motion for a directed verdict, claiming that plaintiff did not demonstrate the cause of her fall, and that other evidence regarding causation was insufficient or improperly admitted. We disagree. Plaintiff testified that on the day of her injury she got out of her car and "slipped and fell." Although she could not specify what caused her fall, she assumed that it was snow or ice.

Photographs of the area taken a few hours after plaintiff fell, as well as testimony from defendants' principal and others, confirmed that the parking lot was covered with patchy snow and ice. Furthermore, the emergency medical technician testified, among other things, that the slippery condition of the parking lot in the area where plaintiff fell made it difficult to transport plaintiff to the ambulance. In addition, meteorological evidence established that between December 13, 2005 and the evening of December 15, 2005 freezing temperatures existed and no precipitation fell. Viewed in a light most favorable to plaintiff as the nonmoving party, the record establishes that the evidence presented and the inferences to be drawn therefrom provide a valid line of reasoning from which the jury could reach its conclusion….

…we find no error in Supreme Court submitting a circumstantial evidence charge to the jury. Plaintiff's proofs were sufficient to provide a rational basis upon which the jury could reach its verdict based not upon speculation but upon the logical inferences to be drawn from the evidence presented (see Schneider v Kings Hwy. Hosp. Ctr., 67 NY2d 743, 744 [1986]; Staples v Sisson, 274 AD2d 779, 781 [2000]).


We reach a different result with regard to the restaurant, which established its prima facie entitlement to summary judgment by submitting evidence that the staircase was in compliance with the applicable Building Code provisions (see Administrative Code of City of NY § 27-375[h]). In opposition to the motion, plaintiffs submitted an affidavit from an expert architect who stated that he visited the building in question and observed that the existing stair was "steel with a matte black non-slip finish that is applied to it as required by New York City Building Code," but the "non-slip finish on the nosing of each tread and top platform is severely worn off," thereby "creating an extremely slippery condition at the edge nosing at the top platform and at each stair tread." This expert evidence submitted by plaintiffs raised a triable issue of fact as to whether the tread of the stairs complied with the pertinent regulations of the Building Code. Moreover, the injured plaintiff's testimony that she slipped on the top step of the subject stairway, coupled with her expert's testimony of the slippery condition of such steps due to worn-off treads, provided sufficient circumstantial evidence to
raise an issue of fact as to whether her fall was caused by the allegedly defective condition (see Garcia v New York City Tr. Auth., 269 AD2d 142 [2000]; Gramm v State of New York, 28 AD2d 787 [1986], affd 21 NY2d 1025 [1968]).

In **Montalvo v Mumpus Restorations, Inc.**, 2010 NY Slip Op 06298 (2nd Dept. 2010),

On May 10, 2003, the plaintiff, a porter at a building in Corona, left the building through a side door and allegedly was struck and injured by a bucket of roofing adhesive that fell from the roof. He commenced this action against the defendant, Mumpus Restorations, Inc. (hereinafter Mumpus), which, several weeks earlier, had repaired a section of the roof. The plaintiff alleged that Mumpus workers had left the bucket on the roof when they completed their work. Mumpus moved for summary judgment dismissing the complaint, and the Supreme Court denied the motion with respect to those causes of action alleging common-law negligence and violation of Labor Law § 200. We affirm the order insofar as appealed from.

The defendant established its prima facie entitlement to judgment as a matter of law in connection with the Labor Law § 200 and common-law negligence causes of action by tendering proof in admissible form that its employees did not leave the bucket on the roof and, therefore, did not cause the plaintiff's injuries (see Ragone v Spring Scaffolding, Inc., 46 AD3d 652, 654; cf. Wein v Amato Prop., LLC, 30 AD3d 506, 507). In opposition, however, the plaintiff raised triable issues of fact as to the defendant's liability. First, the plaintiff presented evidence that the defendant's employees left the bucket on the roof, and that the falling bucket caused his injuries. Moreover, as the Supreme Court properly held, the circumstances reveal a triable issue of fact as to whether the defendant may be held liable under the doctrine of res ipsa loquitur. To invoke that doctrine, a plaintiff is required to show: (1) that the event was "of a kind which ordinarily does not occur in the absence of someone's negligence"; (2) that it was "caused by an agency or instrumentality within the exclusive control of the defendant"; and (3) that it was not "due to any voluntary action or [2]contribution on the part of the plaintiff" (Dermatossian v New York City Tr. Auth., 67 NY2d 219, 226-227 [citation and internal quotation marks omitted]; see Morejon v Rais Constr. Co., 7 NY3d 203, 209; Jappa v Starrett City, Inc., 67 AD3d 968, 969; Gaspard v Barkly Coverage Corp., 65 AD3d 1188, 1189). Of these three elements, the defendant contests only the second, but the evidence established that access to the roof was limited, and there is an issue of fact as to whether access to the roof was sufficiently exclusive to the defendant's employees between the time the bucket allegedly was left on the roof and the time of the incident (see Fields v King Kullen Grocery Co., 28 AD3d 513, 514; O'Connor v Circuit City Stores, Inc., 14 AD3d 676, 677-678; cf. Durso v Wal-Mart Stores, 270 AD2d 877). Accordingly, the Supreme Court properly denied those branches of the defendant's motion which were for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence.

In **Bettineschi v Healy Elec. Contr., Inc.**, 73 AD3d 1109 (2nd Dept 2010)
The data control center of the injured plaintiff's workplace was being updated by the defendant Healy Electric Contracting, Inc. (hereinafter Healy), and the third-party defendant, Bellway Electrical (hereinafter Bellway), with fiber optic and copper cables placed in channels under the floor. The floor was covered with 18-inch square tiles approximately 15 inches above the sub-floor, which were removed as needed in order to access the channels below. The injured plaintiff fell into an opening left by the removal of several tiles.

To prove a prima facie case of negligence in a case based on a hazardous condition, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (see Gordon v American Museum of Natural History, 67 NY2d 836, 837; Lamont v Lane Bryant, Inc., 33 AD3d 669, 669-670; Bradish v Tank Tech Corp., 216 AD2d 505, 506). Cases grounded on circumstantial evidence require a showing of sufficient facts from which the negligence of the defendant and the causation of the accident by that negligence can be reasonably inferred (see Schneider v Kings Hwy. Hosp. [*2][Ctr., 67 NY2d 743; Haggerty v Zelnick, 68 AD3d 721; Garrido v International Bus. Mach. Corp. [IBM], 38 AD3d 594; Bradish v Tank Tech Corp., 216 AD2d at 506; Thomas v New York City Tr. Auth., 194 AD2d 663, 664).

Here, the defendant Healy failed to establish, prima facie, its entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853). In light of circumstantial evidence regarding the access of Healy employees to the data control center for the purpose of installing cables prior to or on the date of the injured plaintiff's fall, Healy failed to eliminate triable issues of fact as to whether it created or had actual or constructive notice of the hazardous condition (see Schneider v Kings Hwy. Hosp. Ctr., 67 NY2d 743; Haggerty v Zelnick, 68 AD3d at 721; Garrido v International Bus. Mach. Corp. [IBM], 38 AD3d at 596).

In Godfrey v Town of Hurley, 68 AD3d 1527 93rd Dept. 2009

Plaintiff commenced this negligence action to recover for injuries sustained when she fell while disposing of brush at a former landfill owned and operated by defendant. Plaintiff testified that, after unloading the brush from her pickup truck, she stepped on something on the ground that made her foot turn over sideways and caused her to fall. Although plaintiff described the site as being littered with sticks, twigs, branches, brush and rocks, she was unable to say what specific debris had caused her fall. Following discovery, defendant moved for summary judgment on the ground that plaintiff cannot establish that it had actual or constructive notice of the dangerous condition upon which she fell. Supreme Court granted the motion and plaintiff appeals.

To demonstrate its entitlement to summary judgment, defendant was "required to establish as a matter of law that [it] maintained the property in question in a reasonably safe condition and that [it] neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice thereof" (Richardson v Rotterdam Sq. Mall, 289 AD2d 679, 679 [2001]; see Braudy v Best Buy Co., Inc., 63 AD3d 1092 [2009];
In support of its motion, defendant submitted only the pleadings, an attorney's affidavit and plaintiff's testimony describing how the accident occurred. Focusing on plaintiff's inability to identify the object on which she fell and the lack of evidence as to how long it may have been present, defendant argued that there is no evidence of actual or constructive notice of a dangerous condition. Conspicuously absent, however, is any evidence that defendant maintained the site in a reasonably safe condition at any time before plaintiff fell, evidence necessitated by plaintiff's description of the littered condition of the site. Since defendant failed to meet its initial burden to show that it had no constructive notice because its premises were properly maintained, Supreme Court erred in granting its motion for dismissal (see Braudy v Best Buy Co., Inc., 63 AD3d at 1092; Van Benschoten v Village of Margaretville, 38 AD3d 1027 [2007]).

Nor did plaintiff's failure to identify what caused her to fall render her complaint so speculative as to warrant dismissal (see Belles v United Church of Warsaw, 66 AD3d 1470, 1470-1471 [2009]; cf. Oettinger v Amerada Hess Corp., 15 AD3d 638, 639 [2005]). Plaintiff testified as to the variety of debris in the area where she fell and defendant failed to demonstrate that the debris did not pose a danger, that she fell on her own brush or that something other than the debris, such as a misstep, caused her to fall.

In Haggerty v Zelnick, 68 AD3d 721 (2nd Dept. 2009)

The complete deposition transcripts of the plaintiff and her boyfriend submitted by the plaintiff in opposition to the motion provided sufficient circumstantial evidence to raise a triable issue of fact as to whether the plaintiff had been kicked by the horse at issue (see generally Schneider v Kings Hwy. Hosp. Ctr., 67 NY2d 743 [1986]; Garrido v International Bus. Mach. Corp. [IBM], 38 AD3d 594, 596 [2007]; Lerner v Luna Park Hous. Corp., 19 AD3d 553 [2005]; Sweeney v D & J Vending, 291 AD2d 443 [2002]). The plaintiff, who did not recall the incident, stated that she entered a paddock to walk the horse back to the stall. According to the plaintiff's boyfriend, he arrived at the scene immediately after he heard a thud, and found the plaintiff lying unconscious on the ground and bleeding from the mouth and the nose with a few missing lower teeth, and the subject horse rearing and kicking nearby. Additionally, the plaintiff raised triable issues of fact as to whether the horse had vicious propensities and, if so, whether the defendants knew or should have known of the horse's vicious propensities (see Bard v Jahnke, 6 NY3d at 596-597; Collier v Zambito, 1 NY3d 444, 446 [2004]; Campbell v City of New York, 31 AD3d 594, 595 [2006]). The defendants' contention that the action is barred by the doctrine of assumption of risk is without merit.
In *Poppke v. Portugese American Club Of Mineola*, NYLJ, 8-5-10 (Sup. Nassau), circumstantial evidence was used in a dram shop case.

In order to sustain a claim under the Dram Shop Act, plaintiff must establish that the defendant unlawfully sold alcohol to a visibly intoxicated person. (Roy v. Volonino, 262 AD2d 546; citing McKinney's Alcoholic Beverage Control Law §65 subd. 2; McKinney's General Obligations Law §11-101 subd. 1). The Court of Appeals in Romano v. Stanley, 90 NY2d 444, held that "Alcoholic Beverage Control Law §65(2), which provides that it is unlawful to furnish an alcoholic beverage to any 'visibly intoxicated person', does not preclude the introduction of circumstantial evidence to establish the visible intoxication of the customer". A claim under the Dram Shop Act may be established through circumstantial evidence, including the testimony of eyewitnesses. (Kirsh v. Farley, 24 AD3d 1198). The Second Department in Roy v. Volonino, supra, found that a forensic toxicologist's affidavit opining that a tavern patron was visibly intoxicated when the tavern served him was admissible on summary judgment, whereby his expertise regarding the effects of alcohol was sufficient to support the opinion based on professional experience as the affidavit included scientific data upon which his conclusions were drawn. A toxicologist's experience regarding the effects of alcohol were found to be sufficient to support the inference that his opinion is based on knowledge acquired through personal professional experience lending credence to his opinion, and his affidavit included scientific data upon which his conclusions were based. (Marconi v. Reilly, 254 AD2d 463, citing Romano v. Stanley, supra). Police Officers at the scene of the accident observed that the defendant operator had an unsteady gait, slurred speech, gazed and bloodshot eyes and smelled of alcohol. (Id.)

The court's function on this motion for summary judgment is issue finding rather than issue determination. (Sillman v. Twentieth Century Fox Film Corp., 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (Rotuba Extruders v. Ceppos, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (Stone v. Goodson, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (Gaither v. Saga Corp., 203 AD2d 239; Black v. Chittenden, 69 NY2d 665).

While proof of a high alcohol count in an individual served alcohol does not, without more, provide a sound basis for drawing inferences about that person's appearance or demeanor for purposes of Dram Shop Liability, (Sorensen v. Denny Nash, Inc., 249 AD2d 745), here, Mr. Cantanese's affidavit does not rely solely on the alcohol levels in Amador, when he opines within a reasonable degree of medical certainty, that Amador would have exhibited visible signs of intoxication. (Kirsh v. Farley, supra). The aforesaid affidavit offers an opinion based upon knowledge acquired through personal professional experience which includes scientific data upon which conclusions were based on, as well upon the police officer's observations at the scene of the accident, and thereafter, that Amador had blurry eyes, droopy eyelids and exhibited the strong smell of alcohol on his breath. The defendants have merely submitted self-serving statements that
Amador was not visibly intoxicated. In any event, the plaintiff has raised a triable issue of fact exists as to whether Amador was visibly intoxicated.

In *Santos v City of New York*, 73 AD3d 900 (2nd Dept. 2010)

In February 2005 the plaintiff allegedly tripped and fell while crossing Broadway near its intersection with Granite Street in Brooklyn, allegedly as a result of a defect in the roadway. The plaintiff commenced this action against, among others, the defendants Cablevision Systems NYC Corp. (hereinafter Cablevision), and the City of New York. Cablevision cross-moved for summary judgment dismissing the complaint insofar as asserted against it on the grounds that the plaintiff could not identify the exact location of the accident and that work performed on behalf of Cablevision approximately 20 months prior to the occurrence could not have caused or contributed to the accident. The City subsequently cross-moved for summary judgment dismissing the complaint insofar as asserted against it on the ground that the plaintiff did not know what caused the accident.

In support of its cross motion, Cablevision submitted the deposition testimony of its construction manager, John Lynn, who acknowledged that Cablevision had been issued a street opening work permit for the period extending from May 19, 2003, to June 18, 2003, allowing it to excavate the roadway in the vicinity of the accident at the intersection of Broadway and Granite Street, and that a trench three feet deep was dug in the roadway at that location. The evidence submitted by Cablevision failed to eliminate all issues of fact as to whether Cablevision caused or contributed to the roadway defect which allegedly caused the accident (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Accordingly, Cablevision failed to establish its prima facie entitlement to judgment as a matter of law on the foregoing basis. Under these circumstances, it is not necessary to consider the sufficiency of the opposition papers (see *Tchjevskaia v Chase*, 15 AD3d 389 [2005]).

Moreover, while the evidence submitted by the City established its prima facie entitlement to judgment as a matter of law, by demonstrating that the plaintiff could not identify the exact location of the accident, or the specific roadway defect which caused the accident (see *Howe v Flatbush Presbyt. Church*, 48 AD3d 419 [2008]; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434 [2006]), the evidence which the plaintiff submitted in opposition to the cross motions, including photographs of the alleged accident site, raised a triable issue of fact (see CPLR 3212 [b]).

**Accident Reports**

The definition of hearsay is usually not in dispute; the application of the rule and its exceptions is where the problems arise. This dispute frequently occurs in determining whether an accident report is admissible.
In Smalls v New York City Tr. Auth., 2009 NY Slip Op 51299(U) [24 Misc 3d 1207(A)], the Supreme Court addressed the issue of hearsay in the context of an accident report.

Bus Operator Sandra Day ("Day") testified that she recorded the make and license plate numbers of the illegally parked vehicles on a scrap paper at the time of the incident. Although this piece of paper is now lost, Day had verbally communicated the information to her dispatcher, who in turn read it back to her for confirmation before entering it into his report. Neither defendant denies contemporaneous ownership of the vehicles identified in the dispatcher's report. Defendant Butchin provides only an affidavit that swears that she has "no recollection of any incident involving Thelma R. Smalls on March 6, 2006" or "being parked next to a bus stop on that date." (Affidavit of Sondra Butchin, annexed to Exhibit D of Butchin's Motion). Third-party defendant Awan testified during deposition that, to his knowledge, he did own the car described in the dispatcher's report and was in the area in question at some point on the day of the accident. (Deposition of Mahzar Awan, pg. 13, annexed as Exhibit H to the Transit Authority's Affirmation in Opposition). As such, neither of the third-party defendants' statements establish that there are no triable issues of fact so as to warrant granting summary judgment.

Although defendants claim that in the absence of the original record such evidence is only hearsay, the Court finds that since this information was properly recorded in the normal course of business, the dispatcher's report is admissible. (Bracco v. Mabstoa, 117 AD2d 273 [1st Dept 1986], Flynn v. Manhattan and Bronx Surface Transit Operating Authority, 94 AD2d 617 [1st Dept. 1983]). Such business records are considered to be generally reliable, and this reliability is enhanced by the fact that the dispatcher's report was entered on a form routinely used for this purpose. (People v. Kennedy, 68 NY2d 569, 579 [1986].

The issue of whether the cars were the proximate cause of the plaintiff's injury is a matter for the jury. It is well settled that "owners of improperly parked cars may be held liable to plaintiffs injured by negligent drivers of other vehicles, depending on the determinations by the trier of fact on the issues of foreseeability and proximate cause unique to the particular case." (Reuter v. Rogers, 232 AD2d 619 [2nd Dept 1996], Sommersall v. New York Tel. Co., 52 NY2d 157, 167 [1981]). While the instant case involves a trip and fall rather than a vehicle accident, it remains a question for the jury as to whether the illegally parked cars, which forced the passengers to disembark in the street, were the proximate cause of the plaintiff's fall. The question of the relative culpability of the Transit Authority, defendants Butchin and Awan, and the plaintiff herself, all of whom could have reasonably played a role in the cause of this accident, must await resolution by a finder of fact. (Ferrer v Harris, 55 NY2d 285 [1982], Petrone v County of Nassau, 305 AD2d 569 [2d Dept 2003], In re Yavkina, 60 AD3d 669 [2d Dept 2009]).

In Babikian v Nikki Midtown, LLC, 60 AD3d 470 (1st Dept. 2009),
As for plaintiff's causes of action for assault (first), battery (third), and negligent hiring against each of the defendants (fifth and sixth), defendants' motion should be denied regardless of the sufficiency of plaintiff's opposing papers, because defendants do not meet their prima facie burden of submitting evidentiary proof in admissible form sufficient to demonstrate as a matter of law that, as they claim, Berlingo was not in their employ at the time of the attack, or, even if he were, that the attack was not within the scope of his duties as a bouncer (see JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 384 [2005]). The unsworn incident report, which was apparently prepared shortly after the attack by defendants' general manager and is submitted by defendants to show that the attack took place outside of their premises, is not authenticated by the attorney's affirmation to which it is attached (see Zuluaga v P.P.C. Constr., LLC, 45 AD3d 479, 480 [2007]; McDonald v Tishman Interiors Corp., 290 AD2d 266, 267 [2002]), and defendants do not provide an affidavit from the general manager. The affidavit of defendants' bookkeeper stating that Berlingo was in the nightclub on the night of the attack "solely as a patron" is inadmissible hearsay, since she does not aver that she spoke from firsthand knowledge and appellants point to no applicable exception (see Nucci v Proper, 95 NY2d 597, 602 [2001]). Nor does the bookkeeper's affidavit lay the foundation necessary for the admissibility of the purported employment records and the computer printout submitted to show what employees were on duty on the date of the attack. The bookkeeper does not state that she is in charge of employment or employment records or otherwise has firsthand knowledge of Berlingo's employment status, or that she prepared these documents and knows what they are and that they were prepared in the regular course of business (see People v Kennedy, 68 NY2d 569, 579-580 [1986]; Zuluaga, 45 AD3d at 480). Nor do plaintiff's allegations, liberally construed, show that the site of the attack was so far removed from defendants' premises as to be beyond the area that defendants might have expected their bouncers to control (see Riviello v Waldron, 47 NY2d 297, 303-304 [1979]).

In Buckley v. J.A. Jones/GMO, 38 A.D.3d 461 (1st Dept. 2007), the court found that:

Contrary to plaintiffs' contentions, the incident report (which plaintiffs do not dispute was prepared in the ordinary course of J.A. Jones's business) may be admissible as a business record under CPLR 4518. Although White, the foreman who provided Caswell with the information in the report, stated in his affidavit that he did not see Buckley fall, White also stated in his affidavit that he "personally witnessed the circumstances surrounding Mr. Buckley's accident." Thus, White may be found at trial to have had "personal knowledge" of the information about the position of the ladder he provided to Caswell, the author of the report (see Matter of Leon RR, 48 N.Y.2d 117, 123, 397 N.E.2d 374, 421 N.Y.S.2d 863 [1979]). In any event, under the circumstances presented here, the use of the incident report to defeat the motion for summary judgment was appropriate (see Levbarg v City of New York, 282 A.D.2d 239, 241, 723 N.Y.S.2d 445 [2001]; Eitner v 119 W. 71st St. Owners Corp., 253 A.D.2d 641, 642, 677 N.Y.S.2d 555 [1998]). As to the requirement of a "business duty" to report the information in question (Matter of Leon RR, 48 N.Y.2d at 122),
given that White was a foreman employed by a subcontractor on the project, it may reasonably be inferred that he was under a business duty to furnish information about an on-the-job accident to Caswell, the general contractor's safety supervisor (see id. at 123). That White and Caswell were employed by different companies (Cross Country and J.A. Jones, respectively) does not negate the inference that White had a business duty to report such information to Caswell (see People v Cratsley, 86 N.Y.2d 81, 90-91, 653 N.E.2d 1162, 629 N.Y.S.2d 992 [1995] [clinical report prepared for sheltered workshop by independent contractor was admissible]; Pencom Sys. v Shapiro, 237 A.D.2d 144, 658 N.Y.S.2d 258 [1997] [recruitment firm's business records containing information provided by job applicants not employed by firm were admissible]). In any event, any issue as to whether White had a business duty to report the incident to Caswell is, for present purposes, unpreserved, as plaintiffs failed to raise any such issue before Supreme Court. We also note that, to the extent the incident report reflects statements by Buckley that White reported to Caswell, such statements would be admissible against plaintiffs as party admissions (see Kelly v Wasserman, 5 N.Y.2d 425, 428-430, 158 N.E.2d 241, 185 N.Y.S.2d 538 [1959]; Penn v Kirsh, 40 A.D.2d 814, 338 N.Y.S.2d 161 [1972]; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:3).

See also, Boccia v. City of New York, 46 A.D.3d 421 (1st Dept. 2007).

However, in Baez-Sharp v. N.Y.C.T.A., 38 A.D.3d 229 (1st Dept. 2007), the court held that to the extent that the motion court relied on the accident reports that were unaccompanied by affidavits attesting to the preparers' personal knowledge and/or duty to create such reports, that was error (Bendik v Dybowski, 227 A.D.2d 228, 229, 642 N.Y.S.2d 284 [1996]).

Similarly, in Montes v. N.Y.C.T.A., 46 A.D.3d 421 (1st Dept. 2007), Contrary to the conclusions in the concurring opinion, the trial court did not error by refusing to admit into evidence all that was contained in a memorandum/report prepared by the Transit Authority during its internal investigation into the cause of the accident.

Much of what is in this report is factual and either was proven through the use of other evidence or involved issues which are not the subject of any meaningful dispute at trial. What was at issue is the admissibility of any of the conclusions set forth at the end of the document. Specifically, the report concludes as follows:

--The eleven (11) year old male youth ran against a red traffic signal in front of the moving bus;
--The B/O failed to use caution, and to anticipate, while approaching a very active intersection;
--The B/O failed to properly observe, and to recognize potential hazard;
--The B/O failed to drive defensively by sounding his horn and stopping in a timely manner;

When read in the abstract, these findings lead one to conclude that the Transit Authority has found that the operator of the bus was negligent in the operation of this vehicle, and was, at least in part, at fault for the cause of this accident. However, there was sworn testimony before the trial court which established that the last three of these conclusions were in reality an assessment by a representative of the Transit Authority as to how the driver's operation of this vehicle measured up to the Transit Authority's internal rules and standards, and did not represent an opinion by the Transit Authority that the driver at the time of the accident had failed to use reasonable care. The Transit Authority's internal standards impose a code of conduct on its drivers that exceeds that of the common law by presuming that every accident is preventable, and that when one occurs, the driver must have to some extent been at fault (see e.g. Veal v New York City Tr. Auth., 148 AD2d 443, 445, 538 N.Y.S.2d 594 [1989]).

The concurring opinion takes the view that since the report does not expressly refer to this enhanced standard of care, it cannot be used either to clarify the report's conclusions or to determine their admissibility. Generally, business records are not self-proving, and determinations of their admissibility often require testimony of qualified witnesses familiar with how the documents are created (see National States Elec. Corp. v LFO Constr. Corp., 203 AD2d 49, 50, 609 N.Y.S.2d 900 [1994] [testimony required to determine admissibility of contractor's summary of damages]). Indeed, a trial court has broad discretion when ruling on the admission of evidence, and may "elicit and clarify testimony" in its attempt to control its courtroom (see Messinger v Mount Sinai Med. Ctr., 15 AD3d 189, 189, 789 N.Y.S.2d 132 [2005], lv dismissed 5 NY3d 820, 836 N.E.2d 1150, 803 N.Y.S.2d 27 [2005]; Henriques v Kindercare Learning Ctr., Inc., 6 AD3d 220, 221, 774 N.Y.S.2d 527 [2004]). This discretion allows the trial court to consider the circumstances by which a document was prepared in determining its relevance on the issue for which it has been proposed. Here, sworn testimony was given by an official with personal knowledge of the criteria used in preparing this document - - testimony which the trial court obviously found to be credible - - which established that the report's conclusions were based on the Transit Authority's internal rules and practices, which in turn impose higher standards than the common law. As such, the opinions as rendered were not admissible to establish the driver's negligence (see Karoon v New York City Tr. Auth., 286 AD2d 648, 730 N.Y.S.2d 331 [2001]).

Moreover, while it is true as noted in the concurring opinion that the report is a business record, the business record statute "does not make admissible evidence which is otherwise inadmissible" (58 NY Jur 2d, Evidence and Witnesses § 465, at 257; see Bostic v State of New York, 232 AD2d 837, 839, 649 N.Y.S.2d 200 [1996], lv denied 89 NY2d 807, 678 N.E.2d 500, 655 N.Y.S.2d 887 [1997]) even assuming that the exhibit was admissible under CPLR 4518, it is well settled that the business records exception to the hearsay rule * * * does not overcome any other exclusionary rule which might properly be invoked * * * such as the requirement
that the evidence sought to be introduced be relevant and material to the issue at hand" [citations and internal quotation marks omitted]). A trial judge has the right, albeit the obligation, to redact from a report any parts thereof which, standing alone, would not be admissible. The fact that these conclusions are not relevant is not changed simply because they are set forth in a business record of the Transit Authority.

Equally important, there is no rational correlation between the conclusions as offered and the findings upon which they are based. For example, the report concludes "the B/O failed to use caution, and to anticipate, while approaching a very busy intersection." There are no factual findings listed in the report which would rationally support such a conclusion or reasonably lead to it. The only factual finding that is remotely related to this conclusion that is contained in the report states as follows: "The B/O first observed the male youth when he was already in front of the bus." That finding, if warranted, does not necessarily support the conclusion that the driver was negligent, nor is there any other explanation which explains the basis for this conclusion. Absent some rational connection supporting such inferences, the author of the report if called to testify, would not have been allowed to give these opinions, assuming he was otherwise found competent to render them. The other arguments have been considered and found to be unavailing.

Police Reports

VTL § 603. Accidents; police authorities and coroners to report.

1. Every police or judicial officer to whom an accident resulting in injury to a person shall have been reported, pursuant to the foregoing provisions of this chapter, shall immediately investigate the facts, or cause the same to be investigated, and report the matter to the commissioner forthwith; provided, however, that the report of the accident is made to the police officer or judicial officer within five days after such accident. Every coroner, or other official performing like functions, shall likewise make a report to the commissioner with respect to all deaths found to have been the result of motor vehicle or motorcycle accidents. Such report shall include information on the width and length of trucks, tractors, trailers and semitrailers, which are in excess of ninety-five inches in width or thirty-four feet in length and which are involved in such accidents, whether such accident took place in a work area and whether it was being operated with an overweight or overdimension permit. Such report shall distinctly indicate and include information as to whether the inflatable restraint system inflated and deployed. Nothing contained in this subdivision shall be deemed to preclude a police officer from reporting any other accident which, in the judgment of such police officer, would be required to be reported to the commissioner by the operator of a vehicle pursuant to section six hundred five of this article.

2. In addition to the requirements of subdivision one of this section, every police officer or judicial officer to whom an accident shall have been reported involving a commercial vehicle as defined in either subdivision four of section five hundred one-a or subdivision one of section five hundred nine-p of this chapter shall immediately investigate the facts, or cause the same to be investigated and report
When the accident has resulted in (i) a vehicle being towed from the accident scene as the result of incurring disabling damage, (ii) a fatality, or (iii) any individual being transported to a medical facility to receive treatment as the result of physical injury sustained in the accident.

VTL § 603-a. Accidents; police authorities to investigate.

1. In addition to the requirements of section six hundred three of this article, whenever a motor vehicle accident results in serious physical injury or death to a person, and such accident either is discovered by a police officer, or reported to a police officer within five days after such accident occurred, the police shall conduct an investigation of such accident. Such investigation shall be conducted for the purposes of making a determination of the following: the facts and circumstances of the accident; the type or types of vehicles involved, including passenger motor vehicles, commercial motor vehicles, motorcycles, limited use motorcycles, off-highway motorcycles, and/or bicycles; whether pedestrians were involved; the contributing factor or factors; whether it can be determined if a violation or violations of this chapter occurred, and if so, the specific provisions of this chapter which were violated and by whom; and, the cause of such accident, where such cause can be determined. The police shall forward a copy of the investigation report to the commissioner within five business days of the completion of such report.

Where a police officer arrives at the scene of an accident shortly after it occurs, the officer may testify as to the location of and damage to the respective vehicles, and offer an opinion as to the point of impact without being qualified as an expert, since the testimony consists of observations not requiring any particular expertise. However, in the absence of any evidence that the officer either witnessed the accident or is qualified to render an opinion as to its cause, the officer may not assign fault. Moreover, while an admission against interest by a party contained in the report may be admissible, the portion of the officer’s report which fails to specify the source of the information, and the hearsay testimony derived from it, is inadmissible. Almestica v. Colon, 304 A.D.2d 508, 757 N.Y.S.2d 336 (2nd Dept 2003).
Merely because a police officer prepares a report in the regular course of business does not make its contents admissible; they must overcome any other exclusionary rule.

In *Cheul Soo Kang v Violante*, 60 AD3d 991 (2nd Dept. 2009),

The trial court erred in admitting a police accident report into evidence. The report did not qualify for admission pursuant to CPLR 4518 (c) because it was not certified, and no foundation testimony establishing its authenticity and accuracy was offered (see *DeLisa v Pettinato*, 189 AD2d 988 [1993]; *Matter of Peerless Ins. Co. v Milloul*, 140 AD2d 346 [1988]). Furthermore, the statements in the report attributed to the plaintiff and defendant driver constituted inadmissible hearsay (see *Carr v Burnwell Gas of Newark, Inc.*, 23 AD3d 998, 1000 [2005]; *Hatton v Gassler*, 219 AD2d 697 [1995]). The error cannot be considered harmless.

In *Afridi v. Glen Oaks Village Owners, Inc.*, 49 A.D.3d 571 (2nd Dept. 2008),

The infant plaintiff sustained second degree burns to her thighs and abdomen after coming into contact with hot water from a faucet in the bathroom of her family's apartment. The plaintiffs commenced this action against the cooperative corporation that owned the apartment where the family resided, alleging negligence in the supply of excessively hot water to the apartment. At the ensuing jury trial, the Supreme Court excluded from evidence a section of a police report indicating that, 12 days after the accident, the hot water from the subject faucet registered a temperature of 160 degrees Fahrenheit. The report failed to supply any details, inter alia, about how the temperature measurement was made.

The Supreme Court providently exercised its discretion in denying the plaintiffs' request to admit the police report into evidence, where the plaintiffs failed to establish a proper foundation for its admission (see *People v Freeland*, 68 NY2d 699, 497 N.E.2d 673, 506 N.Y.S.2d 306; *Sassone v Corhouse*, 129 AD2d 924, 514 N.Y.S.2d 565). Contrary to the plaintiffs' contention, the mere fact that the report may have been a business record, as contemplated under CPLR 4518, "does not overcome any other exclusionary rule which might properly be invoked" (*People v Tortorice*, 142 AD2d 916, 918, 531 N.Y.S.2d 414; accord *Bostic v State of New York*, 232 AD2d 837, 839, 649 N.Y.S.2d 200).

In *Noakes v Rosa*, 54 AD3d 317 (2nd Dept. 2008), a plaintiff’s verdict in Westchester was reversed because of the improper admission into evidence of a police report.
This is an action to recover damages for personal injuries allegedly sustained by the plaintiff in an automobile accident. The plaintiff alleged that the defendant's car rear-ended his car. The defendant alleged that the plaintiff's car backed into her car. At the trial on the issue of liability the court admitted into evidence, over the defendant's objection, a police accident report. The report contained two opposing hearsay statements regarding how this accident allegedly occurred. It also contained a statement allegedly made by the defendant that she was upset because she had received bad news. The subscribing police officer was not an eyewitness and did not testify at trial.

The police report should not have been admitted into evidence as a business record exception to the hearsay rule (see Johnson v Lutz, 253 NY 124). The statement in the report that the defendant "rear-ended" the plaintiff was from an unknown source. Since the source of this statement was not identifiable, it was error to admit it (see Battista v Rizzi, 228 AD2d 533). It could not be established whether the source had a duty to make the statement or whether some other hearsay exception applied (see Murray v Donlan, 77 AD2d 337).

It was also error to admit the statement in the report allegedly made by the defendant that the plaintiff's car backed into her car. This was a self-serving statement that did not fall within a hearsay exception (see Casey v Tierno, 127 AD2d 727).

Since these statements bore on the ultimate issue of fact to be decided by the jury, their admission constituted prejudicial and reversible error, and a new trial is warranted (see Hatton v Gassler, 219 AD2d 697; Gagliano v Vaccaro, 97 AD2d 430).

Similarly, in Huff v. Rodriguez, 45 A.D.3d 1430 (4th Dept. 2007), the court held that a police report is not admissible unless the police officer authoring the report is an expert or an eyewitness, or the report contains an identifiable admission against interest.

However, in Scott v. Kass, 48 A.D.3d 785 (2nd Dept. 2008), the police accident report submitted by the appellants in support of their cross motion for summary judgment contained a statement by the defendant Bryan Kass that he had fallen asleep while driving and that his vehicle had crossed over a double yellow line into oncoming traffic and struck a telephone pole on the opposite side of the road. The police officer who prepared the report was acting within the scope of his duty in recording Kass's statement, and the statement is admissible as the admission of a party (see Guevara v Zaharakis, 303 AD2d 555, 556, 756 N.Y.S.2d 465; Ferrara v Poranski, 88 AD2d 904, 450 N.Y.S.2d 596). Additionally, the diagram and other entries in the police accident report showing where the vehicles struck each other and the position and path of travel of each vehicle is admissible since the reporting officer could make these determinations himself when he arrived on the scene (see Exantus v Town of Ossining, 266 AD2d 502, 699 N.Y.S.2d 94).
Similarly, in Sulaiman v. Thomas, 54 A.D.3d 751 (2nd Dept. 2008), the Supreme Court properly granted the plaintiffs' motion for summary judgment on the issue of liability. In an affidavit submitted in support of the plaintiffs' motion for summary judgment on the issue of liability, the injured plaintiff stated that he was walking southbound on Euclid Avenue in Brooklyn, crossing Sutter Avenue in a crosswalk, with a green signal, when he was struck by a vehicle driven by the defendant. The defendant was traveling northbound on Euclid Avenue, and made a "sudden and abrupt turn" into the crosswalk on Sutter Avenue, leaving the injured plaintiff no time to react. Furthermore, the police report concerning the accident contains the defendant's statement that he was making a right turn into the intersection and he did not see the injured plaintiff because of another car turning left from Euclid Avenue onto Sutter Avenue. Accordingly, the plaintiffs made a prima facie showing of entitlement to judgment as a matter of law (see 34 RCNY 4-03 [a] [1] [i]; 4-04 [d]….

In Huang v. N.Y.C.T.A., 49 A.D.3d 308 (1st Dept. 2008),

The expert's opinions regarding the speed of the train, the time it took to stop and the distance it traveled after striking plaintiff and before stopping, were founded upon information supplied by defendant's own investigative reports and other disclosed internal documents, together with the police report and deposition testimony of the witnesses (see generally Soto v New York City Tr. Auth., 6 NY3d 487, 493-494 [2006]). Contrary to defendant's contention, the expert did not introduce a new theory of liability, i.e., that the conductor had negligently delayed in activating the emergency brake. The police report, which indicated that plaintiff was dragged 40 feet by the train, was properly admitted into evidence under the business record exception through the testimony of the police sergeant who prepared the report, interviewed the witnesses, and recorded their statements (see Penn v Kirsh, 40 AD2d 814 [1972]).

Internal Rules

In Lopez v New York City Tr. Auth., 60 AD3d 529 (1st Dept. 2009),

The court did not err in permitting the jury to hear that the driver had violated Transit Authority rules by not remaining at the scene of the accident. Although an agency's internal rules and practices are inadmissible when they require a standard of care transcending that imposed by common law (see Rahimi v Manhattan & Bronx Surface Tr. Operating Auth., 43 AD3d 802, 804 [2007]), the bulletin at issue merely declared that incidents involving injury or vehicle damage must be reported as soon as possible, which is no more than what is required under common law (see Danbois v New York Cent. R.R. Co., 12 NY2d 234, 240 [1963]). Indeed, the jury was not informed that the Transit Authority had found the driver to be at fault, but was instead accurately advised that he continued without stopping for five blocks after the event.
Admissibility of Administrative Findings

In Martin v. Ford Motor Co., 36 A.D.3d 867 (2nd Dept. 2007),

The 1989 report prepared by the National Highway Traffic and Safety Administration was admissible under the common-law public document exception to the hearsay rule (see Consolidated Midland Corp. v Columbia Pharmaceutical Corp., 42 A.D.2d 601, 345 N.Y.S.2d 105). Accordingly, the report is not "prima facie evidence of the facts" contained therein (CPLR 4520), but merely some evidence of the facts which the trier of fact is free to disbelieve even though the adverse party offers no evidence on the point (see Consolidated Midland Corp. v Columbia Pharmaceutical Corp., supra; Matter of Frenke v Frenke, 267 A.D.2d 238, 699 N.Y.S.2d 313).

In Consolidated Midland Corp., infra, the court explained

In our opinion, it was error for the trial court to refuse to admit into evidence plaintiff's exhibits which were marked 10 and 11 for identification. While we agree with the trial court that these exhibits could not be admitted under CPLR 4520, they should have been admitted under the common-law hearsay exception rule for official written statements, often called the "official entries" or "public document" rule. The common-law rule, which is much broader in scope, has not been superseded by CPLR 4520 (see Richards v. Robin, 178 App. Div. 535, 539; see, also, 5 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 4520.01; 5 Wigmore, Evidence [3d ed.], § 1638a, n. 1; Practice Commentary on CPLR 4520 in McKinny's Cons. Laws of N. Y., Book 7B, p. 480). It should be noted, however, that since these exhibits are not admissible under CPLR 4520 they will not be "prima facie evidence of the facts" contained in them, but merely some evidence which the trier of the facts is free to disbelieve even though the adverse party offers no evidence on the point (see Supplementary Practice Commentary on CPLR 4520, by Professor Joseph M. McLaughlin, in McKinny's Cons. Laws of N. Y., Book 7B, Pocket Part; 5 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 4520.04). We feel it important to add, however, that in the instant case the trial court should afford plaintiff the opportunity of putting on the stand a person with sufficient expertise to explain the seemingly complicated analytical notations, at least with respect to exhibit 10. Without such a witness, the admission of exhibit 10 into evidence would be meaningless.

In Baragano v. Vaynshelbaum, N.Y.L.J. June 30, 2005 (Sup. NY), in a medical malpractice case, Justice Bransten determined that administrative findings by the N.Y.S. D.O.H., O.P.M.C. and U.S. F.D.A. relating to the poor quality of defendant's mammography and limitation of defendant's license, precluding him from performing

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4 The State Administrative Procedure Act (Article 3, Adjudicatory Proceedings, Section 306 Evidence) establishes rules of evidence for administrative hearings.
breast cancer detection-evaluations were relevant because a critical issue in the case was whether defendants incorrectly interpreted plaintiff’s mammogram. The court noted Cramer v. Benedictine Hosp., 190 Misc. 2d 191, 737 N.Y.S.2d 520, aff’d, 301 A.D.2d 924, 754 N.Y.S.2d 414 (3rd Dept. 2003) and Smith v. Delago, 2 A.D.3d 1259, 770 N.Y.S.2d 445 (3rd Dept. 2003).

In Maldonado v. Cotter, 256 A.D.2d 1073, 1074-1075 (4th Dept. 1998), the appellate court noted that the trial court erred in excluding portions of the New York State Department of Health Statement of Deficiencies and Plan of Correction, noting that pursuant to Pub. Health Law. Sec. 10(2), the written reports of State health inspectors on questions of fact related to the enforcement of the Public Health Law “shall be presumptive evidence of the facts so stated therein, and shall be received as such in all courts and places”.


In Richards v. Smith, 9 Misc. 3d 670 (Sup. Kings 2005), plaintiff successfully moved for summary judgment based an finding of the OPMC that unanimously found that the defendant physician committed a battery on plaintiff and revoked defendant’s medical license.

In Rubeis v. Aqua Club, 3 N.Y.3d 408, 416, 708 N.Y.S.2d 292, 296 (2004), in the context of determining whether the injuries sustained by the plaintiff were “grave”, the
Court of Appeals took note of the fact that the plaintiff was found to be disabled and was receiving SSDI.

In Hayes v. Normandie LLC, 306 A.D.3d 133 (1st Dept. 2003), rearg. den., 203 N.Y. App. Div. LEXIS 10750 (1st Dept 2003), app. dis., 100 N.Y.2d 640 (2003), the court noted: "That plaintiff continued to work for a year after his accident does not negate the finding that his injuries were ultimately disabling, as found by the Social Security Administration."

In Frenke v. Frenke, 267 A.D.2d 238 (2nd Dept. 1999), the court did not improvidently exercise its discretion in admitting into evidence a decision of the Social Security Administration as some evidence, but not prima facie evidence, of the facts contained therein.

Collateral Estoppel/Res Judicata

In Bello v Santiago, 2009 NY Slip Op 50954(U) [23 Misc 3d 1127(A)] the Supreme court, Kings County, discussed the doctrines of res judicata and collateral estoppels in the context of an Administrative Law Judge’s determination. The plaintiff’s motion for summary judgment was granted only to the extent of finding that Donat Design is collaterally estopped from arguing that it did not violate Administrative Code §§ 27-147 and 27-1009.

In determining liability in the instant matter, it is also necessary to recognize that plaintiff argues that Donat and/or Santiago pled guilty to violations at the hearings held before the ECB, and hence are bound by the factual findings made by the ALJ pursuant to the doctrines of collateral estoppel and res judicata. "[R]es judicata is generally applicable to quasi-judicial administrative determinations that are "rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law"" (Matter of Jason B. v Antonia Coello Novello, 12 NY3d 107, 2009 NY Slip Op 1244, *5 [2009], quoting Matter of Josey v Goord, 9 NY3d 386, 390 [2007], quoting Ryan v New York Tel.
"One linchpin of res judicata is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim between the parties has been previously brought to a final conclusion" (City of New York v Welsbach Elec. Corp., 9 NY3d 124, 127-128 [2007], quoting Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 347 [1999]). Stated differently, the "doctrine of res judicata only bars additional actions between the same parties on the same claims based upon the same harm" (Employers' Fire Ins. Co. v Brookner, 47 AD3d 754, 756 [2008], quoting Matter of LaRocco v Goord, 43 AD3d 500, 500 [2007], quoted in City of New York v Welsbach Elec. Corp., 9 NY3d 124, 127-128 [2007]).

In contrast, the doctrine of collateral estoppel, or issue preclusion, "applies only if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the [party] had a full and fair opportunity to litigate the issue in the earlier action" (City of New York, 9 NY3d at 128, quoting Parker, 93 NY2d at 349). Hence, "[c]ollateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity" (Buechel v Bain, 97 NY2d 295, 303 [2001], cert denied 535 US 1056 [2002], citing Ryan, 62 NY2d at 500). "The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior proceeding, and is decisive of the present action" (see e.g. City of New York v College Point Sports Assn., ___ AD3d ___, 2009 NY Slip Op 00326 *5-*6 [2009], citing Buechel, 97 NY2d at 304; D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]). "The party against whom preclusion is sought bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination" (see e.g. City of New York, 2009 NY Slip Op 00326, *6, citing Buechel, 97 NY2d at 304; Matter of Juan C. v Cortines, 89 NY2d 659, 667 [1997]; Kaufman v Eli Lilly & Co., 65 NY2d 449, 456 [1985]; see also G. Rama Constr. Enters. v 80-82 Guernsey St. Assoc. LLC, 43 AD3d 863, 865 [2007] "[t]he party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to contest the prior determination").

In further explaining the applicability of the doctrine, it has been stated that:

"The issue of whether a party has had a full and fair opportunity to contest the prior decision requires consideration of the "realities of the litigation" (Staatsburg Water Co. v Staatsburg Fire Dist., supra [72 NY2d 147] at 153, quoting Gilberg v Barbieri, 53 NY2d 285, 292, [1981]; see Buechel v Bain, supra ; Matter of Halyalkar v Board of Regents of State of NY, 72 NY2d 261 [1988]), and the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings' (Staatsburg Water Co. v Staatsburg Fire Dist., supra at
In discussing privity, the Court of Appeals has held that:

"In the context of collateral estoppel, privity does not have a single well-defined meaning (Matter of Juan C. v Cortines, 89 NY2d 659, 667 [1997]). Rather, privity is "an amorphous concept not easy of application" . . . and "includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action" (id., at 667-668 [citations omitted]). In addressing privity, courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the particular circumstances. Doubts should be resolved against imposing preclusion to ensure that the party to be bound can be considered to have had a full and fair opportunity to litigate." (Buechel, 97 NY2d at 304-305).

"In general, a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation" (Juan C., 89 NY2d at 667, quoting D'Arata, 76 NY2d at 664; People v Roselle, 84 NY2d 350 [1994]). Stated differently, privity " includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action"(Juan C., 89 NY2d at 667-668, quoting Watts v Swiss Bank Corp., 27 NY2d 270, 277 [1970]). In addition, it has been recognized that:

"[T]he control/participation' standard remains a useful and key factor in assaying the relationship between parties, for privity purposes (see, Watts v Swiss Bank Corp., 27 NY2d 270, quoted favorably in Matter of Juan C. v Cortines, supra , at 667-668; see generally, Restatement [Second] of Judgments§ 39). Thus, courts should continue to consider the character, right and extent of a party's role in one proceeding as it bears on the intervention of the collateral estoppel doctrine in another. The effect of the permitted activity on the party's interests is key in relationship to the totality of the circumstances and discrete facts at issue in each forum, including a party's access to personal counsel and direct representation (see, Watts v Swiss Bank Corp., supra ; see also, Restatement [Second] of Judgments § 39, Reporter's Note, comment c)."

(David v Biondo, 92 NY2d 318, 323-324 [1998]).

In Robin BB, v Kotzen, 62 AD3d 1187 (3rd Dept. 2009), the court affirmed the granting of plaintiff’s motion for summary judgment.

Defendant also argues that plaintiffs' motion for summary judgment should have been denied because much of what was submitted in support of the motion was not based
upon personal knowledge but, instead, upon an affidavit of plaintiffs' counsel. However, in support of their motion, plaintiffs also submitted affidavits from Skyler, Christopher and Edward that set forth in detail their recollection as to how they were abused by defendant. They also included in support of their motion copies of the pleadings and transcripts of the proceedings that occurred during the criminal prosecution when defendant entered his guilty plea and was later sentenced (see generally McWain v Pronto, 30 AD3d 675, 676 [2006]). This material, as referenced by counsel's affidavit, provided competent evidence to support Supreme Court's decision to grant plaintiffs' motion for summary judgment in plaintiffs' favor on liability (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Finally, defendant also argues that the motion for summary judgment should have been denied because his guilty plea as taken in the criminal proceedings only referenced a limited time period in which he admitted sexually assaulting Skyler, Christopher and Edward and did not constitute a full admission by defendant of the truthfulness of all of the factual allegations made against him that were contained in their complaint in this action. In that regard, we note that defendant, while opposing the motion for summary judgment, did not submit any competent evidence that specifically denied any of the claims made on behalf of plaintiffs. In addition, defendant's admissions made during his plea allocution in his criminal prosecution, when considered with the other materials submitted by plaintiffs in support of this motion, provided a sound basis for Supreme Court's conclusion that no legitimate factual issues existed as to defendant's legal responsibility for the claimed abuse. As such, plaintiffs' motion for summary judgment was properly granted by Supreme Court.

**ADMISSIBILITY OF MEDICAL RECORDS AND REPORTS**

By Sherri Sonin and Robert J. Genis

CPLR 4518 (a) provides in pertinent part:

“Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.” (Emphasis added).
CPLR 4518 is a codification of the “business record” or “shopkeeper’s” rule. The Court of Appeals has clearly recognized that the courts are utilizing this rule in an ever-increasing manner, and that many different kinds of records, however prejudicial or determinative of the factual issues, are being increasingly admitted into evidence under this rule. Wilson v. Bodian, 130 A.D.2d 221, 229 (2nd Dept. 1987)(discussing People v. Kennedy, 68 N.Y.2d 569 (1986). Chief Judge Kaye recognized this development:

“Since that enactment nearly 60 years ago, the statutory exception to the hearsay rule has widened considerably, both as business and record-keeping have become increasingly complex and sophisticated. The business records exception has been recognized as probably the most important hearsay exception, and a major growth point in the law with great potential for further expansion ….” People v. Kennedy, 68 N.Y.2d 569, 578 (1986)(emphasis added).

CPLR 3122-a is a relatively new section that permits certified business records into evidence. It provides:

“(a) Business records produced pursuant to a subpoena duces tecum under rule 3120 shall be accompanied by a certification, sworn in the form of an affidavit and subscribed by the custodian or other qualified witness charged with responsibility of maintaining the records, stating in substance each of the following:
1. The affiant is the duly authorized custodian or other qualified witness and has authority to make the certification;
2. To the best of the affiant's knowledge, after reasonable inquiry, the records or copies thereof are accurate versions of the documents described in the subpoena duces tecum that are in the possession, custody, or control of the person receiving the subpoena;
3. To the best of the affiant's knowledge, after reasonable inquiry, the records or copies produced represent all the documents described in the subpoena duces tecum, or if they do not represent a complete set of the documents subpoenaed, an explanation of which documents are missing and a reason for their absence is provided; and
4. The records or copies produced were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, at the time of the act, transaction, occurrence or event recorded therein, or within a reasonable time thereafter, and that it was the regular course of business to make such records.
(b) A certification made in compliance with subdivision (a) is admissible as to the matters set forth therein and as to such matters shall be presumed true. When more than one person has knowledge of the facts, more than one certification may be made.
(c) A party intending to offer at a trial or hearing business records authenticated by certification subscribed pursuant to this rule shall, at least thirty days before the trial or hearing, give notice of such intent and specify the place where such records may be
inspected at reasonable times. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the offer of business records by certification stating the grounds for the objection. Such objection may be asserted in any instance and shall not be subject to imposition of any penalty or sanction. Unless objection is made pursuant to this subdivision, or is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for objection otherwise required by this subdivision, business records certified in accordance with this rule shall be deemed to have satisfied the requirements of subdivision (a) of rule 4518. Notwithstanding the issuance of such notice or objection to same, a party may subpoena the custodian to appear and testify and require the production of original business records at the trial or hearing.”

This relatively new section of the CPLR may be used by counsel to admit into evidence the business records of a physician or health care provider without having to produce a live witness.

HOSPITAL RECORDS AND REPORTS

In the seminal case of Williams v. Alexander, 309 N.Y. 283 (1955), the Court of Appeals clearly held that since it is the business of a hospital to “diagnose and treat its patients’ ailments,” entries made in a hospital record that relate to the diagnosis, prognosis or treatment of the patient are admissible. 309 N.Y. at 287. Hospital records are admissible pursuant to CPLR 4518 [c] and CPLR 2306. See, Dhillon v. Bryant Associates, 26 A.D.3d 155 (1st Dept. 2006).

Entries concerning the plaintiff’s medical history that are germane to diagnosis and treatment are admissible. Williams v. Alexander, 309 N.Y. 283 (1955); Scott v. Mason, 155 A.D.2d 655, 657 (2nd Dept. 1989); Crisci v. Sadler, 253 A.D.2d 447, 449 (2nd Dept. 1998)(including history related to the medical malpractice of defendant).

X-rays are “documents”, and therefore admissible as part of the hospital record. Moreover, like any other document, are subject to the best evidence rule, which holds that if the circumstances excuse non-production of the x-ray film, the proponent may
establish its “contents” by secondary evidence, such as a radiology report. Schozer v. William Penn Life Ins., 84 N.Y.2d 639 (1994).

Thus, X-rays, MRI, and CT scan tests and reports taken at a hospital are similarly admissible in evidence. Hoffman v. City of New York, 141 Misc. 2d 893 (Sup. Kings 1988); Lanpont v. Savvas Corp., 244 A.D.2d 208, 211 (1st Dept. 1997); Restrepo v. State, 146 Misc. 2d 349, aff’d, 179 A.D.2d 804 (2nd Dept. 1992).

Certified hospital bills are properly admitted into evidence and constitute *prima facie* evidence that the amounts charged were reasonable and necessary. CPLR 4518(b); Kastick v. U-Haul Co. of Western Michigan, 259 A.D.2d 970 (4th Dept. 1999).

**PHYSICIAN’S RECORDS**

Pursuant to CPLR 4518(a), the office records of a physician are admissible. Napolitano v. Branks, 141 A.D.2d 705 (2nd Dept. 1988); Wilson v. Bodian, 130 A.D.2d 221 (2nd Dept. 1987); Prince, Richardson On Evidence, 11th Ed., Sec. 8-309. “Similar to hospital records, it is the business and duty of a physician to diagnose and treat a patient’s illness. Therefore, entries in the office records germane to diagnosis and treatment are admissible, including medical opinions and conclusions.” Wilson v. Bodian, 130 A.D.2d at 231 (emphasis added).

A report made in the ordinary course of a doctor’s medical practice is admissible in evidence as a business record once the requisite statutory foundation has been laid. Hefte v. Bellin, 137 A.D.2d 406, 408 (1st Dept. 1988); Jezowski v. Beach, 59 Misc. 2d 224, 226 (Sup. Oneida 1968). The failure to allow into evidence the medical records *and report* of a treating doctor may constitute reversible error. Crisci v. Sadler, 243 A.D.2d 447, 449 (2nd Dept. 1998).
In discussing the admissibility of medical records and reports it is important to note that it is not just the business and duty of a physician to make records concerning their diagnosis and treatment of a patient, it is a requirement.

All physicians are required “to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient.” 8 N.Y.C.R.R. 29.2[a][3]. See, Osowicki v. Young, 140 A.D.2d 898, 900 (3rd Dept. 1988). This means that a doctor is required to record the patient’s complete history, the physician’s physical examination, including all positive and negative findings from the inventory of systems, abnormalities, diagnosis, procedures performed, and sufficient information to warrant the tests ordered and medications prescribed, if any, to the patient. See, Adrien v. Kaladjian, 199 A.D.2d 57 (1st Dept. 1993); Villaflor v. Board of Regents of the State University of New York, 109 A.D.2d 925, 926 (3rd Dept. 1985); Schwarz v. Board of Regents of the State University of New York, 89 A.D.2d 711, 712 (3rd Dept. 1982); Keppler v. New York State Department of Social Services, 218 A.D.2d 877, 879 (3rd Dept. 1995).

A physician who fails to keep and maintain adequate medical records may be disciplined or sanctioned, particularly where the doctor participates in a medical assistance program (i.e., Medicaid/Medicare). See, Camperlengo v. Barell, 78 N.Y.2d 674 (1991); Education Law Sec. 6509; 18 N.Y.C.R.R. 515.2[b][6]; 8 N.Y.C.R.R. 29.2[a][3].

OTHER DOCTOR’S RECORDS AND REPORTS

Pursuant to 8 N.Y.C.R.R. 29.2[a][3], a medical record is required to convey objectively meaningful medical information concerning the patient treated to other

The purpose behind this requirement is in part to ensure that meaningful information is recorded in case the patient should transfer to another professional or the treating practitioner should become unavailable. *Mucciolo v. Fernandez*, 195 A.D.2d 623, 625, *lv. to app. den.*, 82 N.Y.2d 661 (1993) (emphasis added).

The reality of modern day medicine is that to properly diagnose and treat a patient, a doctor may be required to consult with other physicians and health care professionals. Treating physicians regularly and routinely refer their patients to such specialists. The consultant then customarily sends a report, a copy of a test or some other record of their examination to the referring physician. In the regular course of their business, the treating doctor then considers these records and findings, along with their own examinations, and renders a diagnosis and prescribes a course of treatment. Doctors regularly rely, to some degree, on the conclusions, interpretations and opinions of other medical specialists. Indeed, the failure of a treating physician to refer their patient to an appropriate medical specialist and obtain a copy of the consulting expert’s report and consider it in the course of treating the patient may constitute medical malpractice.

Similarly, to assist the doctor in caring for the patient, the specialist is obligated to write their findings and send their medical conclusions to the referring physician. These medical reports become part and parcel of the treating doctor’s office records, and may play an integral role in determining the course and modalities of treatment.

Thus, the reports of other physicians contained in each doctor’s records are generally admissible. *Cohn v. Haddad*, 244 A.D.2d 519, 520 (2nd Dept. 1997). That
other people prepared the records or reports does not affect the admissibility of the documents. CPLR 4518(a) is explicit:

“All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility.” (emphasis added).

In Stein v. Lebowitz-Pine View Hotel, Inc., 111 A.D.2d 572, mot. for lv. den., 65 N.Y.2d 611 (1985), the court allowed the records and reports prepared by other persons but made a part of the physicians’ records for the patient to be entered into evidence. The court held that:

“Certain laboratory reports, X-rays and electrocardiograms included in the file of decedent’s physician and entered by either the physician or his staff were admissible pursuant to CPLR 4518(a). That these records were prepared by other persons merely affects the weight of this evidence, not its admissibility.” (emphasis added) 111 A.D.2d at 574.

Similarly, in Freeman v. Kirkland, 184 A.D.2d 331 (1st Dept. 1992), the court properly allowed into evidence,

“the complete medical file of plaintiff’s treating osteopathic physician, including records, reports and correspondence generated by other medical specialists and laboratories, where the treating physician’s testimony at trial established that the medical records related to the diagnosis and treatment of plaintiff’s injuries (citations omitted).” (emphasis added) 184 A.D.2d at 332.

In Colezetti v. Pircio, 214 A.D.2d 926, 927 (3rd Dept. on transfer from 2nd Dept. 1995), the plaintiff’s primary treating physician was permitted to testify with regard to the reports he received from the consulting specialists.

In Munoz v. 608-610 Realty Corp., 194 A.D.2d 496, mot. for lv. to app. den., 82 N.Y.2d 661 (1993), the court held that “the report of plaintiff’s consulting surgeon was evidence of a kind accepted in the medical profession as reliable in forming a professional opinion.”
In Marulli v. Pro Sec. Service, Inc., 151 Misc. 2d 1077, 1078 (App. Term, 1992), the Appellate Term held that the trial court properly permitted limited reference by plaintiff’s succeeding treating physicians to the contents of the report of plaintiff’s non-testifying original treating physician.

In Fleiss v. South Buffalo Railway Co., 291 A.D.2d 848 (4th Dept. 2002), the Appellate Division concluded that an examining physician was properly permitted to testify regarding the reports and findings of nontestifying treating physicians and to the results of a functional capacity examination of plaintiff, because those out-of-court materials are of the kind generally accepted as reliable by experts in the medical profession.

In Murray v Weisenfeld, 37 AD3d 432 (2nd Dept. 2007),

The defendant moved for a new trial on the ground that, inter alia, the Supreme Court had improperly admitted the child's medical records into evidence at the trial. The Supreme Court properly denied that motion. The certified records and the medical opinions contained therein were properly admitted, as they were germane to the diagnosis and treatment of the child (see Williams v Alexander, 309 NY 283, 287 [1955]; Bruce-Bishop v Jafar, 302 AD2d 345 [2003]; see also Rodriguez v Piccone, 5 AD3d 757, 758 [2004]; Moran v Demarinis, 152 AD2d 546, 547 [1989]; Wilson v Bodian, 130 AD2d 221, 231 [1987]). The plaintiffs' experts were entitled to rely upon facts set forth in the medical records, as they did not base their opinions upon the conclusions contained in the records (see Bruce-Bishop v Jafar, supra; Moran v Demarinis, supra at 547).

Similarly, in Garritano v Garritano, 62 AD3d 657 (2nd Dept. 2009),

Supreme Court did not err in admitting into evidence the medical testimony and records of the plaintiff's experts, since they relied upon the subject records in the plaintiff's diagnosis and treatment (see Murray v Weisenfeld, 37 AD3d 432, 433-434; Bruce-Bishop v Jafar, 302 AD2d 345; Cohn v Haddad, 244 AD2d 519, 519-520; Freeman v Kirkland, 184 AD2d 331).
**RADIOLOGY REPORTS**

In *Holshek v. Stokes*, 122 A.D.2d 777 (2nd Dept. 1986), the court held that plaintiff’s treating doctor could give testimony based upon his examination of the plaintiff, his reading of an X-ray, *and the report of another doctor*. The court held that:

“All additionally, the doctor’s testimony that the plaintiff has suffered a torn miniscus (sic) was properly admitted, although *based in part on an X-ray and report* not in evidence. An expert may rely upon material not in evidence, if it is of a kind accepted in the profession as reliable in forming a professional opinion (citations omitted). Here, the material relied upon met this test. Additionally, while not in evidence, the defendant had a copy of both the X-ray and the report; accordingly, he was not foreclosed from effective cross-examination.” (emphasis added) 122 A.D.2d at 779.

In *Pegg v. Shahin*, 237 A.D.2d 271 (2nd Dept. 1997), the court held that plaintiff’s treating doctor could properly give testimony concerning the results of certain X-rays and MRI tests. The court noted that:

“To confirm his diagnosis, the physician sent the plaintiff Paul Morabito for an MRI test and X-rays. Under these circumstances, and in light of the fact that MRI and X-ray reports are data which are ‘of the kind ordinarily accepted by experts in the field’, it was not error for the trial court to permit the physician to testify with respect to the MRI and X-ray report (citations omitted).” (emphasis added) 237 A.D.2d at 272.

In *Serra v. City of New York*, 215 A.D.2d 643 (2nd Dept. 1995), the defendant contended that the trial court erred by allowing into an MRI report into evidence, and permitting the plaintiff’s treating physician, Dr. Lehman, to testify concerning the results of the MRI test. The Appellate Division affirmed the trial court and the jury’s verdict, and held that:

“All under these circumstances, and in light of the fact that an MRI report is data which is ‘of the kind ordinarily accepted by experts in the field’, it was not error for the trial court to permit Dr. Lehman to testify with respect to the MRI report (citations omitted).” (emphasis added) 215 A.D.2d at 644.
In Serra v. City of New York, supra, even though the plaintiff failed to lay proper foundation for the admission of the MRI report into evidence, the admission of the report constituted harmless error. Similarly, in Flamio v. State, 132 A.D.2d 594 (2nd Dept. 1987), the Appellate Court held allowing a medical expert to testify with respect to the oral finding of a radiologist who conducted CAT scans and did not testify at trial, if error, was harmless.

Where the medical findings of plaintiff’s expert are based upon his clinical observations of the plaintiff, a physical examination as well as review of certain X-rays, the failure to produce the X-rays does not prove fatal where the references to the X-ray served to confirm the conclusions of the expert following his examination of her. Karayanakis v. L & E Grommery, Inc., 141 A.D.2d 610, 611 (2nd Dept. 1988). See, Gomez v. Metro Terminals Corp., 279 A.D.2d 550 (2nd Dept. 2001).

In Ferrantello v. St. Charles Hospital and Rehabilitation Center, 275 A.D.2d 387, 388 (2nd Dept. 2000), the court found that the plaintiffs’ medical expert was properly permitted to testify that Ferrantello suffered a torn meniscus as a result of her accident. The expert’s opinion was based upon his own examination of Ferrantello, as well as an examination of certified hospital records, a second physician’s medical records, an MRI report, and X-rays. Although no proper foundation was laid for the admission of the MRI report and X-rays, their admission into evidence was harmless error. The expert relied upon those materials primarily to confirm the conclusions he had reached from his examination of Ferrantello and review of the properly-admitted hospital records. Moreover, the materials reviewed by the expert were “of [the] kind accepted in the profession as reliable in forming a professional opinion”.

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In Torregrossa v. Weinstein, 278 A.D.2d 487, 488 (2nd Dept. 2000), the trial court admitted the MRI report of the plaintiff even though the physician who prepared the report did not testify. The treating physician was properly allowed to testify with respect to the MRI report because he had personally examined the plaintiff, and the MRI report is data which is of the kind ordinarily accepted by experts in the field. Although no proper foundation was laid for the admission of the MRI report itself, its admission constituted harmless error.

“The trial court properly permitted the plaintiff's treating physician to testify about his interpretation of X-ray films not admitted into evidence because he used the films and reports in his treatment of the plaintiff and in forming his diagnosis (see, Pegg v. Shahin, 237 A.D.2d 271, 272, 654 N.Y.S.2d 395). Nonetheless, the defendant's expert radiologist was properly precluded from testifying as to his interpretation of the X-ray films and his diagnosis of the plaintiff, as he never physically examined the plaintiff and therefore his diagnosis would have been based primarily on the films not admitted into evidence (see, Nuzzo v. Castellano, 254 A.D.2d 265, 266, 678 N.Y.S.2d 118).” Lee v. Huang, 291 A.D.2d 549, 550, 738 N.Y.S.2d 371, 372-373 (2nd Dept. 2002).

A treating physician may testify about his interpretation of X-ray films not admitted into evidence where he used the films and reports in his treatment of the plaintiff and in forming his diagnosis. Lee v. Huang, 291 A.D.2d 549 (2nd Dept. 2002).

In O’Brien v. Mbugua, 49 A.D.3d 937 (3rd Dept. 2008),

We conclude that where a treating physician orders an MRI clearly a test routinely relied upon by neurologists in treating and diagnosing patients, like plaintiff, who are experiencing back pain he or she should be permitted to testify how the results of that test bore on his or her diagnosis even where, as was apparently the case here, the results are contained in a report made by the nontestifying radiologist chosen by the treating physician to interpret and report based on the radiologist's assessment of the
actual films. Significantly, this is not a case where the expert "essentially served as a conduit for the testimony of the report's author[]" by doing nothing more than "dictating the report's contents" and, thus, exceeded the bounds of permissible opinion testimony (People v Wlasiuk, 32 AD3d at 681). Instead, Danisi rendered an opinion based not only on the MRI results, but also his physical examinations of plaintiff where he identified muscle spasms in her lower and middle back and her other medical records. Under these circumstances, we hold that the MRI report, which was ordered by Danisi in the course of his treatment of plaintiff and is of the type of information which Danisi routinely relies upon in treating his patients, was "'merely . . . a link in the chain of data'" which assisted Danisi in forming his opinion and, thus, the testimony was properly admitted (Ciocca v Park, 21 AD3d 671, 672-673, 799 N.Y.S.2d 677 [2005], affd 5 NY3d 835, 839 N.E.2d 892, 805 N.Y.S.2d 539 [2005], quoting Borden v Brady, 92 AD2d at 984; see Anderson v Dainack, 39 AD3d 1065, 1067, 834 N.Y.S.2d 564 [2007]; cf. Murphy v Columbia Univ., 4

In Henriques v. Kindercare Learning Center, Inc., 6 A.D.3d 220, 221 (1st Dept. 2004), the trial court properly admitted into evidence the reports of Drs Fogelman and Brown as documents relating to the patient’s treatment and condition.

In Byong Yol Yi v Canela, 70 AD3d 584 (1st Dept. 2010)
The affirmed report of plaintiff’s doctor was admissible, even though it relied in part on the unsworn reports of another doctor who read plaintiff’s MRIs (see Rivera v Super Star Leasing, Inc., 57 AD3d 288 [2008]; see also Pommells v Perez, 4 NY3d 566, 577 n 5 [2005]).

Moreover, secondary evidence, such as an X-ray report, is admissible into evidence. See, Schozer v. William Penn Life Ins. Co. of New York, 84 N.Y.2d 639 (1994). The X-ray report is admissible even though the original X-ray is not produced, and the defendant may not rely on an alleged violation of the best evidence rule where it objects to the introduction of the record solely on hearsay grounds. Lanpont v. Savvas Cab Corp., Inc., 244 A.D.2d 208, 211 (1st Dept. 1997).

Wagman

In Wagman v. Bradshaw, 292 A.D.2d 84, 739 N.Y.S.3d 421 (2nd Dept. 2002), the Appellate Division clarified its prior holdings with respect to the admissibility of MRI
reports; it did not change the law. Simply put, the lower court improperly allowed a chiropractor to testify as to the contents of an inadmissible written report interpreting MRI films, which was prepared by another healthcare professional who did not testify, when the MRI films were not in evidence, and without proof, that as an out-of-court material, the written MRI report was reliable.

In Wagman, supra, the appellate court reviewed and discussed the existing case law with respect to these issues, (some of which are discussed infra) and is quoted at length herein.

“The Court of Appeals has held that an expert witness may testify that he or she relied upon specific, inadmissible out-of-court material to formulate an opinion, provided (1) it is of a kind accepted in the profession as reliable as a basis in forming a professional opinion, and (2) there is evidence presented establishing the reliability of the out-of-court material referred to by the witness.” Wagman v. Bradshaw, 292 A.D.2d 84, 85, 739 N.Y.S.3d 421, 422 (2nd Dept. 2002).

“…while the expert witness's testimony of reliance upon out-of-court material to form an opinion may be received in evidence, provided there is proof of reliability, testimony as to the express contents of the out-of-court material is inadmissible.” Wagman v. Bradshaw, 292 A.D.2d 84, 85-86, 739 N.Y.S.3d 421, 422 (2nd Dept. 2002).

“Expert opinion, based on unreliable secondary evidence, is nothing more than conjecture if the only factual foundation, as in this case, is another healthcare provider's interpretation of what an unproduced MRI film purports to exhibit. Admission into evidence of a written report prepared by a non-testifying healthcare provider would violate the rule against hearsay and the best evidence rule.” Wagman v. Bradshaw, 292 A.D.2d 84, 87, 739 N.Y.S.3d 421, 424 (2nd Dept. 2002).

“Plainly, it is reversible error to permit an expert witness to offer testimony interpreting diagnostic films such as X-rays, CAT scans, PET scans, or MRIs, without the production and receipt in evidence of the original films thereof or properly authenticated counterparts (citations omitted). Without receipt in evidence of the original films, a party against whom expert opinion testimony is offered is deprived of the opportunity to cross-examine the expert witness concerning the basis for the opinion, offer opposing evidence to clear misimpressions, or offer a contrary opinion controverting the interpretation of the films, through his or her own expert witness.

“The New York State Legislature has acknowledged the problems inherent in laying foundations for the introduction in evidence of medical material. CPLR 4532-a was thus enacted to provide a remedial and convenient method for the introduction in evidence of X-rays, MRIs, CAT scans, PET scans, electromylograms, sonograms, or fetal heart rate monitor strips, without foundational testimony. The proponent thereof, however, is required to literally comply with the requirements of CPLR 4532-a (see,
Galuska v. Arbaiza, 106 A.D.2d 543, 545, 482 N.Y.S.2d 846 [judgment reversed because X-rays which were not photographically inscribed with the patient's name were improperly admitted into evidence]. Once the actual film is received in evidence, any qualified expert may opine an interpretation as to what it shows, since the opinion testimony is now based upon facts which are in evidence before the court (see, Marion v. B.G. Coon Constr. Co., supra).

"Since CPLR 4532-a applies only to the actual film, scan, or strip resulting from one of the specified medical tests, a written report prepared by a non-testifying healthcare professional interpreting MRI films, such as the MRI report herein, is not admissible into evidence (see, Schwartz v. Gerson, 246 A.D.2d 589, 668 N.Y.S.2d 223 [report prepared by doctor who examined the plaintiff for his insurance carrier but did not testify at trial should not have been admitted into evidence and read to jury]). Such a written report is patently inadmissible hearsay as the declarant, the preparer of the report, is unavailable for cross-examination (see generally, People v. Sugden, 35 N.Y.2d 453, 460, 363 N.Y.S.2d 923, 323 N.E.2d 169).

"Additionally, the receipt in evidence of the contents of a non-testifying healthcare professional's written report, interpreting a film produced as the result of a medical test, violates the best evidence rule (see, Schozer v. William Penn Life Ins. Co. of N.Y., 84 N.Y.2d 639, 620 N.Y.S.2d 797, 644 N.E.2d 1353). The best evidence rule is intended to eliminate or reduce the spectre of deceit or perjury, potential inaccuracies attendant to human recall, or errors in crafting or recording a writing. The rule clearly bars a healthcare provider's written report which interprets the results of a medical test from receipt in evidence.

"In Schozer v. William Penn Life Ins. Co. of N.Y., supra, at 644, 620 N.Y.S.2d 797, 644 N.E.2d 1353, the Court of Appeals noted that the best evidence rule has been applied to "an unproduced X-Ray and the derivative evidence offered in its place to describe its contents". The court further opined that, generally, the original X-ray film must be produced before testimony can be adduced as to its diagnostic significance. Secondary evidence of such a diagnostic interpretive report, will be permitted only if the proponent thereof (1) sufficiently explains the X-ray films' unavailability, and (2) establishes that the secondary evidence accurately and reliably portrays the original. This principle applies with equal force to MRI films and diagnostic reports interpreting them.

"In this case, the MRI report was not, and could not have been, properly admitted into evidence, since the proponent thereof advanced no claim that the original MRI films were lost or destroyed, and consequently, unavailable. The plaintiff's treating chiropractor, notwithstanding these circumstances, was permitted, over objection, to testify as to the ultimate conclusion set forth in the report, prepared by a non-testifying healthcare provider, under the guise of the "professional reliability" basis for admission of an expert's opinion into evidence. The plaintiff's expert's testimony concerning the interpretation of the MRI films, as stated in the report of the non-testifying preparer thereof, was not limited to testimony that his opinion was based, in part, upon the out-of-court material, but rather was impermissibly offered for the truth of the contents of the written MRI report. As such, and with no opportunity for the defendant to cross-examine the healthcare professional who prepared the report, or offer his own evidence or expert testimony to rebut it or controvert the interpretation and
significance of the MRI films, the potential existed for a jury to give undue probative weight to out-of-court material.

“In addition to our holding that the "professional reliability" exception does not permit an expert witness to offer opinion testimony based upon out-of-court material, for the truth of the matter asserted in the out-of-court material, we also take this opportunity to reiterate the requirement that, "[i]n order to qualify for the 'professional reliability' exception, there must be evidence establishing the reliability of the out-of-court material" (Hambsch v. New York City Tr. Auth., supra, at 726, 480 N.Y.S.2d 195, 469 N.E.2d 516). Indeed, "reliability of the material is the touchstone; once reliability is established, the medical expert may testify about it even though it would otherwise be considered inadmissible hearsay" (Borden v. Brady, 92 A.D.2d 983, 984, 461 N.Y.S.2d 497 [Yesawich, J., concurring]).

“In the case at bar, there was no proof presented to establish that the written MRI report contained reliable data. It is significant that the plaintiff’s treating chiropractor never saw the actual MRI films. There was simply no evidence regarding the healthcare professional who prepared the MRI report, or when and under what circumstances it was prepared. Additionally, there was no evidence that the written MRI report offered a detailed interpretation of the several images displayed in the MRI films, or whether the report merely stated a conclusion as to the condition or conditions purportedly revealed by the films. Furthermore, the treating chiropractor’s testimony was equivocal as to whether he used the written MRI report merely to confirm an already established diagnosis or whether he relied upon it to form his diagnosis (compare, Serra v. City of New York, supra). Accordingly, this particular written MRI report was not shown to be sufficiently reliable to permit the witness to rely upon it as out-of-court material "of a kind accepted in the profession as reliable in forming a professional opinion" (People v. Sugden, supra, at 460, 363 N.Y.S.2d 923, 323 N.E.2d 169; Hambsch v. New York City Tr. Auth., supra, at 726, 480 N.Y.S.2d 195, 469 N.E.2d 516; Magras v. Colasuonno, 278 A.D.2d 388, 717 N.Y.S.2d 627; Erosa v. Rinaldi, 270 A.D.2d 384, 704 N.Y.S.2d 891).

“To the extent that prior cases from this court (see, e.g., Torregrossa v. Weinstein, 278 A.D.2d 487, 718 N.Y.S.2d 78; Pegg v. Shahin, 237 A.D.2d 271, 654 N.Y.S.2d 395) have not limited application of the "professional reliability" basis for opinion evidence to permit an expert witness to testify that he or she relied upon out-of-court material which is of a type ordinarily relied upon by experts in the field to formulate an opinion, and have not required proof that the out-of-court material was reliable, those cases should be not be followed.

“In Torregrossa, supra, at 488, 718 N.Y.S.2d 78, "the court admitted into evidence the [MRI] report of John Torregrossa even though the doctor who prepared the report did not testify". The court recognized that the written MRI report was improperly admitted into evidence, but held that the error was harmless. It further held that the "treating physician was properly allowed to testify with respect to the [written] MRI report because he had personally examined him, and the [written] MRI report is data of the kind ordinarily accepted by experts in the field". The inherent inconsistency of that holding is obvious. If admission into evidence of the report, in violation of the best evidence rule and the rule against hearsay, is erroneous, then permitting an expert to
testify as to the substantive contents of the inadmissible report is likewise erroneous. Thus, application of the harmless error doctrine in Torregrossa was incorrect.

“In Pegg, supra, at 272, 273, 654 N.Y.S.2d 395, this court held that the trial court "did not err in permitting the treating physician of the plaintiff * * * to testify concerning the results of certain X-rays and a[MRI] test", based upon written reports interpreting the results because the written reports were data of a type ordinarily accepted by experts in the field, and "[t]he references to the X-rays and the MRI test, for the most part, served to confirm the conclusions drawn by the respective experts following their independent examination of these plaintiffs". To the extent that Pegg (supra), applied the "professional reliability" exception to allow testimony as to the results of the written reports, for the truth of the matters asserted in the written reports, without requiring the proponent of the evidence to establish the reliability of the written reports, it should no longer be followed.

Rules of evidence are the palladium of the judicial process. To suffer intrusions into time-tested concepts limiting the use of secondary evidence destroys the vitality of that judicial process. The danger and unfairness of permitting an expert to testify as to the contents of inadmissible out-of-court material is that the testimony is immune to contradiction. It offends fair play to disregard evidentiary rules guaranteed by the force of common sense derived from human experience. Venerable rules of evidence should not be casually discarded to accommodate convenience and speed in the gathering and presentation of facts or evidence.

“In the instant case, the trial court committed reversible error in permitting the plaintiff's expert, who presented the only medical testimony offered on the plaintiff's case-in-chief, to testify as to the interpretation of MRI films, as set forth in a written report of a non-testifying healthcare professional, for the truth of the matters asserted in the report. It was, moreover, reversible error to permit the plaintiff's expert to state his opinion that there were herniations, which opinion was at least partially based upon the written MRI report, without first establishing the reliability of the written MRI report (see, Magras v. Colasuonno, supra).” Wagman v. Bradshaw, 292 A.D.2d 84, 87-91, 739 N.Y.S.3d 421, 424-427 (2nd Dept. 2002) (emphasis added).

Wagman, has seemingly been abrogated by Pommells v Perez, 4 NY3d 566, 577, n 5 (2005).

In Bonilla v Tortoriello 62 AD3d 637 (2nd Dept. 2009)

As to the plaintiff Maria Angela Joya (hereinafter Maria Angela), the affirmation of Dr. Perez was sufficient to raise a triable issue of fact. Dr. Perez opined, based on his contemporaneous and most recent examinations of Maria Angela, as well as upon his review of her magnetic resonance imaging report, which showed, inter alia, bulging discs at T1-2, T6-7 and T11-12, that Maria Angela's thoracic injuries and observed range of motion limitations were permanent and causally related to the subject accident. He also opined that Maria Angela sustained a significant limitation of use of her thoracic spine. This submission was sufficient to raise a triable issue of fact as to whether, as a result of the subject accident, Maria Angela sustained a serious injury to her
thoracic spine under the significant limitation of use or the permanent consequential limitation of use categories of Insurance Law § 5102(d) (see Williams v Clark, 54 AD3d 942; Casey v Mas Transp., Inc., 48 AD3d 610; Green v Nara Car & Limo, Inc., 42 AD3d 430; Francovig v Senekis Cab Corp., 41 AD3d 643, 644-645; Acosta v Rubin, 2 AD3d 657).

Contrary to the determination of the Supreme Court, Maria Angela provided an adequate explanation for the lengthy gap in her treatment history. Dr. Perez stated in his affirmation that in early June 2005 he concluded that she had reached her maximum medical improvement and advised her that any further treatment at that time would have been merely palliative in nature (see Pommells v Perez, 4 NY3d at 577; see also Shtesl v Kokoros, 56 AD3d 544, 546-547)

In Walker v Walker-Lebron, 2009 NY Slip Op 50792(U) [23 Misc 3d 134(A)] (App. Term 1st Dept),

The affidavit of plaintiff's chiropractor, setting forth positive test results and limitations of motion in plaintiff's cervical and lumbar spine, was sufficient to raise a triable issue as to whether plaintiff sustained a "serious injury" (Insurance Law §5102[d]). These quantified findings, made during a physical examination in 2007, were compared with test results and limitations measured during an examination shortly after the 2001 motor vehicle accident. The chiropractor also referred to an MRI taken 10 weeks after the accident revealing lumbar disc herniation and bulge, and opined that plaintiff's quantified limitations were permanent and caused by the accident (see Britt v Goodspeed Tr., 41 AD3d 179 [2007]; Garner v Tong, 27 AD3d 401 [2006]). Since the MRI report and other unsworn reports were reviewed by plaintiff's chiropractor in reaching his conclusions, they were properly before the court (see Pommells v Perez, 4 NY3d 566, 577, n 5 [2005]; Navedo v Jaime, 32 AD3d 788 [2006]). Plaintiff satisfactorily explained the cessation of treatment when insurance benefits ended, and his chiropractor noted that treatment was only palliative, as the injuries were permanent (see Pommells v Perez, 4 NY3d at 576; Wadford v Gruz, 35 AD3d 258 [2006]).

In Shtesl v Kokoros, 56 AD3d 544 2nd Dept. 2008),

In opposing the motion, Shtesl principally relied on the affirmation of his treating physician Alexander Berenbilt. Berenbilt's affirmation raised a triable issue of fact as to whether Shtesl sustained a serious injury to his cervical spine under the permanent consequential or significant limitation of use categories of Insurance Law § 5102 (d) as a result of the subject accident. Berenbilt's affirmation revealed significant range-of-motion limitations in Shtesl's cervical spine, based on both contemporaneous and recent examinations. Also, Berenbilt properly relied on the affirmed magnetic resonance imaging report of Shtesl's cervical spine, dated May 29, 2002, which revealed the existence of herniated discs at C4-5, C5-6, and C6-7. It was Berenbilt's opinion that such findings were not the result of degeneration or the aging process, but were the result of the subject accident. He concluded that the injuries and limitations noted in the cervical spine were permanent and significant. Therefore, his affirmation raised an issue of fact as to whether Shtesl sustained a serious injury to his cervical spine under the
permanent consequential or significant limitation of use categories of the no-fault statute (see Altreche v Gilmar Masonry Corp., 49 AD3d 479 [2008]; Lim v Tiburzi, 36 AD3d 671 [2007]; Shpakovskaya v Etienne, 23 AD3d 368 [2005]; Clervoix v Edwards, 10 AD3d 626 [2004]; Acosta v Rubin, 2 AD3d 657 [2003]; Rosado v Martinez, 289 AD2d 386 [2001]; Vitale v Lev Express Cab Corp., 273 AD2d 225 [2000]).

In Sutton v Yener (2009 NY Slip Op 06247), the Appellate Division agreed that the plaintiff failed to establish threshold, but there is some useful language and advice.

While the plaintiffs properly relied upon the unsworn magnetic resonance imaging (hereinafter MRI) reports concerning the injured plaintiffs (see Thompson v Saunders, 57 AD3d 971; Williams v Clark, 54 AD3d 942; Zarate v McDonald, 31 AD3d 632; Ayzen v Melendez, 299 AD2d 381), those reports failed to raise a triable issue of fact on their own. The MRI reports merely revealed the existence of bulging discs at L4-5, L5-S1, and C5-6 in Dennis's spine, and bulging discs at C5-6 and C6-7 in Lacy Ann's cervical spine. The mere existence of a bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (see Sealy v Riteway-I, Inc., 54 AD3d 1018; Kilakos v Mascera, 53 AD3d 527; Cerisier v Thibiu, 29 AD3d 507; Bravo v Rehman, 28 AD3d 694; Kearse v New York City Tr. Auth., 16 AD3d 45). The plaintiffs failed to supply such objective medical evidence.

In Sinfelt v Helm's Bros., Inc., 62 AD3d 983 (2nd Dept. 2009),

The plaintiff relied, inter alia, upon the affidavit of her treating chiropractor, Dr. Mark Snyder. Dr. Snyder opined, based on his contemporaneous and most recent examinations, as well as upon his review of the plaintiff's magnetic resonance imaging reports, which revealed, inter alia, disc herniations at L5-S1 and C5-6, and disc bulges at T5-6 and T6-7, that the plaintiff's lumbar and cervical injuries and observed range of motion limitations therein were permanent and causally related to the subject accident. He further opined that the plaintiff's limitations were significant. The affidavit was sufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury to her lumbar or cervical spine under the significant limitation of use and/or the permanent consequential limitation of use categories of Insurance Law § 5102 (d) as a result of the subject accident (see Williams v Clark, 54 AD3d 942 [2008]; Casey v Mas Transp., Inc., 48 AD3d 610 [2008]; Green v Nara Car & Limo, Inc., 42 AD3d 430 [2007]; Francovig v Senekis Cab Corp., 41 AD3d 643, 644-645 [2007]; Acosta v Rubin, 2 AD3d 657 [2003]).

In Dong Soo Kim v Kottler, 58 AD3d 670 (2nd Dept. 2009), the court found that the plaintiff successfully established the threshold when:
The plaintiff's treating physician, Dr. Jae O. Park, opined, based on his contemporaneous and more recent examinations of the plaintiff, as well as upon his review of the plaintiff's magnetic resonance imaging reports, which showed, inter alia, disc bulges in the cervical and lumbar spine as well as a disc herniation in the lumbar spine, that the plaintiff's lumbar and cervical injuries and observed range of motion limitations were permanent, and causally related to the subject accident. He further concluded that the injuries amounted to a permanent consequential limitation of use of the cervical and lumbar spine as well as a significant limitation of use of those regions.

In LaForte v. Tiedmann, 41 A.D.3d 1191 (4th Dept 2007),

The court also properly allowed plaintiff's treating orthopedic surgeon to testify that he had relied on the reports of nontestifying physicians, inasmuch as "those out-of-court materials are of the kind generally accepted as reliable by experts in the medical profession" (Fleiss v South Buffalo Ry. Co., 291 A.D.2d 848, 849, 737 N.Y.S.2d 723). Contrary to defendant's further contention, the court properly refused to give a missing witness charge with respect to plaintiff's primary care physician on the ground that the testimony of that physician would have been cumulative of the testimony of plaintiff's other treating physicians (see Stevens v Brown, 249 A.D.2d 909, 910, 672 N.Y.S.2d 194; cf. Dukes v Rotem, 191 A.D.2d 35, 39, 599 N.Y.S.2d 915, appeal dismissed 82 N.Y.2d 886, 631 N.E.2d 569, 609 N.Y.S.2d 563)

CPLR 4532-a

If the provisions of CPLR 4532-a are strictly complied with, X-rays, MRI films, CAT scans and other diagnostic tests are admissible without calling a physician to authenticate them. See, Galuska v. Arbaiza, 106 A.D.2d 543 (2nd Dept.1984); Harth v. Nicholas Liakis & Son, 103 Misc. 2d 217 (Sup. Nassau 1980). The statute, however, makes it clear that nothing in the Rule “shall prohibit the admissibility of an X-ray [etc] in evidence in a personal injury action where otherwise admissible.” Thus, while adherence to the Rule eliminates the need to produce an authenticating witness, the failure to comply with its provisions does not result in the barring of the films from being entered into evidence. The statute clearly permits a witness, such as, but not limited to, the person who took the film, to authenticate it and thereby allow its admission into evidence. See, Hoffman v. City of New York, 141 Misc. 2d 893 (Sup. Kings 1988).
CPLR 4532-a was amended in 2002 and was expanded to include any “graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test taken of a patient by a medical practitioner or medical facility” (X-rays, MRIs, sonograms, etc.). This section and amendment does not prohibit counsel from placing such items into evidence through other means where otherwise admissible, it merely allows counsel to do so without a live witness. This amendment has been in effect since January 1, 2002.

A more significant amendment to this section, effective January 1, 2005, liberalizes the admissibility of these tests. Now, aside from the name of the patient and the date of the administration of the test, the exhibit will have to contain only “such additional identifying information as is customarily inscribed by the medical practitioner or medical facility.” This conforms the rule to the varying practices of physicians and testing facilities. Perhaps even more significantly, counsel may now lay the foundation for admissibility by showing that the potential exhibit was “received or examined” by the party against whom it will be offered, CPLLR 4532-a(2)(a), or by serving a notice of intent to offer the exhibit and advising of the availability of the exhibit for inspection, CPLR 4532-a(2)(b), and the place of inspection need not be at counsel’s office.

**PSYCHIATRISTS**

The Court of Appeals has held that a psychiatrist can give expert opinion testimony based in part on hearsay, including psychological and medical tests and examinations never introduced into evidence, People v. DiPiazza, 24 N.Y.2d 342 (1969), and interviews with people who do not testify at trial, People v. Stone, 35 N.Y.2d 69, 74-75 (1974); People v. Sugden, 35 N.Y.2d 453 (1974).
In *People v. Sugden*, *supra*, a psychiatrist was allowed to testify based in part on his review of a psychologist’s report and other psychiatric and medical reports, a written confession and written statements. 35 N.Y.2d at 458. In *Fanelli v. Lorenzo*, 187 A.D.2d 1004, 1005 (4th Dept. 1992), a letter written by Dr. Fanelli (the plaintiff’s father), to a psychiatrist who was treating plaintiff for the emotional problems associated with this incident (the subject of the lawsuit) was properly admitted into evidence as a business record of Dr. Fanelli.

In *Wilbur v. Lacerda*, 34 A.D.3d 794 (2nd Dept. 2006), a lead poisoning case, the trial court improperly excluded certain psychologists’ reports.

The plaintiffs commenced this action to recover damages for personal injuries allegedly sustained by the infant plaintiff as a result of exposure to lead paint while residing at premises owned by the defendants. At trial, the plaintiffs presented testimony that the infant plaintiff had cognitive deficits and that the deficits were attributable to the lead poisoning. The defendants, on the other hand, while conceding that there was lead paint at the premises, presented testimony that any of the infant plaintiff's alleged cognitive deficits were not the result of lead poisoning, but rather the result of the trauma of being placed in foster care.

The plaintiffs sought to introduce into evidence four reports completed by psychologists and a speech-language pathologist regarding their separate evaluations of the infant plaintiff, and presented testimony that the reports were made in the ordinary course of business. The Supreme Court found the reports inadmissible, stating that they were not subject to the business record exception. However, "[a] report made in the ordinary course of a doctor's medical practice is admissible in evidence as a business record" (Hefte v Bellin, 137 A.D.2d 406, 408, 524 N.Y.S.2d 42; see Crisci v Sadler, 253 A.D.2d 447, 448, 676 N.Y.S.2d 646). Therefore, the exclusion of that evidence was error.

The error with regard to three of the reports, however, was harmless. The excluded reports dated June 10, 2002, August 20, 2002, and November 22, 2002, respectively, do not tend to support the plaintiffs' position, as they concerned evaluations of the infant plaintiff conducted after he was placed in foster care. Moreover, one of the plaintiffs' witnesses testified about the substance of those reports (see Webber v K-Mart Corp., 266 A.D.2d 534, 535, 698 N.Y.S.2d 894; Guiga v JLS Constr. Co., 255 A.D.2d 244, 245, 685 N.Y.S.2d 1).

The remaining report, dated August 22, 1996, concerned an evaluation of the infant plaintiff when he was approximately 26 months old, after his exposure to lead paint.
but nearly six years before he was placed in foster care. *This report concluded that the infant plaintiff had limited language skills and a mild cognitive delay. This was relevant and contradicted the defendants' position as it tended to make the plaintiffs' contention that the infant plaintiff's alleged cognitive deficits resulted from lead poisoning more probable* (see *People v Davis*, 43 N.Y.2d 17, 27, 371 N.E.2d 456, 400 N.Y.S.2d 735; *Valentine v Grossman*, 283 A.D.2d 571, 573, 724 N.Y.S.2d 504). The weight to be accorded to this report is a matter to be determined by the jury (see *Coates v Peterson & Sons*, 48 A.D.2d 890, 369 N.Y.S.2d 503).

Accordingly, the exclusion of that report cannot be deemed harmless (see *Valentine v Grossman*, supra; *Crisci v Sadler*, supra at 448; *Gomez v City of New York*, 215 A.D.2d 353, 354, 625 N.Y.S.2d 646). Therefore, the motion should have been granted and we remit the matter to the Supreme Court, Westchester County, for a new trial on the issues of proximate cause and damages only.

**FOUNDATION**

In *People v. Kennedy*, 68 N.Y.2d 569, 579-580 (1986) ⁵, the three foundation requirements of CPLR 4518(a) are outlined by the Court of Appeals:

1. the record must be made in the regular course of business;
2. it must be the regular course of business to make the record; and
3. the record must have been made at the time of the event, or within a reasonable time thereafter.

The Court of Appeals has also held that an expert may base their opinion on material that is not in evidence, if it is of a kind accepted in the profession as reliable in forming a professional opinion. *People v. Sugden*, 35 N.Y.2d 453, 459-450 (1974). See, *e.g.*, *Comizio v. Hale*, 165 A.D.2d 823, 824 (2nd Dept. 1990); *Toth v. Community Hospital at Glen Cove*, 22 N.Y.2d 255, 259, 261-264 (1968).

In *Weinstein v. New York Hospital*, 280 A.D.2d 333, 334 (1st Dept. 2001), the objection that materials relied upon by the experts were never admitted into evidence is unpersuasive, since such materials were used primarily to confirm conclusions that the

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⁵ In *People v. Kennedy*, 68 N.Y.2d 569 (1986), the Court of Appeals held that the foundation requirements of CPLR 4518(a) are applicable to criminal proceedings.
experts had already reached from their own examinations of plaintiff and the properly admitted hospital records.

Once the prerequisites have been, the record is admissible. See, Kelly v. Wasserman, 5 N.Y.2d 425, 430 (1959). The jury will decide what, if any, weight they will give to the evidence. CPLR 4518(a).

**WHO CAN LAY FOUNDATION**


Similarly, any witness that is familiar with the record keeping practices of the “business” is competent to testify and lay foundation for the admission into evidence of the medical records and reports. Trotti v. Estate of Buchanan, 272 A.D.2d 660 (3rd Dept. 2000).

In People v. Cratsley, 86 N.Y.2d 81 (1995), the Court of Appeals affirmed a decision that allowed into evidence an IQ test report prepared by a psychologist who was not an employee of the Association of Retarded Citizens (ARC) facility, through a counselor at the facility. In People v. Cratsley, *supra*, a mentally retarded adult resident of the ARC facility was allegedly raped by an employee of the facility. The prosecution offered the psychologist’s report into evidence through the counselor, that testified that in
order to carry out her evaluation and counseling of the resident, she had to know the resident’s medical and psychological background, and therefore maintained all relevant records, including medical, psychological and social histories. She testified that she recognized the psychologist’s report as an initial evaluation prepared in accordance with ARC’s requirements, and she worked with these reports as part of her regular course of business at ARC, and they were relied upon for various purposes. 86 N.Y.2d 89-90.

Because the report was prepared for ARC, and in conformity with its procedures, the fact that the psychologist was not himself an ARC employee did not defeat its admission. The report had the indicia of reliability characteristic of a business record, and supported the trial court’s conclusion that the report was a business record under CPLR 4518(a), and the evidence was properly received. 86 N.Y.2d 90-91.

In McClure v. Baier’s Automotive Service Center, Inc., 126 A.D.2d 610 (2nd Dept. 1987), the court held that an adequate foundation was laid for the introduction into evidence of the records of the plaintiff’s former treating physician through the testimony of his medical secretary, who explained that the entries in the record were made in the regular course of business by members of the physician’s staff during the plaintiff’s office visits.

In Hessek v. Roman Catholic Church of Our Lady of Lourdes in Queens Village, 80 Misc. 2d 410, 412 (Civ. Ct. Queens 1975), the managing agent of a medical corporation where plaintiff received treatment testified that the plaintiff was a patient, that the file in question was kept in the regular course of the business of the doctor, that the agent had personally seen the file and was familiar with the entries in the file and the doctor’s signature in the file. The records were properly entered into evidence.
The widow of the former treating doctor may also lay the foundation for the admission of the records, including his medical opinions. Duffy v. Thomas A. Edison, Inc., 240 App. Div. 1002 (2nd Dept. 1933); Jezowski v. Beach, 59 Misc. 2d 224 (Sup. Oneida 1968)(reviewing the trial transcript of Duffy v. Thomas A. Edison, Inc., supra).

**USE OF SUBPOENAS**

Pursuant to CPLR 4518 (c), where a hospital produces its records pursuant to a subpoena duces tecum [CPLR 2306(a)] and the records are accompanied by an appropriate certification or authentication, they are admissible without the necessity for any foundation testimony. Joyce v. Kowalcowski, 80 A.D.2d 27, 29 (4th Dept. 1981).

Out of state records that are properly certified are similarly admissible. *Id.*

Counsel seeking the admission of medical records from doctor’s office may do so by serving a subpoena duces tecum for the records on the physician or secretary/managing agent. Pursuant to CPLR 2305[b], a subpoena duces tecum requires compliance by producing the requested material and by providing a witness that can identify it and testify about its origin, purpose and custody. Castro v. Alden Leeds, Inc., 144 A.D.2d 613, 615 (2nd Dept. 1988). If the subpoenaed witness fails to appear, the court is required to issue a warrant, pursuant to CPLR 2308(a), to ensure compliance with the subpoena duces tecum. The failure to issue such a warrant may constitute reversible error. Hefte v. Bellin, 137 A.D.2d 406 (1st Dept. 1988).

Counsel should take note that CPLR 3120 has been amended, and these amendments affect subpoena practice. The amended version of CPLR 3120 (3) provides (in part): “The party issuing a subpoena duces tecum as provided hereinabove shall at the same time serve a copy of the subpoena upon all other parties and, within five days of
compliance therewith, in whole or in part, give to each party notice that the items
produced in response thereto are available for inspection.”

The amendment prevents a defendant from secretly subpoenaing a non-party’s
records concerning the plaintiff; the defendant must give notice to the plaintiff and the
plaintiff has an opportunity to object or move to quash the subpoena. The objecting party
must state with reasonable particularity the reasons for each objection. Similarly, the
non-party whose records are being sought may give notice to the party seeking the
records that one or more documents are being withheld and the grounds for doing so.

Moreover, to prevent abuse, “[A] medical provider served with a subpoena duces
tecum requesting the production of a patient's medical records pursuant to this rule need
not respond or object to the subpoena if the subpoena is not accompanied by a written
authorization by the patient. Any subpoena served upon a medical provider requesting
the medical records of a patient shall state in conspicuous boldfaced type that the records
shall not be provided unless the subpoena is accompanied by a written authorization by
the patient.”

CPLR 2301 was amended and requires that a “trial subpoena duces tecum shall
state on its face that all papers or other items delivered to the court pursuant to such
subpoena shall be accompanied by a copy of such subpoena.”

As defense counsel now needs HIPPA-compliant authorizations from the plaintiff
in order to obtain records at trial pursuant to a subpoena duces tecum, there should be
fewer “surprises” in the Subpoenaed Records Room in court.

Certification
While pursuant to CPLR 2306, a *subpoena duces tecum* may be used to place medical records in evidence, it is not the exclusive means of doing so. If counsel offers a properly certified and authenticated copy of the records, a subpoena does *not* have to be served, and pursuant to CPLR 4518[c] (or now if notice was served, pursuant to CPLR 3122-a), the records are admissible in evidence. *Joyce v. Kowalcewski*, 80 A.D.2d 27, 29 (4th Dept. 1981). See also, CPLR 3122-a.

In *Wayne County Department of Social Services v. Petty*, 273 A.D.2d 943, 944 (4th Dept. 2000), the court held that certified computer generated records kept in the ordinary course of business are admissible.

In *Kasman v. Flushing Hospital and Medical Center*, 224 A.D.2d 590 (2nd Dept. 1996), the Appellate Division noted that the lower court erred in permitting a doctor’s report to be received into evidence where the proponent failed to offer proper foundational testimony *or to certify or authenticate the record*. Clearly uncertified medical records are inadmissible. See, e.g., *Parmisani v. Grasso*, 218 A.D.2d 870, 872 (3rd Dept. 1995); *McGuirk v. Vedder*, 271 A.D.2d 731, 732 (3rd Dept. 2000). The clear import of these holdings is that properly certified or authenticated records are admissible.

**PRACTICE TIPS**

It is no secret that the courts are overburdened, overworked and understaffed. Yesterday’s formalities must yield to today’s practicalities. If a trial can take place without the delays inherent in having to schedule, produce and question foundation witnesses merely to enter records into evidence, the courts will function in a more efficient, economical and expeditious fashion. Indeed, CPLR 104, provides that “the
civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.”

Pursuant to CPLR 4518( c), records are admissible in evidence if they bear a certification or authentication “by an employee delegated for that purpose or by a qualified physician.” To avoid their having to appear in court as an authenticating witness, the medical provider or an appropriate member of its staff, should duly execute such a certification and annex it to the medical records along with a copy of the subpoena, and send everything to the Courthouse Subpoenaed Records Room. Annexing a copy of the subpoena to the records explains their presence in court, and helps the clerks to process the records.

Alternatively, counsel can obtain an affidavit from the appropriate person. Some judges permit certain testimony to be admitted in the form of an affidavit. While obviously this cannot be done for all witnesses, it seems an appropriate mechanism for foundation witnesses for medical records. CPLR 3122-a should also help in this regard.

Foundation witnesses can testify over the telephone. Pursuant to CPLR 3113(d) parties may stipulate to take a deposition of a witness by “telephone or other remote electronic means and[to allow] a party[to] participate electronically.”

The courts have allowed testimony to be taken over the telephone in a variety of circumstances. In the context of Family Court proceedings, pursuant to the Federal Uniform Interstate Family Support Act (UIFSA) and the New York State Family Court Act Section 580-316(f), a party or a witness residing in another state may testify via telephone. See, In Re Ronald D. v. Doe, 178 Misc. 2d 457, 461 (Fam. Ct. Jefferson 1998). Similarly, testimony may be taken over the telephone at Administrative Hearings,
such as an unemployment proceeding. 12 N.Y.C.R.R. 461.7[c][2]; In Re Murphy, 264 A.D.2d 877, 878 (3rd Dept. 1999).


In Ferrante by Ferrante v. Ferrante, 127 Misc. 2d 352 (Sup Queens 1985), the court held that where the plaintiff was 92 years old, in poor physical condition and permanently confined to a nursing home, she could not travel to Queens to testify on her own behalf. The court determined that justice would be best served by having the plaintiff testify from Florida via a telephone conference call. 127 Misc. 2d at 353.

In Superior Sales & Salvage, Inc. V. Time Release Sciences, Inc., 227 A.D.2d 987 (4th Dept. 1996), the appellate court held that in this jury trial, the judge did not err in permitting a witness to go on vacation and use a courtroom speakerphone to conclude the cross-examination.

In VanDyke v. Jefferson Anesthesiology Services, P.C., N.Y.L.J. September 27, 2001, P. 25, Col. 2 (Sup. Jefferson), ___ Misc. 2d ___, ___ N.Y.S.2d ___, 2001 WL 1154973, the court held that under the proper circumstances, telephone depositions are permissible. The court permitted the plaintiff to depose the defendant’s out-of-state witness telephonically, but held that said testimony could not be used in lieu of live testimony, and could only be used for discovery and impeachment. The court noted that the defendant’s untimely application to hold the telephone deposition was the cause of its
ruling, and detailed how such a deposition could be arranged if requested in a timely manner.

The trial judge should encourage the parties to stipulate to the admission into evidence of medical records and reports. Most judges routinely encourage counsel to stipulate to as much evidence as possible. This saves time and money, and narrows appealable issues.

Experienced jurists ask the counsel opposing the admission of the records some of the following questions to assist the court in narrowing the issues:

Q: Were you given an authorization to obtain a copy of the subject records?
Q: Did you send for and receive a copy of the records?
Q: Have you compared the records you received from “X” with the records the proponent is offering into evidence?
Q: Do you concede that the records being offered into evidence are a fair, accurate and complete copy of the records you have?
Q: Do you concede that if an appropriate witness was called to the stand, the witness would testify and establish the requisite foundation for the admissibility of the records?

If the answers to these questions are “yes”, then the court may consider these admissions and all other relevant facts and circumstances, as proscribed by CPLR Sections 104, 4518, and 2305-2307, in deciding the admissibility of the records and the necessity of producing a foundation witness. Moreover, in a case where the party opposing the introduction of the records has retained their own expert witness, the fact that said witness can have the opportunity to discuss the records when they testify would certainly eliminate any possible prejudice.

If the answers to these questions are affirmative, then the court may consider these admissions and all other relevant facts in conjunction with the applicable sections of the CPLR in deciding the admissibility of the records and the necessity of producing a foundation witness.
CONCLUSION

Where counsel lays the proper foundation, the medical records and reports of various medical care providers may be admitted into evidence. The benefits in terms of monetary savings and justice to the parties may be significant. See, In Re Palma S. v. Carmine S., 134 Misc. 2d 34 (Fam. Ct. Kings 1986); Hessek v. Roman Catholic Church of Our Lady of Lourdes in Queens Village, 80 Misc. 2d 410, 412 (Civ. Ct. Queens 1975). The benefits in terms of the overall judicial efficiency and economy may be even greater.

JUST SAY “NO” – KEEPING OUT REFERENCES TO ALCOHOL, DRUGS AND INCONSISTENT HISTORIES IN HOSPITAL RECORDS

By Sherri Sonin and Robert J. Genis

A person is injured in an accident. He or she is taken to a hospital for emergency treatment. In the hustle and bustle of a busy emergency room, while numerous people are all speaking at once and shouting over the din of loud speakers blaring codes and paging various doctors, notes are made by overworked, exhausted and understaffed hospital personnel concerning the medical history of the injured person. Sometimes these entries are erroneous, sometimes they are based on hearsay by third parties, or by incompetent interpreters.

In the prosecution of a plaintiff’s personal injury lawsuit, counsel should be mindful that frequently these erroneous or misleading entries concerning the plaintiff’s medical history are inadmissible. The purpose of this article is to assist all parties in redacting such highly prejudicial entries from the plaintiff’s hospital records, particularly in cases involving records of alleged use of alcohol or drugs.
**History must relate to Diagnosis and Treatment**

In the seminal case of *Williams v. Alexander*, 309 N.Y. 283 (1955), the Court of Appeals clearly held that notations in hospital records are admissible *only as they relate to the diagnosis, prognosis or treatment of the patient*. In *Williams*, *supra*, the Court of Appeals *reversed* the trial and appellate courts for allowing into evidence a hospital record entry that gave a different account by the plaintiff of how the accident occurred than the account given by the plaintiff at trial.

“As the statute makes plain, and we do not more than paraphrase it, entries in a hospital record may not qualify for admission in evidence unless made in the regular course of the ‘business’ of the hospital, and for the purpose of assisting it in carrying on that ‘business.’ The business of a hospital, it is self-evident, is to diagnose and treat its patients’ ailments. Consequently, *the only memoranda that may be regarded as within the section’s compass are those reflecting acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise ‘helpful to an understanding of the medical or surgical aspects of *** [the particular patient’s] hospitalization.’*” 309 N.Y. at 287 (emphasis added).

This rule of law applies to the history given by the patient, whether it relates to how or where the injury occurred, as well as whether the patient allegedly ingested alcohol or drugs.

**Inconsistent History**

Occasionally the history in a hospital or medical record of how the patient became injured is different than the history offered under oath by the plaintiff. Defense counsel will seek to admit the inconsistent history in the medical record to impeach and discredit the plaintiff. Counsel for plaintiff should seek to redact the inconsistent history where it is not legally admissible.

In applying the above-mentioned rule of law, the Courts have traditionally held certain entries regarding the history of how the plaintiff became injured to be
inadmissible. For example, in Edelman v. City of New York, 81 A.D.2d 904 (2nd Dept. 1981), the Appellate Division reversed the trial court for allowing into evidence an entry stating that the plaintiff “fell getting out of a cab” when the plaintiff claimed she took a step after exiting a cab and fell in a hole. The court erroneously admitted the statement as an admission against interest.

In Echeverria v. City of New York, 166 A.D.2d 409 (2nd Dept. 1990), the Appellate Division reversed the trial court for allowing into evidence a hospital record entry to the effect that the plaintiff became injured due to a fall at home, when the plaintiff was claiming that he became injured as a result of being assaulted by police officers.

In Passino v. DeRosa, 199 A.D.2d 1017 (4th Dept. 1993), the trial court commit reversible error when it denied the plaintiff’s motion in limine to exclude statements in plaintiff’s hospital record that she became injured when she fell on her icy driveway. At trial, the plaintiff was claiming that she tripped on a raised portion of a walkway and her foot landed in a four-inch gully on the edge of the driveway.

In Haulette v. Prudential Ins. Co., 266 A.D.2d 38, 39 (1st Dept. 1999), the Appellate Division held that the trial court properly redacted three references in the hospital record indicating that the plaintiff fell off a ladder, there being no basis for defendant’s speculation that the plaintiff was the source of the information. Plaintiff testified at trial that he fell from a four-foot high mobile scaffold that was missing guard rails and the wheels of which were not in the locked position. The Appellate Court also noted that even if the plaintiff was the source of the information, the references were not relevant to the diagnosis of his injuries and treatment.
In *Quispe v. Lemle & Wolff, Inc.*, 266 A.D.2d 95 (1st Dept. 1999), the Appellate Division noted that whether a plaintiff fell from a height of eight feet or jumped from that height is not germane to plaintiff’s diagnosis or treatment, and the history portion of the hospital record was not admissible.

In *Zito v. City of New York*, 49 A.D.3d 872 (2nd Dept. 2008),

On appeal, the plaintiff argues, inter alia, that the court erred in failing to redact part of his hospital record which indicated that the bullet entered through the front of his body and exited his back, that he was entitled to a missing witness charge with respect to the defendants' ballistics expert, and that the jury verdict was against the weight of the evidence with respect to the apportionment of fault.

We agree with the plaintiff's contention that it was error to admit into evidence the statement, contained in the history portion of the plaintiff's hospital records, that the bullet entered through the front of his body. Inasmuch as the record does not establish whether the statement was germane to either diagnosis or treatment, it constituted hearsay and should have been redacted from the record (see *People v. Townsley*, 240 AD2d 955, 659 N.Y.S.2d 906; *Wilson v Bodian*, 130 AD2d 221, 519 N.Y.S.2d 126).

In *Musaid v. Mercy Hospital of Buffalo*, 249 A.D.2d 958, 959 (4th Dept. 1998), the Appellate Court held that the trial court “erred in denying plaintiff’s motion to preclude the admission into evidence of an entry in the hospital record of plaintiff’s daughter and an incident report prepared by a nurse employed in the emergency department of the Hospital.”

In *Thompson v. Green Bus Lines, Inc.*, 280 A.D.2d 468 (2nd Dept. 2001), the injured plaintiff testified that he was standing on the sidewalk when he was injured and that no part of his body was on the street. The defendants impeached the injured plaintiff’s credibility with a medical report which stated that “the patient was standing on the sidewalk when the bus arrived. He stepped into the street and the bus continued to roll, going over his right foot”. The Appellate Division reversed the lower court for
committing reversible error by improperly admitting into evidence this portion of the injured plaintiff’s medical record into evidence. “Although the notation in the medical record was inconsistent with the injured plaintiff’s position at trial, it could not be received in evidence as a prior inconsistent statement as the defendants were unable to offer any proof to connect the injured plaintiff to the statements.” Id.

In Rivera v. City of New York, 293 A.D.2d 383, 741 N.Y.S.2d 30, 31-32 (1st Dept. 2002), the Appellate Division did not allow certain ‘inconsistent’ statements into evidence and held that:

“The statements in the hospital record attributed to the infant plaintiff’s mother, also a plaintiff herein, that the infant was struck by a thrown rock were not admissible either as admissions or under the business records exception to the hearsay rule (CPLR 4518). The statements were not admissions since the mother did not witness the occurrence but based the statements on what she heard from persons other than the infant (see, Quispe v. Lemle & Wolff, 266 A.D.2d 95, 698 N.Y.S.2d 652; Geraty v. National Ice Co., 16 App.Div. 174, 181-182, 44 N.Y.S. 659, affd. 160 N.Y. 658, 55 N.E. 1095). Nor do the statements qualify as business records since defendant failed to adduce evidence showing that the statements were germane to treatment or diagnosis (see generally, Williams v. Alexander, 309 N.Y. 283, 287, 129 N.E.2d 417; cf., Haulotte v. Prudential Ins. Co., 266 A.D.2d 38, 39, 698 N.Y.S.2d 24). The statements in police records to the same effect attributed to the infant's father, not a party herein, were also properly excluded, since the father had no personal knowledge as to how the accident happened and was under no duty to make the statements (see, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517; People v. Cruz, 283 A.D.2d 295, 728 N.Y.S.2d 1, lv. denied, 97 N.Y.2d 640, 735 N.Y.S.2d 497, 761 N.E.2d 2).”

In Cuevas v. Alexander’s, Inc., 23 A.D.3d 428 (2nd Dept. 2006), the trial court was reversed for allowing defense counsel to read to the jury portions of a hospital record, which constituted inadmissible hearsay, as they related to the manner of the accident and were not germane to the plaintiff’s diagnosis and treatment. “Although the entries in the hospital record were inconsistent with the plaintiff’s position at trial, they could not be received in evidence as prior inconsistent statements as the respondents were
unable to offer any proof to connect the plaintiff to the statements”, and because the statements in the hospital record directly contradicted the plaintiff’s account as to how the accident occurred, the “erroneous admission of these statements contained in the hospital record cannot be deemed harmless, as the entries related to the very issue to be determined by the jury, i.e., how the accident happened.”

In Acosta v. Trinity Lutheran Church, 12 Misc. 3d 1175(A), 824 N.Y.S.2d 760 (Sup. Kings 2006), the court reiterated this rule:

Here, it was the business of Lutheran Medical Center to diagnosis Acosta's condition and to treat him for his injuries, not to record a statement describing the cause of the accident in which his injuries were sustained ( see id. at 288). Trinity Lutheran Church fails to demonstrate how Acosta's slipping on ice, as opposed to tripping on something, could have affected the emergency room physician's diagnosis or treatment of Acosta.

Thus, a statement by a patient detailing the circumstances of an accident, where it is immaterial to and was never intended to be relied upon in the treatment of the patient, and “which serve[s] no medical purpose, may not be regarded as having been made in the regular course of the hospital's business” ( Williams v. Alexander, 309 N.Y. 283, 288 [1955]; see also Del Toro, 33 A.D.2d at 165). This is because “[t]here is no need in [such a] case for the physician to exercise care in obtaining and recording the information or to question the version, whatever it might be, that is given to him [or her]” ( Williams, 309 N.Y. at 288).

Here, it was the business of Lutheran Medical Center to diagnosis Acosta's condition and to treat him for his injuries, not to record a statement describing the cause of the accident in which his injuries were sustained ( see id. at 288). Trinity Lutheran Church fails to demonstrate how Acosta's slipping on ice, as opposed to tripping on something, could have affected the emergency room physician's diagnosis or treatment of Acosta.

In Coker v. Bakkal Foods, Inc., 52 A.D.3d 765 (2nd Dept. 2008), the court ruled that:

A hearsay entry in a hospital record as to the happening of an injury is admissible at trial, even if not germane to diagnosis or treatment, if the entry is inconsistent with a position taken by a party at trial. However, there must be evidence connecting the party to the entry (see Cuevas v Alexander's, Inc., 23 AD3d 428, 429, 805 N.Y.S.2d 605; Thompson v Green Bus Lines, 280 AD2d 468, 469, 721 N.Y.S.2d 70; Echeverria v City of New York, 166 AD2d 409, 410, 560 N.Y.S.2d 473; Gunn v City of New York, 104 AD2d 848, 849, 480 N.Y.S.2d 365). Here, the Supreme Court properly precluded the
admission of the entry contained in the plaintiff's hospital record, which indicated that
the plaintiff fell at home, and the testimony of the physician's assistant who made the
entry, where it was unclear whether the plaintiff was the source of that information
(see Echeverria v City of New York, 166 AD2d at 410)(emphasis added).

Pre-Existing Medical Conditions

“The court did not err in refusing defendant's request to admit into evidence
certain preaccident medical records concerning plaintiff on the ground that the documents
were not irrelevant to the issues at trial. The fact that plaintiff had, during one office visit,
complained of fatigue, including low back pain, with no diagnosis concerning causation,
did not have a tendency to prove that plaintiff had a preexisting back injury. In addition,
the fact that plaintiff had been treated for testicular trauma due to an accidental kick by a
child was irrelevant to plaintiff's postaccident sexual problems, which plaintiff testified
resulted from limitation of movement due to the severity of his back pain.” Stevens v.

A pre-existing condition need not preclude an award of future damages. Flaherty

Requisite Foundation

In order to attempt to establish the foundation for the admission of the statement,
the proponent must produce the witness who recorded the statement, and that witness
must connect the plaintiff to the statement(s). Cuevas v. Alexander’s, Inc., 23 A.D.3d
428 (2nd Dept. 2006); Mikel v. Flatbush General Hosp., 49 A.D.2d 581 (2nd Dept. 1975);
Gunn v. City of New York, 104 A.D.2d 848 (2nd Dept. 1984); Thompson v. Green Bus
Lines, 280 A.D.2d 468, 469 (2nd Dept. 2001). Only that witness can say what the basis
of his or her notes was.
Without the foundation witness, it is unknown who wrote the note, what it means and for what purpose it was written! What, if any, significance is to be attached to the note is a matter of sheer speculation and conjecture. The author of the note and expert testimony are required in order to even attempt to lay foundation for its admission.

The witness should then be produced for a hearing outside the presence of the jury in an attempt to lay the foundation for the admission of the statement as an admission against interest. Because of the extremely prejudicial value of the statement, if the requisite foundation is not laid, there will then be no prejudice to the plaintiff. If a proper foundation is laid, the testimony can either be read back to the jury or the witness may now be questioned in front of the jury, or the statement will now be allowed into evidence and read to the jury.


In Musaid v. Mercy Hospital of Buffalo, 249 A.D.2d 958, 959 (4th Dept. 1998), the Appellate Court held that the trial court “erred in denying plaintiff’s motion to preclude the admission into evidence of an entry in the hospital record of plaintiff’s daughter and an incident report prepared by a nurse employed in the emergency department of the Hospital.”
Moreover, CPLR 4518 does not make admissible voluntary hearsay statements by third persons not employed by the hospital nor under any duty in relation to the hospital or its business. Del Toro v. Carroll, 33 A.D.2d 160, 165 (1st Dept. 1969). If the hospital record is to be used against the plaintiff as an admission, it should affirmatively appear that he furnished it. Id. It must be established by the proponent of the evidence “that the plaintiff was the source of the information recorded, and that the translation was provided by a competent, objective interpreter whose translation was accurate”. Quispe v. Lemle & Wolff, Inc., 266 A.D.2d 95, 96 (1st Dept. 1999). See, Gaudino v. NYCHA, 23 A.D.2d 838 (1st Dept. 1965); Scotto v. Dilbert Bros., Inc., 263 App. Div. 1016 (2nd Dept. 1942).

Where the plaintiff makes the purported statement through an interpreter, the recorder can only testify to what the interpreter said, and as such constitutes inadmissible hearsay. Gaudino v. NYCHA, 23 A.D.2d 838 (1st Dept. 1965); Scotto v. Dilbert Bros., Inc., 263 App. Div. 1016 (2nd Dept. 1942); Quispe v. Lemle & Wolff, Inc., 266 A.D.2d 95 (1st Dept. 1999).

**Alcohol and Drugs**

The same legal principles apply to redacting references in medical records concerning the alleged use of alcohol or drugs by the plaintiff.

**Blood Alcohol Test Inadmissible**

In Amaro City of New York, 40 N.Y.2d 30 (1976), the Court of Appeals upheld the trial court’s ruling that a laboratory report of a blood sample that indicated a blood alcohol level of .09% was inadmissible. The blood sample was not tested until a number of hours after it was taken; a lapse in time that could only work in favor of the plaintiff by causing a lower reading of alcohol content.
In Marigliano v. City of New York, 196 A.D.2d 533, 535 (2nd Dept. 1993), the Appellate Division reversed the lower court for allowing into evidence a blood alcohol test which indicated a reading of .0439%, and noted that had this been a prosecution under the VTL, the Court would have been required to instruct the jury that a blood alcohol reading under .05% constituted *prima facie* proof that the plaintiff’s ability to operate a motor vehicle was *not* impaired. 196 A.D.2d at 535. The Court held that, “we find that reversible error was committed in the admission of this evidence absent any proof as to the test’s authentication, satisfactory care in the collection of the sample, its analysis, or in the chain of custody (see, Matter of Nyack Hosp. v. Government Empls. Ins. Co., 139 A.D.2d 515, 526 N.Y.S.2d 614).” 196 A.D.2d at 535. See also, Roy v. Reid, 38 A.D.2d 717 (2nd Dept. 1972). The court’s decision on this issue was abrogated by Rodriguez v. T.B.T.A., 276 A.D.2d 769 (2nd Dept. 2000), *app. dis.*, 96 N.Y.2d 814 (2001), which is discussed below.

In Shea v. N.Y.C.T.A., 289 A.D.2d 558, 559-560 (2nd Dept. 2001), the Appellate Division noted that the trial court “properly disallowed expert evidence regarding the plaintiff’s blood alcohol content (hereinafter BAC) at the time of the accident in the absence of any proof as to when the BAC measurement was taken. Under this circumstance, there was no basis for the expert’s ‘relation back’ testimony, and any conclusions as to the plaintiff’s BAC level at the time of the occurrence would have been purely speculative”.

In Martin v. City of New York, 275 A.D.2d 351, 353 (2nd Dept. 2000), *lv. to app. den.*, 96 N.Y.2d 710 (2001), the Appellate Division held that while the trial court erred in redacting from the hospital record entered into evidence a blood alcohol test showing a
blood alcohol level of .374; said error was harmless because there was no evidence presented to show that the plaintiff’s alleged intoxication contributed to or caused the subject accident.

In Rodriguez v. T.B.T.A., 276 A.D.2d 769 (2nd Dept. 2000), app. dis., 96 N.Y.2d 814 (2001), the Appellate Division abrogated Marigliano v. City of New York, 196 A.D.2d 533 (2nd Dept. 1993) with respect to the admissibility of blood alcohol tests. In Rodriguez supra, the court held that a Blood Alcohol Content (B.A.C.) test should have been allowed into evidence where the defendant offered a certified hospital record containing the entry and produced the attending emergency room physician from the date in question that treated the plaintiff, the doctor testified that the test was a "routine procedure" for trauma patients and was required "[f]or reasons of diagnosis and treatment" and to aid the anesthesiologist if surgery was needed. The physician testified as to the procedures that were followed that supported the conclusion that the test results were admissible.

Thus, under the specific and limited factual circumstances present wherein the defendant established a detailed foundation for the admission of the test through a certified record and an appropriate foundation witness, the test was admissible. The well reasoned dissent noted that even under these circumstances, the test should not have been admitted. The cogent and scholarly dissent is worth reading, and details the history of CPLR 4518 and the purpose and function of judge as a gatekeeper with respect to redaction of inadmissible portions of an otherwise admissible record. The majority opinion made no attempt to distinguish or reconcile their opinion with that of the Court of Appeals in Amaro v. City of New York, 40 N.Y.2d 30 (1976).
In Westchester Med. Ctr. v. State Farm Mut. Auto. Ins. Co., 44 A.D.3d 750 (2nd Dept. 2007), the court issued an interesting decision:

At bar, the defendant failed to lay a proper foundation for admission of the BAC report by proffering any evidence regarding the care in the collection of Gjelaj’s blood sample and its analysis (see Marigliano v. City of New York, 196 AD2d 533, 601 N.Y.S.2d 161; Fafinski v. Reliance Ins. Co., 106 AD2d 88, 91-92, 484 N.Y.S.2d 729, affd 65 NY2d 990, 484 N.E.2d 121, 494 N.Y.S.2d 92). Thus, while the defendant raised a triable issue of fact regarding intoxication sufficient to defeat the plaintiff’s motion, on this record, it cannot establish intoxication as a matter of law. We note in this regard that although the BAC report was inadmissible to establish the defendant's prima facie case on its cross motion (see generally Beyer v. Melgar, 16 AD3d 532, 533, 792 N.Y.S.2d 140), the Supreme Court properly considered it in opposition to the plaintiff’s motion (see Zuckerman v. City of New York, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595; Phillips v. Kantor & Co., 31 NY2d 307, 291 N.E.2d 129, 338 N.Y.S.2d 882).

What is interesting is the court’s citation to Marigliano, because in Rodriguez v. T.B.T.A., 276 A.D.2d 769 (2nd Dept. 2000), app. dis., 96 N.Y.2d 814 (2001), the Appellate Division abrogated Marigliano v. City of New York, 196 A.D.2d 533 (2nd Dept. 1993) with respect to the admissibility of blood alcohol tests. In Rodriguez supra, the court held that a Blood Alcohol Content (B.A.C.) test should have been allowed into evidence where the defendant offered a certified hospital record containing the entry and produced the attending emergency room physician from the date in question that treated the plaintiff, the doctor testified that the test was a "routine procedure" for trauma patients and was required "[f]or reasons of diagnosis and treatment" and to aid the anesthesiologist if surgery was needed. The physician testified as to the procedures that were followed that supported the conclusion that the test results were admissible.

In Rodriguez, under the specific and limited factual circumstances presented therein, the defendant established a detailed foundation for the admission of the test through a certified record and an appropriate foundation witness, the test was admissible. The well reasoned dissent noted that even under these circumstances, the test should not
have been admitted. The cogent and scholarly dissent is worth reading, and details the history of CPLR 4518 and the purpose and function of judge as a gatekeeper with respect to redaction of inadmissible portions of an otherwise admissible record. The majority opinion made no attempt to distinguish or reconcile their opinion with that of the Court of Appeals in Amaro v. City of New York, 40 N.Y.2d 30 (1976).

What is interesting in Westchester Med. Ctr, is the court is now citing Marigliano with approval, and reviving its viability.

In Levine v. NYS Thruway Auth., 52 A.D.3d 975 (3rd Dept. 2008), in a case involving a claim of inadequate safety devices in a roadway, a Court of Claims verdict in favor of the plaintiff on liability was affirmed.

Defendant further contends that the Court of Claims erroneously failed to consider proof of claimant's intoxication. We disagree. Claimant testified that he had a few drinks at a business luncheon which ended at about 2:30 P.M. on the day of the accident, but did not consume any alcohol thereafter. Claimant disclosed this information to the State Trooper who administered an alcosensor test revealing that claimant had a blood alcohol level of .02% after the accident. Although a forensic pathologist testified that a chemical test performed at the hospital disclosed that claimant had a blood alcohol level of .08%, no other proof was presented to establish that claimant was intoxicated at the time of the accident. Under these circumstances, the Court of Claims could choose not to credit the pathologist's testimony (see e.g. Butler v New York State Olympic Regional Dev. Auth., 307 AD2d 694, 696, 763 N.Y.S.2d 162 [2003]).

In People v. Levy, 2008 NY Slip Op 51878U; 20 Misc. 3d 1145A; 2008 N.Y. Misc. LEXIS 5965; 240 N.Y.L.J. 59 (District Court, 1st Dist., Nassau County 2008), the court ruled a urine test was inadmissible because of inadequate foundation, inadequate chain of custody, and that the evidence was testimonial in nature, and pursuant to Crawford, supra, and was violative of the defendant's right of confrontation.
Alcohol On Breath Inadmissible

In Amaro City of New York, 40 N.Y.2d 30 (1976), the Court of Appeals upheld the exclusion of a doctor’s testimony that he detected an odor of alcohol on the plaintiff’s breath. 40 N.Y.2d at 36.

In Marigliano v. City of New York, 196 A.D.2d 533, 535 (2nd Dept. 1993), abrogated on other grounds, Rodriguez v. T.B.T.A., 276 A.D.2d 769 (2nd Dept. 2000), app. dis., 96 N.Y.2d 814 (2001), the Appellate Court held that further reversible error was committed when the court permitted the city to introduce and comment on ambulance reports containing notations referring to an odor of alcohol on the plaintiff’s breath. Id.

Evidence of Drinking is Inadmissible

In Roberto v. Nielson, 262 App. Div 1034, aff’d, 288 N.Y. 581 (1942), the Appellate Division reversed the lower court for admitting into evidence an entry in the hospital record that stated “but evidently, after a day of beer and wine drinking, he was somehow involved in an auto accident”.

In Senn v. Scudieri, 165 A.D.2d 346 (1st Dept. 1991), the Appellate Division held the trial court committed reversible error when it admitted into evidence a notation in the New York Hospital Emergency Room Record that stated “the patient is drunk and uncooperative!”

The Appellate Division also stated that “We have held that the slurring of one’s speech, in and of itself, when that person is at the same time coherent, is insufficient to conclude that person is intoxicated…. Further as discussed supra, the single fact that alcohol has been consumed by a person, does not in and of itself constitute

In Mercedes v. Amusements of America, 160 A.D.2d 630 (1st Dept. 1990), the Appellate Division held that the admission of the history portion of the hospital record indicating that the injury occurred while the plaintiff was intoxicated, was fundamental error.

In Delgado v. City of New York, 128 A.D.2d 484 (1st Dept. 1987), the lower court was reversed for allowing the history portion of a hospital chart to be brought to the attention of the jury where it indicated that the plaintiff stated the cause of his injury was that he had been drinking and fell downstairs that morning. Defense counsel cross-examined the plaintiff, who claimed that he fell on a sidewalk that evening, to see if the hospital record refreshed his recollection or whether he told the doctors at the hospital he injured his ankle falling down stairs. Despite curative instructions by the court, the plaintiff suffered prejudice as a result of the court’s erring in permitting defense counsel to ask these questions.

In Kaminer v. John Hancock Mut. Ins. Co., 199 A.D.2d 53 (1st Dept. 1993), the Appellate Division affirmed the trial court’s determination that the defendant’s expert testimony that the 73 year old plaintiff’s medication causes drowsiness in about 50% of those who take it and a drunken type of walk (ataxia) in about 30%, was impermissibly speculative and influenced the jury to an extent that it effectively deprived the plaintiff of a fair trial in a trip and fall case.

In Ward v. Thistleton, 32 A.D.2d 846 (2nd Dept. 1969), the Appellate Division held that “the admission into evidence of a ‘Radiographic Request Card’ containing a
notation that plaintiff Nancy Ward was ‘Drunk’ was erroneous in view of the fact that no proof was offered to show who had made the entry, whether he was under a duty to do so, what the source of his information was, and whether the entry was made in the regular course of business of the hospital.”

However, in Huerta v. N.Y.C.T.A., the Appellate Division ruled that where there is a good faith basis for questioning a witness about his or her alcohol use at the time of the subject accident, the answers to such questions may be relevant with respect to the attentiveness of the witness, even though they might not be sufficient by themselves to establish intoxication. 290 A.D.2d 33, 42, 735 N.Y.S.2d 5, 13 (1st Dept. 2001), app. dis., 98 N.Y.2d 643, 744 N.Y.S.2d 758 (2002).

**Prior Intoxication is Inadmissible**

In Del Toro v. Carroll, 33 A.D.2d 160 (1st Dept. 1969), the Appellate Division reversed the lower court for allowing into evidence portions of hospital records showing prior incidents of intoxication. “In our opinion, the introduction of these portions of the hospital records showing prior incidents of intoxication was highly prejudicial and was calculated to establish in the minds of the jury that appellant was intoxicated at the time of the accident…” 33 A.D.2d at 163-164.

“In sum, the introduction of portions of the hospital records showing prior drug abuse, seizures and subsequent psychiatric treatment was highly prejudicial and calculated to establish in the minds of the jurors that plaintiff was either intoxicated by drugs or alcohol, or that he had suffered a seizure at the time of the accident …. Defense counsel’s questioning, the admission of the hospital records … all served to deprive plaintiff of a fair trial and clearly had a prejudicial effect on the jury …. The jury was
adversely affected by plaintiff’s ‘less than exemplary habits and lifestyle’.” Arroyo v. The City of New York, 171 A.D.2d 541, 543 (1st Dept. 1991). References in a hospital record to the plaintiff’s possible alcohol abuse are properly excluded as hearsay. Cooper v. Bronx Cross County Medical Group, 259 A.D.2d 410 (1st Dept. 1999).


Moreover, in a case involving a claim for wrongful death, pursuant to CPLR 4504(c), a hospital record indicating a history of alcoholism may be inadmissible because it tends to disgrace the memory of the decedent. Tinney v. Neilson’s Flowers Inc., 61 Misc. 2d 717, 719, aff’d, 35 A.D.2d 532 (2nd Dept. 1970).

Evidence of chronic alcoholism, standing alone, is inadmissible to impeach a witness’s character or to allow a jury to infer that the witness was intoxicated at a particular time. People v. Fappiano, 134 Misc. 2d 693, 696, aff’d, 139 A.D.2d 524 (2nd Dept. 1988), app. den., 72 N.Y.2d 918 (1988).

Records of Prior Treatment for Substance Abuse are Inadmissible

Records of treatment for substance abuse may be confidential and therefore, non-discoverable, and inadmissible. Mental Hygiene Law, Section 23.05 (a) provided that “a person’s participation in a substance abuse program shall not be used against such person in any … proceeding in any court”. While this section of the Mental Hygiene Law was repealed (effective October 5, 1999), section 33.13 (c ) (1) is still in effect, and requires confidentiality of said records, as does section 22.05 (b). Pursuant to 42 CFR Part 2, P. 21796, the United States Department of Health and Human Services promulgated regulations for the confidentiality of drug abuse patient records, and concluded that “good cause” warranting a court order permitting disclosure should be limited to those instances where there is a “threat to life or serious bodily injury of another person … or if the patient brings the matter up in any legal proceeding”, and that even in those instances, the disclosure should be limited to “that information which is necessary to carry out the purpose of the disclosure”. See, In re Guardianship of Alexander, 149 Misc. 2d 200 (Surrogate Bronx 1990); In re W.H., 158 Misc. 2d 788 (Family Ct. Rockland 1993).

In the case of In re Maximo M., 186 Misc. 2d 266 (Family Ct. Kings 2000), a thorough analysis of the interplay between the federal regulations and the New York State Mental Hygiene Law was recently made. In re Maximo M., supra, dealt with the vital interests of a ward of the court; a child that was the subject of an abuse or neglect proceeding. In its analysis of the various statutes and competing needs, the court noted that

“in child protective proceedings, the court must have the ability to assess the parent’s actual ability to care for the subject child. It is compelling in this context that the court be able to determine the extent to which the respondent’s drug use impairs her ability to provide proper supervision and guardianship of her child. In the court’s view,
the respondent’s access to drug rehabilitation services without meaningful compliance would be further evidence of child neglect, in addition to the drug abuse itself.” 186 Misc. 2d at 276.

The court pointed out that:

“under 42 CFR 2.64(d), the court must apply a two part analysis to determine whether good cause exists for disclosure of drug treatment records. Once the court determines that the public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services, the court must consider whether other ways of obtaining the information are available or would be effective. It clearly is the intent of the applicable federal law that this determination be made with regard to the facts of the specific case.” 186 Misc. 2d at 275.

The court then found that “given the compelling public interest at stake in a child abuse or neglect proceeding; given the fact that otherwise confidential communications are expressly admissible in such cases; and considering the relevant case law, this court finds that good cause does exist for the production of respondent’s treatment record from ARTC.” 186 Misc. 2d at 277. See, In re Marlene D., 285 A.D.2d 462 (2nd Dept. 2001).

Thus, “however important a right of confidentiality may be with respect to these types of records, it must yield to the greater right of a child to be free from parental neglect or abuse.” Id.

In discussing the procedure to be followed, the court held that the court’s order to produce the records must contain certain protections against unnecessary disclosure.

“An order authorizing a disclosure must limit disclosure to those parts of the patient’s’ record which are essential to fulfill the objective of the order. This requires that the court examine the patient’s records in camera to determine which portions reveal evidence of the respondent’s voluntary and regular participation in the program, or lack of such participation; and any evidence of child neglect, including continued drug use. The federal statute, regulations and state law do not authorize the wholesale disclosure of such portions of the records as do not relate to these issues. The federal regulations also require that the court limit disclosure to those persons whose need for information is the basis of the order; and include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services. The regulations specify that the court for example, should ‘seal from public
scrutiny the record of any proceeding for which disclosure of a patient’s record has been ordered.”  

Because the unique circumstances and needs attendant to a child abuse or neglect proceeding are not present in a personal injury lawsuit, such records should not be disclosed in an ordinary negligence case. See, Cronin v. Gramercy Five Associates, 233 A.D.2d 263 (1st Dept. 1996). Because the records ought not be disclosed, it may be improper to allow cross-examination of a party regarding their participation in a drug treatment program. People v. Torres, 119 A.D.2d 508, 509-510 (1st Dept. 1986); People v. Simms, 174 A.D.2d 979 (4th Dept. 1991). Similarly, the court precluded cross-examination of the plaintiff’s past heroin use and addiction because he was participating in a chemical dependency treatment program. Matter of M. v. N.Y.C.T.A., 4 Misc. 3d 829 (Sup. Richmond 2004).

In L.T. v Teva Pharms. USA, Inc., 71 AD3d 1400 (4th Dept. 2010)

Plaintiff appeals from an order granting the motion of The Harvard Drug Group, L.L.C. (defendant) to compel plaintiff to provide authorizations permitting the release of her alcohol treatment records and denying plaintiff’s cross motion for a protective order. Generally, records concerning substance abuse treatment are confidential and are not subject to disclosure unless certain requirements are met (see e.g. 42 USC § 290dd-2 [a], [b]; Mental Hygiene Law §§ 22.05, 33.13 [c]). Defendant is correct that, absent evidence that plaintiff was treated by a facility “conducted, regulated, or directly or indirectly assisted by any department or agency of the United States,” the federal statute does not apply (42 USC § 290dd-2 [a]; see United States v Zamora, 408 F Supp 2d 295, 299-300). We agree with plaintiff, however, that the state law applies and thus that disclosure by court order is permitted only “upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality” (Mental Hygiene Law § 33.13 [c] [1]; see § 22.05). Here, the court failed to make the requisite finding that the interests of justice significantly outweighed the need for confidentiality (see e.g. Matter of Michelle HH., 18 AD3d 1075, 1077-1078; Sohan v Long Is. Coll. Hosp., 282 AD2d 597), and we conclude that Supreme Court abused its discretion in ordering plaintiff to provide defendant with authorizations compliant with the Health Insurance Portability and Accountability Act of [*2]1996 ([HIPAA] 42 USC § 1320d et seq.) permitting release of her alcohol treatment records (see generally MS Partnership v Wal-Mart Stores, 273 AD2d 858).

Child Abuse

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In *Angela N. v Suhr*, 71 AD3d 1489 (4th Dept. 2010)

Plaintiff commenced this action seeking damages resulting from, inter alia, lead poisoning sustained by two of her children while residing at an apartment owned by Thomas Gervasi and Elaine Gervasi (defendants). Defendants appeal from that part of an order denying that part of their motion seeking to compel plaintiff to provide authorizations for certain records of Child Protective Services. Those records concerned an alleged incident of sexual abuse involving one of the children who allegedly sustained neurological and psychological injuries as a result of the lead poisoning. Contrary to the respective contentions of plaintiff and defendants, Social Services Law § 372 is inapplicable in this case inasmuch as the child in question was not subject to foster care during the relevant time period (see § 372; *Lamont v City of New York*, 297 AD2d 527 [2002]). Rather, disclosure of reports of child abuse and maltreatment and the resulting investigation of such abuse is governed by Social Services Law § 422 (see § 422 [4] [A]; see also *Catherine C. v Albany County Dept. of Social Servs.*, 38 AD3d 959, 960 [2007]). Here, Supreme Court properly refused to compel plaintiff to provide the authorizations permitting disclosure of the requested records to defendants because defendants are not individuals to whom disclosure is permitted pursuant to section 422 (4) (A) (see *Catherine C.*, 38 AD3d at 960; *Matter of Sarah FF.*, 18 AD3d 1072, 1074 [2005]).

**Expert Testimony is Required, but may be Limited**

*If* the defendant is attempting to claim that the alleged statements were relevant to medical diagnosis, prognosis and treatment, then he can only do so through expert testimony. Obviously, only an expert witness can determine whether a statement is relevant to medical diagnosis, prognosis and treatment and that such a determination is outside the ken of ordinary lay people. See, *Haulotte v. Prudential Ins. Co of America*, 266 A.D.2d 38, 39 (1st Dept. 1999); *Rodriquez v. T.B.T.A.*, 276 A.D.2d 769, 770 (2nd Dept. 2000), *app. dis.*, 96 N.Y.2d 814 (2001). Moreover, in many cases, the defendant does not have any eyewitnesses or independent admissible proof that the plaintiff was allegedly intoxicated when he became injured.

Usually, the plaintiff has served a Notice for Discovery and Inspection, and pursuant to that notice and/or a typical Preliminary Conference Order, the defendant was
required to serve all the names of all witnesses, including expert witnesses. The failure of the defendant to furnish CPLR 3101(d)(1) expert disclosure on these topics should result in the defendant’s being precluded from attempting to offer such testimony at trial. Without expert testimony, the defendant cannot prove that the purported alcohol use was related to the plaintiff’s medical diagnosis, prognosis or treatment. Without expert testimony, how can the notation be interpreted without engaging in total speculation?

The courts have held that even an expert may not be permitted to give testimony based on a review of the records that the plaintiff was intoxicated at the time of his or her accident and that said intoxication was a proximate cause of the accident. Haulotte v. Prudential Ins. Co. of America, 266 A.D.2d 38, 39 (1st Dept. 1999)(trial court affirmed for precluding defendant’s pathologist from testifying as to plaintiff’s blood alcohol level at the time of the accident and its effect on his balance and ability); See, Romano v. Stanley, 90 N.Y.2d 444, 450 (1997)(“it is well known that the effects of alcohol consumption may differ greatly from person to person”); Sorensen v. Denny Nash Inc., 249 A.D.2d 745, 747-748 (3rd Dept. 1998)(“it is well established, however, that the effects of alcohol consumption, as well as alcohol tolerance, may differ in significant respects from one individual to another”). Cf., Adamy v. Ziriakus, 92 N.Y.2d 396 (1998). Moreover, such testimony by its very nature would be impermissibly speculative, prejudicial and improper. See, Kaminer v. John Hancock Mut. Ins. Co., 199 A.D.2d 53 (1st Dept. 1993)(defendant’s expert should not be permitted to testify as to the affects of medication the plaintiff was taking to suggest that she fell due to dizziness caused by the medicine); Davis v. Pimm, 228 A.D.2d 885, 888 (3rd Dept. 1996), lv. to app. den., 88 N.Y.2d 815 (1996); Pascuzzi v. CCI Co., 292 A.D.2d 685, 687 (3rd Dept.
2002 (prejudicial error to allow defendant’s expert to opine that plaintiff “blacked out” as a result of his diabetic condition, causing him to drive off the road).

If an expert cannot give such testimony, how can the defendant be allowed to offer a bare hospital record on this issue without engaging in total speculation? If there is no proof that the plaintiff was intoxicated at the time of the accident, and that said intoxication was a proximate cause of the accident, the prejudice to the plaintiff outweighs any purported probative value to such an entry.

Where there is no evidence of intoxication at the time of the subject accident, an entry indicative of alcohol use is devoid of probative value. How much, if any, alcohol may have allegedly been ingested, and over what period of time; what, if any, alcohol was allegedly in plaintiff’s body and what, if any, effect it allegedly had on plaintiff; was the accident itself in any manner causally related to the alleged use of alcohol, are all unanswerable questions that require impermissible speculation, and all to the detriment and prejudice of the plaintiff.

**Failure to Exchange Party Statements may Preclude Admissibility**

In most cases a Preliminary Conference Order was entered into, and pursuant to the terms of said Order, all parties are typically required to furnish all adverse party statements. See, CPLR 3101(e). If the defendant failed to disclose the statement in a timely fashion, and having done so in total violation of a discovery notice and a Court Order, plaintiff should request that the court preclude the defendant from offering said statements at the time of trial.

Plaintiff should point out that had the defendant exchanged this information in a timely fashion, plaintiff could have investigated and interviewed hospital personnel and
attempted to pin down the facts and circumstances surrounding the alleged statements: who said what, when and where it was said and to whom, and in what language, who interpreted, what proficiency they had, and under what conditions this all occurred under. Plaintiff should note that as a result of the defendant’s failure to comply with court-ordered discovery, the plaintiff will have been effectively precluded from being able to investigate the witness(es) with regards to their backgrounds, potential biases and motives, and the facts and circumstances surrounding the occurrence so that counsel could properly prepare to cross-examine and impeach their credibility or otherwise probe and question their memory and its accuracy, completeness and veracity.

Frequently, the name of the proposed witness is illegible in the records. In such a situation, counsel opposing the introduction of the statement may have a good faith basis for not anticipating the testimony of the previously unknown witness, and would therefore suffer real prejudice by the testimony. The party that violated the Court Order and discovery notice should not profit from its wrongdoing.

Additionally, pursuant to CPLR 3121(a), “… where a party obtains a copy of a hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party.” (emphasis added). Once again, if the defendant has violated the CPLR and never served a duplicate copy of the hospital record on the plaintiff, they should not be allowed to benefit from their willful omission.

Moreover, plaintiff cannot be impeached with extrinsic evidence on such a collateral matter. Badr v. Hogan, 75 N.Y.2d 629 (1990); Ingebretsen v. Manha, 218 A.D.2d 784 (2nd Dept. 1995).
Psychiatric History

Where the plaintiff does not claim psychiatric damages, his psychiatric records are not discoverable and not admissible. Cottrell v. Weinstein, 270 A.D.2d 449 (2nd Dept. 2000). If there is a dispute, the court should conduct an in camera review of the records and make a determination outside the presence of the jury. Id.; Sadicario v. Stylebuilt Accessories, Inc., 250 A.D.2d 830 (2nd Dept. 1998); Zappi v. Pedigree Ski Shop, 244 A.D.2d 331 (2nd Dept. 1997); Latibaudiere v. City of New Rochelle, 239 A.D.2d 318 (2nd Dept. 1997).

Where the plaintiff has withdrawn his claims of psychiatric damages, his psychiatric history is not admissible. L.S. v. Harouche, 260 A.D.2d 250 (1st Dept. 1999); Strong v. Brookhaven Memorial Hospital Medical Center, 240 A.D.2d 726 (2nd Dept. 1997); Kohn v. Fisch, 262 A.D.2d 535 (2nd Dept. 1999).

In a case involving a claim of wrongful death, pursuant to CPLR 4504(c), a record of a psychiatric history may be inadmissible as it may tend to disgrace the memory of the decedent. Eder v. Cashin, 281 App. Div. 456, 461 (3rd Dept. 1953).

CONCLUSION

Where the history given by the plaintiff to a health care provider is germane to diagnosis and treatment, it is admissible, and may be testified to by a treating physician. Scott v. Mason, 155 A.D.2d 655, 657 (2nd Dept. 1989); Davison v. Park Avenue Properties Associates, MCA Inc., 183 A.D.2d 681 (1st Dept. 1992); People v. Caccese, 211 A.D.2d 976, 977 (3rd Dept. 1995), app. den., 86 N.Y.2d 780 (1995).

However, where there is an entry in a medical record of a history that is prejudicial to the plaintiff and that history is not relevant to diagnosis and treatment or the
foundation for the admissibility of the statement is not present, the plaintiff’s counsel should make an appropriate and timely motion in limine to preclude defense counsel from mentioning the history in question before the jury. A timely and proper motion made prior to counsel giving their opening statements may result in the defendant being precluded from discussing the prejudicial history contained in plaintiff’s medical or hospital record in defendant’s opening statement, during cross-examination of the plaintiff, during questioning of any expert or lay witnesses, and to have any such entries in the hospital records redacted.

The Treating Doctor as an Expert Witness

By Sherri Sonin and Robert J. Genis

In the trial of a personal injury lawsuit, the plaintiff may produce a treating physician as an expert witness to give testimony as to the plaintiff’s injuries, their causation, their significance, consequences and manifestations, and future prognosis. The question may arise, what, if anything, need be disclosed about such a witness? This article addresses that question.

No Expert Disclosure Necessary

Pursuant to CPLR 3101(d)(1), other than in a medical malpractice case, upon request, a party must identify the names and qualifications of those people expected to testify as expert witnesses, and disclose the substance of the facts and opinions to be offered. However, where the plaintiff in a personal injury case plans on calling treating physicians as expert witnesses, there need be no compliance with these requirements. In
the court held that treating physicians need not be disclosed as experts retained to testify
at trial under CPLR 3101(d)(1)(i) to the extent that they will be testifying at trial, if at all,
as “percipient fact witnesses”. The court noted that:

“The role of a treating physician has nothing inherently to do with the process of
litigation. The role of the treating physician is, instead, to care for and heal the patient.
At some point, of course, if the patient’s condition gives rise to litigation, a treating
physician may be called upon to testify at trial, but this would be an entirely secondary
role.” 169 Misc. 2d at 743.

In Hunt v. Ryzman, 292 A.D.2d 345, 346 (2nd Dept. 2002), lv. to app. den., 98
N.Y.2d 697 (2002), the court held that “[I]t is well settled that the disclosure
requirements of CPLR 3101(d)(1)(i) do not apply to treating physicians (citations
omitted).” See, Rook v. 60 Key Centre, Inc., 239 A.D.2d 926, 927 (4th Dept. 1997);

In Tonaj v. ABC Carpet Co., Inc., 43 A.D.3d 337 (1st Dept. 2007),

Supreme Court properly denied defendants' motion, based on CPLR 3121 and
22 NYCRR § 202.17, to preclude the opinion testimony of Tonaj's treating
neurologist causally linking the seizures to the accident, since both provisions are
inapplicable.

A treating doctor may properly be permitted to testify regarding future surgery for
the plaintiff notwithstanding a lack of prior notice pursuant to CPLR 3101(d). Butler v.
Grimes, 40 A.D.3d 569 (2nd Dept. 2007).

For example, in a medical malpractice case, plaintiff was properly permitted to
adduce testimony from a subsequent treating physician who did not advance a new theory
of liability, and his observations as to the surgical field were not expert opinion requiring notice pursuant to CPLR 3101(d)(1). In addition, since he was plaintiff’s treating physician, he could testify as to the cause of the injuries even though he expressed no opinion as to causation in the previously exchanged report. Finger v. Brande, 306 A.D.2d 104 (1st Dept. 2003).

A treating physician may testify about his interpretation of X-ray films not admitted into evidence where he used the films and reports in his treatment of the plaintiff and in forming his diagnosis. Lee v. Huang, 291 A.D.2d 549 (2nd Dept. 2002).

Disclosure with respect to treating physicians is governed by CPLR 3121 and 22 NYCRR 202.17, and not CPLR 3101(d)(1). McGee v. Family Care Services, 246 A.D.2d 308 (1st Dept. 1998); Malanga v. City of New York, 300 A.D.2d 549 (2nd Dept. 2002).

Pursuant to 22 N.Y.C.R.R. 202.17(b)(1), medical reports of treating providers are to be exchanged between the parties. “[M]edical reports may consist of completed medical provider, workers’ compensation, or insurance forms that provide the information required by this paragraph.”6

When the plaintiff’s intended expert is a treating physician whose records and reports have been disclosed pursuant to CPLR 3121 and 22 N.Y.C.R.R. 202.17, the preclusion of the expert’s testimony on the issue of causation based on the failure to serve CPLR 3101(d) notice constitutes an improvident exercise of the court’s discretion. Ryan v. City of New York, 269 A.D.2d 170 (1st Dept. 2000). See, Overeem v. Neuhoff, 254

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1 Where the defendant does not seek to have a physician examine the plaintiff, 22 N.Y.C.R.R. 202.17 may not be applicable; the rule contemplates a reciprocal exchange of medical reports and not a unilateral exchange. Diamantstein v. Friedman, 199 A.D.2d 458, 459 (2nd Dept. 1993); Dorato v. Schilp, 130 A.D.2d 348, 349-350 (3rd Dept. 1987). Moreover, the plaintiff may not have to obtain and furnish reports for physicians that plaintiff does not intend to call to testify at trial. Peterson v. Wert, 134 A.D.2d 668 (3rd Dept. 1987).
A.D.2d 398 (2nd Dept. 1998)(failure to serve CPLR 3101(d)(1) notice, and failure of report exchanged to discuss causation of injuries should not preclude a treating physician from being allowed to give expert testimony with respect to these issues on the plaintiff’s behalf in a medical malpractice case); Finger v. Brande, 306 A.D.2d 104 (1st Dept. 2003).

In Holshek v. Stokes, 122 A.D.2d 777 (2nd Dept. 1986), the Appellate Division affirmed the trial court for allowing plaintiff’s doctor to give testimony as to the permanence of plaintiff’s condition, despite the fact that the physician’s report stated that it was not determinable whether the injuries were permanent. The appellate court noted that:

“while the doctor’s report did not state that the injuries were permanent, it did not foreclose this possibility; therefore the defendant cannot claim surprise or prejudice by this testimony. Moreover, permanency cannot be considered an injury or condition. Rather, it relates to the severity of the knee injuries put into issue in the medical report (citation omitted). Further, the doctor’s testimony as to the possibility of arthritis in the future was properly admitted as a valid medical opinion as to a possible complication of the injuries. Again, the defendant cannot claim surprise or prejudice by this testimony, especially in light of the fact that the condition was raised in the bill of particulars. Lastly, we find that the doctor’s testimony that the plaintiff’s present symptoms could indicate the onset of arthritis was properly admitted as the plaintiff testified as to these symptoms at trial; therefore the doctor was merely giving his opinion as a medical doctor as to the significance of these symptoms.” 122 A.D.2d 777, 778-779.

Thus, where the plaintiff’s doctor’s report did not indicate that his injuries were permanent, testimony as to permanence may still be admissible where the plaintiff alleged that the injuries were continuing and permanent in his Bill of Particulars, thereby placing the defense on notice of the claim. Serpe v. Eyris Productions, Inc., 243 A.D.2d 375, 380 (1st Dept. 1997).

A physician may testify as to the details of functional consequences of previously reported injuries or conditions despite the fact that his report did not mention these functional consequences. Shehata v. Sushiden American, Inc., 190 A.D.2d 620 (1st Dept. 141
1993). A plaintiff's medical witness may properly be permitted to testify about possible future surgery without defendant ever having been advised of that possibility prior to trial in a narrative report. Rule 22 N.Y.C.R.R. 202.17(h) does not preclude a medical witness from detailing the functional consequences of previously reported injuries or conditions, and may relate a conclusion that can have been reasonably anticipated from the injuries that were fully disclosed to the defendant. Taylor v. Daniels, 244 A.D.2d 176 (1st Dept. 1997).

In Reed v. City of New York, 304 A.D.2d 1 (1st Dept. 2003), app. den., 100 N.Y.2d 503 (2003), the Appellate Division similarly allowed such testimony:

“Defendants also argue that plaintiff's expert neurologists should not have been permitted to testify during trial that plaintiff's brain injuries placed her at risk for Alzheimer's disease, epilepsy, seizures and dementia since there was no mention of these future disabilities either in the medical expert reports which were exchanged prior to trial, or in plaintiff's bill of particulars. Defendants maintain that they were prejudiced by the delayed disclosure and cannot be faulted for failing to produce an expert witness to rebut information presented by plaintiff for the first time on direct examination, and defendants' ability to effectively cross-examine these experts about previously undisclosed future disabilities was impeded.

“We find, however, that defendants' claims of surprise ring hollow as defendants were clearly on notice that plaintiff was claiming a serious, degenerative brain injury, and, by their own admission, had retained "an eminent, board-certified neurologist who was consulted ... on several occasions before trial," but who they neglected, for unarticulated but seemingly obvious reasons, to call at trial. Indeed, defendants did not deem it necessary to so much as ask for an adjournment to consult with their expert after plaintiff's experts testified on direct. Absent prejudice or surprise to defendants, that branch of the trial court's decision granting plaintiff's cross motion pursuant to CPLR 3025(c) to conform her pleadings to the proof adduced at trial constituted, in our view, a proper act of discretion (see Alomia v. New York City Tr. Auth., 292 A.D.2d 403, 406; Sylvan Lawrence Co. v. 180 Realty Co., 268 A.D.2d 238).”

No Report Served

In Schwartz v. Tab Operating Co., Inc., 239 A.D.2d 244 (1st Dept. 1997), the Appellate Division held that the trial court properly exercised its discretion in allowing
plaintiff’s expert to testify “where such testimony was limited to what was contained in
the expert’s records that defendants could have obtained well before trial, having been
furnished with authorizations therefor. Thus, defendants could have been surprised or
otherwise prejudiced only because they did not avail themselves of such authorizations.
Nor do we find reversible error in the trial court’s permitting this expert to testify that the
accident in question was the cause of plaintiff’s injury and that the injury was the cause
of her symptomolgy ....” See, Lombardi v. Wlazlo, 170 A.D.2d 653 (2nd Dept.
1991)(plaintiff’s furnishing an authorization enabling the defendant to obtain access to, or
copies of, the results of all diagnostic tests performed on him fully complies with the

Where the plaintiff does not obtain and serve a report from a treating doctor, and
the defendant fails to make a motion prior to the filing of a Note of Issue to compel
production of such a report, the defendant’s failure to make a timely motion may
constitute a waiver of its right to seek preclusion of the physician’s testimony at trial.
Mendola v. Richmond OB/GYN Associates, 191 Misc. 2d 699, 700-701 (Sup. Richmond

Assuming that the plaintiff’s failure to provide a medical report is not willful,
such as actually possessing a report and intentionally refusing to serve a copy of it on
defense counsel, the court may find that the intent of 22 N.Y.C.R.R. 202.17 has been
complied with: that the adversary has been provided with information necessary to
defend the action and to prevent surprise, and had not been put at an unfair disadvantage.
In *Mendola, supra*, the court found that the defense was sufficiently apprised of the nature and substance of the proposed testimony of the plaintiff’s treating doctors, and could hardly claim surprise or prejudice at trial because the plaintiff did not supply medical reports from her treating doctors. The court noted that the defense extensively questioned the plaintiff during her examination before trial about her various doctors and the treatment she received, and the defense acknowledged that it was aware of the names of the plaintiff’s treating doctors well in advance of trial, had been provided with medical authorizations to obtain plaintiff’s medical records from those doctors, and in fact had the plaintiff’s medical and hospital records in its possession prior to the start of trial.

The interests of justice and good cause requirement to avoid preclusion, is “concerned less with the excuse offered for the failure to timely serve the report than it is with a party’s need for the medical proof, the availability of alternate resources and the adverse party’s preparedness to cross-examine” with respect to the evidence based upon a report which was not provided in accordance with the rules. 191 Misc. 2d at 701[quoting *McDougal v. Garber*, 135 A.D.2d 80, 94 (1st Dept. 1988), *mod. on other grnds*, 73 N.Y.2d 246 (1989)].

With respect to the “interests of justice”, the court noted that without the testimony of her treating doctors, the plaintiff would be unable to offer any evidence in support of her case, and plaintiff’s non-compliance with 22 N.Y.C.R.R. 202.17 did not operate to bar the admission into evidence of the testimony proffered by the plaintiff’s treating doctors. 191 Misc. 2d at 701-702.
Recent Examinations

In DeStefano v. Gonzalez, 38 A.D.2d 532 (1st Dept. 1971), five years prior to trial, plaintiff furnished defendant with a copy of a medical report by a treating physician. “The Bill of Particulars made it clear that ‘Plaintiff claims that the injuries to her cervical and lumbo sacral spine are permanent in nature.’ As is the usual practice, the treating physician examined the plaintiff shortly before trial some five years later.” 38 A.D.2d 532. No updated or recent medical report was furnished to the defendant. Defense counsel objected to the doctor giving testimony as to the results of the examination, conducted two weeks prior to trial, and as to the permanence of plaintiff’s injuries. The trial court properly exercised its discretion in allowing said testimony.

In Iasello v. Frank, 257 A.D2d 362 (1st Dept. 1999), plaintiff’s physician and chiropractor were properly permitted to testify concerning their recent examinations of plaintiff even though reports of such examinations were not served on defendant because the physician’s testimony described no new injuries or claims but merely the consequences of the injuries described in previously served medical reports. See, Parkes v. New York Congregational Nursing, 5 Misc. 3d 1009 (Civ. Kings, 2004).

In Johnson v. School Dist. of City of Poughkeepsie, 83 A.D.2d 931 (2nd Dept. 1981), the plaintiff’s doctor examined her and wrote a report indicating that she sustained 1st and 2nd degree burns, which were the injuries described in her bill of particulars. Three years later, and immediately prior to trial, the physician examined her again and determined that some of the burns were in fact 3rd degree. No report of the examination immediately before trial was exchanged. The trial court was reversed for limiting the trial testimony of the doctor to the contents of his report. The court noted that 3rd degree
burns, as contrasted to 2nd or 1st degree cannot be considered an injury or condition, as it relates to the severity of the injury or condition known to exist and previously put in issue, and therefore the defendants could be surprised or prejudiced. Thus, a physician may testify regarding the degree of the plaintiff’s injury although the doctor’s report did not do so or indicated a different degree of injury.

In Balmaceda v. Perez, 182 A.D.2d 983, 984 (3rd Dept. 1992), app. den., 80 N.Y.2d 755 (1992), the court held that no error was committed by the trial court by allowing plaintiff’s medical expert to testify about his final examination of plaintiff, an examination that was not reported to the defendant. Defendant was not surprised or prejudiced by the testimony of the undisclosed examination inasmuch as plaintiff’s injuries had not changed, but, rather, increased in their severity. Moreover, defendant was given an opportunity to have a doctor reexamine plaintiff, but failed to do so.

In Langhorne v. County of Nassau, 40 A.D.3d 1045 (2nd Dept. 2007), a jury verdict that failed to make an award for past and future loss of services and for future pain and suffering and future loss of earnings was reversed.

“\textit{The trial court erroneously precluded the plaintiffs from eliciting testimony from the injured plaintiff’s treating physician as to the permanency of the injured plaintiff’s injuries on the ground that the report indicating the permanency was not timely exchanged with the defendants' attorney} (see 22 NYCRR 202.17[h]). The relevant court rule only applies to new injuries, and the permanency of a previously reported injury does not constitute a new injury (see Hughes v Webb, 40 A.D.3d 1035, 837 N.Y.S.2d 698 [2007] [decided herewith]). \textit{The trial court thus erred in precluding the plaintiffs from eliciting testimony from the injured plaintiff’s treating physician regarding his findings and prognosis from his latest examination of the injured plaintiff, which took place approximately one week before the trial.} The plaintiffs’ counsel made clear to the trial court that there were no new injuries, and that he had just come into possession of the report that same day (see Hughes v. Webb, supra; Krinsky v Rachleff, 276 A.D.2d 748, 715 N.Y.S.2d 712; Jasello v Frank, 257 A.D.2d 362, 683 N.Y.S.2d 49). Consequently, the court also erred in limiting the questioning of that physician to his findings as of December 30, 1998.
Moreover, the trial court erred in permitting defense counsel to elicit certain testimony from the defendants' medical expert that was not only beyond the scope of his medical report, but inconsistent with the conclusions that were set forth in that report (see Matszewska v Golubeya, 293 A.D.2d 580, 742 N.Y.S.2d 309; Gregory v Mulligan, 266 A.D.2d 344, 698 N.Y.S.2d 309).

Where, as here, there is a danger that substantial justice has not been done because improper evidentiary rulings tainted the jury verdict, an appellate court should order a new trial (see Gomez v Park Donuts, 249 A.D.2d 266, 267, 671 N.Y.S.2d 103; Wisotsky v Oak Leasing Corp., 212 A.D.2d 527, 632 N.Y.S.2d 574). Accordingly, there should be a new trial on the issue of the injured plaintiff's damages for past and future pain and suffering, and past and future loss of earnings.

While not an issue of expert testimony,

“Under the circumstances of this case, where the injured plaintiff's wife provided unrefuted evidence regarding the toll that her husband's injury had taken on her, including evidence of her activities in attending to him and taking care of his basic daily needs, at the expense of her social life and sexual relationship with him, and the likelihood that these circumstances would continue into the future, the jury's determination that she was entitled to no damages on her derivative cause of action for loss of past and future services could not have been reached on "any fair interpretation of the evidence," and thus, is against the weight of the evidence (Lolik v Big V Supermarkets, 86 N.Y.2d 744, 746, 655 N.E.2d 163, 631 N.Y.S.2d 122; see Nicastro v Park, 113 A.D.2d 129, 495 N.Y.S.2d 184). Accordingly, the trial court correctly ordered a new trial on those categories of damages (see CPLR 4404[a]; Grant v City of New York, 4 AD3d 158, 772 N.Y.S.2d 39; Simmons v Dendis Constr., 270 A.D.2d 919, 705 N.Y.S.2d 779).”

In Hughes v. Webb, 40 A.D.3d 1035 (2nd Dept. 2007),

“…the Supreme Court erred in precluding the infant's treating physician from testifying as to the permanence of the infant's injuries, based upon a recent examination, on the ground that the plaintiff failed to serve a report of the examination pursuant to 22 NYCRR 202.17(h). There could be no claim of surprise or prejudice engendered by this testimony. The plaintiff's bill of particulars clearly included allegations that the ankle fracture resulted in permanent injuries. "[P]ermanency cannot be considered an injury or condition" (Holshek v Stokes, 122 A.D.2d 777, 778, 505 N.Y.S.2d 664). Consequently, no medical report was required to be served prior to the physician's testimony, as no new injuries or claims were being made, and the physician was to testify merely to the consequences of the injury as described in the previously-served medical records (see Iasello v Frank, 257 A.D.2d 362, 363, 683 N.Y.S.2d 49; Serpe v Eyris Prods., 243 A.D.2d 375, 380, 663 N.Y.S.2d 542; Kurth v Wallkill Assoc., 132 A.D.2d 529, 530, 517 N.Y.S.2d 267). To the extent that our decision in Fienco v Rose (34 AD3d 629, 824 N.Y.S.2d 666), can be read as holding to the contrary, it should not be followed. The Supreme Court also improvidently exercised its discretion in precluding the infant's treating physician
from giving expert opinion testimony as to the permanency of the infant's injuries, based upon the other evidence in the case (see Neils v Darmochwal, 6 AD3d 589, 590, 774 N.Y.S.2d 809; Markey v Eiseman, 114 A.D.2d 887, 495 N.Y.S.2d 61).

Similarly, in Logan v Roman, 58 AD3d 810 (2nd Dept. 2009), the court allowed a treating doctor to give testimony on subject matters that were not provided in his prior narrative report.

Under the circumstances, the Supreme Court improvidently exercised its discretion in precluding the plaintiff Bryan Cambridge (hereinafter the plaintiff) from offering videotaped trial testimony of his treating physician, Dr. William Walsh, concerning his pre-existing right hip arthritis and its aggravation, which allegedly was caused by a motor vehicle accident on May 9, 2002. Since Dr. Walsh was the plaintiff's treating physician, he should have been permitted to testify at trial notwithstanding any failure or deficiency in providing disclosure pursuant to CPLR 3101(d)(1)(i), as that provision does not apply to treating physicians (see Butler v Grimes, 40 AD3d 569, 570; Hunt v Ryzman, 292 AD2d 345). Dr. Walsh could testify to the cause of the injuries even if he had expressed no opinion regarding causation in his previously-exchanged medical report (see Overeem v Neuhoff, 254 AD2d 398).

In any event, the defendants were not surprised or prejudiced by the videotaped testimony of Dr. Walsh, which included an opinion on causation which was not set forth in his previously-exchanged medical report (see 22 NYCRR 202.17[h]). The defendants' examining physician had issued a report more than two years before the trial which concluded that the plaintiff's right hip arthritis was pre-existing and was not "aggravated, accentuated, created, or rendered symptomatic" as a result of the motor vehicle accident. This report also contained an admission by the plaintiff that his right hip arthritis was pre-existing. Thus, the question of whether the plaintiff's pre-existing right hip arthritis was aggravated by the motor vehicle accident was clearly "put in issue in the respective medical reports previously exchanged" (22 NYCRR 202.17[h]).

Moreover, the videotaped testimony of Dr. Walsh was recorded 11 weeks prior to the trial date. Thus, the defendants had ample opportunity to prepare their defense to address this claim at trial. In addition, we note that on cross-examination of Dr. Walsh, during the videotaped testimony, the defendants' counsel was well prepared to and did question Dr. Walsh at length about the discrepancy between his testimony on direct and the opinion expressed in his written narrative report (see McLamb v Metropolitan Suburban Bus Auth., 139 AD2d 572, 573).
**Conclusion**

The courts are loath to interfere with the plaintiff’s right to offer the expert testimony of treating doctors, as long as they have been identified and authorizations to obtain their records have been exchanged, and some notice of the substance of their expected testimony has been provided in a bill of particulars.

**Doctor’s Specialty does NOT limit their testimony**

By Sherri Sonin and Robert J. Genis

It is well-established that a physician need not be a specialist in a particular field in order to be considered a medical expert. Humphrey v. Jewish Hospital and Medical Center of Brooklyn, 172 A.D.2d 494 (2nd Dept. 1991); McGoldrick v. Licata, 298 A.D.2d 439 (2nd Dept. 2002); See, Joswick v. Lenox Hill Hosp., 161 A.D.2d 352 (1st Dept. 1990)

Indeed, reversible error is committed where a trial court sets aside a verdict in favor of the plaintiff because the plaintiff’s medical expert did not practice the same specialty as a defendant surgeon. Robertson v. Greenstein, 308 A.D.2d 381 (1st Dept. 2003).

While it is well settled that the determination of a witness’ qualification to testify as an expert rests in the sound discretion of the trial court, where the court fails to afford the plaintiff an opportunity to lay foundation for qualification of her witness, error is committed. Further error is committed where the court does not allow a licensed
podiatrist, who had treated burns during his residency, to offer expert testimony as to the
106 (2nd Dept. 2003).

In **Payant v. Imobersteg**, 256 A.D.2d 702 (3rd Dept. 1998), the Appellate Division
reversed the lower court for precluding plaintiff’s medical experts from testifying in a
medical malpractice case. The trial court improperly precluded a board certified
infectious disease specialist from testifying against an orthopedic surgeon based on his
specialization in the field of medicine. The trial court also improperly precluded the
plaintiff’s board certified orthopedic surgeon because he had not performed surgery since
1974 (23 years prior to the time of the trial) because he could not readily recall the steps
he had taken to keep abreast of current medical procedures and trends. Neither expert
was familiar with the practice of medicine in the locality.

The Appellate Division noted that the lack of skill or expertise goes to the weight
of his testimony, not its admissibility, and the development of vastly superior medical
schools and postgraduate training, modern communications, the proliferation of medical
journals, along with frequent seminars and conferences, have eroded the justification for
the “locality rule”, and a medical expert may give testimony about minimum standards
applicable throughout the United States. 256 A.D.2d 702, 681 N.Y.S.2d 135 (3rd Dept.
1998). Thus, a board certified orthopedic surgeon from New York City can testify as to
the acceptable standards of care in Livingston County. **Kelly v. State**, 259 A.D.2d 962,
Nassau 2002).
The law is settled that a physician need not be a specialist in a particular field in order to qualify as a medical expert. Bodensiek v. Schwartz, 292 A.D.2d 411, 739 N.Y.S.2d 405 (2nd Dept. 2002)(oncologist can testify against a gynecologist); Kwon v. Martin, 19 A.D.3d 664, 799 N.Y.S.2d 63 (2nd Dept. 2005)(neurologist can read an MRI film).

A pathologist may offer an expert opinion against and with regard to the standard of care of a general surgeon. Once the expert sufficiently established his or her qualifications as a medical expert and their familiarity or knowledge with the relevant standards of care, the expert need not be a specialist in the particular area at issue to offer an opinion. Any lack of skill or expertise goes to weight of his or opinion as evidence, not its admissibility. Erbstein v. Savasatit, 274 A.D.2d 445, 711 N.Y.S.2d 458 (2nd Dept. 2000).

The following are some other examples of the application of this rule of law.

An opthalmologist who testified that he was familiar with the standard of care utilized in laser surgery, although he himself had never performed the procedure may give testimony as to the standards of care. The expert’s lack of personal experience in performing the procedure went to the weight to be given his testimony and not its admissibility. Ariola v. Long, 197 A.D.2d 605, 602 N.Y.S.2d 666 (2nd Dept. 1993), lv. to app. dis., 82 N.Y.2d 920, 610 N.Y.S.2d 154 (1994).

A board certified neurologist is competent to testify as to departures committed by the defendants, orthopedic surgeons, where the expert established adequate foundation by testifying that he had been involved 200 to 300 cases of carpal tunnel injuries, many of
which were similar to that presented by the plaintiff. Julien v. Physician’s Hospital, 231 A.D.2d 678, 647 N.Y.S.2d 831 (2nd Dept. 1996).

A physician that is not a psychiatrist may give testimony as to the conversion hysteria suffered by the plaintiff. Any lack of skill or expertise on his part was merely a factor to be considered by the jury and goes to the weight to be given to the testimony and not its admissibility. Smith v. City of New York, 238 A.D.2d 500, 656 N.Y.S.2d 681 (2nd Dept. 1997).

A general surgeon may be qualified to render an opinion in the specialty of obstetrics or gynecology. Humphrey v. Jewish Hospital and Medical Center of Brooklyn, 172 A.D.2d 494, 567 N.Y.S.2d 737 (2nd Dept. 1991).


A neurologist may give expert testimony in the fields of neurosurgery or pediatrics. Allone v. University Hospital of New York University Medical Center, 235 A.D.2d 447, 652 N.Y.S.2d 1011 (2nd Dept. 1997).

A physician specializing in radiology may be competent to render an expert opinion with respect to the treatment of plaintiff’s decedent by defendant, an orthopedic surgeon. Mineo v. Owen W. Young, M.D., P.C., 248 A.D.2d 1012, 670 N.Y.S.2d 152 (4th Dept. 1998).


In Dykstra v Avalon Rest. Renovations, Inc., 60 AD3d 446 (1st Dept. 2009).

 Plaintiff's expert, a general surgeon with a subspecialty in vascular surgery, was not required to have practiced in the specific specialty of orthopedic surgery since he had the requisite knowledge regarding general practices for preventing blood clots during surgery (see Robertson v Greenstein, 308 AD2d 381, 382 [2003], lv dismissed 2 NY3d 759 [2004]). The weight to be accorded his testimony, which conflicted with that of defendant's expert orthopedic surgeon concerning not only whether certain clot prevention techniques were indicated but also whether use of such techniques would have prevented the injury-causing clot, was "a matter peculiarly within the province of the jury" (Torricelli v Pisacano, 9 AD3d 291, 293 [2004], lv denied 3 NY3d 612 [2004] [internal quotation marks and citations omitted]). Defendant's argument that plaintiff's expert should not have been allowed to testify because he practices in Connecticut, not New York, where the surgery took place, was not raised before the trial court, and we decline to consider it.

In Diel v Bryan, 71 AD3d 1439 (4th Dept. 2010)

We reject the contention of defendant that plaintiff's expert witness, a board certified anesthesiologist, was not qualified to testify concerning the standard of care to be applied in evaluating defendant's care and treatment of decedent with respect to the administration of anesthesia during a dental procedure. "[T]he anesthesiologist possessed the requisite skill, training, knowledge and experience to render a reliable opinion with respect to the standard of care applicable to the administration of the anesthesia" in this case (id. at 1494; see Bickom v Bierwagen, 48 AD3d 1247 [2008]). Although defendant's expert in oral maxillofacial surgery testified that there were "separate rules [concerning anesthesia] for dentists only," defendant failed to establish how the administration of anesthesia to decedent during a dental procedure required special training or differed in any material respect from the administration of anesthesia by a board certified anesthesiologist. Indeed, we note that, at the time of decedent's procedure, the "separate rules" for acquiring a dental anesthesia certificate provided that a dentist could obtain certification to administer general anesthesia and parenteral sedation by completing "one year of post-doctoral [*2]training in anesthesiology acceptable to the [D]epartment [of Education]" (8 NYCRR 61.10 [c] [1] [emphasis added]).
We reject the further contention of defendant that the testimony of plaintiff's expert was not based upon facts in the record (see generally Cassano v Hagstrom, 5 NY2d 643, 646 [1959], rearg denied 6 NY2d 882 [1959]), and we conclude that such testimony sufficiently established a causal connection between defendant's deviations from the applicable standard of care and decedent's death (see generally Matott v Ward, 48 NY2d 455, 459-462 [1979]; Elston v Canty, 15 AD3d 990 [2005]). Contrary to defendant's contention, Supreme Court properly allowed plaintiff to cross-examine defendant with respect to her admitted theft of narcotic medications from her former employer. A witness may be cross-examined with respect to specific immoral, vicious or criminal acts that have a bearing on his or her credibility (see Badr v Hogan, 75 NY2d 629, 634 [1990]; Shainwald v Barasch, 29 AD3d 337 [2006]).

In Williams-Simmons v Golden, 71 AD3d 413 (1st Dept. 2010)

Although not a radiologist, plaintiffs' medical expert, an internist and medical oncologist, was qualified to opine as to the propriety of defendants' care of plaintiff Sylvia Williams-Simmons (see Matott v Ward, 48 NY2d 455, 459 [1979]; Joswick v Lenox Hill Hosp., 161 AD2d 352, 354-355 [1990]).

In Plourd v Sidoti, 69 AD3d 1038 (3rd Dept. 2010)

To the extent the issue is disputed, we agree with Supreme Court that defendants met their initial burden of demonstrating a prima facie entitlement to summary judgment as a matter of law. The burden accordingly shifted to plaintiff to show, by competent medical proof, that a deviation from the accepted standard of care occurred and that a causal nexus existed between that deviation and her injuries (see Daugharty v Marshall, 60 AD3d 1219, 1221 [2009]; Bell v Ellis Hosp., 50 AD3d 1240, 1241 [2008]; Snyder v Simon, 49 AD3d 954, 956 [2008]). To that end, plaintiff submitted the affidavit of G. Richard Braen, a physician licensed to practice in New York who is board certified in internal medicine and currently employed in the field of emergency medicine.

Initially, given that the alleged malpractice occurred in the context of emergency medicine, Braen's board certification and his employment support an inference that his expert opinion was a reliable one, "and any alleged lack of skill or experience goes to the weight to be given to the opinion, not its admissibility" (Bell v Ellis Hosp., 50 AD3d at 1242; see Borawski v Huang, 34 AD3d 409, 410 [2006]).

PROOF OF DAMAGES WITHOUT EXPERT TESTIMONY

By Sherri Sonin and Robert J. Genis
Is a medical expert’s testimony necessary in every case? While frequently such testimony is helpful, particularly to prove the permanence of the injuries claimed, it is not always required.

It is long and well established that jurors are permitted to act upon matters of knowledge and experience common to all persons within the jurisdiction without the necessity of testimony from an expert witness. Shaw v. Tague, 257 N.Y. 193 (1931). See, Prince, Richardson On Evidence, 11th Ed., Sec. 2-206. Lay opinions may be the basis for a jury’s determination of the existence of conscious pain and suffering. Cotiletta v. Tepedino, 151 Misc. 2d 660 (Sup. Kings, 1991); Pinckert v. Trucklease Corp., ___ F. Supp. ___, 2006 U.S. Dist. LEXIS 17590, N.Y.L.J. April 19, 2006 (S.D.N.Y. 2006) (lay witness may be basis of circumstantial evidence of conscious pain and suffering). In Pinckert, the court reviewed New York law, and determined that it permitted an award for pain and suffering to be based solely on circumstantial evidence.

In Shaw v. Tague, supra, the Court held that it was proper for a jury to decide that a car striking a pedestrian caused the pedestrian’s hair to turn white without any expert medical testimony.

In Alvarez v. Mendik Realty Plaza, Inc., 176 A.D.2d 557 (1st Dept. 1991), app. den., 79 N.Y.2d 756 (1992), the plaintiff sustained a herniated disc when he slipped and fell on debris lying on a stairway. As a result, he underwent surgery a month after the accident, and still complained of back pain up until the time of trial, five years later. “Plaintiff”s testimony, when considered along with the medical records detailing Mr.
Alvarez’ hospital and surgery, adequately established both causation and permanency of Mr. Alvarez’ injury….” 176 A.D.2d at 558.

“We reject the contention that Supreme Court erred in denying defendants' motion to strike plaintiff's testimony regarding the alleged injury to his groin and testicular area. There can be no question that where an injury is "beyond the observation of the lay jury", expert medical testimony is required to causally link it to the accident (Brown v. County of Albany, 271 A.D.2d 819, 821, 706 N.Y.S.2d 261, lv. denied, 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653). In this case, however, all of the testimony addressed in defendants' brief merely represents plaintiff's own reports of the past and present pain and discomfort that he experienced in his testicles and, to a lesser degree, the impact that pain and discomfort had upon his ability to engage in sexual relations. In our view, the condition described by plaintiff was not beyond the understanding of the lay jury, and expert medical testimony was not required to causally connect it to the accident.

“Even if this were not so, we also conclude that sufficient expert evidence was adduced at trial. In the absence of direct evidence, causation "may be inferred from the facts and circumstances underlying the injury, [provided] the evidence [is] sufficient to permit a finding based on logical inferences from the record and not upon speculation alone" (Silva v. Village Sq. of Penna, 251 A.D.2d 944, 945, 674 N.Y.S.2d 873; see, Schneider v. Kings Highway Hosp. Ctr., 67 N.Y.2d 743, 744, 500 N.Y.S.2d 95, 490 N.E.2d 1221). Here, plaintiffs submitted emergency room records indicating that there was blood in plaintiff's urine following the accident and that he had sustained a bladder injury. Although plaintiff's treating physician stated that he could only "assume" the groin injury was caused by the accident, his opinion was based on his physical examination of plaintiff and review of the emergency room records (see, Matott v. Ward, 48 N.Y.2d 455, 461, 423 N.Y.S.2d 645, 399 N.E.2d 532) and defendants failed to proffer any evidence to controvert that explanation of the injuries sustained.” Madsen v. Merola, 288 A.D.2d 520-521, 732 N.Y.S.2d 150, 151-152 (3rd Dept. 2001).

In an assault case, plaintiff’s testimony, considered together with his medical records, sufficiently established both causation and the permanency of his serious and permanent injuries. Falcaro v. Kessman, 215 A.D.2d 432 (2nd Dept. 1995).

The plaintiff in Parrott v. Pelusio, 65 A.D.2d 914 (4th Dept. 1978), was struck in the eye with a club, and the force of the blow knocked him to the ground, his eye bled and he was removed by ambulance to the hospital. The records indicate that he was diagnosed as having sustained a rupture of the left globe and a laceration of the lower left
eyelid. The jury was entitled to draw its own conclusion, despite the absence of medical testimony, that it was the blow to the eye with the club that caused the ruptured globe resulting in the removal of the eye.

“Bruises and contusions are the common sequelae and physical manifestations of a fall down a flight of stairs. They are not remote and unusual effects which would call for more than a layman’s knowledge of cause and effect.” Rivera v. State of New York, 115 Misc. 2d 523, 525 (Ct. Claims 1982); Ingelston v. Francis, 206 A.D.2d 745, 746 (3rd Dept. 1994).

No medical testimony was required to prove physical injuries, pain and suffering, mental suffering and injury to reputation in a case involving claims for false arrest, false imprisonment and assault and battery. O’Donnell v. K-Mart Corp., 100 A.D.2d 488 (4th Dept. 1984).

In Esposito v. Jenson, 229 A.D.2d 951, 952 (4th Dept. 1996), the court held that a “jury may infer, without the aid of expert testimony, that a retained root tip and the further surgery necessary to remove it would cause plaintiff discomfort and some consequential expense”.

“A prima facie case may be established without the necessity of offering expert testimony where the ‘very nature of the acts complained of bespeaks improper treatment and malpractice’ (citation omitted). No expert is necessary to explain that a veterinarian should x-ray a dog’s throat, esophagus and stomach if she suspects that the dog has swallowed something.” Mathew v. Jerome L. Klinger, D.V.M., P.C., 179 Misc. 2d 609 (App. Term 2nd Dept. 1998). See, Restrepo v. State, 146 Misc. 2d 349, 355, aff’d, 179 A.D.2d 804 (2nd Dept. 1992).
In *Hammer v. Rosen*, 7 N.Y.2d 376, 380 (1960), the Court held that where the very nature of the acts complained of bespeaks improper treatment and malpractice, no expert testimony is necessary, and that if the defendant chooses to justify those acts as proper treatment, he is under the necessity of offering evidence to that effect.

A death certificate may provide competent medical proof of causation of death. *Rosenberg v. New York University Hospital*, 128 Misc. 2d 90, 93 (Sup. NY 1985).


**EMOTIONAL INJURIES**


In *Battalla v. State of New York*, 10 N.Y.2d 237 (1961), an infant skier was placed in a chair lift without being properly secured and locked in place with a belt. The plaintiff became frightened and hysterical as a result of this, and sustained consequential emotional injuries.
When a person is falsely informed that their mother has died, they may be compensated for their emotional harm. *Johnson v. State of New York*, 37 N.Y.2d 378 (1975).

In *Allinger, supra*, two policemen forcibly entered plaintiff’s apartment, screamed and swore at her and her daughter, held a gun to her head and confined them against their will. At trial plaintiff testified that the conduct of the police officers made her fear for her life, she still has trouble sleeping and suffers from nightmares. No medical proof was presented. “The conclusion that a mother and her young child may be terrified and suffer emotional trauma from the sudden, explosive entry into their apartment of strangers carrying guns does not require special knowledge or training.” *Allinger v. City of Utica*, 226 A.D.2d 1118, 1120. The court specifically held that “a jury could find even without medical testimony, that the conduct of the police officers was the proximate cause of the emotional injuries suffered by plaintiff.” *Id.*

Where a person opens a can of soda, drank some, felt something in her throat which she pulled out and which was some kind of insect, no medical testimony is required to prove that the resulting illness of nausea and vomiting was caused by the incident. *Mitchell v. Coca-Cola Bottling Co.*, 11 A.D.2d 579 (3rd Dept. 1960); *Gay v. A & P Food Stores*, 39 Misc. 2d 360 (Civ. Bronx 1963).

**Verdict Sheet**

Emotional distress and loss of liberty are separate components of a false arrest claim, and are also separate from the emotional distress of a malicious prosecution claim. *Martinez v. Port Authority of New York and New Jersey*, 445 F.3d 158 (2nd Cir. 2006).
CONCLUSION

While having an expert medical witness testify is advisable in many cases, it is not required in all cases.

LOSS OF EARNINGS

By Sherri Sonin and Robert J. Genis

Personal injury cases frequently involve claims of loss of earnings. The questions then arise, under what circumstances are these losses compensable, and what is the quantum of proof.

An individual who is injured, either temporarily or permanently, as a result of the negligence of another may recover damages for loss of earnings where the injury prevents him from performing the work or services in which he was engaged at the time of injury. Ehrcott v. New York, 96 N.Y. 264 (1884). This includes future loss of earnings. Weir v. Union Ry, 188 N.Y. 416 (1907).

Practice tip: a plaintiff that actually worked on the books and has a verifiable loss of earnings should offer into evidence proof of said earnings or seek to have defense counsel stipulate to the earnings.

Infants

It is well established that an infant may recover for future loss of earnings. Campolo v. City of Yonkers, 137 A.D.2d 480 (2nd Dept. 1988); Ledogar v. Giordano, 122 A.D.2d 834 (2nd Dept. 1986), app. discontinued and withdrawn, 68 N.Y.2d 911 (1986); Sullivan v. Locastro, 178 A.D.2d 523, 527 (2nd Dept. 1991), lv. den., 81 N.Y.2d 701;
The jury has a right to consider prospects of advancement, and the probability of attaining a higher position and earning a greater salary. Geary v. Metropolitan Street Railway Co., 731 App. Div. 441. The refusal to give any consideration and fail to make any award for the plaintiff’s prospective loss of earnings may be improper and require the court to grant a motion for addituar. Metz v Great Atlantic & Pacific Tea Co., 30 Misc. 2d 258, 164 (Sup. Kings 1961).


“Recovery for lost earning capacity is not limited to a plaintiff’s actual earnings before the accident, however, and the assessment of damages may instead be based upon future probabilities (citation omitted).” Kirschhoffer v. Van Dyke, 173 A.D.2d 7, 10 (3rd Dept. on transfer from 2nd Dept. 1991); Grayson v. Irvmar Realty Corp., 7 A.D.2d 436, 439 (1st Dept. 1959).

An opera singer injured due to a defendant’s negligence may seek to recover for lost earnings and royalties, notwithstanding that all of her professional earnings were paid directly to her corporation, and the decline in the profits of her corporation were relevant and admissible. “The proper test is not whether plaintiff’s salary was reduced for these years, but whether her earnings were reduced because of her injury. The Met ignores the possibility that but for the injury, plaintiff’s earnings (and Canta Fidelia’s [her
corporation]) likely would have been far greater.” Behrens v. Metropolitan Opera Assoc., 18 A.D.3d 47, 794 N.Y.S.2d 301 (1st Dept. 2005).

A fact witness, such as a union member that gives testimony as to the terms of the plaintiff’s pension plan, is a fact witness and not an expert witness, and no expert disclosure is necessary. Sheppard v. Blitman/Atlas Building Corp., 288 A.D.2d 33, 35 (1st Dept. 2001).

Experts


While a vocational rehabilitation expert is qualified to assess plaintiff’s vocational abilities, without proper foundation, the witness is not qualified to express an opinion on past and future loss of earnings, past and future loss of household services, and future medical expenses; that is normally the subject of an economist. Smith v. M.V. Woods Construction Co., Inc., 309 A.D.2d 1155 (4th Dept. 2003).

That an economist is not required does not mean that an economist cannot testify. An economist may give expert testimony as to the economic value of loss of earnings and benefits. See, Dennis v. Dachs, 85 A.D.2d 223, resettled, 88 A.D.2d 511 (1st Dept. 1982), lv. gtd, 88 A.D.2d 795, app. wdrn, 58 N.Y.2d 972 (1983). An economist may
properly testify based on assumed facts which are fairly inferable from the evidence, such as evidence of the plaintiff’s age, employment skills and physical limitations, and may project plaintiff’s future lost earnings based on the assumption that the plaintiff will not be employed in the future.  


Recovery is not limited to actual earnings before the accident and a plaintiff may introduce expert testimony assessing damages based upon future probabilities. An expert may rely on out-of-court material if it is of a kind accepted in the profession as reliable in forming a professional opinion. This may include a letter from plaintiff’s employer describing plaintiff’s potential for advancement.  


A vocational economic analyst expert witness may also be used to establish future loss of earnings.  


Expert economic testimony has been permitted to establish the pecuniary value of the loss of services of a plaintiff, such as in a wrongful death action. See, _DeLong v. County of Erie_, 60 N.Y.2d 296, 307-308 (1983)(value of housewife-mother). Thus while expert testimony is permissible to prove the value of a plaintiff’s claims for loss of household services, it is not a prerequisite to establishing their value.  


**Problem Clients**

In _Spose v. Ragu Foods, Inc._, 142 Misc. 2d 366 (Sup. Monroe 1989), the court allowed a plaintiff that was involved in a post-accident injury, which completely disabled him, to recover for loss if earnings. The court noted that while “past and projected future
earnings may be material issues to be considered by the trier of fact in evaluating an injury to a plaintiff’s earning capacity, they are not, in and of themselves, determinative of that capacity.” Id., 142 Misc. 2d at 369.


Petrilli v. Federated Department Stores, Inc., 40 A.D.3d 1339, 1341-1343 (3rd Dept. 2007), is a welcome decision. That the plaintiff returned to work for a period of time after the subject accident does not preclude an award for past and future loss of earnings. Moreover, an expert is not necessary where all that need be done are mathematical calculations based on evidence, such as hourly rates and hours worked.

In Imbierowicz v. A.O. Fox Mem’l Hosp., 43 A.D3d 503 (3rd Dept 2007), a wrongful death action, plaintiff’s economist was seemingly intentionally speculative.

Turning to the jury's awards for past and future pecuniary loss, we find that plaintiff's proof of decedent's potential income was improperly presented to, and considered by, the jury. A decedent's gross income at the time of death is the proper measure of the value of past and future lost earnings (see Johnson v Manhattan & Bronx Surface Tr. Operating Auth., 71 N.Y.2d 198, 204, 519 N.E.2d 326, 524 N.Y.S.2d 415 [1988]; Plotkin v New York City Health & Hosps. Corp., 221 A.D.2d 425, 426, 633 N.Y.S.2d 585 [1995], lv dismissed 88 N.Y.2d 917, 670 N.E.2d 224, 646 N.Y.S.2d 983 [1996]. While increased future earnings could be considered if they were likely to occur (see e.g. Kirschhoffer v Van Dyke, 173 A.D.2d 7, 10, 577 N.Y.S.2d 512 [1991]), damages for wrongful death are not recoverable when they are based on contingencies that are "uncertain, dependent on future changeable events and, thus, inherently speculative" (Farrar v Brooklyn Union Gas Co., 73 N.Y.2d 802, 804, 553 N.E.2d 1055, 537 N.Y.S.2d 26 [1988]). Here, plaintiff primarily relied upon the testimony of an economist who had based his calculation of what decedent would have earned as a construction worker upon average income data for construction workers in the Cities of Albany, Schenectady and Troy. The economist conceded that this data did not include earnings of construction workers in Delaware County, the much more rural area where decedent had lived and worked, and there was no evidence that decedent would have or could have worked in Albany, Schenectady or Troy. Thus, the economist's opinion of the value of the earnings lost was speculative and lacked a proper foundation (see Toscarelli v Purdy, 217 A.D.2d 815, 818, 629 N.Y.S.2d 833 [1995]; Merrill v Albany Med. Ctr. Hosp., 126 A.D.2d 66, 70, 512 N.Y.S.2d 519 [1987] [Kane, J.P. concurring in part and dissenting in part], appeal dismissed 71 N.Y.2d 990, 524 N.E.2d 873, 529 N.Y.S.2d 272 [1988]; Morales v City of New York, 115 A.D.2d 439, 439-440, 497 N.Y.S.2d 5 [1985], lv denied 67 N.Y.2d 605, 492 N.E.2d 794, 501 N.Y.S.2d 1024 [1986]). While the record contains other evidence of what decedent had earned and would likely earn in Delaware County, it leads to a lower annual income amount than that stated by the economist. Since the jury's awards do not state lost earnings separate from other pecuniary loss, we cannot determine whether they were based on speculation. Accordingly, the matter must be remitted for a new trial on damages as well (see Murry v Witherel, 287 A.D.2d 926, 929, 731 N.Y.S.2d 571 [2001]; Edwards v Stamford Healthcare Socy., 267 A.D.2d 825, 828, 699 N.Y.S.2d 835 [1999]).

In Xanboo v. Ring, 40 A.D.3d 1081 (2\textsuperscript{nd} Dept 2007), In support of their claim for an attorney's fee, the defendants presented the testimony of the partner in the law firm which represented them. This partner, who had supervised all aspects of the case during the approximately four years of litigation between the parties, testified as to the services performed, and as to the generation of the firm's records detailing those services. The records, which indentified the attorneys who worked on the case, the tasks that they performed, and the time spent on each task, were created contemporaneously with the services performed, and were properly admitted into evidence pursuant to the business records exception to the hearsay rule (see CPLR 4518[a]; People v Kennedy, 68 N.Y.2d 569, 503 N.E.2d 501, 510 N.Y.S.2d 853). Contrary to the plaintiff's contentions, this evidence was sufficient to support the Supreme Court's determination without the necessity of calling multiple witnesses who would have merely offered cumulative testimony at best (see Shaw, Licitra, Eisenberg, Esernio & Schwartz v Gelb, 221 A.D.2d 331, 633 N.Y.S.2d 212).

\textbf{Undocumented Aliens}

An illegal/undocumented alien working off the books can recover for their loss of earnings. Balbuena v. IDR Realty, 6 N.Y.3d 338, 812 N.Y.S.2d 416 (2006). In Balbuena, the Court of Appeals reversed the Appellate Division, First Department, and affirmed the Appellate Division, Second Department \textit{sub nom.}, Majlinger v. Cassino Contracting Corp., 25 A.D.3d 14, 802 N.Y.S.2d 56 (2\textsuperscript{nd} Dept. 2005). The Court of Appeals noted that a jury may be permitted to consider the plaintiff’s immigration status as one factor in its determination of the damages, if any, warranted under the Labor Law. “An undocumented alien plaintiff could, for example, introduce proof that he had subsequently received or was in the process of obtaining the authorization documents
required by ICRA and, consequently, would likely be authorized to obtain future employment in the United States.” The Court noted that a “jury’s analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case.” The Court held that “in the absence of proof that plaintiffs tendered false work authorization documents to obtain employment, that ICRA does not bar maintenance of a claim for lost wages by an undocumented alien.”

The failure of the trial court to allow the plaintiff to recover for past and future lost earnings is reversible error. Piedrahita v. RGF Development Corp., 38 A.D.3d 741 (2nd Dept. 2007); Shi Pei Fang v. Heng Sang Realty Corp., 38 A.D.3d 520 (2nd Dept. 2007); Cordova v. 360 Park Ave. South Associates, 33 A.D.3d 750 (2nd Dept. 2006). If, however, the plaintiff obtained employment by submitting false documentation to the employer, the undocumented employee may be precluded from recovering for lost wages. Coque v. Wildflower Estates Developers, Inc., 31 A.D.3d 484 (2nd Dept. 2006).

“We agree that the plaintiff administrator should be permitted to offer evidence of any wages that his decedent, an alien working in the United States on an apparently illegal basis, might have earned. **Any pertinent evidence is competent unless prohibited by statute** *(see, Freeman v Corbin Ave. Bus Co., 60 AD2d 824, 825, lv denied 44 NY2d 649)*. It is for the jury to weigh defense proof that decedent would have earned those wages, if at all, by illegal activity *(see, Spadaccini v Dolan, 63 AD2d 110, 124)*. Public Administrator of Bronx County v. Equitable Life Assurance Society of the United States, 192 A.D.2d 325 (1st Dept. 1993)(emphasis added).


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However, in Sanango v. 200 E. 16th S. Housing Corp., 15 A.D.3d 36 (1st Dept. 2004), the Appellate Division, First Department changed this policy. The Appellate Division, Second Department, continued to uphold the rights of undocumented aliens in Majlinger v. Cassino Contracting Corp., 25 A.D.3d 14 (2nd Dept. 2005), and a split then existed between the Appellate Divisions in the New York. See, Oro v. 23 #. 79th St. Corp., 10 Misc. 3d 82 (App. Term 2nd Dept. 2005). In Balbuena, supra, the Court of Appeals resolved this issue and as stated above, continued to uphold the rights of undocumented aliens to be compensated for their lost earnings.

In Ramroop v. Flexo-Craft Printing, Inc., 11 NY.Y.3d 160 (2008), the Court of Appeals addressed the issue of loss of earning of an undocumented alien in the context of Workers Compensation.

This appeal puts into clear focus the tension between the statute's vocational rehabilitation objective to return an injured worker to the marketplace, and the re-employment of a worker, as in this case, who is not authorized to so participate in the first instance. Section 15(3)(v)'s legislative history underscores this tension:

"A key feature of the bill [that became section 15(3)(v)] is the requirement that the worker receiving additional compensation participate in Board approved programs of retraining and rehabilitation. This helps both the worker and the employer since it will tend to reduce the effects of the injury, restore the worker to re-employment and help him achieve his optimum earning capacity" (Senate Introducer Mem in Support, Bill Jacket, L 1970, ch 286 [emphasis added]). Simply put, it cannot have been the Legislature's goal to "restore . . . to re-employment" a worker who may not be lawfully employed. Reversal of the Appellate Division order would not only promote such restoration, it would effectively place the instant claimant, and others similarly situated, in a more favorable position than claimants who must meet all statutory requirements. This would amount to our directing the Board to put its imprimatur on an "additional compensation" award in contravention of its statutory mandate, a result which the law compels against.

Thus, the Court of Appeals has again acknowledged that an undocumented alien is entitled to Workers Compensation payments, and has now held that as a matter of law, such a person is not eligible to participate in programs of retraining and rehabilitation in
order to rejoin the workplace; they are permanently unemployable with no means of obtaining training to become employable. This effectively precludes the defense from producing a vocational rehabilitation expert to testify in a personal injury lawsuit that plaintiff is a malinger that doesn’t want to work and that retraining is available to them!

Similarly, the Court has now repeatedly held that since an undocumented alien may not legally work, he/she is permanently unemployable, thus laying the groundwork for a future loss of earnings claim.

In *Amoah v. Mallah Management, LLC*, 57 A.D.3d 29 (3rd Dept. 2008), issued an expansive decision on the topic of undocumented aliens that procured their employment through the use of fraudulent documents, and upheld their right to obtain Workers Compensation benefits.

It is also well settled that the status of an injured worker as an undocumented alien does not, in and of itself, prohibit an award of workers' compensation benefits (see e.g. *Matter of Ramroop v Flexo-Craft Print., Inc.*, 11 NY3d 160, 168, 896 N.E.2d 69, 866 N.Y.S.2d 586 [2008]; *Matter of Testa v Sorrento Rest.*, 10 AD2d 133, 135, 197 N.Y.S.2d 560 [1960], lv denied 8 N.Y.2d 705 [1960]) or recovery for lost earnings in a personal injury action predicated on state Labor Law violations (see *Balbuena v IDR Realty LLC*, 6 NY3d at 358-359). In *Balbuena*, the Court of Appeals explained that IRCA seeks to combat the employment of undocumented workers and found that such objective would not be hindered and, indeed, would be furthered by state laws imposing liability on employers under the Labor Law for their undocumented workers' injuries. Although, in that case, the Court of Appeals expressly relied on the absence of proof that the plaintiffs had committed a criminal act in violation of IRCA, that Court left open the question presented here of whether such a violation would necessarily lead to a different result. We find, under the circumstances here, that it does not.

1 Similarly, in *Madeira v Affordable Hous. Found., Inc.* (469 F3d 219 [2006], supra), the Second Circuit Court of Appeals, in determining that "New York law does not conflict with federal immigration law or policy in allowing an injured worker to be compensated for some measure of lost earnings at United States pay rates" (id. at 228), limited its conclusion to, among other things, situations where the employee had not
violated IRCA, and specifically noted that "we need not consider the effect of an employee's immigration fraud on a workers' compensation claim" (id. at 246 n 27).

…the proscriptions against obtaining employment by submitting fraudulent documentation must be viewed in the context of the employer's obligations to use due diligence in ascertaining the employee's status and the penalties imposed upon the employer for violating IRCA 2. In this context, we find that "limiting a [reduced earnings] claim by an injured undocumented alien would lessen an employer's incentive to . . . supply all of its workers the safe workplace that the Legislature demands" (Balbuena v IDR Realty LLC, 6 NY3d at 359). Thus, such a result would actually provide an economic incentive to employers to violate IRCA by disregarding the employment verification system and would undermine IRCA's primary goal of combating the employment of undocumented workers (see id. at 359-360). On the other hand, it is unlikely that denying wage-replacement benefits to injured unauthorized workers will deter illegal aliens from violating IRCA in order to obtain employment in the first place.

Significantly, in view of the determination that claimant is totally disabled and, therefore, is under no obligation to seek employment, among other things, there is no evidence here that the award would require claimant to commit or continue to commit an IRCA violation or otherwise present a "definite and positive obstacle to the effective operation of [federal immigration] policy" (Madeira v Affordable Hous. Found., Inc., 469 F3d at 247) 4. Accordingly, under the particular circumstances present here, we conclude that the decision of the Board is correct and we decline to disturb it.

This decision has been applied to third party personal injury cases as well. Coque v. Wildflower Estates Developers, Inc., 58 A.D.3d 44 (2nd Dept. 2008) is an important case in this regard.

We hold that a worker's submission of false documentation is sufficient to bar recovery of damages for lost wages only where that conduct actually induces the employer to hire the worker, and that this circumstance is not present where the employer knew or should have known of the worker's undocumented status or failed to verify the worker's eligibility for employment as required by federal legislation.

In reviewing the Court of Appeals decision in Balbuena v. IDR Realty LLC, 6 N.Y.3d 338 (2006), the appellate court’s decision merits extensive attention.

The Court further noted that, although it was not lawful for the plaintiffs to be employed in this country, this was not the type of illegality that would preclude them from recovering damages for their lost earnings as a matter of New York law, since the work
they were performing was itself legal, and no statute makes it a crime to be employed
without proper documentation. In addition, the Court observed that the plaintiffs'
inability to mitigate damages did not preclude recovery, since both of them allegedly
had sustained injuries that would preclude them from being employed at any time in
the future and, in any event, the jury could take the plaintiff's immigration status into
account in determining the award of damages for lost wages, if any, to which the
plaintiffs were entitled. Accordingly, the Court concluded that federal immigration policy
did not bar awards of damages to the plaintiffs for lost wages.

Although the Court of Appeals emphasized that there was no evidence that the plaintiffs
in the cases before it had submitted false documentation at the time they were hired,
Court had no occasion to specify what the consequences of such conduct would have
been. At one point, the Court appeared to indicate that the submission of false
documentation was but one factor to be considered in determining whether an award
of damages for lost wages would be barred by federal immigration policy (see
Balbuena, 6 NY3d at 360 ["Aside from the compatibility of federal immigration
law and our state Labor Law, plaintiffs here--unlike the alien in Hoffman--did not
commit a criminal act under IRCA"] [emphasis added]).

Even assuming that the Court's language supports the defendants' present argument
that the submission of a fraudulent document upon being hired is alone a sufficient
basis for denying a plaintiff damages for lost wages, our reading of Balbuena leads us
to conclude that this rule is limited to situations in which an innocent employer is
duped by fraudulent documentation into believing that the employee is a United States
citizen or otherwise eligible for employment, as was the employer in Hoffman, for
example (see Hoffman, 535 U.S. at 141; id. at 155 [Breyer, J., dissenting]). In this case,
the evidence at trial showed that the plaintiff submitted a false social security card to City
Wide at the time he was hired. It also appears, however, that City Wide violated the
IRCA because it listed only the plaintiff's social security card on the Form I-9 it
completed, when it was required (as explained on the form itself) to verify additional
documentation. Although the Balbuena decision made clear that the plaintiffs' conduct
could not be "equate[d] [to] the criminal misconduct of the employee in Hoffman" if "it
was the employers who violated IRCA by failing to inquire into plaintiffs' immigration
status or employment eligibility" (Balbuena, 6 NY3d at 360), the Court of
Appeals was not called upon to determine whether an award of damages for lost wages
would be preempted under the circumstances this Court faces now, where it appears that
both the plaintiff and the employer violated the IRCA.

We do not believe that the Balbuena decision should be read so broadly as to stand
for the proposition that a worker forfeits his or her right to recover lost earnings
merely by virtue of submitting a false document at the time he or she is hired. Rather,
the false document must actually induce the employer to offer employment
to the plaintiff. At the conclusion of its decision, the Court of Appeals stated: "We
therefore hold, on the records before us in these Labor Law §§ 200, 240(1) and
241(6) cases, and in the absence of proof that plaintiffs tendered false work authorization
documents to obtain employment, that IRCA does not bar maintenance of a claim for lost
wages by an undocumented alien" (Balbuena, 6 NY3d at 363 [emphasis added]). Thus, the Court of Appeals did not hold that the mere submission of any false document would preclude a plaintiff from recovering damages for lost wages, but rather, that such damages would be unavailable if the plaintiff submitted such documents to obtain employment. **If the employer was, or should have been, aware of the plaintiff's immigration status, and nonetheless hired the plaintiff "with a wink and a nod"** (Hoffman, 535 U.S. at 156 [Breyer, J., dissenting]), the false document was not necessary to obtain employment.

Similarly, in our decision on the prior appeal in this matter, we noted that "an undocumented alien may be precluded from recovering damages for lost wages if he or she obtained employment by submitting false documentation to the employer" (Coque v Wildflower Estates Developers, Inc., 31 AD3d 484, 487, 818 N.Y.S.2d 546, citing Balbuena, 6 NY3d at 362-363 [emphasis added]). Contrary to the defendants' contention, this statement does not support their position. **If the employer hires the employee with knowledge of the employee's undocumented status, or without verifying the employee's eligibility for employment, the employer has not been induced by the false document to hire the employee and, thus, the employee has not "obtained employment by" submitting the false document.**

Indeed, the Balbuena Court suggested that the plaintiff's right to recover damages for lost wages is affected by the employer's knowledge of (or willful blindness to) the plaintiff's undocumented status. The Court observed that: "Moreover, there is no evidence in the records before us that plaintiffs (like the alien worker in Hoffman) tendered false documentation in violation of IRCA or that their employers satisfied their duty to verify plaintiffs' eligibility to work" (Balbuena, 6 NY3d at 362 [emphasis added]; see also id. at 360 ["there is no allegation in these cases that plaintiffs produced false work documents in violation of IRCA or were even asked by the employers to present the work authorization documents as required by IRCA"] [emphasis added]). The Court cited with approval (id. at 359) a decision of the New Hampshire Supreme Court, which held that a responsible party may be held liable to an undocumented alien for lost wages if that party "knew or should have known of [the employee's] status, yet hired or continued to employ him nonetheless," and that the employee's submission of fraudulent documents does not bar recovery unless the employer "reasonably relied upon those documents" (Rosa v Partners in Progress, Inc., 152 NH 6, 13, 868 A2d 994, 1002).

FOOTNOTES

1 We recognize that in a case involving damages for an alleged violation of the Labor Law, it is not the employer who is penalized for violating the IRCA, since the defendants in such an action are usually the property owner and the general contractor. (Indeed, an action against the employer is barred by Workers' Compensation Law §
Yet, the same principles apply regardless of the identity of the defendant, since precluding recovery of damages for lost wages in Labor Law cases would provide a windfall to defendants and, more important, would reduce their incentive to comply with the requirements of the Labor Law and provide employees with a safe place to work (see *Balbuena v IDR Realty LLC, 6 NY3d at 361 n 8*).

**FOOTNOTES**

2 In this case, for example, although the plaintiff was only 30 years old at the time of the accident, the award for future lost wages covered a period of only five years, and totaled only $60,000.

Thus, we conclude that where an employer violates the IRCA in hiring an employee, such as by failing to properly verify the employee's eligibility for work, the employee is not precluded, by virtue of his submission of a fraudulent document to the employer, from recovering damages for lost wages as a result of a workplace accident, even if he or she participated in an illegal hire. Clearly, an employer should not be rewarded for its failure to comply with federal immigration law by being relieved of liability for its failure to provide a safe workplace. Moreover, where an employer is complicit in an illegal hire, foreclosing the employee from recovering damages for lost wages does not discourage violations of federal immigration law, but has exactly the opposite effect, from the employer's perspective. Although, pursuant to our holding, an employee may be entitled to recover damages for lost wages despite his or her participation in an illegal hire, such a recovery is not a reward for wrongdoing, but merely constitutes the relief to which an injured worker is normally entitled, and thus represents the status quo. Indeed, there is no reason to believe that any undocumented alien has an incentive to submit fraudulent documents in order to obtain employment with the hope of someday receiving a large award of damages for lost wages as a result of a workplace accident. Moreover, while relieving defendants (including owners and general contractors) of liability for lost wages would constitute an unjustified windfall, an award of such damages does not constitute a windfall to the employee, since it is appropriate for a jury to take the plaintiff’s immigration status into consideration in determining the amount of damages for lost wages, if any, to which the plaintiff is entitled (see *Balbuena, 6 NY3d at 362*).
accident (cf. Matter of Amoah v Mallah Mgmt., LLC, 57 AD3d 29, 2008 NY Slip Op 08228, 866 N.Y.S.2d 797 [3d Dept 2008] [undocumented alien who submits false documentation to employer at time of hiring is not precluded from obtaining Worker's Compensation benefits, regardless of whether employer violated IRCA in hiring employee]). Accordingly, the jury's award of damages for lost wages in this case should not be disturbed.

Indeed, a trial court commits reverseable error if it does not permit the plaintiff to submit the issue of loss of earnings of an undocumented alien to the jury. Lee v. Riverhead Bay Motors, 57 AD3d 283 (1st Dept. 2008). See, Fang v. Heng Sang Realty Corporation, 38 A.D.3d 520 (2nd Dept. 2007); Piedrahita v. RGF Dev. Corp., 38 A.D.3d 741 (2nd Dept. 2007); Jara v. Strong Steel Door, Inc., 58 AD3d 600 (2nd Dept. 2009).

While the trial court dismissed plaintiff Han Soo Lee's claim for lost wages on other grounds, it misrepresented the law when it suggested to the jury that plaintiff was precluded from recovering lost wages because of his immigration status (see Balbuena v IDR Realty LLC, 6 NY3d 338, 362, 845 N.E.2d 1246, 812 N.Y.S.2d 416 [2006]). The court erred in failing to provide a curative instruction explaining that working in the United States without the proper documentation is neither a crime pursuant to the Immigration Reform and Control Act (8 USC § 1324a et seq.) (see id. at 361) nor a bar to the recovery of damages in a civil action for personal injuries, and this error caused undue prejudice to plaintiff. Lee v Riverhead Bay Motors, supra.

Indeed, in Fang v. Heng Sang Realty Corporation, 38 A.D.3d 520 (2nd Dept. 2007), the Record on Appeal and Briefs submitted to the court make crystal clear that the past and future loss of earnings claims were based solely on plaintiff’s naked testimony.

In Janda v Michael Rienzi Trust, 2009 NY Slip Op 31371(U) (Sup. Queens), the court allowed a jury to make an award for loss of earnings for an undocumented alien with paper work problems.

At trial, Mr. Janda testified through an interpreter that he is an undocumented worker from Poland, and that he came to New York on a tourist visa which has expired. He stated that he first started working for ABC Construction Company sometime between
1999 and 2000, performing asbestos removal work, at which time he presented his licenses for asbestos removal work and copy of a Social Security card to ABC Construction. Mr. Janda testified that he took courses, and received a diploma and course completion certificate for asbestos removal. He stated that his licenses included his photograph and a Social Security number which he obtained from friends. ABC Construction’s president, Stanko Koronsovac, testified that he would have only accepted the actual Social Security card and would not have accepted a copy. Testimony was presented by Mr. Janda, Mr. Koronsovac, and ABC Construction’s vice-president, Alex Gregoriou, regarding Mr. Janda’s I-9 form. This form listed a February 22, 2001 date of hire. Mr. Janda stated that he filled out portions of the form with help from his friends and that he did not complete the portion of the I-9 form which required him to verify his status as a citizen or non-citizen permitted to work lawfully in this country.

Mr. Janda stated that he never made any representations to any employer as to his immigration status and stated that he did not have a work visa. ABC Construction’s officers testified that they retained the I-9 form which was not verified by the employee, and no other I-9 form was completed by Mr. Janda. Evidence was presented that Mr. Janda was employed by ABC between 1999 and 2005, although W-2 forms could not be located for all of these years.

The evidence presented at trial regarding Mr. Janda’s use of a false Social Security number, as well as the asbestos removal licenses bearing the false Social Security number, and evidence of his union membership, all of which were presented at the time of hiring is insufficient, as a matter of law, to establish that ABC Construction was induced into believing that Mr. Janda was a United States citizen or otherwise entitled to work in this country. Although ABC Construction claims to have verified his status, there is no evidence that it ever requested that Mr. Janda complete the I-9 form, or provide any evidence as to his citizenship or legal right to work in this country. The jury, based upon the evidence presented was thus not precluded from awarding lost earnings. That branch of defendant’s motion which seeks to set aside the judgment not withstanding the verdict as to lost earnings is denied.

In *Maliqi v 17 E. 89th St. Tenants, Inc.*, 2009 NY Slip Op 29255, N.Y.L.J. June 19, 2009, P. 27 Col. 1 (Sup. Bronx), the plaintiff had already obtained summary judgment on the issue of liability. For the trial on damages, the court faced a case of first impression – that of a plaintiff in the midst of a political asylum case. The following are excerpts from the decision.

Defendant's *in limine* motion seeks to exclude evidence concerning Plaintiff's projected future lost wages and/or medical expenses based upon the possibility that the Board of Immigration Appeals (hereinafter BIA)[FN1] will deny Plaintiff political asylum in the United States (see generally, *Maliqi v. Attorney General of the United States*, 262 Fed. Appx. 426 [3rd Cir. 2008]).
After Plaintiff applied for political asylum, his application for relief was heard by an immigration judge who denied Maliqi's prayer. The denial was reviewed by the BIA and affirmed. On appeal, the Third Circuit Court of Appeals found that the decisions of both the immigration judge and the BIA were "sufficiently vague, incomplete, and contradictory" so that the appeals court lacked a sufficient basis to properly review Maliqi's claims (see, Maliqi v. Attorney General of the United States, Id. at 428). Accordingly, the Third Circuit remanded the case to the BIA for subsequent agency action consistent with the court's opinion. The appeals court faulted the prior tribunals' opinions as inadequate regarding denial of political asylum, withholding of removal, and relief sought under the United Nations' Convention Against Torture (CAT). In regard to the reconsideration, the parties advised this Court that the BIA is scheduled to revisit the case in July, 2009. Plaintiff did not agree to Defendant's suggestion that this case be continued pending BIA reconsideration.

In response to Defendant's argument that he could not legally be employed, Plaintiff maintains that regardless of the legality of employment, any immigration reference would prejudice the jury because of the present national controversy about undocumented aliens employed here. Further, Plaintiff says allegations of immediate deportation are untrue. He states that his evidence (including expert testimony) will show that he is legally present in this country. The federal government has instituted no administrative or criminal proceedings against Maliqi, and Plaintiff maintains he voluntarily revealed his presence to the Department of Homeland Security with his asylum application. According to Plaintiff, he is entitled to asylum under both international and domestic law (see generally, Immigration and Nationality Act of 1952, §252; United Nations Convention Against Torture, supra. n. 5). Because his appeal remains pending, Plaintiff says he retains the right to remain in the United States during reconsideration of his BIA case and no negative inference arises from that fact (see generally, Yeung v. INS, 76 F3d 337 (11th Cir. 1995).

Keeping federal preemption in mind, Congress provides in Subchapter II (Admission of Aliens, Travel Control of Aliens and Citizens) of Chapter 12 (Immigration & Nationality), Title 8 (Aliens and Nationality), United States Code, that any alien (irrespective of status) may apply for political asylum as long as he is physically present in the United States or arrives in this country (see generally, 8 USC §1158[a]). Although §1158(a) does not specifically address whether asylum seekers may work while their applications are processed, Homeland Security regulations require work authorizations be issued during the period that non-frivolous asylum applications are pending. The regulations are construed to permit work authorizations during the entire time that an asylum application is pending (see, 8 CFR § 274a.12[c][8]; and generally, Alfaro-Orellana v. Ilchert, 720 F. Supp. 792 [ND Cal 1989]). The regulations alleviate economic hardship for aliens who would, without them, be unable to lawfully work pending consideration of their asylum applications (see generally, Diaz v. Immigration & Naturalization Service, 648 F. Supp. 638 [E.D. Ca. 1986]). Based upon this regulatory scheme, the Court concludes that Plaintiff legitimately was employed during the time that he suffered his accident (see generally, United States v. Bazargan, 992 F2d 844 [8th Cir. 1993]).
Turning to Plaintiff's request that Defendant be barred from arguing that evidence of Plaintiff's claimed future lost wages and/or medical expenses must be excluded upon the possibility that the BIA will deny political asylum, the Court grants Plaintiff's relief to the extent Defendant may not suggest to the jury that Plaintiff's immigration status prohibits any award of future lost wages or medical expenses. However, Plaintiff’s immigration condition is relevant in the sense that the jury may consider the economic realities that exist if Plaintiff is ultimately not permitted to remain in the United States. The jury may consider the effect on Plaintiff's wage earning ability and required medical care costs in the event he is required to return to his homeland. Likewise, the corollary — Defendant's request that Plaintiff be prohibited from introducing evidence concerning future lost wages and/or medical expenses — is denied.

Under no circumstances may Defendant assert that Plaintiff was working illegally at the time of the accident. From the discussion above concerning Department of Homeland Security regulations, the Court concludes that Plaintiff, in fact, was legally employed while his asylum application was, and is yet, in process. Nevertheless, reference to Plaintiff's immigration status is rationally related to his recovery of future wages and medical expenses and as such evidence relevant to this issue will be allowed at trial.

Plaintiff requests that the Court permit testimony from an economics expert concerning future lost wages and medical costs that Plaintiff may incur because of his injuries. Such testimony is relevant here. Expert testimony will be allowed, if otherwise qualified, subject to the Court's qualifying instruction involving costs in the event that Plaintiff loses his immigrant status proceeding. The expert testimony will assist the jury in determining an appropriate damages amount should the jury find in Plaintiff's favor. Such cannot be said of the proposed expert testimony of Plaintiff's immigration counsel. This would be speculative at best and presents issues concerning objectivity. The expert's conclusion will be of such limited value that it admission serves no purpose.

Plaintiff is not precluded from recovering either lost wages or medical expenses because of his immigration status (see, Han Soo Lee v. Riverhead Bay Motors, 57 AD3d 283 [1st Dept.2008]). Plaintiff's status as an illegal alien, in and of itself, cannot be used to rebut a claim for future lost wages (see, Hocza v. City of New York, 2009 US Dist. Lexis 3574 [SDNY 2009]). As the First Department found in Hon Soo Lee, supra., it is a misrepresentation of the law to say that Plaintiff is precluded from recovering future lost wages because of immigration status (see also, Balbuena v. IDR Realty LLC, supra.).

Working in the United States without proper documentation is neither a crime pursuant to the Immigration and Nationality Act of 1952 (8 USC § 1324a, et seq.) nor a bar to the recovery of damages in a civil action for personal injuries. To allow a jury to believe otherwise is error and will cause undue prejudice to Plaintiff (see, Lee v. Riverhead Bay Motors, supra. at 284).
Notwithstanding, the length of time during which Plaintiff may continue earning wages in the United States and the likelihood of his potential deportation are factual issues for resolution by the jury (see generally, Collins v. New York City Health & Hosps. Corp., 201 AD2d 447 [2nd Dept. 1994] [error to limit evidence of illegal alien's lost wages to potential earning in India]).

Therefore, the jury is, subject to qualifying instructions from the Court, permitted to consider the economic effect in the event that Plaintiff loses his political asylum case. For the reasons discussed above, Plaintiff is allowed to provide economics expert testimony, but may not present testimony from his immigration counsel in the form of expertise.

Federal Court in Accord

In Affordable Housing Foundation, Inc. v. Cleidson C. Silva, 469 F.3d 219 (2nd Cir. 2006), the court agreed with the NYS rulings on this issue.

…we conclude that federal immigration law does not clearly preempt New York State law allowing undocumented workers to recover lost United States earnings where, as in this case, (1) the wrong being compensated, personal injury, is not authorized by IRCA under any circumstance; (2) it was the employer rather than the worker who knowingly violated IRCA in arranging for the employment; and (3) the jury was instructed to consider the worker's removeability in deciding what, if any, lost earnings to compensate.

New York's highest court's construction of the scope of recovery allowed by its own state law plainly controls this court's reading of that law. See Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1190 (2d Cir. 1992). Nevertheless, because federal preemption of state law is itself a federal question, Balbuena's reasoning and conclusion on that issue can only inform, not bind, our resolution of this appeal. Accordingly, although we reference Balbuena's reasoning in this opinion, we do so in the context of independently deciding whether IRCA, as enacted by Congress and as interpreted by the Supreme Court in Hoffman Plastic, necessarily preempts New York law to the extent the state allows injured undocumented workers to recover compensatory damages for lost earnings at United States pay rates. We conclude that where, as in this case, (1) the wrong being compensated is personal injury, conduct not authorized by IRCA; (2) it was the employer and not the worker who violated IRCA by arranging for employment; and (3) the jury was instructed to consider the worker's removeability in assessing damages, New York law does not conflict with federal immigration law or policy in allowing an injured worker to be compensated for some measure of lost earnings at United States pay rates.

The trial court gave the following charge to the jury, which was affirmed by the court:

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Plaintiff's status as an undocumented alien should not be considered by you when you deliberate on the issue of defendant[s'] liability under Labor Law Section 240(1). However, you may conclude that plaintiff's status is relevant to the issue of damages, specifically to the issue of lost wages which the plaintiff is claiming. You might consider, for example, whether the plaintiff would have been able to obtain other employment since as a matter of law, it is illegal for an employer in the United States to employ an undocumented alien, although Of Course it does happen that certain employers violate that law. If the plaintiff did not lose any income because you conclude that he would not have been able to work, and I mean not been able to work due to his alien status, you could not award him any damages for lost wages. You might also want to consider his status in determining the length of time he would continue to earn wages in the United States and in considering the type of employment opportunities that would be available to him. The fact that an alien is deportable does not mean that deportation will actually occur, but you are allowed to take the prospect of deportation into account in your deliberations.

Finally, even if you conclude that the plaintiff would be deported at some point, you could conclude that he would lose income from employment overseas if you have a basis for making that calculation. In short, it's up to you, the jury, to decide what weight, if any, to give plaintiff's alien status just as you would any other evidence. Alien status is not relevant to items of damage other than lost earnings.

The determination by the 2nd Circuit has been followed by the District Courts. See, Dos Reis v. Vannatta Realty, 515 F. Supp.2d 441 (S.D.N.Y. 2007). However, in Ambrosi v. 1085 Park Avenue LLC, 2008 U.S. Dist. LEXIS 73930, 06-CV-8163 (BSJ) (S.D.N.Y. 2008) [a decision made prior to Coque and Amoah, supra] held that where a plaintiff knowingly files fraudulent documents to obtain employment, he/she may not be compensated for lost earnings.

The evidentiary issues raised by the plaintiff’s immigration status were recently addressed BY Judge Sweet in Hocza v. City of New York, 2009 U.S. Dist. LEXIS 3574, 06-CV-3340 (S.D.NY. 2009). Judge Sweet reviewed case law that did not permit the introduction into evidence of the plaintiff’s immigration status and then stated:

The above cases make clear that, standing alone, Hocza's immigration status does not raise a triable issue of fact as to whether Hocza will remain in the country. See Asgar-
Ali, 2004 Slip. Op. 51061 at *3 ("[U]ndocumented immigrants may sue and recover for future lost earnings at the rate of pay they were receiving in the United States so long as they are not subject to imminent deportation hearings. Defendants bear the burden of demonstrating with concrete evidence that plaintiff's deportation is imminent and not just speculative or conjectural." (quotation and alterations omitted)). Any probative value that Hocza's immigration status might have is outweighed by the obvious prejudice that would flow from its use to speculate as to Hocza's removal from the country.

Judge Sweet then held that:

The City may not discuss or inquire into Hocza's immigration status with respect to the possibility that he will be deported. However, Hocza's immigration status may be relevant to the question of the job opportunities he would have had in this country. The parties may therefore address Hocza's immigration status with respect to its impact on opportunities for employment in the United States.

The City also seeks to present evidence with regard to Hocza's unlawful presence in the United States, arguing that the question of whether he has willfully misrepresented a material fact or perpetrated a fraud by reason of his unlawful presence in the United States bears on his credibility. Evidence of a witness's character for truthfulness is governed by Fed. R. Evid. 608. The City may inquire as to specific instances of conduct that are relevant to the witness's character for veracity, but it may not introduce extrinsic evidence as to that conduct. See 4 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 608.22 (Joseph M. McLaughlin, ed., 2d ed. 2008).

Conclusion

For the above-stated reasons, the City will be precluded from presenting evidence related to Hocza's immigration status, except for the limited purpose of addressing its effect on job opportunities in the United States.

Query: if the plaintiff claimed that his injuries were permanent and prevented him from working, wouldn’t the sole basis of the admission into evidence of his immigration status be irrelevant and moot?

It is also noteworthy that the plaintiff’s immigration status is irrelevant to his claim for medical expenses. Hernandez v. GPSDC (New York) Inc., 2006 U.S. Dist. LEXIS 9172, 04 CV 127 (GWG) (S.D.N.Y. 2006).
Practice tips: In public work contracts, Article 8 of the New York Labor Law require the payment of prevailing wage and supplemental benefits to all workers. New York Labor Law § 220 states "The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined." (Labor Law § 220[3]). Article 8 also provides that "supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality, as hereinafter defined." (Id.). Finally, "[a]ny person or corporation that wilfully pays or provides after entering into such contract or a subcontract to perform on any portion of such contract, less than such stipulated wage scale or supplements as established by the fiscal officer shall be guilty of a misdemeanor . . ." (Id.).

The IRCA also does not undermine the protections that the Fair Labor Standards Act ("FLSA") affords. The FLSA requires payment of a minimum wage in the private and public sector. "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following [minimum wage] rates . . ." (29 USC § 206). The FLSA defines employee as "any individual employed by an employer." (Id. § 203[e][1]). As the NLRA does, the FLSA covers undocumented aliens because courts interpret the FLSA's protection broadly. (See Patel v Quality Inn South, 846 F.2d 700, 703 n 4 [11th Cir 1988]; see also Zavala v Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 322 [DNJ 2005] [stating that the FLSA covers undocumented workers]). In addition, the FLSA and the IRCA share the same objective because "[t]he FLSA's coverage of undocumented workers has a similar effect [of reducing illegal immigration by eliminating the economic incentive to hire undocumented aliens] in that it offsets what is perhaps the most attractive feature of such workers their willingness to work for less than the minimum wage." (Patel, 846 F.2d at 704). Importantly, employers who seek to profit from illegal workers by underpaying them "run the risk of sanctions under the IRCA." (Id.).

By assuring fair treatment of illegal workers and payment of at least a minimum wage to all workers, the NLRA and the FLSA resemble the guarantee of a "prevailing wage" that New York Labor Law Article 8 provides. (See Labor Law § 220[3]). For example, similar to the protection of workers against unfair pay in Article 8, "[t]he prime
purpose of the [FLSA] was to aid the unprotected, unorganized and lowest paid of the nation's working population . . . " (Zavala, 393 F. Supp. 2d at 320 [internal quotations omitted]). The FLSA merely mandates that, as a matter of federal law, employers must pay a minimum wage and "[n]othing in FLSA suggests that undocumented aliens cannot recover unpaid minimum wages and overtime . . . " (Patel, 846 F.2d at 706). As discussed in the next section, New York Labor Law applies to undocumented workers as well, and, just as the IRCA does not interfere with the protections of the FLSA and the NLRA, it does not prevent application of New York Labor Law in this action. Pineda v. KEL-Tech Construction, Inc., 15 Misc. 3d 176, 184-185 (Sup. NY 2007).

Thus, plaintiff should obtain copies of the contracts and union contracts for wages and benefits to determine what the prevailing wages and benefits are the job in question, and should consider retaining an economist as an expert for trial.

Discovery Issues: In Barahona v. Trustees of Columbia University in the City of New York, 11 Misc. 3d 1035 (Sup. Kings 2006), the trial court permitted discovery by the defendants of the plaintiff’s applications for green card/work permit status and citizenship status, and authorizations to obtain the INS and IRS records for the plaintiff. However, in Ochs v Trust, 12 Misc. 3d 1157(A), 2006 N.Y. Slip Op. 50938 (U), 2006 WL 1372948, aff’d, 39 A.D.3d 514, 2007 N.Y. Slip Op. 02913, 2007 WL 1017345 (2nd Dept. 2007), the trial court granted plaintiff’s motion for a protective order and vacated the defendant’s Notice to Admit claiming that plaintiff was currently a non-documented alien”, and denied the defendant’s cross-motion to: preclude the plaintiff from testifying about his lost earnings, compel the plaintiff to appear for a further deposition as to his immigration status, and to produce citizenship documentation. See also, Pineda v. KEL-Tech Construction, Inc., 15 Misc. 3d 176, 190 (Sup. NY 2007)(denying discovery of immigration status records in unpaid wages cases because discovery poses a serious risk of injury to the plaintiffs based on Federal case law); Gomez v. LI.R.R., 201 A.D.2d 455 (2nd Dept. 1994)(notice to admit re: immigration status vacated).
Practice Tip: In a case involving a claim for lost earnings for an undocumented alien, the plaintiff should question the defendants about what, if any, documents they required the plaintiff to furnish and compel production of documents that the defendants signed with respect to verification of the plaintiff’s status; the defendants face criminal sanctions for knowingly allowing an undocumented alien to work for them, and may decide discretion is the better of valor with respect to these claims. IRCA specifically addresses undocumented workers and the payment of their wages. Although this federal statute does not penalize these workers for gaining employment without proper work authorization, it does place limits on their hiring. First, "[i]n general. It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing that the alien is an unauthorized alien . . . ." (8 USC § 1324a[a][1][A]). To this end, "[t]he person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien . . . ." (Id. § 1324a[b][1][A]). The employer complies with the requirement by "examination of a document if the document reasonably appears on its face to be genuine." (Id. § 1324a[b][1][A][ii]). Specifically, an employer must examine a "social security account number card" or "other documentation evidencing authorization of employment in the United States." (Id. § 1324a[b][1][C]).

The Court can take judicial notice of what the pay scale of the minimum wage is. See, Garcia v. Freeland Realty, Inc., 63 Misc. 2d 937, 943; People v. Hall, 49 N.Y.S.2d 309, 310; People ex rel. Tipaldo v. Morehead, 156 Misc. 522, rev’d on other grounds, 270 N.Y. 233.

**INFLATION**
“The jury also had a right in coming to a proper evaluation of the loss sustained by the decedent’s next of kin to consider the constant erosion in the value of the dollar and the present and ever upward spiraling cost of living, (citations omitted), the decedent’s present position and his potential advancement in life earning capacity (citations omitted).” Lucivero v. Long Island R. Co., 22 Misc. 2d 674, 675 (Sup. Kings 1960)(emphasis added).

In awarding the plaintiff his special damages for future medical expenses and loss of earnings, the jury was at liberty as a matter of common sense to factor in the inevitable affects of inflation over a period of time. See, Spadaccini v. Dolan, 63 A.D.2d 110, 125 (1st Dept. 1978); Neddo v. State of New York, 194 Misc. 379, aff’d, 275 App. Div. 492, aff’d, 300 N.Y. 533 (1949).

In fact, the New York Court of Appeals has recently held that:

“An inflation adjustment, as such, does not provide additional compensation for a plaintiff above and beyond the damages already awarded; rather, it ensures that the passage of time will not devalue the award because of a general rise in prices for goods and services, including such items as medical care. Consequently, some adjustment for inflation, whether made by a jury and incorporated in the verdict, or made by a court after the verdict has been rendered, should occur. Otherwise, plaintiffs might receive less than the full recovery contemplated by CPLR 4111(f).” Schultz v. Harrison Radiator Div. General Motors Corp., 90 N.Y.2d 311, 319 (1997)(emphasis added), mot. to clarify remittitur den., 92 N.Y.2d 834.

“CPLR 4111(f) provides that the trier of fact is to ‘award the full amount of future damages *** without reduction to present value.’” Brown v. State, 184 A.D.2d 126, 129, mot. for lv. to app. den., 81 N.Y.2d 711 (1993). This “estimate could be made only by adding to present-day costs a reasonable amount for inflation. To fail to account for inflation is to award less than the full amount of future damages.” Id. “We conclude that the statute requires the trier of fact to account for inflation in making its award for future damages ….” 184 A.D.2d at 128-129 (emphasis added).

“A jury’s calculation of damages for loss of future earnings, based only upon the amount that decedent was earning at the time of death, defies logic and common sense. Experience tells us that if plaintiff’s decedent had continued to work for another 20 or 30
years, his wages would have increased, and that some, if not most, of this increase would have been the result of inflation.” Gambardelli v. Allstate Overhead Garage Doors, Inc., 150 Misc. 2d 395, 397 (Sup. NY, 1991).

This Court may take judicial notice of government inflation statistics as a basis for determining what portion of an award is due to inflation. Sommers v. Sommers, 203 A.D.2d 975, 876 (4th Dept. 1994). This Court may also take judicial notice of facts taken from other cases. Sam & Mary Hous. Corp. v. Jo/Sal Mkt. Corp., 100 A.D.2d 901 (2nd Dept. 1984). Judicial notice may be taken without notice and after trial. Rothstein v. City University of New York, 194 A.D.2d 533, 534 (2nd Dept. 1993). However, the court cannot take judicial notice of a rate of inflation without a proper basis, or in the absence of expert testimony, Kelly v. State of New York, 259 A.D.2d 962 (4th Dept. 1999).

The Court of Appeals recently discussed the admissibility and effects of inflation, and noted that at the trial, expert testimony was presented stating that inflation would cause medical expenses to increase at a rate of 7.75% per year, and that wages and fringe benefits would grow at the rate of 3.37% per year. Schultz v. Harrison Radiator Div. General Motors Corp., 90 N.Y.2d 311, 315 (1997). In Ursini v. Sussman, 143 Misc. 2d 727, Justice Gamerman noted that based on various economists he had heard testify, the rate of inflation ranged from 6% to 8%. See also, Gambardelli v. Allstate Overhead Garage Doors, Inc., 150 Misc. 2d 395 (Sup. NY 1991). In Peterson v. Zuercher, 152 Misc. 2d 684, 689 (1992), the Court noted that defendants’ economist testified that both historical information and forecasts of the future indicate that inflation will average 5% per year during the next 30 years.

More recent cases might offer different and more current rates. Counsel should examine such cases to determine their applicability and utility.

CONCLUSION

Economic losses can be quite significant, and may affect the amount of damages a jury might award to compensate a plaintiff for their pain and suffering. In such a case, plaintiff should seek full compensation for these items of damages.

EXPERT WITNESSES

By Sherri Sonin and Robert J. Genis

Expert witnesses can make you a lot of money and can cost you a lot of money. Your decision of whether to retain an expert, and who you retain, can be the most important decisions you make in a case.

Is an Expert Required?

Whenever you have a case where the jury’s conclusions depend upon facts or conclusions that are not common knowledge, expert testimony is necessary. Dougherty v. Milliken, 162 N.Y. 527 (1900); DeLong v. County of Erie, 60 N.Y.2d 296 (1983). See, PJI 1:90; Prince, Richardson On Evidence, 11th Ed., Sec. 7-302. The Court of Appeals has clearly held that the testimony of an expert witness may be received when such testimony would be helpful, DeLong v. County of Erie, 60 N.Y.2d 296, 307, and an
opinion may be expressed on any issue when such opinion would be helpful, People v. Cronin, 60 N.Y.2d 430, 433. See, Prince, Richardson On Evidence, 11th Ed., Sec. 7-301.


There are numerous situations that require the use of an expert witness, and the following is not intended to be a comprehensive or even representative list; it is merely illustrative.

**Malpractice**


This requirement is not limited to medical malpractice; it applies to other types of professional malpractice, such as against architects, 530 East 89 Corp. v. Unger, 43 N.Y.2d 776 (1977), and attorneys, Greene v. Payne, Wood & Littlejohn, 197 A.D.2d 664 (2nd Dept. 1993).

Expert testimony is not always necessary to establish a *prima facie* case of medical malpractice; the doctrine of *res ipsa loquitur* may apply. Kambat v. St. Francis

**Medical Opinions**

In order to prove the permanence and/or causation of certain injuries, expert testimony may be necessary. See, Ayres v. Delaware L. & W.R.R., 158 N.Y. 253, 263 (1899); Dunham v. Village of Canisteo, 303 N.Y. 498 (1952); Dufel v. Green, 84 N.Y.2d 795 (1995); Daliendo v. Johnson, 147 A.D.2d 312 (2nd Dept. 1989).

**Premises**

There are other situations that may also require expert testimony. In a case involving a claim of injuries due to inadequate security, expert testimony may be necessary to establish deficiencies in building security and reasonable additional safety measures. Iannelli v. Powers, 114 A.D.2d 157 (2nd Dept. 1986). In Trentacosti v. Materesa, 67 A.D.2d 1025 (3rd Dept. 1979), expert opinion was necessary to prove that the reason smoke backed up was defective construction of a fireplace.

Expert testimony may be necessary to establish that a stairway is architecturally unsound and dangerous. Quinlan v. Cecchini, 41 N.Y.2d 686 (1977). See, Decker v. R.H. Macy & Co., 3 A.D.2d 756 (2nd Dept. 1957)(whether existence of a change in the level between a sidewalk and a parking lot was unsafe unless the difference between the levels was made conspicuous); Pine v. Moawood, 1 A.D.2d 903 (2nd Dept. 1956)(whether a step had been constructed in a manner that conformed to safe, standard and proper practice); Ordway v. Hillirad, 266 App. Div. 1056 (4th Dept. 1943)(whether the manner of placing a rug in a hallway was contrary to proper standards); Pignatelli v. Gimbel
Custom, Practice and Standards

Expert testimony may be necessary to establish custom and usage, see, e.g., Duffy v. Owen A. Mandeville, Inc., 5 N.Y.2d 730 (1958); Miller v. L.I.R.R., 212 A.D.2d

The court errs when it excludes the testimony of plaintiff’s expert with respect to the standards established by the American National Standards Institute (ANSI) and the industry practice regarding the operation of automatic doors. Because the preferred testimony addressed only the standard of care, the fact that the expert had not seen the door was likewise immaterial. Alvarez v. First National Supermarkets, Inc., 11 A.D.3d 572, 783 N.Y.S.2d 62 (2nd Dept. 2004).

It may be \textit{reversible error} to preclude an expert from testifying as to the rules and standards governing the construction of ramps and stairs in the City of New York. \textit{Portilla v. Rodriguez}, 179 A.D.2d 631 (2\textsuperscript{nd} Dept 1992).

It may be \textit{reversible error} to preclude an expert from testifying as to the accepted practices among municipalities. \textit{Ceravole v. Giglio}, 152 A.D.2d 648, 649 (2\textsuperscript{nd} Dept. 1989).

Similarly, error is committed where the court precludes the plaintiff’s expert, a civil engineer with a master’s degree in transportation engineering, from testifying as to “human factors” as they relate to the alleged dangerous condition represented by the allegedly oversized riser at the base of the partition doorway, and fails to limit the plaintiff from laying the foundation for the proposed expert testimony. The court also erred in precluding the expert from testifying to the New York City Building Code requirements governing riser heights in support of his opinion that the height of the riser was dangerous. \textit{Wichy v. City of New York}, 304 A.D.2d 755, 758 N.Y.S.2d 385 (2\textsuperscript{nd} Dept. 2003).

An engineer specializing in workplace safety compliance, who has training in mechanical design and inspection, and personally inspected the baler at issue, was qualified to render an opinion on the safety of the baler as designed. \textit{Blandin v. marathon Equipment Co.}, 9 A.D.3d 574, 780 N.Y.S.2d 190 (3\textsuperscript{rd} Dept. 2004).

There must be adequate factual foundation to support the expert, or preclusion is warranted. \textit{Moss v. City of New York}, 5 A.D.3d 312, 774 N.Y.S.2d 139 (1\textsuperscript{st} Dept. 2004)(meteorologist). Where an expert gives invalid and erroneous expert opinion, the trial judge may strike the testimony, and where the jury has rendered a verdict on such
testimony, the court may set the verdict aside. *Ficic v. State Farm Fire & Casualty Co.*, 9 Misc. 3d 793, 804 N.Y.S.2d 541 (Sup. Richmond 2005).

**Internal Guidelines**


**Authoritative Texts & Scientific Studies as Direct Evidence**

In *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 545 (2002), the Court of Appeals rejected the use of clinical practice guidelines to prove an accepted practice where the authoring body explicitly stated the guidelines were “not rules” and the expert failed to set forth a factual basis for her reliance on them.

“Although opinion in a publication which an expert deems authoritative may be used to impeach an expert on cross-examination (citations omitted), the introduction of such testimony on direct examination constitutes impermissible hearsay (citations omitted). In any event, the expert testified on cross examination that he did not consider any books or articles in the field of infectious diseases ‘authoritative’.” *Lipschitz v. Stein*, 10 A.D.3d 634, 635, 781 N.Y.S.2d 773, 776 (2nd Dept. 2004). Moreover, further error was committed because the defense expert was improperly permitted to refer to a study that was not admitted into evidence, and its reliability was not established.
In Hinlicky v. Dreyfuss, 6 N.Y.3d 636 (2006), the Court of Appeals affirmed the use of an algorithm into evidence as demonstrative evidence. The Court noted that scientific works are generally excluded as hearsay when offered for their truth, and that in the instant case, the defendant was permitted to testify without objection that the process he used was consistent with a set of “clinical guidelines” recommended by the AHA and the ACC, that the “flow diagram” had been published prior to the surgery at issue and that he had incorporated the process into his practice. The algorithm was used as a demonstrative aid for the jury in understanding the process followed. Significantly, the plaintiff never requested a limiting instruction about the use of this demonstrative evidence. A party may not rely on said evidence as “stand alone proof” of a standard of care. See, Spensieri v. Lasky, 94 N.Y.2d 231, 239 (1999).

While there is a professional reliability exception to the hearsay rule, that rule merely permits an expert to testify based on hearsay, and does not make the hearsay independently admissible. Such material is not directly admissible in evidence for the truth of the matter asserted. People v. Goldstein, 6 N.Y.3d 119, 126-127 (2005). Expert witnesses need to rely on facts in the record or personally known to them, or may base their opinions upon information provided by other witnesses who were subject to full cross-examination. Where an expert’s opinion is based solely on an article and the opinion of a doctor not available for cross-examination, an insufficient basis exists for the witness. Missan v. Dillon, 12 Misc. 3d 1153(A), N.Y.L.J. April 26, 2006 (Sup. NY).

Once admitted for demonstrative purposes, the courts should circumscribe their use substantively by medical experts. If a party is concerned that the purpose for admitting the evidence is changing from demonstrative to substantive evidence, they
should promptly object and request a limiting instruction. While because the plaintiff’s attorney failed to make a timely objection, the Court noted that it has acknowledged the need for limits on admitting the basis of an expert’s opinion to avoid providing a “conduit for hearsay”. Hinlicky v. Dreyfuss, 6 N.Y.3d 636 (2006).

**Economist**


**Is an Expert Permitted?**

Admissibility of the expert testimony is primarily a question left to the discretion of the trial judge. Selkowitz v. County of Nassau, 45 N.Y.2d 97 (1978); DeLong v. County of Erie, supra. See, PJI 1:90; Prince, Richardson On Evidence, 11th Ed., Sec. 7-301. “The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror”. DeLong v. County of Erie, 60 N.Y.2d at 307. “It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness”. People v. Cronin, 60 N.Y.2d 430, 433 (1983).
Is an Expert Needed?

As a trial attorney you have to carefully look at your case and decide if you need an expert. Depending on the case and the venue, you may decide that you do. If the facts are in your favor and common sense says you should win, less may be more. Keep in mind that if the cynical and jaded jury thinks you are trying to fluff up the case by putting some hired gun on the stand who is trying to sell them a bill of goods based upon junk science, you have lost more than you might have gained.

For example, where your client is robbed at gunpoint, you may not need to call a psychiatrist, psychologist or social worker on the stand to prove that your client suffered emotional trauma. Allinger v. Utica, 226 A.D.2d 1118 (4th Dept. 1996). Similarly, an expert on liability may not be necessary either. Kambat v. St. Francis Hosp., 89 N.Y.2d 489 (1997). In a typical trip and fall case caused by an optical illusion/confusion, expert testimony is not required. Chafoulias v. 240 E. 55th Street Tenants Corp., 141 A.D.2d 207 (1st Dept. 1988). In a ceiling collapse case, expert testimony may not be necessary. Andersen v. Park Center Associates, 250 A.D.2d 473 (1st Dept. 1998)(expert testimony is not necessary to explain that a brownish discoloration on the ceiling is attributable to a water leak). In a case involving the speed of a motor vehicle, you may not need an expert witness. Shpritzman v. Strong, 248 A.D.2d 524, 525 (2nd Dept. 1998)(“A lay witness is ordinarily permitted to testify as to the estimated speed of an automobile based on the prevalence of automobiles in our society and the frequency with which most people view them at various speeds”).

If, however, you cannot make out a case without an expert, or you feel that without an expert the jury will not understand how the defendant was negligent and how
that negligence was a substantial factor in causing the plaintiff’s injuries, then you need an expert.

Sometimes your expert is needed so that the Appellate Division will sustain your verdict.

Who can be your expert?


How do you select an expert?

Neutral Witnesses

While many lawyers prefer to use paid experts with courtroom experience, counsel should consider whether there are any “neutral” municipal experts available. In an automobile case, if the Accident Investigation Squad (AIS) from the NYPD responded to the accident, you may have a neutral and independent accident reconstruction expert who was at the scene immediately after it happened, and is in the best position to evaluate all of the evidence, and is impervious to a collateral attack. Hansel v. Lamb, 257 A.D.2d 795 (3rd Dept. 1999)(State Trooper who investigated the accident was permitted to testify
as an expert witness despite the failure of the defendant to serve notice pursuant to CPLR 3101[d]).

In a case involving a fire, the Fire Marshall, Chief or Cause and Origin Investigator may be a terrific witness for the price of $15.00 subpoena fee. Similarly, in an elevator case involving a serious injury or death, the Department of Building inspector may have examined the instrumentalities and know what defect caused the accident, and about all the prior violations on it!

**Defendant as Plaintiff’s Expert**

Another underutilized source of expert witnesses is from the defendant itself. During the course of depositions, counsel should ask questions about the witness’s background to qualify the witness as an expert. The witness can establish what the industry customs, practices and standards are, what the defendant’s internal rules require, and whether the defendant departed from those standards.

The plaintiff may call the defendant as a witness during the plaintiff’s direct case and as a presumed hostile witness, the witness may be asked leading questions and cross-examined. This is commonly done in medical malpractice cases. *Knutson v. Sand*, 282 A.D.2d 42, 45 (2nd Dept. 2001)(defendant doctor may be required to give testimony as to both opinion and fact); *Vega v. LaPaloria*, 281 A.D.2d 623, 624 (2nd Dept. 2001)(defendant doctor may be fully examined as to alleged departures from accepted medical practices); *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 29 (1964); *Forman v. Azzara*, 23 A.D.2d 793, aff’d, 16 N.Y.2d 955 (1965); *Braun v. Ahmed*, 127 A.D.2d 418 (2nd Dept. 1987); *Segreti v. Putnam Community Hosp.*, 88 A.D.2d 590, 592 (2nd Dept. 1982); *Giventer v. Rementeria*, 181 Misc. 2d 582 (Sup. Richmond 1999).
The most opportune time to question the defendant to set up your questions for trial are at the deposition. The court made this clear in Orner v. Mount Sinai Hosp., 305 A.D.2d 307, 309-310 (1st Dept. 2003).

Contrary to defendants' contention, the substantive questions relating to the expert opinions of the witnesses and the status of generally accepted community standards of medical practice were appropriate (see McDermott v Manhattan Eye, Ear & Throat Hosp., 15 NY2d 20 [1964]; Johnson v New York City Health & Hosps. Corp., 49 AD2d 234, 236 [1975]). Accordingly, it was not plaintiff's questions, but rather the defense counsel's instructions to the witnesses not to respond and his otherwise inappropriate and excessive interference, which were improper. Indeed, “the evidentiary scope of an examination before trial is at least as broad as that applicable at the trial itself” (Johnson, 49 AD2d at 237). Consequently, when faced with objections at a deposition, “the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR 3115” (White v Martins, 100 AD2d 805, 805 [1984]).

Furthermore, general background questions, such as date of birth, marital status, board certification, and experience testifying as an expert in court, are routinely permitted at trial, and defense counsel improperly, and, it appears at times disingenuously, objected, interrupted and occasionally directed his witnesses not to answer these and other questions. That some of plaintiff's counsel's questions were inartful or otherwise imperfect did not give defense counsel license to react impatiently nor interfere as he did. A complete reading of the depositions reveals that defense counsel's attitude toward plaintiff's counsel was sardonic and unprofessional which, in turn, fostered an uncooperative attitude from defendants' witnesses. Indeed, “[d]efendants' counsel, in ordering his clients not to respond during depositions to questioning in areas which counsel unilaterally deemed to be irrelevant, and in continually objecting to matters other than form ... effectively thwarted plaintiffs' efforts to depose defendants” (Levine v Goldstein, 173 AD2d 346 [1991]). We take this opportunity to express our regret that we are placed in the position of having to refer to these and other such fundamental principles of procedure and professional civility to an experienced defense lawyer.

However, where the plaintiff calls the defendant as a witness during plaintiff’s direct case, plaintiff may still impeach the defendant with prior inconsistent statements made at his EBT and at other trials, and it is not improper to refer to prior malpractice actions involving the defendant. Skerencak v. Fischman, 214 A.D.2d 1020 (4th Dept. 1995). See, CPLR 3117; 4514; 4517. It is harmless error to impeach the defendant with a prior criminal conviction and by attacking his credentials when he is called by the plaintiff during plaintiff’s direct case where defense counsel stated at the outset that he intended to call the defendant as a witness, and at that time plaintiff could have attacked his credibility on cross-examination. Id.

See, Maraziti v. Weber, 185 Misc. 2d 624 (Sup. Dutchess 2000)((OPMC finding against defendant physician); People v. Baxter, 299 A.D.2d 845 (4th Dept. 2002)(disbarred attorney). Cf., Cramer v. Benedictine Hosp, 190 Misc. 2d 191 (Sup. Ulster 2002). In People v. Yaldizian, 5 Misc. 3d 739 (Sup. Queens 2004), the trial court held that a doctor may be cross-examined about his prior suspension from the practice of medicine.

Using the defendant as your expert can be done in virtually any case. Lippel v. City of New York, 281 A.D.2d 327 (1st Dept. 2001); Zambanini v. Otis Elevator Co., 242 A.D.2d 453 (1st Dept. 1997); Glasburgh v. Port Authority of N.Y. & N.J., 213 A.D.2d 196 (1st Dept. 1995); Lingener v. State Farm Mut., 195 A.D.2d 838 (3rd Dept. 1993). You do not have to serve expert disclosure with respect to calling the defendant or its employee as an expert witness. Lippel v. City of New York, supra. An additional benefit to calling the defendant as a witness during the plaintiff’s direct case is that where a party makes a statement during testimony at a trial which is adverse to his or her
contention and it is uncontradicted by other witnesses’ testimony, the statement constitutes a judicial admission. **Knutson v. Sand**, 282 A.D.2d 42, 48 (2nd Dept. 2001).

Where you are unable to get a municipal expert or use the defendant or its expert, you may then have to retain an expert. A benefit to retaining an expert is that they are more likely to be available for trial than a witness that has to interrupt their lives in exchange for a $15.00 subpoena fee.

**Examining Doctors**

When a medical expert witness is necessary, the question sometimes arises whether to call a treating doctor, if available, or an examining physician as an expert witness. Sometimes there is no treating doctor, or the treating doctor may refuse to come to court, or may no longer be available. In such a circumstance, it is prudent to retain an examining physician. Because counsel does not always know in advance when this scenario may occur, if it appears likely that you will not be able to produce a treating doctor, hire an examining physician.

**Adverse Examining Doctors**


A court may commit reversible error where it does not permit you to do so.

“It was an improvident exercise of discretion for the Supreme Court to deny the plaintiff’s application for a brief continuance of the trial in order to compel the testimony of the defendant's examining doctor as a fact witness, where the plaintiff had properly subpoenaed the witness and the witness failed to appear as directed. It is well settled that the substance of a report prepared by a physician employed by a defendant to examine a plaintiff, which was furnished to both parties, can be elicited by the plaintiff as part of his
or her direct case through the testimony of the physician (see *Gilly v. City of New York*, 69 N.Y.2d 509, 510-512; *Beivilacqua v. Gilbert*, 143 A.D.2d 213, 214). The testimony of the defendant's doctor was material, and there is no indication in the record that the request for a continuance was made for the purpose of delay, or that the need for a continuance resulted from the plaintiff's failure to exercise due diligence. Accordingly, the request was improperly denied (see *Lila v. Bata*, 33 AD3d 875; *Zysk v. Bley*, 24 AD3d 757, 758; *Hodges v. City of New York*, 22 AD3d 525, 526-527).” *Hughes v. Webb*, ___ A.D.3d ____, 2007 WL 1560126, 2007 NY Slip. Op. 04597 (2nd Dept. 2007).

**Expert Cannot be Cross-Examined on CPLR 3101(d) disclosure**


**No Expert disclosure for Treating Doctor**


**Limits on Defense Experts**

Where a defendant provides its examining doctor’s narrative report, the expert is limited by the contents of the report and cannot give contradictory testimony at trial.
Dalrymple v. Koka, 2 A.D.3d 769 (2nd Dept. 2003); Beeley v. Spencer, 309 A.D.2d 1303 (4th Dept. 2003). In Matszewska v. Golubeya, 293 A.D.2d 580, 581 (2nd Dept. 2002), the Supreme Court properly precluded the testimony of the defendant’s medical expert. In his report, which was provided to the plaintiff in accordance with 22 NYCRR 202.17(c), the defendant's expert concluded that the plaintiff's pre-existing arthritis was not related to and would not have any effect on her recovery. At trial approximately four months later, the defendant claimed that there was an error in the report and sought to elicit testimony from the expert that the plaintiff's pre-existing arthritis would affect her recovery. Because this contradictory testimony surprised and would have prejudiced the plaintiff, and the defendant failed to demonstrate good cause for its admission, the Supreme Court properly excluded the testimony. See, Mazurek v. Home Depot U.S.A., Inc., 303 A.D.2d 960 (4th Dept. 2003); Flaherty v. American Turners New York, Inc., 291 A.D.2d 256 (1st Dept. 2002).

Where the radiological films in issue are not in evidence, a defendant’s expert radiologist is properly precluded from testifying as to his interpretation of the X-ray films and his diagnosis of the plaintiff, as he never physically examined the plaintiff and therefore his diagnosis would have been based primarily on the films not admitted into evidence. Lee v. Huang, 291 A.D.2d 549 (2nd Dept. 2002).

A defendant in a medical malpractice case cannot opine that the plaintiff’s arthritis developed as a result of recurrent traumatic injuries, like Jerry Rice, Picabo Street, Mickey Mantle, Joe Namath, Kirk Gibson and Bo Jackson, and not his malpractice. “Clearly, there was no acceptable basis for the admission of Dr. Stamer’s opinion that numerous famous athletes, none of whom he treated, developed degenerative

If an expert relies on out-of-court material, there must be evidence establishing the reliability of the material. Thus, a defendant’s expert may not opine as to the statistics of asymptomatic herniated discs without revealing the basis of this testimony and not mere speculation. Velez v. Svehla, 229 A.D.2d 528 (2nd Dept. 1996).

**What are the Evidentiary Foundations for the Expert’s Testimony?**

The expert’s opinion must be based on facts in the record or personally known to the witness. Cassano v. Hagstrom, 5 N.Y.2d 643, 646 (1959); Tarlowe v. Metropolitan Ski Slopes, 28 N.Y.2d 410, 414 (1971). The Court of Appeals has also held that an expert may base their opinion on material that is not in evidence, if it is of a kind accepted in the profession as reliable in forming a professional opinion. People v. Sugden, 35 N.Y.2d 453, 459-450 (1974). See, e.g., Comizio v. Hale, 165 A.D.2d 823, 824 (2nd Dept. 1990); Toth v. Community Hospital at Glen Cove, 22 N.Y.2d 255, 259, 261-264 (1968).

Thus, a plaintiff may properly testify as to his estimate of his running speed at the time of his accident based on his experience on a calibrated treadmill, and said testimony lays a sufficient foundation for his accident reconstruction expert to form an opinion. Soto v. N.Y.C.T.A., 6 n.y.3D 891 (2006).

Pursuant to CPLR 4515, the question does not need to posed as a hypothetical, and the witness does not need to testify as to the basis of his opinions until cross-examination. The witness, may however, do so. Buck Constr. Corp. v. 200 Genesee St., 109 A.D.2d 1056 (4th Dept. 1985).

“All an expert need not give technical reasons or bases for his opinion on direct examination. The matter may be left for development on cross-examination. If the facts
in the hypothetical question are fairly inferable from the evidence, the expert may state his opinion without further foundation. The extent to which he elaborates or fails to elaborate on the technical basis supporting the opinion affects only the weight of the expert testimony.” Tarlowe v. Metropolitan Ski Slopes, Inc., 28 N.Y.2d 410, 414. See, CPLR 4515.


In Owens v. City of Syracuse, 258 A.D.2d 898 (4th Dept. 1999), plaintiff’s expert was properly permitted to testify that that the defendant’s failure to provide a center line along the entire length of a road violated a section of the New York Manual of Uniform Traffic Control Devices, constituted a departure from good and accepted practices and was a proximate cause of plaintiff’s injuries. His testimony was based upon a visit to the accident site and information he gathered from reviewing the EBT transcripts and documents and photographs relating to the accident, and concluded that the 85th percentile speed of vehicles traveling on the street exceeded 25 miles per hour.

**Credentials**

Plaintiff must be permitted to establish the expert witness’s credentials to lay the foundation for his/her testimony, even if the adverse party is willing to concede that the witness is an expert. Werner v. Sun Oil Co., 65 N.Y.2d 839 (1985); Counihan v. J.H. Werbelovsky’s Sons, Inc., 5 A.D.2d 80 (1st Dept. 1957).

**Magic Words**
The expression of the expert’s opinion does not need to use any “magic words”. The Court of Appeals has held that the opinion as a whole, need reflect only a degree of confidence sufficient to satisfy accepted standards of reliability. Matott v. Ward, 48 N.Y.2d 455 (1979).

The Court of Appeals pointed out that there is no “single verbal straightjacket alone” of a term or expression that must be used, but rather, “by any formulation from which it can be said that the witness’ ‘whole opinion’ reflects an acceptable level of certainty”. Id. at 460.

“In sum, we conclude that, considering the totality of his testimony rather than focusing narrowly on single answers, Dr. Millard’s opinion, though not solicited or expressed in terms of the particular combination of magical words represented by the phrase ‘reasonable degree of medical certainty’, conveyed equivalent assurance that it was not based on either supposition or speculation.” Id. at 462-463. What is necessary is a “substantive indication of reasonable reliability”. Id. at 463.

The Court reviewed various cases where terms such as “probability”, “likely”, “could be”, “possibly was”, “probably was”, “possible cause”, “could have”, “could be” and “it seems to be” were all deemed sufficient and acceptable. Id. at 461-462. After reviewing the case law, the Court “made clear that it is not a dictionary dilettantism that is to govern, but whether it is ‘reasonably apparent’ that ‘the doctor intends to signify a probability supported by some rational basis’. (See, also, Matter of Ernest v. Boggs Lake Estates, 12 N.Y.2d 414, 416 [‘it may be assumed with all reasonable likelihood’ that the accident trauma ‘could possibly have influenced adversely’]….” Id. at 461-462.

In following Matott v. Ward, the courts have echoed its sentiments. In In re Cyr v. Bero Construction Corp., 75 A.D.2d 914 (3rd Dept. 1980), the court squarely addressed the question of with what degree of certainty must the opinion of an expert be expressed for it to have probative force. The court also determined that the opinion did not have to
be expressed in terms of “reasonable medical certainty”, but the opinion merely had to make it “reasonably apparent that the doctor intended to signify a probability and that the opinion was supported by a rational basis.” *Id.* at 915.

Thus, where the expert’s testimony conveyed an assurance that it was not based on supposition or speculation, even though not expressed in terms such as “reasonable degree of medical certainty”, it is sufficient. See, *John v. City of New York*, 235 A.D.2d 210 (1st Dept. 1997). All that is required is that reasonable people can conclude that it was more probable than not that the event was a substantial factor in causing the condition. See, *Elkins v. Ferencz*, 93 N.Y.2d 938 (1999), rev’d, 253 A.D.2d 601, 605 (1st Dept 1998).

This rule was recently reiterated in *Knutson v. Sand*, 282 A.D.2d 42 (2nd Dept. 2001). In the context of a dental malpractice case, the court held that “[S]o long as the inference of departure from the requisite standard of care is fairly supported by the evidence and consistent with a party’s argument or theory of the case, it may be drawn. 282 A.D.2d at 45. The court pointed out that CPLR 4515 permits an expert to state what he or she knows in natural or conventional language and thought. “A court’s duty, therefore, is not to reject opinion evidence because non-lawyer witnesses answer questions that are not hypothetical or fail to use the words and phrases preferred by lawyers and judges, but rather to determine whether the whole record exhibits substantial evidence that there was a departure from the requisite standard of care. 282 A.D.2d at 46.

An expert may testify to the ultimate issue in the case. See, *e.g.*, *Dufel v. Green*, 84 N.Y.2d 795 (1995), where the Court held in an automobile case involving the “No-
fault Threshold”, the plaintiff’s doctor is permitted to answer questions that track the statutory language and offer an opinion on these questions.

**Cross-Examination**

Articles, treatises, texts, books or pamphlets are hearsay and may be used to impeach the credibility of a witness on cross-examination where the witness refers to the document as authority for his/her own opinions, *Spiegel v. Levy*, 201 A.D.2d 378 (1st Dept. 1994), *lv. den.*, 83 N.Y.2d 758 (1994), or where the witness recognizes the document as authoritative even if he/she does not rely on it in forming his/her opinions, *Benson v. Behrman*, 248 A.D.2d 153 (1st Dept. 1998). The practice of cross-examination of a witness with such an authoritative treatise is not limited to those cases in which the expert admits that he/she has read the book or article concerning which they are being questioned. *Mark v. Colgate University*, 53 A.D.2d 884, 886 (2nd Dept. 1976). The designation of “authoritative” includes a witness’s concession that the article is “well respected”, “very competent”, “it is of value”, “… some of what he has written can be considered authoritative.” *Dumet v. Schanzer*, N.Y.L.J. January 16, 2001 (Sup. NY); *Spiegel v. Levy*, *supra*. However, where a defendant doctor gives testimony at a deposition, and subsequently dies, and his counsel reads his EBT transcript into evidence, plaintiff may not attempt to posthumously impeach the deceased witness with portions of a book written by the decedent. *Cioffi v. Lenox Hill Hosp.*, 287 A.D.2d 335, 731 N.Y.S.2d 169 (1st Dept. 2001).

An expert witness may be compelled to provide the names of the books he/she considers authoritative. *Bryant v. Bui*, 265 A.D.2d 848 (4th Dept. 1999).
In *Lenzini v. Kessler*, 48 A.D.3d 220 (1st Dept. 2008), the court reminded counsel that expert witnesses cannot use a treatise as a sword and shield.

Although a scientific text is inadmissible as hearsay when offered for its truth or to establish a standard of care, it may be introduced to cross-examine an expert witness where it has been demonstrated that the work is the type of material commonly relied upon in the profession and has been deemed authoritative by such expert (*Hinlicky v. Dreyfuss*, 6 NY3d 636, 848 N.E.2d 1285, 815 N.Y.S.2d 908 [2006]; cf. *Matter of Yazalin P.*, 256 AD2d 55, 680 N.Y.S.2d 530 [1998]). In the subject medical malpractice trial, the court did not improvidently exercise its discretion in authorizing the use of certain material for impeachment purposes as against plaintiffs' expert witnesses. Plaintiffs' expert in radiology was, in that regard, questioned about a medical text he had brought to court, made notes thereon, and clearly deemed sufficiently authoritative notwithstanding that he may not have accepted everything contained in it. As for plaintiffs' expert in gynecology, he expressly recognized the reliability of the material about which he was cross-examined. Indeed, *a physician may "not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative" where he has already relied upon the text and testified that "he agreed with much of it"* (*Spiegel v. Levy*, 201 AD2d 378, 379, 607 N.Y.S.2d 344 [1994], lv denied 83 NY2d 758, 639 N.E.2d 416, 615 N.Y.S.2d 875 [1994]). Moreover, the court delivered the appropriate limiting instructions.

Where the defendant retains a number of medical experts and they prepare reports which are served on plaintiff’s counsel, but the defendant does not produce all of it’s experts as witnesses at trial, it is fair to ask the testifying witness to review a report of a non-appearing witness and to comment on it. *Calandra v. Martino*, N.Y.L.J. January 24, 2001, P. 30 Col. 4 (Civ. Richmond).

Plaintiff’s counsel may cross-examine a defendant’s expert witness regarding how much income he derived from testifying and performing evaluations on behalf of insurance companies and/or law firms that perform insurance defense work. *Young v. Knickerbocker Arena*, 281 A.D.2d 761, 763-764 (3rd Dept. 2001).

**Frye or Daubert? New York is a “Fryebert” State**


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7 Under *Daubert*, the court may look to a variety of factors to determine whether the expert opinion is admissible, including: (1) whether the theory of technique is subjected to peer review and publication; (2) the known potential rate of error; (3) whether the theory can and has been tested; and (4) whether there is "general acceptance" of the opinion or technique in the relevant scientific community.
However, they are instructive to the extent that they address the reliability of an expert's methodology.


**Necessity to Object**


**Basis of Objection**

The basis of the attack on the proposed testimony must be based on the methodology of the expert.  *Clemente v. Blumenberg*, 183 Misc. 923, 705 N.Y.S.2d 792 (Sup. Richmond 1999).  Unless the proffered expert has virtually no credentials, counsel
will probably be unsuccessful in seeking to exclude the witness on the basis of lack of expertise alone. *Id.* Where the court excludes the testimony on the basis of relevance only, the court may commit reversible error. *Valentine v. Grossman*, 283 A.D.2d 571, 572-573, 724 N.Y.S.2d 504, 505-506 (2nd Dept. 2001). Preclusion on methodology will be sustained. *Bonilla v. N.Y.C.T.A.*, 295 A.D.2d 297, 742 N.Y.S.2d 903 (2nd Dept. 2002).

In *Alston v. Sunharbor Manor, LLC*, 48 A.D.3d 600 (2nd Dept. 2008), the court rejected the defendant’s Frye challenge and cogently stated the standard and purpose of a Frye hearing.

The defendants' further contention that expert testimony regarding the diagnosis of the decedent's injuries as thermal burns should have been stricken pursuant to *Frye v United States (293 F 1013)* is likewise without merit. The main purpose of a Frye inquiry is to determine whether the scientific deduction in a particular case has been sufficiently established to have gained general acceptance in a particular field, not, as the defendants would have it used here, to verify the soundness of a scientific conclusion (see *Parker v Mobil Oil Corp.*, 7 NY3d 434, 857 N.E.2d 1114, 824 N.Y.S.2d 584; *Nonnon v City of New York*, 32 AD3d 91, 819 N.Y.S.2d 705, affd 9 NY3d 825, 874 N.E.2d 720, 842 N.Y.S.2d 756; *Zito v Zabarsky*, 28 AD3d 42, 44, 812 N.Y.S.2d 535).


The Crown defendants moved to preclude the testimony of the plaintiffs' expert, or alternatively, for a Frye hearing (see *Frye v United States, 293 F 1013*), and also moved for summary judgment dismissing the complaint insofar as asserted against them. The Supreme Court did not improvidently exercise its discretion in determining that the plaintiffs' expert witness was qualified to testify (see *Pignataro v Galarzia*, 303 AD2d 667, 757 N.Y.S.2d 76). Moreover, under the facts of this case, the plaintiffs' expert's conclusions as to the lack of a compartment door and the defective design of the braking system were not based on novel theories and did not warrant a preliminary Frye-type hearing (see *Parker v Crown Equip. Corp.*, 39 AD3d 347, 835 N.Y.S.2d 46; see also *Frye v United States, 293 F 1013*).

In *Diejoia v. Gacioch*, 42 A.D3d 977 (4th Dept. 2007),
We conclude that the court erred in agreeing with defendants following a Frye hearing that plaintiff's expert vascular surgeon (hereafter, expert surgeon) and plaintiff's treating vascular surgeon (hereafter, treating surgeon) were not permitted to testify on the issue of causation. Plaintiff's expert surgeon testified that the thrombosis that originated at the site of the catheterization in the groin occluded the entire right and left femoral arteries and also grew to occlude the distal aorta and the sacral spinal vessels, leaving only one vessel to support the whole spine and provoking the spinal stroke and ultimate paralysis. He further testified that it was well documented that a thrombosis of the distal aorta involving both right and left iliac vessels can result in spinal paralysis and that this was not a novel theory, and indeed had been described in the medical literature for 20 to 30 years. Plaintiff's expert surgeon conceded, however, that the medical literature that he reviewed does not specifically identify cases in which cardiac catheterization in the groin was the cause of the aortic thrombosis that led to an acute spinal cord infarct and paralysis. The court's ruling following the Frye hearing with respect to plaintiff's expert surgeon was based almost exclusively on the fact that he could not produce any medical literature indicating that cardiac catheterization has ever caused thrombosis and, subsequently, paralysis. In determining that plaintiff's expert surgeon would not be permitted to testify concerning causation, the court thus determined that his theory of causation was novel and not yet accepted in the medical field. Similarly, when the court required plaintiff's treating surgeon to explain his theory of causation during the Frye hearing, he also was unable to produce any medical literature that specifically supported his theory that cardiac catheterization could lead to delayed paralysis. At the close of plaintiff's case, the court granted defendants' motions to dismiss the complaint based on plaintiff's failure to present competent medical evidence with respect to causation.

We conclude that the court applied the Frye test too restrictively in refusing to allow plaintiff's expert surgeon and treating surgeon to testify with respect to the issue of causation. Plaintiff's expert surgeon testified that thrombotic events are well known to be associated with angiography and the cardiac catheterization process and that thrombosis of the distal aorta and both femoral arteries are known to have led to a spinal stroke. Similarly, plaintiff's treating surgeon testified concerning the science behind the formation of blood clots as the result of catheterization and related it to the condition of plaintiff, whose aorta was "totally blocked" with clot and thrombus. Moreover, plaintiff's treating surgeon testified with respect to the mechanism of paralysis, explaining that a growing thrombus can keep blood flow from reaching the back wall of the spine, resulting in stroke and paralysis. He further testified that he has observed actual cases of delayed paralysis and that paralysis can occur up to 27 days after surgery.

As set forth in Frye v United States (293 F 1013), "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." We conclude on the record before us that the theory of causation set forth by plaintiff's expert surgeon and treating surgeon is not premised on novel science but, rather, is premised on "generally accepted scientific principles and existing data" (Zito v...
"Frye is not concerned with the reliability of a certain expert's conclusions, but instead with whether the expert's deductions are based on principles that are sufficiently established to have gained general acceptance as reliable." (Nonnon v City of New York, 32 AD3d 91, 103, 819 N.Y.S.2d 705, aff'd 9 NY3d 825, 2007 N.Y. LEXIS 1615 [June 27, 2007]).

Here, while plaintiff's expert surgeon and treating surgeon concededly did not produce medical literature that documented a prior case study in which cardiac catheterization through the groin was the cause of the aortic thrombosis that led to an acute spinal cord infarct and paralysis, they each laid a foundation for their theories on causation with generally accepted medical principles of vascular medicine and blood supply that are not novel, nor are they even challenged herein. "[T]he underlying support for the theory of causation need not consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion[s] reached by the plaintiff's expert[s]." (Marsh v Smyth, 12 AD3d 307, 312-313, 785 N.Y.S.2d 440). "The fact that there was no textual authority directly on point" with respect to the onset of the events that resulted in plaintiff's paralysis "is relevant only to the weight to be given the testimony, but does not preclude its admissibility." (Zito, 28 AD3d at 46). Moreover, "[u]nhlike a newly developed test or process, a theory about the mechanism of an injury will not prompt the profession generally to weigh in with its own studies or publications on] subject" (Marsh, 12 AD3d at 312). Because the conclusions of plaintiff's expert surgeon and treating surgeon were based on accepted scientific principles involving medicine and the vascular system and were not "based solely upon the expert[s'] own unsupported beliefs" (id.), the court erred in determining that their testimony with respect to causation was inadmissible based solely upon the fact that there was no medical literature linking a cardiac catheterization in the groin to an aortic thrombosis with a delayed spinal infarct and paralysis.

Finally, we conclude that the court properly refused to admit the proffered testimony of a third expert for plaintiff on the issue of negligence because that expert had not practiced medicine since 1987, approximately 16 years before plaintiff's surgery, and her opinion was based on her conversation with plaintiff's treating surgeon (see generally Matott v Ward, 48 N.Y.2d 455, 459-462, 399 N.E.2d 532, 423 N.Y.S.2d 645).

Timing of Objection

With respect to the timing of when an application for a hearing is to be made, the courts have made clear that "there is an evolving preference for early presentation because scientific issues may involve a time-consuming analysis of an expert’s methodology and the pertinent literature (citations omitted)." Drago v. Tishman Construction Corp. of New York, 4 Misc. 3d 354, 362, 777 N.Y.S.2d 889, 894-895 (Sup,

**Burden of Movant**

“The movant should support its motion in limine by reference to some scientific material of evidentiary value, for a court cannot undertake an independent review of scientific literature (citation omitted). Drago, supra, 4 Misc. 3d at 360, 777 N.Y.S.2d at 894; Guscott, supra. In Guscott, supra, the court considered DSM-4.

If based on a review of the movant’s materials and/or upon consideration of the plaintiff’s materials, the court may decide that no hearing is necessary. When a party requests a Frye/Daubert hearing, “The Court’s job is not to decide who is right and who is wrong, but rather to decide whether or not there is sufficient scientific support for the expert’s theory. An oversimplification of this has been described as counting scientific votes, not to determine who wins or loses, but only to that there is a substantial portion of the scientific community that supports the causal relationship between environmental tobacco smoke, sinusitis and asthma (citations omitted).” Gallegos v. Elite Model Management Corp., 195 Misc. 2d 223, 225, 758 N.Y.S.2d 777, 778 (Sup. NY 2003).

In People v. Goldstein, 6 N.Y.3d 119 (2005), the Court of Appeals noted that

*The proponent's burden of showing acceptance in the profession may be met through the testimony of a qualified expert, whether or not that expert is the same one who seeks to rely on the out-of-court material.* Here, the People's burden was met by Hegarty's testimony. Hegarty acknowledged that "traditionally" psychiatrists did not rely on interviews with third parties, but said that "several researchers, forensic psychiatrists, past presidents of the Academy of Psychiatry and Law, Park Dietz and Philip Resnick, for example" had emphasized the need for a broader approach. While she acknowledged that "not everybody holds this view" and that "many good forensic psychiatrists might . . . disagree," she testified that interviewing of third parties is "becoming more and more the practice." She added that the seeking out of facts from sources other than defendant's own statements and the clinical record is "very, very much supported in the literature."

The court also noted that

it can be argued that *there should be at least some limit on the right of the proponent of an expert's opinion to put before the factfinder all the information, not otherwise admissible, on which the opinion is based. Otherwise, a party might effectively nullify the hearsay rule by making that party's expert a "conduit for hearsay" (Hutchinson v Groskin, 927 F2d 722, 725 [2d Cir 1991]).*

In People v. LeGrand, 8 N.Y.3d 449 (2007), the Court of Appeals permitted expert testimony with respect to the reliability of eyewitness identification. The main issue before us is whether the hearing court erred when it refused to admit expert testimony on the reliability of eyewitness identifications, which it concluded was based on novel scientific principles, theories or techniques that are not generally accepted by the relevant scientific community.

After a Frye hearing, Supreme Court found that the proposed testimony was relevant to the facts of the case, that defendant's witness was a qualified expert and that the proposed testimony was beyond the ken of the typical juror. However, the court denied defendant's motion to admit expert testimony, ruling that the proposed expert testimony was not generally accepted within the relevant scientific community. For the reasons that follow, *we hold that where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant*
scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror. Taking into account that trial courts generally have the power to limit the amount and scope of evidence presented, we nevertheless conclude that, in this case, the court erred when it precluded the testimony of defendant’s eyewitness identification expert in its entirety.

Significant dicta in the Court’s decision was that a court may take “judicial notice” of other court decisions involving the area of expert testimony.

Further, expert opinion testimony regarding the reliability of an eyewitness identification should be treated in the same manner as testimony offered by other experts. A court need not hold a Frye hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. "Once a scientific procedure has been proved reliable, a Frye inquiry need not be conducted each time such evidence is offered [and courts] may take judicial notice of reliability of the general procedure” (Wesley, 83 NY2d at 436 [Kaye, Ch.J., concurring]).

**Burden of Opposition**


In Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 446-447 (2006), mot. for rearg. den., 8 N.Y.3d 828 (2007), the court affirmed a dismissal of a case based on the methodology used by the plaintiff’s expert on proximate cause. See, Hassett v. L.I.R.R. Co., 6 Misc.3d 168, 787 N.Y.S.2d 837 (Sup. Kings 2004). In Parker, supra, the dismissal was based on a lack of foundation for the expert testimony, and not based on Frye; indeed, no Frye objection was made, nor did either side request a Frye hearing. The Court in Parker, supra, 448-449, noted that
“...we find it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community.

The argument that precise quantification is not necessary finds support in case law from other jurisdictions. For example, the Fourth Circuit has noted that "while precise information concerning the exposure necessary to cause specific harm to humans and exact details pertaining to the plaintiff's exposure are beneficial, such evidence is not always available, or necessary, to demonstrate that a substance is toxic to humans given substantial exposure and need not invariably provide the basis for an expert's opinion on causation" (Westberry v Gislaved Gummi AB, 178 F.3d 257, 264 [4th Cir 1999] quoting Federal Judicial Center, Reference Manual on Scientific Evidence 187 [1994]); see also Heller v Shaw Indus., Inc., 167 F.3d 146, 157 [3d Cir 1999], Hardyman v Norfolk & W. Ry. Co., 243 F.3d 255, 265-266 [6th Cir 2001]) 4. Some cases requiring an expert to establish the dosage at which a substance is toxic and the amount of exposure a plaintiff actually experienced also appear to recognize that an exact number may not be necessary (see Wright, 91 F.3d at 1107 ["We do not require a mathematically precise table equating levels of exposure with levels of harm, but there must be evidence from which a reasonable person could conclude that a defendant's emission has probably caused a particular plaintiff the kind of harm of which he or she complains"]; McClain, 401 F.3d at 1241).

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - -

4 We recognize that these cases employ a Daubert analysis. However, they are instructive to the extent that they address the reliability of an expert's methodology.

There could be several other ways an expert might demonstrate causation. For instance, amici note that the intensity of exposure to benzene may be more important than a cumulative dose for determining the risk of developing leukemia. Moreover, exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin. It is also possible that more qualitative means could be used to express a plaintiff's exposure. Comparison to the exposure levels of subjects of other studies could be helpful provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects. These, along with others, could be potentially acceptable ways to demonstrate causation if they were found to be generally accepted as reliable in the scientific community.

In Klenburg v. Forley, 6 Misc. 3d 1026(A) (Sup. NY 2005), upon the plaintiff’s motion to preclude a defendant from offering the testimony of a subsequent treating physician from testifying as to his theory of causation in a medical malpractice case, Justice Sklar noted that based on the materials submitted to him, there was no need for a
Frye hearing and precluded the defendant from offering Dr. McCord’s testimony as to his theory of causation.

In Doe v. G.J. Adams Plumbing, Inc., 8 Misc. 3d 610, 794 N.Y.S.2d 636 (Sup. Oneida 2005), the court discusses privacy issues of plaintiff’s HIV status and claims of future damages as they relate to future life expectancy, and may need a Frye/Daubert hearing.

There must be adequate factual foundation to support the expert, or preclusion is warranted. Moss v. City of New York, 5 A.D.3d 312, 774 N.Y.S.2d 139 (1st Dept. 2004)(meteorologist). Where an expert gives invalid and erroneous expert opinion, the trial judge may strike the testimony, and where the jury has rendered a verdict on such testimony, the court may set the verdict aside. Ficic v. State Farm Fire & Casualty Co., 9 Misc. 3d 793, 804 N.Y.S.2d 541 (Sup. Richmond 2005). See, Lara v. N.Y.C.H. & H. Corp., 305 A.D.2d 106, 757 N.Y.S2d 740 (1st Dept. 2003).

Avoidance of Hearing

Where there is no scientific technique or novel application of science at issue, a defendant’s factual disagreement with a plaintiff’s medical causation theory does not warrant a hearing. Gayle v. Port Authority of New York and New Jersey, 6 A.D.3d 183, 184, 775 N.Y.S.2d 2, 3 (1st Dept. 2004). “Defendant’s Frye objection during the testimony of plaintiff’s medical experts was properly rejected, since there were relevant examples and data accompanying the experts’ opinions (citation omitted). It was the jury’s prerogative to resolve the conflicting testimony from the medical causation experts as it did (citation omitted).” 6 A.D.3d at 184, 777 N.Y.S.2d at 3-4. See, Tavares v. N.Y.C.H. & H. Corp., 2003 N.Y. Slip Op. 51278(U), 2003 N.Y. Misc. Lexis 1217, 2003

In Connolly v. Lampert, 13 Misc. 3d 512, 2006 WL 2271271 (Civ. NY 2006), the court determined in a medical malpractice case that a hearing was not necessary, and noted that the weighing of evidence is clearly outside of the realm of the court’s function in performing a Frye analysis. Similarly, in Meth v. Gorfine, 34 A.D.3d 267 (1st Dept. 2006), the Appellate Division held that the IAS court properly denied a Frye hearing. “The type of cancer and whether the diagnostic delay would have affected plaintiff's prognosis are typical oncological issues that should be presented to a jury, and do not involve the type of procedure or test contemplated for a Frye hearing (see Marsh v Smyth, 12 A.D.3d 307, 785 N.Y.S.2d 440 [2004]).”

In DeMeyer v. Advantage Auto, 9 Misc.3d 306, 797 N.Y.S.2d 743 (Sup. Wayne 2005), the court reviews the law of New York, noting that it is a Frye state, and not a Daubert state and discusses the basis of holding a hearing.


The Court must make a preliminary inquiry to see whether a hearing is necessary. “Where, as here, the trial court admits expert testimony without conducting a preliminary inquiry into the reliability of the procedures utilized by the experts, the proper course is to

**Standard of Review**

Thus, the role of the trial court is limited, and is merely to determine whether the experts’ deductions are based on principles that are sufficiently established to have gained general acceptance as reliable, and are not to intrude upon the jury’s realm of weighing the evidence. Marsh v. Smyth, 12 A.D.3d 307, 785 N.Y.S.2d 449 (1st Dept. 2004).

It is not necessary “that the underlying support for the theory of causation consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion reached by the plaintiff’s expert.” Marsh v. Smyth, 12 A.D.3d 307, 312-313, 785 N.Y.S.2d 440, 449 (1st Dept. 2004); Zito v. Zabarsky, 28 A.D.3d 42 (2nd Dept. 2006). “General acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather, it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions.”); Zito v. Zabarsky, 28 A.D.3d 42 (2nd Dept. 2006)(quoting, Beck v. Warner-Lambert Co., N.Y.L.J. September 13, 2002, P. 18 Col. 2, 2002 NY Slip Op. 40431U, 2002 N.Y. Misc. LEXIS 1217 (Sup. New York).

The plaintiff’s experts’ theory of medical causation must be based on more than theoretical speculation or a scientific hunch. However, the “fact that there is no textual
authority directly on point to support the experts’ opinion is relevant only to the weight to be given the testimony, but does not preclude its admissibility.” Zito v. Zabarsky, 28 A.D.3d 42 (2nd Dept. 2006). Temporal evidence may be utilized.

The courts should not apply Frye in an overly restrictive manner, as strict application “may result in disenfranchising persons entitled to sue for the negligence of tortfeasors. With the plethora of new drugs entering the market, the first users of a new drug who sustain injury because of the dangerous properties of the drug or inappropriate treatment protocols will be barred from obtaining redress if the test were restrictively applied.” Zito v. Zabarsky, 28 A.D.3d 42 (2nd Dept. 2006).

In Nonnon v. City of New York, 32 A.D.3d 91 (1st Dept. 2006), aff’d solely on procedural grnds, 9 N.Y.3d 825 (2007), the Appellate Division held that:

“In this case, neither the deductions of the expert epidemiologists and toxicologists, nor the methodologies employed by them, in reaching their conclusions is premised on the type of "novel science" implicating the concerns articulated in Frye. For example, in Marsh v Smyth (12 AD3d 307, 785 N.Y.S.2d 440 [2004]), this Court reversed a motion court's Frye ruling. At issue was the testimony of two medical experts, who averred that plaintiff's arm was improperly positioned during a surgical procedure, causing "long thoracic nerve palsy." The motion court disallowed the testimony, finding that the experts' conclusions were not accepted in the field. We reversed, holding that Frye is not concerned with the reliability of a certain expert's conclusions, but instead with "whether the experts' deductions are based upon principles that are sufficiently established to have gained general acceptance as reliable" (id. at 308; see also Lustenring v AC & S, 13 AD3d 69, 786 N.Y.S.2d 20 [2004], lv denied 4 N.Y.3d 708, 796 N.Y.S.2d 581 [2005] [defendant's factual disagreement with plaintiff's theory that workplace exposure to asbestos caused mesothelioma did not require Frye hearing]).

“Here, plaintiffs' experts laid a proper foundation for the introduction of their opinions. They followed generally accepted methods for the collection and analysis of evidence and applied proper techniques to reach their conclusions.

“Epidemiology itself is certainly not novel. It is defined as "(1) a branch of medical science that deals with the incidence, distribution, and control of disease in a population; [or] (2) the sum of the factors controlling the presence or absence of a disease or pathogen" (Merriam Webster's Collegiate Dictionary 389 [11th ed [2003]). It is a science which "focuses on the question of general causation (here, is the [landfill] capable of causing disease?) rather than that of specific causation (here, did [the landfill]
cause disease in a particular individual?)" (Reference Manual on Scientific Evidence, Reference Guide on Epidemiology 336 [2d ed (2000)]). **Epidemiological studies, such as those conducted by the City and plaintiffs, are similarly not novel.** In addition, numerous courts have held that this field of science is "the primary generally accepted methodology for demonstrating a causal relation between a chemical compound and a set of symptoms or a disease" (Soldo v Sandoz Pharms. Corp., 244 F. Supp. 2d 434, 532 [W D Pa 2003] [internal citations omitted]; Castillo v E.I. DuPont De Nemours & Co., 854 So. 2d 1264, 1270 [Sup Ct Fla 2003]; see Arnold v Dow Chem. Co., 32 F. Supp. 2d 584 [ED NY 1999]; Conde v Velsicol Chem. Corp., 804 F. Supp. 972, 1025-1026 [S D Ohio 1992], affd 24 F.3d 809 [1994]). At least one court has noted that "epidemiological evidence is indispensable in toxic and carcinogenic tort actions where direct proof of causation is lacking" (In re Joint E. & S. Dist. Asbestos Litig., 52 F.3d 1124, 1128 [1995]).

“Plaintiffs' toxicological evidence is similarly admissible without a Frye hearing. Toxicology is likewise not a novel field of science. Rather, "classically [it] is known as the science of poisons" (Reference Manual on Scientific Evidence, Reference Guide on Toxicology 403 [2d ed]). In fact, the City's argument is not that the field is novel, but that plaintiffs' toxicological submissions fail to show causation because they do not give a specific dose-response relationship between the carcinogens in the landfill and plaintiffs' cancers.

“To the extent that the City challenges the methodology of Dr. Neugebauer's study, which found an increased incidence of acute lymphoid leukemia in the population in closest proximity to the landfill, and the failure to account for racial distribution, these issues are properly the subject of cross-examination at trial, as they go to credibility and to the weight to be given to the evidence (Wesley 83 N.Y.2d 417, 426-427, 633 N.E.2d 451, 611 N.Y.S.2d 97; see Gayle v Port Auth. of New York & New Jersey, 6 AD3d 183, 184, 775 N.Y.S.2d 2 [2004]). Similarly, plaintiffs' experts are properly subject to cross-examination, and the substance of their reports a proper subject for questioning. However, as neither the epidemiological reports nor the toxicological submissions concern "novel science," Frye's concerns are not implicated and no pre-trial hearing was required. (Emphasis added).

**Discretion**

Where there is corroborating evidence in favor of a conclusion, such as the reliability of eyewitness identification, where the trial court exercises its discretion to exclude expert testimony with respect to such eyewitness testimony will be affirmed.

In *Richards v. Home Depot Inc.*, 456 F.3d 76 (2nd Cir. 2006), the court reversed the lower court for dismissing plaintiff’s case based on federal preemption on plaintiff’s failure to warn claim.

In *Adesina v. Aladan Corp.*, 438 F. Supp.2d 329 (S.D.N.Y. 2006), the plaintiff claimed injuries caused by an allergic reaction to latex gloves. The defendant moved for summary judgment claiming that the plaintiff’s failure to warn claims were preempted by the Food and Drug Administration’s Glove Manual, and the Food, Drug and Cosmetic Act, and based *Daubert* objections to the plaintiff’s expert. The court denied motions for summary judgment on grounds that there was no preemption, and that the objections made went to the credibility and weight to be afforded to the witnesses, and not the admissibility of their conclusions.

**Preclusion Biomechanical Expert**

The first case to address this issue in New York remains the seminal case:


However, the engineer disregarded the actual facts of this case in forming his conclusion that the change in velocity was five miles per hour. The testimony of the plaintiff was that she was slowing down when she was hit and that caused her vehicle to move a few feet forward. The defendant stated that the plaintiff's vehicle was at a stop when he hit her and that he was traveling at about 25 miles per hour when his vehicle hit the plaintiff's SUV. The defendant further stated that both vehicles did not move and remained in the same place after the impact.

In view of either version of the facts the defendant's statement that the vehicles did not move after the impact is contrary to the Newtonian theory of physics testified to by the defendant's expert engineer. Accordingly, the court finds the defendant's testimony that the plaintiff's vehicle did not move after impact to be incredible. Indeed, all the factual testimony was at odds with the methodology and assumption used by the biomedical engineer to reach his conclusion. The engineer acknowledged that if the speed of the defendant's bullet vehicle were traveling at 25 miles per hour or 15 miles per hour when it struck the plaintiff's target vehicle traveling at five miles per hour or less then the change in velocity would be approximately double his basic assumption that the change in velocity was five miles per hour. Therefore, the studies and the literature upon which
he relied to form his conclusion that the plaintiff would not have suffered a herniated disk from the impact may not be applicable.*927

**The Literature**—The studies**FN2** upon which the engineer used to form his opinion were first supplied to the court and the plaintiffs as the *Frye* hearing was about to commence. At that time the court stated that the studies may be reliable. However, on reflection and with more time to examine these studies, this court is of the opinion that the literature upon which the expert relies was not independent nor reliable. A review of the studies reveals that five to 10 human volunteers participated in the studies who are either associated with the authors or their sponsors. By knowing the hypothesis and purpose of the testing, the responses of the participants may have biased the results. Moreover, the size of the sample is too small to create a statistically significant inference to make a general conclusion about the entire automobile riding population which is involved in rear-end collisions.


Lastly, the attempts by the various authors to boot-strap the data from other studies supporting their hypothesis which utilized similar, but different, control variables and different methodology is a stretch in an attempt to overcome the obviously inadequate number of participants in any one study. Moreover, some of the studies utilized “crash dummies” with sensors upon them to measure the force upon a potential occupant. While “crash dummies” of various sizes are widely used by automobile designers, they do not indicate that a potential occupant cannot sustain serious cervical or lumbar injuries.

Using repair costs and photographs as a method for calculating the change in velocity of two vehicles at impact is not a generally accepted method in any relevant field of engineering or under the laws of physics. Hence, under the *Frye* test of general acceptance, the opinion upon which it relies is inadmissible. By applying the *Daubert/Kumho* factors, this court also finds this methodology to be invalid. The engineer acknowledged that this was a method that he developed which has not been scientifically tested. Indeed, the engineer, when questioned by this court whether there was any literature supporting this method of calculating change in velocity, claimed there was none.

Accordingly, this court finds that the proffered biomedical engineer is qualified as an expert in biomedical engineering based upon his professional training and may render an
opinion as to the general formula of forces upon objects provided he uses the facts in evidence.

However, he may not render an opinion based upon his report and testimony at the 
Frye hearing because the source of the data and the methodology employed by him in reaching his conclusion is not generally accepted in the relevant scientific or technical community to which it belongs. Moreover, applying the Daubert/Kumho factors to the proposed opinion, this court finds that the data and the methodology employed by the biomechanical engineer are not scientifically or technically valid. Therefore, such testimony is not reliable and may not be presented to the jury. Lastly, a biomechanical engineer lacks the training and experience to testify that the plaintiff did not sustain “serious injuries” as a result of this accident. Hence, the expert opinion is precluded from presentation to the jury.

In Santos v. Nicolas, 65 AD3d 941 (1st Dept 2009), affirming, 24 Misc.3d 999, 879 N.Y.S.2d 701 (Sup. Bronx 2009), the court’s preclusion of a defense biomechanical expert was affirmed.

An evidentiary ruling made before trial is generally reviewable only in connection with the appeal from the judgment rendered after trial (Weatherbee Constr. Corp. v Miele, 270 AD2d 182 [2000]). Accordingly, no discrete appeal lies from an order granting plaintiff’s motion to preclude proposed expert testimony (Rodriguez v Ford Motor Co., 17 AD3d 159, 160 [2005]). Since the order defendants seek to challenge was nothing more than an evidentiary ruling, it did not go to the merits of the case (cf. Matter of City of New York v Mobil Oil Corp., 12 AD3d 77 [2004]).

Were we to reach the merits of the appeal, we would affirm. At the Frye hearing (Frye v United States, 293 F 1013 [DC Cir 1923]) to determine the admissibility of proffered expert witness testimony opining on the causation of plaintiff’s personal injuries, defendants failed to establish that this expert’s theory was generally accepted in the scientific community. The exclusion of such testimony was thus a provident exercise of the court’s discretion (see Coratti v Wella Corp., 56 AD3d 343 [2008]).


Plaintiffs Christopher Garner, an infant by his mother and natural Guardian Sonia Garner, and Sonia Garner, individually, move to preclude portions of the proposed testimony of Dr. Robert Fijian which are not generally accepted as reliable in the scientific community or for a Frye hearing. (Frye v United States, 293 F 1013 [DC Cir
Defendants Trans & Limo, Inc. and Yakov Kogut oppose plaintiff’s motion seeking preclusion of Dr. Fijan’s testimony on the basis that the proposed testimony is based on generally accepted methodologies and procedures in the area of biomechanical engineering and is therefore admissible under the Frye standard. (Id). Defendant William Baird joins in co-defendants’ opposition.

Plaintiffs have met their burden of making a prima facie showing sufficient to challenge the testimony of the proposed expert. The burden thus shifts to defendants to show by a fair preponderance of the credible evidence that the witness is competent in his field of expertise, that the testimony is based upon scientific principles generally accepted and that the matter about which the witness testifies is beyond the expertise of the jury and relevant to the issues in the case. (Id; Zito v Zabarsky, 28 AD3d 42 [2d Dept 2006]).

A Frye Hearing was conducted to determine whether the scientific methods used by Dr. Fijan to reach his conclusion that the force generated in the accident was not sufficient to cause the type of injury alleged to have been sustained by plaintiff Christopher Garner’s left knee and whether those methods are scientifically reliable.

According to defendants’ expert exchange made pursuant to CPLR 3101(d), Robert S. Fijan, Ph.D., is an expert in accident reconstruction, photoglammetry, biomechanical analysis and computer animation. Dr. Fijan obtained his B.S.E. in Engineering Science from the University of Florida, Gainsville and obtained his M.S. in Mechanical Engineering and in 1990 obtained his Ph.D. in mechanical engineering, both from Massachusetts Institute of Technology. He served as an assistant professor in the Department of Mechanical Engineering and Applied Mechanics at the University of Michigan from 1990 to 1994.

The Court heard the testimony of Dr. Robert Fijan, a self-employed biomechanical engineer. Dr. Fijan defined biomechanical engineering as the application of physics and mechanical engineering to the human body. He testified that he has no medical training but that through his training, he is able to review structural injuries to the human body. According to the witness, in the last forty years, the field of accident reconstruction is well accepted in the field of engineering through articles in scientific journals. Dr. Fijan testified that he relies upon other sciences and utilizes the general application of basic principles of physics and mechanical engineering and applies them to the human body.

While testifying, Dr. Fijan referred to his expert’s report. Plaintiffs objected on the ground that defendants had not provided plaintiffs with the report. Defendants correctly noted that they were not required to provide any more than a CPLR 3101(d) expert exchange, which they did do, as the requirement that an expert’s report be exchanged only applies to medical reports. (Uniform Rules for the Trial Courts [22NYCRR] § 208.13). As the report had not been exchanged or provided to the Court it was not admitted into evidence and Dr. Fijan was not permitted to read from it.
Dr. Fijan testified that based on his calculations of force, the impact to plaintiff’s vehicle could not have caused the claimed meniscus tear in plaintiff Christopher Garner’s knee. Dr. Fijan stated that the methodology he employed in reaching his conclusion that the physical forces between the two cars were not capable of causing plaintiff’s injury has been accepted for decades in the relevant scientific community. The witness stated that the results of his calculations showed that the maximum force on plaintiff’s knee was 500 lbs compared to the force generated while walking which is 1000 lbs. Dr. Fijan testified he used vehicle stiffness parameters from the *3 results of publicly available crash tests, such as those performed by the National Highway and Traffic Safety Administration. Dr. Fijan referred to one textbook, “Basic Orthopedic Biomechanics” but did not provide its authorship and he mentioned a few other articles and their authors but gave no context for those sources and could not say whether they dealt with biomechanics and a torn meniscus.

It is well settled that the proponent of scientific evidence must establish that the theory and method used by a particular witness is generally accepted in the scientific community. (Frye v United States, 54 App DC 46, 293 F 1013 [DC Cir 1923]). New York courts permit expert testimony based on scientific principles or procedures only after the principle, procedure or theory has gained general acceptance in the relevant scientific field. (People v Wesley, 83 NY2d 417, 422 [1994]; Frye v United States, supra at 1014). A Frye inquiry poses the elemental question of “whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally” (People v Wesley, 83 NY2d at 422). Frye “emphasizes ‘counting scientists’ votes, rather than on verifying the soundness of a scientific conclusion.’ ” (Wesley, 83 NY2d at 439; see also Parker v Mobil Oil Corp., 7 NY3d 434, 446-447 [2006]). “[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” (Frye v United States, supra at 1014). “[T]he particular procedure need not be ‘unanimously indorsed’ by the scientific community but must be ‘generally acceptable as reliable.’” (People v Wesley, 83 NY2d at 423, quoting People v Middleton, 54 NY2d 42, 49 [1981]). “[B]ecause a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no means follows that he or she is qualified to express expert opinions as to other fields.” (Nimely v City of New York, 414 F3d 381, 399 n 13 [2d Cir 2005]).

Defendants have failed to meet their burden of demonstrating that Dr. Fijan’s proposed testimony is based on generally accepted methodologies and procedures in the area of biomechanical engineering and that their expert’s theory of causation is generally accepted in the scientific community. While Dr. Fijan stated several times that the methodologies he used are generally accepted and have been used for decades, these conclusory statements were not supported by evidence such as peer review reports or other scientific studies. Dr. Fijan stated that he had a CD available with all the sources he used to form his opinion and he also stated that the documents he relied upon were contained in his expert’s report, but neither was before the Court. There was no support given for the methodology of using repair
costs and photocopies of photographs to determine the velocity of the vehicles and calculate the force of impact.

Dr. Fijan is not a medical doctor and he failed to cite any studies to support his conclusion that a passenger in the back seat of a vehicle, whose knee hits the car door at the moment of the collision, could not have suffered a torn meniscus. Therefore, Dr. Fijan’s opinion that the accident did not cause or contribute to plaintiff Christopher Garner’s knee injury is based upon unreliable methodology and lacks sufficient foundation.*4

Accordingly, based on the testimony adduced at the hearing, plaintiffs’ motion to preclude the testimony of Robert S. Fijan, Ph.D. is granted.

DEMONSTRATIVE EVIDENCE

By Sherri Sonin and Robert J. Genis

Demonstrative evidence can be the most important and powerful evidence in a trial. Demonstrative evidence can help you win your case, and can help you win a larger verdict than would otherwise be obtained. Demonstrative evidence can be costly or cost-effective.

Demonstrative evidence is sometimes referred to as “real evidence” and may be directly perceived by the trier of fact. It is the most natural and satisfactory process of proof. Harvey v. Mazal Amer. Partners, 79 N.Y.2d 218 (1992), on remand, 179 A.D.2d 1 (1992).

“It is a common practice in the courts of this state, and probably throughout the Union, to furnish such assistance to jurors by the employment of maps, diagrams,
drawings, and photographs, as well as by models; the purpose being to enable the jury to
use their eyes as well as their ears in order to gain an intelligent comprehension of the
case. 'Nothing short of an exact representation to the sight,' said Tenney, C. J., in State v.
Knight, 43 Me. 132, 'can give with certainty a perfectly correct idea to the mind.' Of
course, in actual practice these accessories to the understanding must often be only
approximations to the actualities; but it is enough to render a model receivable for
purposes of illustration if it fairly represents the original object.” People v. Del Vermo,
192 N.Y. 470, 482-483 (1908).

“Photographs, maps, diagrams, and models, fairly representative of normal or
ordinary conditions, and photographs, maps, and diagrams of unusual and defective
conditions, have been admitted, and no reason occurs to us why a truthful mechanical
representation of a defective condition should be excluded. The party against whom it is
received must rely upon the proper discharge by the trial court of the duty of instructing
the jury against misleading or deceptive possibilities.” McKeon v. Proctor and Gamble,
162 App. Div. 784, 790 (2nd Dept 1914).

A model or diagram may be used for “demonstrative or illustrative purposes” and
not entered into evidence, even though there is no proof of its accuracy or that is a correct
admission of the demonstrative exhibit into evidence, and to reduce the chance of
reversible error, the trial court should give appropriate limiting instructions. See,

To enter demonstrative materials into evidence, it must be relevant to the question
evidence of a whiskey bottle was erroneous when the bottle was not properly connected
to the party). In order to satisfy the requirements of relevancy, the object must be
properly identified, and it may be necessary to show that the object is in the substantially
same condition as it was at the time of the event in issue. People v. Flanigan, 174 N.Y.
356, 368 (1903). If the object has substantial probative value, the fact that it might
arouse sympathy or other emotions of the jury will not serve to exclude it. Harvey v. Mazal Amer. Partners, 79 N.Y.2d 218 (1992).

**TYPES OF DEMONSTRATIVE EVIDENCE**

*Exhibition of Injured Portion of Body*

It is one of the oldest and most well established tenets of evidentiary trial practice law that where the question in issue is the nature and extent of the plaintiff’s injuries, notwithstanding the danger of prejudice to the defendant, the exhibition of the plaintiff’s injuries is generally allowed. Harvey v. Mazal Amer. Partners, 165 A.D.2d 242, 243 (1st Dept. 1991), aff’d as modified, 79 N.Y.2d 218, 223 (1992), on remand, 179 A.D.2d 1, 6-7 (1st Dept. 1992). “We have in past cases recognized the importance of demonstrative evidence and have allowed parties to exhibit their injuries to the members of the jury.” 79 N.Y.2d at 223.

In Harvey v. Mazal Amer. Partners, 79 N.Y.2d 218 (1992), the plaintiff, who sustained brain and spinal cord damage, was wheeled into the courtroom and while not under oath, was questioned before the jury. The questions did not involve disputed issues in the case. The plaintiff himself was an exhibit whose condition was an issue at trial and was properly before the jury. Allowing the plaintiff to be an “exhibit”, “represents a valuable and reliable method of proof, and although such demonstrative evidence may inflame the passions of the jury or incite extreme sympathy, that itself does not serve as a basis for exclusion.” 165 A.D.2d at 243; See, 179 A.D.2d at 7. See, Carlisle v. County of Nassau, 64 A.D.2d 15 (2nd Dept. 1978).

In Mulhado v. Brooklyn City R.R., 30 N.Y. 370, 372 (1864), the plaintiff was allowed to exhibit injured his injured arm to the jury. In Clark v. Brooklyn Hgts. R.R.
Co., 177 N.Y. 359 (1904), the plaintiff was properly allowed to drink water and write his name before the jury to show tremors that he sustained. In Perry v. Metropolitan St. Ry. Co., 68 App. Div. 351 (2nd Dept. 1902), the plaintiff’s body was properly allowed to be exhibited to the jury, and the plaintiff’s doctor was properly permitted to point out the injuries to the plaintiff’s ribs.

In Sutherland v. County of Nassau, 109 A.D.2d 664 (2nd Dept. 1993), lv. to app. den., 81 N.Y.2d 710 (1993), the plaintiff was permitted to partially disrobe and redress in the presence of the jury to demonstrate the limiting affect of his disabled arm and hand.

In Dietz v. Aronson, 244 App. Div. 746 (2nd Dept. 1935), the court held it was error not to permit the jury to examine an infant plaintiff’s throat to determine the results of the operation by comparison with a diagram in evidence of a normal throat.

In Riddle v. Memorial Hosp., 43 A.D.2d 750 (3rd Dept. 1973), a witness was allowed to testify and demonstrate his observations as to the plaintiff’s limitations.

However, in Weinstein v. Daman, 132 A.D.2d 547, 548-549 (2nd Dept. 1987), the trial court committed reversible error when it granted the defendant’s application to conduct an experiment in order to test the credibility of the plaintiff, and allowed the jurors to sit in the witness chair and cover his or her right eye and determine whether they could see the defense attorney with their other eye. The plaintiff claimed that because of the loss of vision in his right eye, he was unable to see defense counsel when he rose to make an objection. The Appellate Division held this procedure to be “highly prejudicial”, “clearly improper” and “inadmissible”.

**Fungible Objects**

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In Weber v. International Ry. Co., 57 Misc. 157 (Sup. Erie 1907), the trial court held that the jury was not prejudiced by seeing the plaintiff’s shirt “saturated with blood”.

In Johnson v. Michelin Tire Corp., 110 A.D.2d 824 (2nd Dept. 1985), an automobile tire was properly allowed into evidence. In Guagliardo v. Ford Motor Co., 7 A.D.2d 472 (4th Dept. 1959), component parts of a steering mechanism and a photograph of it were properly admitted into evidence.

**Photographs**

Properly authenticated photographs are admissible whenever they are relevant to describe the physical characteristics of a person, place, or thing. People v. Webster, 139 N.Y.73, 83 (1893); Bornt v. Pittstown, 248 A.D.2d 854 (3rd Dept 1998), lv. den., 92 N.Y.2d 854 (1998). Photographs are properly authenticated by the testimony of any witness familiar with the subject portrayed that the picture is correct representation of the person, place, object or condition depicted. Moore v. Leaseway Transp., 49 N.Y.2d 720 (1980); Saporito v. City of New York, 14 N.Y.2d 474 (1964); People v. Brown, 216 A.D.2d 737 (1995).


**Similarity**

In Guzman v Spring Cr. Towers, Inc. (2009 NY Slip Op 05508) (2nd Dept.)
Contrary to the plaintiff's contention, the Supreme Court properly admitted into evidence photographs of a barrier similar to the barrier used at the construction site near the location of the plaintiff's accident, since there was testimony that the photograph fairly and accurately represented the barrier used at the time of the accident (see Shalot v Schneider Natl. Carriers, Inc., 57 AD3d 885, 886; Cubeta v York Intl. Corp., 30 AD3d 557, 561; Kartychak v Consolidated Edison of N.Y., 304 AD2d 487).

In Dubec v. N.Y.C.H.A., 39 A.D.3D 410 (1ST Dept. 2007),

The photographs introduced by plaintiff taken at an unspecified time the month after the accident were properly admitted, over defendant's objection, for the limited purpose of demonstrating that the "misleveled" condition of the elevator on the day of the accident was substantially the same as depicted in the photos (see Diakosavilis v Bright and Sunny Corp., 265 A.D.2d 294, 696 N.Y.S.2d 220 [1999], lv denied 94 N.Y.2d 762, 729 N.E.2d 708, 708 N.Y.S.2d 51 [2000]; cf. Moore v Leaseway Transp. Corp., 49 N.Y.2d 720, 723, 402 N.E.2d 1160, 426 N.Y.S.2d 259 [1980]). Although the court indicated at the time the photos were introduced that it would later instruct the jury about this evidence, it failed to do so during the main charge. It was only after the jury asked the court, during deliberations, to give instructions about the "use and weight" of the photos that the court cautioned the jury that plaintiff offered the photos to demonstrate that the condition of the elevator was substantially the same as it was when her accident occurred and that they did not "show the condition of the elevator on the date of the accident." The court should have given this instruction during the main charge, and, in order to alleviate any possible prejudice to defendant, further instructed the jury not to speculate how the elevator in the pictures came to be "misleveled." Furthermore, it was improper for plaintiff to cross-examine defendant's witness with one of these photos in order to establish that he was not qualified to testify about what a "misleveled" elevator is.

In Shalot v Schneider Natl. Carriers, Inc., 57 AD3d 885 (2nd Dept. 2008),

Contrary to the plaintiff's position, the Supreme Court properly admitted into evidence photographs of a tractor-trailer that was similar to the tractor-trailer involved in the accident, since Orer testified that the photographs fairly and accurately represented the tractor-trailer he was driving at the time of the accident (see Cubeta v York Intl. Corp., 30 AD3d 557, 561; Kartychak v Consolidated Edison of N.Y., 304 AD2d 487). Additionally, the testimony given by the defendants' accident reconstruction expert verified that the tractor-trailer depicted in the photographs was comparable in height and length to the one involved in the accident.
In Anderson v. Dainack, 39 A.D3d 1065 (3rd Dept. 2007), the court properly precluded the defendant from offering into evidence photographs and testimony regarding the damage and presumably lack thereof to plaintiff’s vehicle in a motor car accident case in a trial on damages only.

Supreme Court's preclusion of photographs and testimony concerning the condition of the vehicles after the accident due to possible prejudice by the jury against plaintiff was within its discretionary authority (see Saulpaugh v Krafte, 5 AD3d 934, 934-935, 774 N.Y.S.2d 194 [2004]. lv denied 3 NY3d, 610, 820 N.E.2d 292, 786 N.Y.S.2d 813 [2004]). However, we have stated that even when liability is not at issue, "proof as to the happening of an accident is probative and admissible as it describes the force of an impact or other incident that would help in determining the nature or extent of injuries and thus relate to the question of damages" (Rodriguez v Zampella, 42 A.D.2d 805, 806, 346 N.Y.S.2d 558 [1973]; see also Homsey v Castellana, 289 A.D.2d 201, 201, 733 N.Y.S.2d 719 [2001]). While we would encourage a trial court to allow such photographs and testimony and then instruct the jury that the absence of damage would not preclude the possibility that plaintiff sustained an injury, where, as here, defendants were permitted to elicit testimony that the vehicles were a very short distance apart between one and eight feet and that defendant's car slowly rolled into plaintiff's car, we find no error (see CPLR 2002; Brown v County of Albany, 271 A.D.2d 819, 820, 706 N.Y.S.2d 261 [2000], lv denied 95 N.Y.2d 767, 740 N.E.2d 653, 717 N.Y.S.2d 547 [2000]; Khan v Galvin, 206 A.D.2d 776, 777, 615 N.Y.S.2d 111 [1994]).

Limitation in Use

In Wall v. Shepard, 53 A.D.3d 1050 (4th Dept. 2008),

We reject the contention of defendant that the court abused its discretion in limiting his use of photographs of the postaccident condition of the parties' vehicles in order to elicit testimony with respect to the nature and extent of plaintiff's alleged injuries. We conclude that the court did not abuse its discretion under the circumstances of this case, inasmuch as defendant was permitted to elicit testimony concerning the circumstances surrounding the motor vehicle accident (see Anderson v Dainack, 39 AD3d 1065, 1066, 834 N.Y.S.2d 564).

Pictures of the Injured Portion of the Body

It is long and well established that pictures showing the plaintiff’s injuries are admissible. Alberti v. N.Y., L.E. & W.R.R., 118 N.Y. 77, 88 (1899)(photograph showing
manner in which plaintiff’s limbs were contracted). As stated in *Axelrod v. Rosenaum*, 205 A.D.2d 722, 722-723 (2nd Dept. 1994):

“with respect to the issue of damages, we find that the trial court improperly refused to permit the introduction of a photograph of the plaintiff taken shortly after the accident while the plaintiff was in the hospital. Photographs that fairly and accurately represent the plaintiff shortly after an accident are admissible when they aid the jury in their assessment of the medical testimony and plaintiff’s pain and suffering. In the case at bar, the photograph of the plaintiff was not inflammatory and could have aided the jury in determining the amount of damages to be awarded to the plaintiff.”

In *Gallo v. Supermarkets Gen. Corp.*, 112 A.D.2d 345 (2nd Dept. 1985), the Appellate Division upheld the admission of multiple photographs of “unsightly injuries” and plaintiff’s 3rd degree burns from hot tar. The hot tar caused the plaintiff to suffer third-degree burns over a significant portion of his body, including his face, head, neck, chest, arms and waist. He was hospitalized for nearly two months, was subject to debridement and skin grafting procedures and had 75 percent of one ear removed. He had permanent, extremely disfiguring facial scars. 112 A.D.2d at 346.

The court concluded “that the photographs were not prejudicial. While the photographs reveal some rather unsightly injuries, they were introduced only during the damages phase of the trial, where they were clearly relevant to the jury’s assessment of Mr. Gallo’s pain and suffering, and helped the jury to understand the medical testimony relating to Mr. Gallo’s treatment.” 112 A.D.2d at 349.

In *Rivera v. City of New York*, 160 A.D.2d 985 (2nd Dept. 1990), the Appellate Division upheld the admission of photographs of infant’s burned feet taken a few days after the accident were not inflammatory and aided the jury in its assessment both of the medical testimony and the plaintiff’s pain and suffering. She was unable to grow
toenails, her toes were permanently malpositioned, and her left leg was smaller than the right. See, Morinia v. N.Y.C.H.A., 250 A.D.2d 657 (2nd Dept. 1998).

In Salazar v. B.R. Fries and Associates, Inc., 251 A.D.2d 210 (1st Dept. 1998), the Appellate Division upheld the admission of five photographs taken of plaintiff shortly after her accident, where her middle finger was severed and was subsequently reimplanted.

In Colon v. N.Y.C.H.A., 248 A.D.2d 254, 255 (1st Dept. 1998), photographs depicting a serious laceration to the infant plaintiff’s thigh were not unduly inflammatory, and were properly admitted to help the jury evaluate the medical testimony and assess plaintiff’s pain and suffering.

In Krueger v. Frisenda, 218 A.D.2d 685 (2nd Dept. 1995), the court properly admitted into evidence pictures of plaintiff’s abdomen with extensive scarring from multiple surgeries and absence of muscles in abdomen properly admitted into evidence. See also, Martin v. Maintenance Co. Inc., 588 F.2d 355 (2nd Cir. 1978).

In Crisci v. Sadler, 253 A.D.2d 447, 448-449 (2nd Dept. 1998), the Appellate Division reversed the lower court for failing to allow into evidence a photograph of the infant plaintiff on his third birthday, where the picture showed a marked deformity of his left elbow. The photograph was probative of when the deformity arose.

Photographs showing injuries may be admissible in evidence notwithstanding their being partially obliterated with ink. In Re T.-B. Children, 168 A.D.2d 396 (1st Dept. 1990).

In Westpahl v. Greyhound Lines, Inc., 2007 NY Slip Op 50223(U) [14 Misc 3d 1231(A)] (Sup Queens),
Motion by defendants *in limine* for an order precluding plaintiff from offering at trial the accident photographs of decedent, any evidence of conscious pain and suffering, any evidence of pre-impact terror, any evidence relative to the alleged sale of decedent's artwork, any testimony by Dr. Alan Leiken and any evidence in support of plaintiff's claim for loss of decedent's household services is denied in all respects.

Photographs that are a fair and accurate representation of plaintiff shortly after the accident are admissible to aid the jury in assessing plaintiff's pain and suffering and the medical testimony adduced relative thereto (*see Axelrod v. Rosenbaum*, 205 AD2d 722 [2nd Dept 1994]). The probative value of such evidence may outweigh its potential for prejudice (*see Salazar v. B.R. Fries and Assoc.*., 251 AD2d 210 [1st Dept 1998]). The motion, therefore, is premature. Since the issue of whether the photographs of decedent's injuries are sought to be admitted only to inflame the jury or whether they will properly aid the jury in assessing decedent's conscious pain and suffering must await plaintiff's offer of proof at trial on the issue of conscious pain and suffering.

**Photographs of Treatment**

Photographs of treatment are similarly admissible. *Caprara v. Chrysler Corp.*, 71 A.D.2d 515, 522 (3rd Dept. 1979), aff'd, 52 N.Y.2d 114, rearg. den., 52 N.Y.2d 1073 (1981)(color photographs of the plaintiff lying on a Stryker frame with Churchfield tongs attached to his scalp were properly admitted because they assisted the jury in understanding the medical evidence).


In *McNaier v. Manhattan Ry. Co.*, 51 Hun. 644 (2nd Dept. 1889), aff’d, 123 N.Y. 664 (1890), the court held that the sight of a skull and surgical instruments used to operate on it is not inflammatory.

In *Bellevue-Santiago v. City Ready Mix, Inc.*, N.Y.L.J. April 20, 2001, P. 1. Col. 1 (Sup. Kings), the Court held that the plaintiff could properly place into evidence a
videotape that was taken of the surgical procedure performed on the plaintiff by her

treating physician/surgeon.

Day in the life videotapes of the plaintiff that depict their injuries and struggle for
existence are admissible. Caprara v. Chrysler Corp., supra; Sullivan v. LoCastro, 178

**Pictures of the Deceased**

(1974), the Court held that:

“The general rule is that photographs of the deceased are admissible if they
tend to prove or disprove a disputed or material issue, to illustrate or elucidate
other relevant evidence, or to corroborate or disprove some other evidence offered
or to be offered (Ann., Evidence -- Photograph of Corpse, 73 ALR 2d 769, 775-779; cf.
People v. Webster, 139 N. Y. 73, 83; People v. Fish, 125 N. Y. 136, 147-148; People v.
Lewis, 7 A D 2d 732). Admission of photographs of homicide victims is generally within
the discretion of the trial court (Ann., Evidence -- Photograph of Corpse, 73 ALR 2d
they are otherwise properly admitted as having a tendency to prove or disprove
some material fact in issue, photographs of a corpse are admissible even though they
"portray a gruesome spectacle and may tend to arouse passion and resentment
against the defendant in the minds of the jury" (Ann., Evidence -- Photograph of
Corpse, 73 ALR 2d 769, 787, supra.; see 3 Wharton's op. cit., supra.; S 637, pp. 289-
290; Richardson, Evidence [9th ed.], S 131; cf. People v. Singer, 300 N. Y. 120, 122).
There are many cases in which photographs of a homicide victim have been held
admissible to show, for example, the position of the victim's body, the wounds of the
victim, or to illustrate expert testimony (3 Wharton's op. cit., supra.; S 627, pp. 296-
309, esp. cases cited in ns. 37, 39, and 51). Photographic evidence should be excluded only
if its sole purpose is to arouse the emotions of the jury and to prejudice the
defendant.” (emphasis added).

**Foundation**

In Gallo v. Supermarkets Gen. Corp., 112 A.D.2d 345, 348-349 (2nd Dept. 1985),
the Court properly admitted into evidence photographs of the injured plaintiff taken while
he was undergoing treatment at the hospital. There was evidence that plaintiff looked at
himself in the mirror prior to undergoing the skin graft surgery, and was able to testify
that the photographs in question accurately portrayed his appearance at that time. Such testimony suffices to establish the admissibility of the photographs, since any discrepancies which may exist between his portrayal therein and what other people observed is properly addressed to the weight which the jury might ascribe to the pictures and not to their admissibility.

**Pictures of the Scene of the Accident or Instrumentality Involved**

If the foundation is laid that the photographs are a fair and accurate representation of the scene, that is sufficient for their admission into evidence. *Catanese v. Quinn*, 29 A.D.2d 675 (2nd Dept. 1968). The failure of the court to allow into evidence a photograph of an allegedly defective door, where the infant-plaintiff claimed that he fell through it, is error. *Lacanfora v. Goldapel*, 37 A.D.2d 721 (2nd Dept. 1971). Failure to admit into evidence a picture of a broken chain involved in an accident may be reversible error. *Ladd v. City of Lackawanna*, 25 A.D.2d 489 (4th Dept. 1966).


The photographs are admissible even where there are certain minor alterations to the conditions since the time of the accident. Schuster v. Town of Hempstead, 130 A.D.2d 481, 483, *mot. for lv. den.*, 70 N.Y.2d 613 (1987). Similarly, a photograph may be admissible even though there are minor variations from the conditions as they existed at the time of the accident. Delgado v. Pasternak, 22 A.D.2d 799 (2nd Dept. 1964); Saporito v. City of New York, 14 N.Y.2d 474 (1964).

Moreover, even where the plaintiff’s testimony concerning the photographs is inconsistent, “any inconsistencies in the testimony of the plaintiffs … presented factual issues for the jury, the resolution of which this court will not lightly disturb (see, Nicastro v. Park, 113 A.D.2d 129, 495 N.Y.S.2d 184).” Schuster v. Town of Hempstead, 130 A.D.2d 481, 483, *mot. for lv. den.*, 70 N.Y.2d 613 (1987).

**Photographs May Establish Constructive Notice**

“It has long been settled that photographs may be used to prove constructive notice of an alleged defect shown in the photographs, if they are taken reasonably close to the time of the accident, and there is testimony that the condition at the time of the accident was substantially as shown in the photograph. (citations omitted).” Karten v. City of New York, 109 A.D.2d 126,127 (1st Dept. 1985). Said photographs establish a *prima facie* case of notice and negligence. *Id.* at 128.

There is no express rule requiring that pictures of the condition be taken within a specific time frame after the accident occurs. In Taylor v. New York City Transit Authority, 48 N.Y.2d 903, 904 (1979), the Court of Appeal held that, “[T]he jury could
have found that, *whenever taken*, the photographs introduced by plaintiff were a fair and accurate representation of the condition of the penultimate step on the stairway as of the time of the occurrence.”(emphasis added).

In *Ruiz v. 195 Property Associates*, 245 A.D.2d 224 (1st Dept. 1997), the Court held that “the fact that the photographs were taken several years after the accident does not render them inadmissible to demonstrate such notice (see, *Taylor v. New York City Transit Authority*, 48 N.Y.2d 903, 424 N.Y.S.2d 888, 400 N.E.2d 1340).”

In *McCoy v. City of New York*, 38 A.D.2d 961 (2nd Dept. 1972), photographs taken a month after the accident were admissible and sufficient to prove notice. In *Karten, supra*, the photographs were taken three weeks after the incident. See, *Ferlito v. Great South Bay Associates*, 140 A.D.2d 408 (2nd Dept. 1988)(photos taken two to three weeks after the accident were admissible and established notice); *Atkins v. Francesca Realty Associates*, 238 A.D.2d 457 (2nd Dept. 1997)(photos taken six days later were admissible and established notice).

In *Williamson v. Board of Educ.*, 50 A.D.2d 667 (3rd Dept. 1975), *aff’d*, 40 N.Y.2d 979 (1976), the court properly allowed into evidence pictures of a student-cyclist performing a stunt prior to plaintiff’s accident for the limited purpose of showing notice of the general activity of cyclists by the school with respect to plaintiff’s claim of negligent supervision, where the plaintiff was injured by a student-cyclist.

In *Leventhal v. Forest Hills Gardens Corp.*, 308 A.D.2d 434, 764 N.Y.S.2d 125 (2nd Dept. 2003), in a trip and fall case, the trial court properly allowed into evidence one photograph constituting a general overview of the area, but improperly excluded from evidence three more specific photographs showing the accident site in greater detail. The
photographs may have allowed the jury to infer, based upon the appearance of the defect, that the condition had to have come into being over such a length of time that knowledge thereof should have been acquired by the defendant in the exercise of reasonable care, and under these circumstances, were not cumulative.

In Salvia v. Hauppauge Rte. 111 Assoc., 47 A.D.3d 791 (2nd Dept. 2008) reiterated that a photograph can provide constructive notice of a defective conditions.

To provide a defendant with constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident so as to permit the defendant to discover and remedy it (see Gordon v American Museum of Natural History, 67 NY2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646). **Photographs may be used to prove constructive notice of an alleged defect if the photographs are taken reasonably close to the time of the accident, and if there is testimony that the conditions at the time of the accident were similar to the conditions shown in the photographs** (see Batton v Elghanayan, 43 NY2d 898, 899, 374 N.E.2d 611, 403 N.Y.S.2d 717; DeGruccio v 863 Jericho Turnpike Corp., 1 AD3d 472, 473, 767 N.Y.S.2d 274; DeGiacomo v Westchester County Healthcare Corp., 295 AD2d 395, 743 N.Y.S.2d 548).

The defendant failed to establish its prima facie entitlement to judgment as a matter of law by showing that it did not have constructive notice of the alleged depression. In support of its motion for summary judgment, the defendant submitted the plaintiff's photographs of the subject depression and the plaintiff's deposition testimony relating to the admissibility of the photographs. **A jury could reasonably infer from the irregularity, width, depth, and appearance of the depression apparent in the photographs that the condition existed for a sufficient period of time for it to have been discovered and remedied by the defendant in the exercise of reasonable care** (see Taylor v New York City Tr. Auth., 48 NY2d 903, 904, 400 N.E.2d 1340, 424 N.Y.S.2d 888; Batton v Elghanayan, 43 NY2d at 900; Sotomayor v Pafos Realty, LLC, 43 AD3d 905, 906, 841 N.Y.S.2d 619; DeGruccio v 863 Jericho Turnpike Corp., 1 AD3d at 473; Leventhal v Forest Hills Gardens Corp., 308 AD2d 434, 435, 764 N.Y.S.2d 125). Accordingly, the defendant's motion for summary judgment dismissing the complaint should have been denied regardless of the sufficiency of the plaintiff's papers in opposition (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316).

In Jacobsen v. Krumholz, 41 A.D.3d 128 (1st Dept. 2007), there were triable issues of fact as to whether the defect was trivial and as to whether defendant had constructive notice. **The photographs depicted a lengthy irregular
depression with a jagged edge (see Argenio v Metropolitan Transp. Auth., 277 A.D.2d 165, 166, 716 N.Y.S.2d 657 [2000]), and, although there were no adverse weather or lighting conditions at the time of plaintiff's accident, and the area was not crowded, plaintiff testified at her deposition that she was concerned with vehicles entering and exiting the lot and therefore could not have been expected to be looking downward (see George v New York City Tr. Auth., 306 A.D.2d 160, 761 N.Y.S.2d 182 [2003]). The store manager's testimony regarding his lack of actual notice notwithstanding, plaintiff's testimony that the defect was of long duration, as well as the photographs, support an inference that the complained-of condition was not suddenly created and raise a triable issue as to whether defendant could have obtained timely knowledge of it by the exercise of ordinary care (see Dyssenko v Plaza Realty Serv., Inc., 8 AD3d 207, 779 N.Y.S.2d 197 [2004]).

In Stevens v. State, 47 A.D.3d 624 (2nd Dept. 2008), the Court of Claims judge was reversed for dismissing the claimant’s case.

Based on our review of, among other things, photographs depicting the pothole that were introduced into evidence, the witnesses' descriptions of the pothole, and expert testimony indicating that someone's foot could get "trap[ped]" if they stepped down into the pothole, we conclude that the pothole constituted a dangerous condition, was visible and existed for a sufficient period of time so as to place the defendant on constructive notice of its existence (see Gordon v American Museum of Natural History, 67 NY2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646), and was a proximate cause of the claimant's injuries. Accordingly, we award the claimant judgment against the defendant on the issue of liability, and remit the matter to the Court of Claims for a trial on the issue of damages (see Emmi v State of New York, 143 AD2d 876, 878, 533 N.Y.S.2d 406).

In Mayo v Santis, 74 AD3d 470 (1st Dept. 2010)

In exercising its function of issue-finding rather than issue-determination (see Insurance Corp. of N.Y. v Central Mut. Ins. Co., 47 AD3d 469, 472 [2008]), the motion court properly determined that photographs of defendants’ stair step, upon which plaintiff tripped and fell, demonstrated not only the quarter-inch rise at the edge of the step where plaintiff testified she tripped, but also the approximately 12 inches of missing bullnose protector and an exposed nail in the middle of the step. Based on these photographs, a jury could also reasonably conclude that this step was more worn than the steps beneath it and was surfaced with slippery linoleum. This presents a question of fact as to whether the condition of the step constituted a defect that—despite its triviality (see Argenio v Metropolitan Transp. Auth., 277 AD2d 165, 166 [2000])—nonetheless had the characteristics of a trap or a snare (see Rivera v 2300 X-tra Wholesalers, 239 AD2d 268 [1997]).

In Bolloli v Waldbaum, Inc., 71 AD3d 618 (2nd Dept. 2010)
To permit a finding of constructive notice, “a condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it” ([Deveau v CF Galleria at White Plains, LP, 18 AD3d 695, 695 [2005]; see Gordon v American Museum of Natural History, 67 NY2d at 837; Stone v Long Is. Jewish Med. Ctr., 302 AD2d 376 [2003]). Furthermore, “[a] photograph may be used to prove constructive notice of an alleged defect shown in the photograph if it was taken reasonably close to the time of the accident and there is testimony that the condition at the time of the accident was substantially as shown in the photographs” ([Lustenring v 98-100 Realty, 1 AD3d 574, 577 [2003]).

Here, the defendants failed to make a prima facie showing of entitlement to judgment as a matter of law. Contrary to the defendants’ contention, the evidence submitted in support of their motion for summary judgment, including the deposition testimony of the plaintiff and the store’s manager at the time of the accident, as well as various photographs of the area where the plaintiff fell, were insufficient to demonstrate, as a matter of law, that the alleged defect in the parking lot was trivial and, therefore, not actionable ([see Serano v New York City Hous. Auth., 66 AD3d 867 [2009]; Ricker v Board of Educ. Of Town of Hyde Park, 61 AD3d 735 [2009]).

Moreover, the defendants failed to establish, as a matter of law, that they lacked constructive notice of the alleged defect. The plaintiff testified at her deposition that she had seen the particular pothole that caused her to fall two months prior to her accident. The store manager also testified at his deposition that he performed inspections on a regular basis of the parking lot, including the area directly in front of the store where the plaintiff fell. Also, the photographs in the record show a noticeable pothole in the area where the plaintiff fell. Thus, triable issues of fact exist as to whether the defendants had constructive notice of the alleged defect.

Photographs may also be used to prove that a condition is not “trivial”. Felix-Cortes v City of New York, 54 AD3d 358 (2nd Dept. 2008).

Upon consideration of the photographic exhibits which were admitted into evidence at the trial, as well as the time, place, and circumstances of the accident ([see Trincere v County of Suffolk, 90 NY2d 976, 978), there exists a valid line of reasoning and permissible inferences which could have led the jury to conclude that the defect which caused the plaintiff's accident was not trivial in nature ([see Cohen v Hallmark Cards, 45 NY2d 493, 499; Tapia v Dattco, Inc., 32 AD3d 842, 844).

Diagrams, Maps, and Charts

Diagrams

It is long and well established that diagrams, even though not drawn to scale, are generally admissible in evidence to assist the jury in understanding oral testimony. Clegg

In Flah’s, Inc. v. Richard Rosette Electric, Inc., 155 A.D.2d 777 (3rd Dept. 1989), a diagram of an electrical system was held admissible even though it differed from the actual layout; it depicted one line and the actual system had three lines.

Where there is foundation that cars involved in an accident were in the same position immediately after the collision as at the time police observed them and made a diagram based upon their own observations of the scene, are admissible. Heiney v. Patillo, 76 A.D.2d 855 (2nd Dept. 1980); Lee v. DeCarr 36 A.D.2d 554 (3rd Dept. 1971)(skid marks). However, in Driscoll v. N.Y.C.T.A., 53 A.D.2d 391 (1st Dept. 1976), the court held that a police officer’s diagram, with arrows indicating that the plaintiff was roller skating in the street and not the sidewalk, contrary to plaintiff’s testimony at trial, was inadmissible where the officer was not a witness to the incident and did not have any first-hand knowledge of the scene.

**Charts**

Charts are admissible because they are an alternative method of communicating the testimony of the witness. Public Operating Corp. v. Weingart, 257 App. Div. 379 (1st Dept. 1939); People v. Kuss, 81 A.D.2d 427 (4th Dept 1981); People v. Estrada, 109 A.D.2d 977 (3rd Dept. 1985); Ferlito v. Great South Bay Associates, 140 A.D.2d 408 (2nd Dept. 1988); People v. Workman, 283 App. Div. 1066 (2nd Dept. 1954). Charts and similar visual aids may be used to illustrate events, provided that the material depicted pertains to matters in evidence. Johnston v. Colvin, 145 A.D.2d 846, 848 (3rd Dept.

An attorney or a witness may draw the chart or diagram, and a blackboard may be used. McKay v. Lasher, 121 N.Y. 477 (1890). An attorney may use a blackboard or chart during a summation. Carroll v. Roman Catholic Diocese of Rockville Centre, 26 A.D.2d 552, 553 (2nd Dept. 1966); Hiliuk v. Daponte, 100 A.D.2d 612 (2nd Dept. 1984); Johnston v. Colvin, 145 A.D.2d 846, 848 (3rd Dept. 1988). An attorney may place figures on a blackboard during his summation. Haley v. Hockey, 199 Misc. 512 (Sup. Jefferson 1950).

In Hinlicky v. Dreyfuss, 6 N.Y.3d 636 (2006), the Court of Appeals affirmed the use of an algorithm into evidence as demonstrative evidence. The Court noted that scientific works are generally excluded as hearsay when offered for their truth, and that in the instant case, the defendant was permitted to testify without objection that the process he used was consistent with a set of “clinical guidelines” recommended by the AHA and the ACC, that the “flow diagram” had been published prior to the surgery at issue and that he had incorporated the process into his practice. The algorithm was used as a demonstrative aid for the jury in understanding the process followed. Significantly, the plaintiff never requested a limiting instruction about the use of this demonstrative evidence. A party may not rely on said evidence as “stand alone proof” of a standard of care. See, Spensieri v. Lasky, 94 N.Y.2d 231, 239 (1999).

Once admitted for demonstrative purposes, the courts should circumscribe their use substantively by medical experts. If a party is concerned that the purpose for admitting the evidence is changing from demonstrative to substantive evidence, they
should promptly object and request a limiting instruction. While because the plaintiff’s attorney failed to make a timely objection, the Court noted that it has acknowledged the need for limits on admitting the basis of an expert’s opinion to avoid providing a “conduit for hearsay”. Hinlicky v. Dreyfuss, 6 N.Y.3d 636 (2006).

**Internal Guidelines**

The court may properly admit a defendant’s internal guidelines and give appropriate limiting instructions so that the plaintiff may establish that the defendant lacked any guidelines for handling security issues. Gerbino v. Tinseltown USA, 13 A.D.3d 1068, 1070, 788 N.Y.S.2d 538, 540 (4th Dept. 2004).

**Maps**


**Models and Anatomical Exhibits**

A model is admissible if it fairly and accurately reflects what it represents and will assist the jury. See, Coolidge v. City of New York, 99 App. Div. 175, aff’d, 185
N.Y. 529 (1906); USS v. Town of Oyster Bay, 44 A.D.2d 853 (2nd Dept. 1974); People v. Del Verno, 192 N.Y. 470, 482-483 (1908).

The model may be admissible even though it is not identical to the original and merely approximates it. People v. Del Verno, 192 N.Y. 470, 482-483 (1908); McKeon v. Proctor and Gamble, 162 App. Div. 784, 790 (2nd Dept. 1914)(model of a broken pin was properly admitted into evidence); People v. Langley, 232 A.D.2d 427 (2nd Dept. 1996), app. den., 89 N.Y.2d 865 (1996)(similar baseball bat).

In McNaier v. Manhattan Ry. Co., 51 Hun. 644 (2nd Dept. 1889), aff’d, 123 N.Y. 664 (1890), the court held that the sight of a skull and surgical instruments used to operate on it is not inflammatory.

In Dietz v. Aronson, 244 App. Div. 746 (2nd Dept. 1935), the court held it was error not to permit the jury to examine an infant plaintiff’s throat to determine the results of the operation by comparison with a diagram in evidence of a normal throat.

A model or diagram may be used for “demonstrative or illustrative purposes” and not entered into evidence, even though there is no proof of its accuracy or that is a correct representation. Knop v. Dechart, 7 A.D.2d 390 (4th Dept. 1896).

Pursuant to C.P.L. 60.44, a witness under the age of 16 may use an anatomically correct doll in testifying in prosecutions of certain sexual offenses. People v. McGuire, 152 A.D.2d 945 (4th Dept. 1989). The statute does not bar other witnesses from doing so. People v. Herring, 135 Misc. 2d 487 (Sup. Queens 1987)(70 year old aphasic man allowed to do so); People v. Rich, 137 Misc. 2d 474 (Sup. Monroe 1987)(17 year old allowed to do so).

Enlargements
Enlargements are admissible to assist the jury or for their use to more intimately detail items, such as the accident scene. In Salzano v. City of New York, 22 A.D.2d 656 (1st Dept. 1964), the court erred in failing to admit into evidence an enlargement of a photograph showing the hole that the plaintiff fell in. In Jarvis v. Long Island R. Co., 50 Misc. 2d 769, aff’d, 25 A.D.2d 617 (1st Dept. 1966), the court properly admitted blow-ups of aerial pictures. Enlargements may be made of virtually anything. Hoffman v. Prussian National Ins. Co., 181 App. Div. 412 (2nd Dept. 1918)(bill of sale); Frank v. Chemical National Bank, 37 N.Y.S. (1874)(checks that were allegedly forged); People v. Jones, 257 App. Div. 5 (4th Dept. 1939)(fingerprints).

A slide projector may be used to display color enlargements. Conkey v. New York Central R. Co., 206 Misc. 1077 (Sup. Monroe 1954).

**Videotapes and Movies**

“Similar to a photograph, a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted (see, People v Byrnes, 33 NY2d 343, 347-349). Testimony, expert or otherwise, may also establish that a videotape ‘truly and accurately represents what was before the camera’ (id., at 349). Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering (cf., People v Ely, 68 NY2d 520, 527-528). The availability of these recognized means of authentication should ordinarily allow for and promote the general, fair and proper use of new technologies, which can be pertinent truth-yielding forms of evidence.” People v. Patterson, 93 N.Y.2d 80, 84 (1999).

“[h]owever, the obligation and need for responsible accuracy and careful reliability should not be sacrificed to some of the whims and weaknesses of fast moving and rapidly changing technology.” Id.

A videotape is admissible into evidence if it is a relevant, true, accurate and authentic representation of what it claims to depict. City of New York v. Prophete, 144 Misc. 2d 391 (Civ. Ct. 1989). See, In Re Burack, 201 A.D.2d 561 (2nd Dept. 1994)(the
court properly allowed into evidence a videotape of a will execution); People v. Higgins, 89 Misc. 2d 913 (Sup. Bronx 1977); People v. Laufer, 275 A.D.2d 655 (1st Dept. 2000).

Whether a videotape or movie is admissible is within the discretion of the trial court, and depends upon the facts and circumstances of each case. When there is any tendency to exaggerate any of the true features which are sought to be proved, the court may refuse to allow the tape into evidence. In Mechanick v. Conradi, 139 A.D.2d 857 (3rd Dept. 1988), the trial court properly refused the showing of a videotape showing vehicles being operated at speeds no greater than 55 mph, contradicting the state trooper’s testimony that the motorcycle was speeding, and the tape showed a van instead of a motorcycle. See, Cramer v. Kuhns, 213 A.D.2d 131 (3rd Dept. 1995).

However, in Scheel v. L.I.R.R., 17 N.Y.2d 872, mod. on other grounds, 18 N.Y.2d 684 (1966), a tape of a scene as viewed from a moving car was admitted, even though it did not show what the driver could have seen with peripheral vision or by moving his head.

In Mercatante v. Hyster Co., 159 A.D.2d 492 (2nd Dept. 1990), the Appellate Division reversed the lower court for allowing the defendant to show to the jury a videotape demonstrating the operational capabilities of a machine when the actual machine involved in the lawsuit was available for inspection in the courthouse during the trial.

In Glusaskas v. Hutchinson, 148 A.D.2d 203 (1st Dept. 1989), the Appellate Division reversed the lower court for allowing the defendant to admit into evidence a videotape showing the defendant doctor performing an entirely separate surgery on a different patient who was suffering from a different condition and was subjected to
different procedures. The Appellate Division noted that the videotape was prepared exclusively for litigation by the defendant physician and was self-serving to disprove his negligence. See, Dunn v. Moss, 193 A.D.2d 983 (3rd Dept. 1993). Cf., Constantino v. Herzog, 203 F.3rd 164 (2nd Cir. 2000) (videotape of ACOG CME program admissible as learned treatise for impeachment purposes, and for use by expert during direct examination).

In Bellevue-Santiago v. City Ready Mix, Inc., N.Y.L.J. April 20, 2001, P. 1. Col. 1 (Sup. Kings), the Court held that the plaintiff could properly place into evidence a videotape that was taken of the surgical procedure performed on the plaintiff by her treating physician/surgeon.

In Austin v. Bascaran, 185 A.D.2d 474 (3rd Dept. 1992), a case involving a claim of negligent supervision of a dog with vicious propensities, the trial court erred in allowing into evidence a highly prejudicial videotape of the defendant’s dog herding sheep and following commands.

A film of a crime in progress is admissible. People v. Teicher, 73 A.D.2d 136 (1st Dept. 1980); People v. Rodriguez, 264 A.D.2d 690 (1st Dept. 1999). Cf., People v. Patterson, 93 N.Y.2d 80, 85 (1999). A plaintiff is entitled to discovery of surveillance videotapes depicting the actual accident, Rankin v. Waldbaum, 176 Misc. 2d 184 (Sup. Nassau 1998), and assuming they are a fair and accurate portrayal of the incident, are admissible.

However, in Rivera v. Eastern Paramedics, 267 A.D.2d 1029, 1030-1031 (4th Dept. 1999), the audiotape portion of a videotape was inadmissible because it contained a hearsay description of decedent’s care by his nurses.

**Surveillance**

Since Boyarsky v. G.A. Zinnerman Corp., 240 App. Div. 361 (1st Dept. 1934), the courts have allowed surveillance films to be used to contradict the plaintiff’s claims of injuries. However, there must be pre-trial disclosure of all such tapes and memoranda concerning them. CPLR 3101(i); DiMichel v. South Buffalo Ry., 80 N.Y.2d 184 (1992), rearg. den., 81 N.Y.2d 835 (1993), cert. den., 510 U.S. 816 (1993), rearg. dis., 82 N.Y.2d 921 (1994). In Tran v. New Rochelle Hospital Med. Ctr., 99 N.Y.2d 383 (2003), the Court of Appeals clarified the application of CPLR 3101(i), and noted that surveillance tapes and other specified materials are subject to “full disclosure”, regardless of need or hardship, are not limited to those materials a party intends to use at trial, and if made prior to the plaintiff’s deposition must be disclosed prior to that deposition.

The failure of the defendant to furnish the surveillance materials in a timely fashion may result in their being precluded from using these materials at the time of the trial. Evans v. Anheuser-Busch, 277 A.D.2d 874 (4th Dept. 2000); Young v. Knickerbocker Arena, 281 A.D.2d 761, 762-763 (3rd Dept. 2001). Copies may be furnished. Zegarelli v. Hughes, 3 N.Y.3d 64 (2004).

Plaintiff may also subpoena records concerning the surveillance videotapes, and affirmatively use said tapes at trial. Barnes v. New York State Thruway Authority, 176 Misc. 2d 195 (Ct. Claims 1998). Plaintiff may depose the videotape photographer and
obtain records concerning the circumstances surrounding the making of the tapes.


“[w]e now turn to the unique problems posed by surveillance films. Personal injury defendants secure surveillance materials in order to verify the extent of a plaintiff’s purported injuries and introduce them because they are powerful and immediate images that cast doubt upon the plaintiff’s claims. And indeed, if accurate and authentic, a surveillance film that undercuts a plaintiff’s claims of injury may be devastatingly probative. At the same time, however, film and videotape are extraordinarily manipulable media. Artful splicing and deceptive lighting are but two ways that an image can be skewed and perception altered. As one court has noted, "[t]he camera may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. Action may be slowed down or speeded up. The editing and splicing of films may change the chronology of events. An emergency situation may be made to appear commonplace. That which has occurred once, can be described as an example of an event which recurs frequently ... Thus, that which purports to be a means to reach the truth may be distorted, misleading, and false" (Snead v American Export-Isbrandtsen Lines, 59 FRD 148, 150).

Thus, while an accurate surveillance film may indeed prove to be a bombshell, the possibility of inaccuracy, given the nature of the medium, is very real.” 80 N.Y.2d 184, 192-193.

“Because films are so easily altered, there is a very real danger that deceptive tapes, inadequately authenticated, could contaminate the trial process.” 80 N.Y.2d at 196

“As noted above, however, surveillance films are extraordinarily susceptible to manipulation, and, once altered, are peculiarly dangerous. Thus, we cannot fashion a rule that is premised upon their authenticity...” 80 N.Y.2d at 197 (emphasis added).

In Tran v. New Rochelle Hosp. Med. Ctr., 99 N.Y.2d 383, 756 N.Y.S.2d 509 (2003), the Court held that a defendant could not withhold surveillance videotapes of a plaintiff until after a plaintiff was deposed, and were on the same footing as other material discoverable under CPLR 3101(a). In Zegarelli v. Hughes, 3 N.Y.3d 64, 781 N.Y.S.2d 488 (2004), the Court held that a defendant complies with its obligation to disclose a videotape when it delivers a complete copy of the tape to plaintiff’s counsel and makes the original available for plaintiff’s counsel to review. The videotape may not be admissible, however, where the court determines that the scenes depicted on it are not

The plaintiff may use surveillance videotapes disclosed by the defendant on her direct case. Hairston v. Metro-North Commuter Railroad, 6 Misc. 3d 399, 786 N.Y.S.2d 890 (Sup. NY 2004); Barnes v. N.Y.S. Thruway Authority, 176 Misc. 2d 195, 671 N.Y.S.2d 616 (Ct. Cl. 1998).

Plaintiff may obtain videotapes depicting his accident in the course of discovery. Rankin v. Waldbaum, Inc., 176 Misc. 2d 184 (Sup. Nassau 1998). Where a defendant attempts to use such a videotape against the plaintiff to show that the accident did not occur, it must produce proof that the videotape is a true, fair, and accurate representation of the events depicted, or it is inadmissible. Read v. Ellenville Nat’l Bank, 20 A.D.3d 408 (2nd Dept. 2005). In order for a videotape to be admissible, it must be properly authenticated and a chain of custody established. Read v. Ellenville Nat’l. Bank, 20 A.D.3d 408 (2nd Dept. 2005). See, e.g., Williams v. Halpern, 12 Misc. 3d 1156A, N.Y.L.J. May 5, 2006 (Sup. NY 2006)(chain of custody blood samples).

Audiotapes

Assuming an adequate foundation has been established, sound recordings have long been admissible. People v. Feld, 305 N.Y. 322 (1953); Frank v. Cossitt Cement Prods., Inc., 197 Misc. 670 (Sup. Madison 1950); Tepper v. Tannenbaum, 65 A.D.2d 588 (1st Dept. 1978).

If, however, the audiotape has been obtained illegally, it cannot be used. Ruskin v. Safir, 177 Misc. 2d 190 (Sup. NY 1998). Cf., Breezy Point Cooperative, Inc., 234 A.D.2d 409 (2nd Dept. 1996)(secretly recorded tapes admissible).

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Transcripts of properly admitted audiotapes are also admissible. People v. Gicanios, 199 A.D.2d 411 (2nd Dept 1993); People v. Dyla, 169 A.D.2d 777 (2nd Dept. 1991). The jury should be instructed that the transcripts are being provided as an aid to assist them. People v. Ashford, 190 A.D.2d 886 (3rd Dept. 1993); People v. Papa, 168 A.D.2d 692 (2nd Dept. 1990). A transcript of an English translation of a tape recording in a foreign language may also be provided to the jury. People v. Ali, 195 A.D.2d 368 (1st Dept. 1993); People v. Santos, 168 A.D.2d 392 (1st Dept. 1990). If a party disagrees with the transcript or translation, they should provide an alternate version to be given to the jury. People v. Rodriguez, 205 A.D.2d 328 (1st Dept. 1994).

“911” Tapes


Police Radio Calls

Tapes of police radio calls may also be admissible. People v. Perkins, 213 A.D.2d 358 (1st Dept. 1995); People v. Weatherly, 246 A.D.2d 340 (1st Dept. 1998).

Computer Animation

Computer animation recreations of an event are admissible in evidence, but like any other demonstrative evidence, must be based on facts in evidence. Usually they are
based on an accident reconstructionist report, which is based on other admissible
(W.D.N.Y. 1993); **Norfleet v. New York City Transit Authority**, 124 A.D.2d 715 (2nd
Dept. 1986); **People v. McHugh**, 124 Misc. 2d 559 (Sup. Bronx 1984)(computer
animation of a car accident is admissible); **Szeliga v. General Motors**, 728 F.2d 566 (1st

However, in **Kane v. Triborough Bridge & Tunnel Authority**, 8 A.D.3d 239, 778
N.Y.S.2d 52 (2nd Dept. 2004), computer animation recreation of an accident was held
inadmissible. In **Kane v. Triborough Bridge & Tunnel Authority**, 8 A.D.3d 239, 241-
242, 778 N.Y.S.2d 52, 54-55 (2nd Dept. 2004), the trial court improvidently exercised its
discretion in permitting the computer-generated animation to be played for the jury. “The
plaintiff failed to lay a foundation for its admission into evidence. Moreover, the
circumstances portrayed in the computer-generated animation were sufficiently different
from those which existed at the time of the accident to render its utility questionable in
light of the high potential for prejudice inherent in allowing the jury to view it (citations
omitted). Finally, even if the first two errors had not occurred, the trial court erred in
failing to instruct the jury that the computer-generated animation was being admitted for
the limited purpose of illustrating the expert’s opinion as to the cause of the accident and
that it was not to consider the computer-generated animation itself in determining what
actually caused the accident (citations omitted). Without such a limiting instruction, the
trial court left open the possibility that the jury might ‘confuse art with reality’ (citations
omitted).”
In *Kartychak v. Consolidated Edison of New York, Inc.*, 304 A.D.2d 487, 758 N.Y.S.2d 644 (1st Dept. 2003), the trial court properly admitted into evidence photographs of the re-created work site, three witnesses having testified that the photographs fairly and accurately depicted the general setup behind the Con Ed truck at the time of the accident.

**Black Box**

New York has now joined courts in some other jurisdictions that have admitted “black box” [a/k/a Event Data Records (EDR) a/ka SDM] data into evidence. *People v. Slade*, ___ Misc. 2d ___, N.Y.L.J. January 18, 2005, P. 20 Col. 1 (Sup. Nassau); *People v. Christmann*, 3 Misc. 3d 309 (Sup. Wayne 2004); *People v. Hopkins*, 6 Misc. 3d 1008A, 2004 WL 3093274 (Sup. Monroe 2004). In *People v. Reynolds*, 193 Misc. 2d 697 (Sup. Essex 2002), the court denied the defendant’s application for a *Frye* hearing on the admissibility of this technology.

The technology of a “black box” module has been generally accepted as reliable in the relevant scientific community, and no *Frye* hearings are necessary. *People v. Hopkins*, 6 Misc. 3d 1008A (County Ct. Monroe 2004). This does not mean that this technology is always admissible. In *Hotaling v. CSX Transportation*, 5 A.D.3d 964, 969, 773 N.Y.S.2d 755, 760 (3rd Dept. 2004), in an accident involving two trains, “the defendant conceded that the tapes from each train were not calibrated to each other so it would not be accurate to compare them side by side. Numbers relating to distances and times may lead to juror speculation unless expert proof puts them in context to explain their significance (citation omitted). As defendant had no expert to interpret the speed tapes, the court appropriately precluded their admission into evidence.”
In People v. Muscarnera, 16 Misc. 3d 622, 634-635 (Dist. Ct. Nassau 2007), a case involving the issue of whether the defendant drove recklessly, the court addressed the admissibility of the data from the EDR.

The defendant seeks the "preclusion" of the results of the data from the powertrain control module (black box) obtained from the defendant's automobile after the accident, based upon the grounds that the results are scientifically unreliable. In the alternative, the defendant requests that the court conduct a Frye hearing prior to the trial to ascertain the reliability of the results.

The admissibility test for expert testimony was established in Frye v United States (293 F 1013 [1923]). It requires that expert testimony be based on scientific principle or procedure which has been sufficiently established to have gained general acceptance in the particular field in which it belongs. (People v Wesley, 83 NY2d 417 [1994].) The New York Court of Appeals has unanimously affirmed the continuing validity of the Frye test, rather than the federal Daubert test standard. (See, Daubert v Merrell Dow Pharmaceuticals, Inc., 509 US 579 [1993].) The Frye test standard only applies to novel scientific theories or tests. (People v Wernick, 89 NY2d 111 [1996].) Whether the Frye standard has been satisfied with respect to a particular type of scientific evidence is for the trial judge to decide. A court may be able to make its determination by reference to scientific literature or judicial opinions. (People v Hopkins, 6 Misc 3d 1008[A], 2004 NY Slip Op 51748[U] [Monroe County Ct 2004].) If there is insufficient scientific literature or judicial opinions, a court may conduct a hearing on the issue of general acceptance in the relevant scientific community. (People v Jeter, 80 NY2d 818 [1992].)

In New York, trial level courts have held that data recorded on a "Sensing Diagnostic Module" (SDM) or a "black box" seized from a defendant's automobile is reliable, without holding a Frye hearing. (See, People v Hopkins, 6 Misc 3d 1008[A], 2004 NY Slip Op 51748[U], supra; People v Christmann, 3 Misc 3d 309 [Just Ct, Wayne County 2004].) In Nassau County, Judge Honorof, after conducting a Frye hearing, found the data recorded on a SDM to be scientifically reliable. (See, People v Slade, Index No. 0666-03.) Notwithstanding the foregoing, however, no appellate court in New York State has ruled on the admissibility of data recorded on a SDM. Nor have the People presented this court with any literature concerning the scientific principles of a SDM or the reliability of data recorded on a SDM. Thus, this court finds that there is a lack of binding judicial precedent on this issue and this court cannot admit into evidence the data recorded on the "black box" without first holding a hearing on its reliability. Moreover, in the instant case the data was recorded on a "powertrain control module" (black box), not a SDM (black box). The court is not certain whether a "powertrain control module" and a SDM are one and the same.

In view of the foregoing, the portion of the defendant's motion seeking an in limine pretrial evidentiary ruling prohibiting the use of data from the "black box" found in the defendant's automobile is granted to the extent that a Frye hearing shall be held prior to trial.

Defendant has moved, in limine, for a hearing pursuant to Frye v. United States, 293 F 1013, to test the reliability of the information contained in the SDM (sensing diagnostic module or "black box") modules seized from the vehicle, a 2004 Cadillac alleged to have been driven by the defendant at the time of the crash. He contends that application of the Frye standard would preclude the admission of such information because the SDM module has not been generally accepted as reliable in the scientific community in this state as indicated by the absence of judicial precedent on this issue.

The People oppose a Frye hearing and urge this court to adopt the reasoning and findings set forth in Bachman v. General Motors Corporation, 332 Ill App 3rd (4th Dist 2003), a decision issued by an appellate level court in the State of Illinois recognizing SDM data as being generally accepted as reliable and accurate by the automobile industry and, therefore, admissible pursuant to Frye v. United States, 293 F 1013. They also refer the court to a Newark Village Court case decided on January 16, 2004, wherein the court, based upon its adherence to the Frye determination rendered in Bachman v. General Motors Corporation, concluded that the evidence of data recorded on a SDM was admissible (People v. Christmann, 3 Misc 3d 309 defendant was charged with speeding and failure to exercise due care in a fatal automobile accident involving a pedestrian). Additionally, the People have submitted several other exhibits in support of their position, namely, a copy of the transcribed minutes of the Davis-Frye hearing held on January 10, 2003, in the Circuit Court for the County of Eaton in the case People of the State of Michigan v. Stephan Wood which reflects the trial court's decision to admit evidence of data collected from SDMs as well recognized and accepted in the scientific community; and three articles entitled, respectively, "Recording Automobile Crash Event Data" presented at the International Symposium on Transportation Recorders held May 3-5, 1999 and authored by Augustus "Chip" Chidester, John Hinch, members of the National Highway Traffic Safety Administration and Thomac C. Mercer, Kevin S. Schultz, representatives of the General Motors Corporation; "Real World Experience With Event Data Recorders" authored by Augustus "Chip" B. Chidester, John and Thomas A. Roston, all members of the National Highway Traffic Safety Administration (undated); and "Crash Data Retrieval System Validation Testing," a report of the Wisconsin State Patrol Academy issued on November 2, 2001. The People argue further that defendant's stated concerns regarding the SDM data limitations raise foundational issues regarding the specific reliability of the procedures used to generate data, all of which go to the weight of the evidence rather than its admissibility.

When discussing the Frye standard of admissibility in connection with DNA evidence, the New York Court of Appeals in People v. Wesley, 83 NY2d 417, 420-423 stated:

"While foundation concerns itself with the adequacy of the specific procedures used to generate the particular evidence to be admitted, the test pursuant to Frye v United States
(293 F 1013) poses the more elemental question of whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally. *** The long-recognized rule of Frye v United States (supra) is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field. In Frye (supra, at 1014) the court stated: 'Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs' (emphasis supplied). *** This Court has noted that the particular procedure need not be 'unanimously indorsed' by the scientific community but must be 'generally accepted as reliable' (see, [*14]People v Middleton, 54 NY2d 42, 49, supra)."

Also in Wesley, the Court of Appeals acknowledged that application of the Frye standard to other types of novel scientific evidence, e.g. use of radar in speed detection (People v. Magri, 3 NY2d 562, 565-566) and identification through bite marks (People v. Middleton, 54 NY2d 42, 49-50), had resulted in a judicial determination concerning their general acceptance as reliable in the relevant scientific community.

The key to admissibility of novel or scientific evidence is general acceptance in the scientific community as reliable. According to one noted treatise, reliability may be established in at least three ways: (1) "general acceptance may be so notorious that the court may take judicial notice of it" (2) "acceptance may be established by reference to legal writings and judicial opinions" (3) if neither of the above can be resorted to, the trial judge "may conduct a hearing at which the proponent may establish admissibility by offering evidence of acceptance, including the expert's own testimony" (Prince, Richardson on Evidence § 7-311 [Farrell 11th ed]; cites omitted).

In this case, the court is persuaded, based upon its review of the cases and other supporting documentation submitted by the People, and in the absence of any contrary or contradictory evidence, that the SDM module technology has been generally accepted as reliable in the relevant scientific community. A Frye hearing is, therefore, unnecessary to determine the admissibility of evidence with respect thereto at trial. The defendant's request for such hearing is denied.

**Experiments**

A demonstration or experiment is admissible, at the trial court’s discretion, as long as the conditions are sufficiently similar to those existing at the time in question to make the result achieved by the test relevant to the issue. People v. Estrada, 109 A.D.2d 977 (3rd Dept. 1985). See, People v. Acevedo, 40 N.Y.2d 701, 704 (1976); Riddle v.

In Weinstein v. Daman, 132 A.D.2d 547, 548-549 (2nd Dept. 1987), the trial court committed reversible error when it granted the defendant’s application to conduct an experiment in order to test the credibility of the plaintiff, and allowed the jurors to sit in the witness chair and cover his or her right eye and determine whether they could see the defense attorney with their other eye. The plaintiff claimed that because of the loss of vision in his right eye, he was unable to see defense counsel when he rose to make an objection. The Appellate Division held this procedure to be “highly prejudicial”, “clearly improper” and “inadmissible”.

The testimony of a floor manager of the hotel where an accident occurred that she performed an experiment with the step ladder which indicated that the injured plaintiff did not properly lock the step ladder in place was inadmissible. Coku v. Millar Elevator Indus., Inc., 12 A.D.3d 340, 784 N.Y.S.2d 149 (2nd Dept. 2004).

In Vinci v. Ford Motor Co., 45 A.D.3d 335 (1st Dept. 2007)
Although the issue of the admissibility of defendant's crash test video is unquestionably a close call, we conclude that its admission was a proper exercise of discretion despite certain dissimilarities between the accident condition and the conditions under which the test was conducted.

We further conclude, however, that the trial court's refusal to permit plaintiff's expert to testify as a rebuttal witness with respect to the crash test video warrants reversal. Contrary to the trial court's ruling, plaintiff could not have been expected to introduce testimony regarding the video during his expert's direct testimony since the video, a defense exhibit, had not even been admitted into evidence at that point.

Only “[b]y effective exploitation of the dissimilarities between the [video] and the [accident]” could plaintiff have minimized the significance to be attached to the crash test video (Uss v Town of Oyster Bay, 37 NY2d 639, 641 [1975]). Plaintiff was *337 deprived of this opportunity, and thus it was an abuse of discretion for the trial court to deny plaintiff the right to present rebuttal testimony on this key issue (see Eisner v Daitch Crystal Dairies, 27 AD2d 921 [1967]).

Conclusion

Seeing is believing. We live in a material world, so it behooves counsel to bring their demonstrative materials to court in order to have a full and visual trial to properly educate the jury.

Trivial Defect

In Bruinsma v Simon Prop. Group, Inc., 74 AD3d 859 (2nd Dept. 2010), the court reminded us that

“[T]here is no ‘minimal dimension test’ or per se rule that a defect must be of a certain minimum height or depth in order to be actionable” (Trincere v County of Suffolk, 90 NY2d 976, 977 [1997]). Rather, a court must look at the “width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury” (id. at 978 [internal quotation marks omitted]). Here, the defendants failed to make a prima facie showing that the alleged defect was trivial and, therefore, not actionable. The evidence submitted by the defendants regarding the dimensions and irregular shape of the alleged defect, including the plaintiff’s deposition testimony [*2]and photographs of the accident site, raised issues of fact as to whether the alleged defect was trivial and, therefore, not actionable (see Bolloli v Waldbaum, Inc., 71 AD3d 618 [2010]). In view of the foregoing, it is unnecessary to consider the sufficiency of the plaintiffs’ opposition papers (see Tchjevskata v Chase, 15 AD3d 389 [2005]).
In *Rivas v Crotona Estates Hous. Dev. Fund Co., Inc.*, 74 AD3d 541 (1st Dept. 2010),

The motion court improperly determined that dismissal of the complaint was warranted on the ground that the defect that allegedly caused plaintiff’s accident was so trivial as to be nonactionable. The photographs, which show a missing portion of a triangular tile in the lobby floor, do not unequivocally demonstrate that that defect is trivial (see *Abreu v New York City Hous. Auth.*, 61 AD3d 420 [2009]). In the absence of evidence demonstrating the depth of the defect, and in light of plaintiff’s testimony that her injury resulted from her heel getting caught in a hole caused by a missing tile, issues of fact remain as to whether the nature of the defect was such as to constitute a tripping hazard (see *Elliott v East 220th St. Realty Co.*, 1 AD3d 262, 263 [2003]).

Furthermore, the fact that plaintiff was aware of the defect prior to her injury is not relevant to the question of whether the defect was significant. The open and obvious nature of an obstacle or defect simply negates the property owner’s duty to warn of it; “it does not eliminate [*2]the property owner’s duty to ensure that its property is reasonably safe” (*Lawson v Riverbay Corp.*, 64 AD3d 445, 446 [2009]).

Open & Obvious

In *Shah v Mercy Med. Ctr.*, 71 AD3d 1120 (2nd Dept. 2010), the court also noted that

The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for a jury (see *Ruiz v Hart Elm Corp.*, 44 AD3d 842 [2007]). Whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (see *Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008, 1009 [2008]).

In *Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 AD3d 599 (1st Dept. 2010)

First, plaintiff’s testimony that she had frequently observed the protruding metal on many frequent visits to the building does not establish, as a matter of law, that the alleged danger was open and obvious, and we note that there is no evidence as to how far the metal protruded from the heater (see *Westbrook v WR Activities-Cabrera Mktgs.*, 5 AD3d 69, 72 [2004]). Second, while an open and obvious danger negates the duty to warn and is relevant to the issue of comparative negligence, it does not negate the duty to maintain the premises in a reasonably safe condition (see
id. at 72-73; Caicedo v Cheven Keeley & Hatzis, 59 AD3d 363 [2009]), and we cannot say, as a matter of law, that the stairwell was in a reasonably safe condition

In HEADLEY v. M & J LTD. PARTNERSHIP, 70 A.D.3d 1312 [4th Dept 2010]

According to plaintiffs, who rented an apartment from defendant, Donna Headley (plaintiff) fell as a result of the dangerous condition of the back deck and steps of the apartment, i.e., the presence of a mildewy growth in the wood that, when wet, rendered the deck and steps unusually slippery.

The complaint, as amplified by the bill of particulars, alleged that defendant created the allegedly dangerous condition by "allowing water, mold and mildew to form and remain on the steps of the premises," and "that it had actual or constructive notice of the allegedly dangerous condition. Supreme Court properly denied the motion (see Khamis v CG Foods, Inc., 49 AD3d 606, 607 [2008]; see generally Welch v De Cicco, 9 AD3d 725 [2004]; Backer v Central Parking Sys., 292 AD2d 408, 409 [2002]). We note in particular that, by its own submissions, which included the deposition testimony of both plaintiffs, defendant failed to establish that it did not have actual notice of the allegedly dangerous condition. Contrary to defendant's contention, the fact that plaintiff was aware of the condition did not relieve defendant of its duty to maintain the deck and steps in a reasonably safe condition. "The fact that a dangerous condition is open and obvious does not negate the duty to maintain premises in a reasonably safe condition but, rather, bears only on the injured person's comparative fault" (Rice v University of Rochester Med. Ctr., 55 AD3d 1325, 1327 [2008]; see Baines v G & D Ventures, Inc., 64 AD3d 528, 529 [2009]; Konopczynski v ADF Constr. Corp., 60 AD3d 1313, 1315 [2009]).

In Cooper v American Carpet & Restoration Servs., Inc., 69 AD3d 552 (2nd Dept. 2010)

Here, the defendant failed to establish, prima facie, that the hose, which was coiled and took up most of the width of the ramp, was not inherently dangerous (see Salomon v Prainito, 52 AD3d 803; Fabish v Garden Bay Manor Condominium, 44 AD3d 820; Belogolovkin v 1100-1114 Kings Highway LLC, 35 AD3d 514; Palmer v Vitrano, 29 AD3d 656). The fact that the condition was open and obvious only raised a triable issue of fact as to the injured plaintiff's comparative negligence (see Cupo v Karfunkel, 1 AD3d 48). Although the defendant improperly raised for the first time in its reply papers the contention that it owed no duty of care to the injured plaintiff, we may consider it on appeal because the existence of a duty presents a question of law which could not have been avoided if brought to the Supreme Court's attention at the proper juncture (see Dugan v [*2]Crown Broadway, LLC, 33 AD3d 656). "As a general rule, a party who enters into a contract to render services does not assume a duty of care to third parties outside the contract" (id.; see Church v Callanan Indus., 99 NY2d 104, 111; Espinal v Melville Snow Contrs., 98 NY2d 136, 138-139). "Nevertheless, a recognized exception to this rule exists where a defendant who undertakes to render services
negligently creates or exacerbates a dangerous condition" (Dugan v. Crown Broadway, LLC, 33 AD3d at 656; see Church v Callanan Indus., 99 NY2d at 111; Espinal v Melville Snow Contrs., 98 NY2d at 141-142). Under the circumstances, the defendant failed to establish, prima facie, that it did not create the alleged hazardous condition (see Espinal v Melville Snow Contrs., 98 NY2d 136; Laap v Francis, 54 AD3d 1006; Dugan v Crown Broadway, LLC, 33 AD3d 656). Since the defendant failed to meet its initial burden as the movant, this Court need not review the sufficiency of the plaintiffs' opposition papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851).

Recurring Condition

In Baillargeon v. King County waterproofing Corp., 29 A.D3d 838 (2nd Dept. 2006), summary judgment was properly denied where there was a failure to repair a recurrent leaking condition of the roof, even though the injured plaintiff could not identity what caused him to slip and fall.

In Irizarry v. 15 Mosholu Four, LLC, 24 A.D3d 373 (1st Dept. 2005), the lower court was reversed for granting summary judgment where the plaintiff and a nonparty witness testified at depositions that no only was refuse on the subject stairwell a recurring condition, but that it frequently remained unremedied. The stairs were generally unclean and litter was allowed to accumulate to an uncomfortable level, and complaints were made to the superintendent and the landlord that t he stairs were not clean and that garbage littered the stairs after tenants brought their garbage bags down the stairs for disposal. This evidence, when compared to defendants’ witnesses’ testimony regarding defendants’ alleged cleaning schedule, raised issues of fact as to whether there was actually a dangerous and frequently unremedied recurring condition on the stairs that caused plaintiff’s injury. Constructive notice may be demonstrated by evidence of a recurring dangerous condition in the area of the accident that was routinely left

Similarly, in Batista v. KFC National Management Co., 21 A.D3d 917 (2nd Dept. 2005), the manager of the restaurant which leased the subject property testified that her daily inspection of the premises frequently revealed the presence of wood chips on the adjacent sidewalk. Under these circumstances, a trier of fact could reasonably infer that the defendant had actual notice of such a recurring condition. In addition, there was evidence that the wood chips on the sidewalk emanated from the defendants’ property, and that such condition may have constituted a hazardous situation which precipitated her fall.

These cases follow a line of cases [See, Erikson v. J.I.B. Realty Corp., 12 A.D3d 344 (2nd Dept. 2004); Roussos v. Ciccotto, 15 A.D3d 641 (2nd Dept 2005); Mullin v. 100 Church LLC, 12 A.D.3d 263 (1st Dept. 2004)].

**SIDEWALKS**

**PROOF OF NOTICE IN SIDEWALK DEFECT CASES**

By Sherri Sonin & Robert J. Genis

Walking the streets and sidewalks of New York City can be a dangerous and trying experience. The same can be said of representing a client that was injured as a result of a defective sidewalk. Pursuant to Section § 7-201 of the New York City Administrative Code, counsel representing a person injured by a hazardous condition on a sidewalk or roadway must usually prove that the City had actual prior written notice of the condition at least 15 days prior to the date of the plaintiff’s accident.
However, NYC Administrative Code § 7-210, applicable to sidewalk-defect accidents occurring on or after September 14, 2003, shifted liability for sidewalk accidents in most instances from the City to abutting land owners.

To prove his or her *prima facie* case, frequently plaintiff’s counsel will seek to utilize a “Big Apple Map”. These maps bear symbols on them indicating the type of defective condition present on the sidewalk or crosswalk and are accompanied by a legend to interpret the symbols on the map, and are filed by the Big Apple Pothole and Sidewalk Protection Corporation on the City’s Department of Transportation Prior Notification Unit. Copies of the maps are kept by the Big Apple Pothole and Sidewalk Protection Corporation’s office with proof of the date and time they were served on the City’s Department of Transportation Prior Notification Unit.

**ADMISSIBILITY OF “BIG APPLE” MAP REGARDING NOTICE OF DEFECTIVE CONDITION**

Usually, the plaintiff does not offer the Big Apple Map into evidence to prove the existence of a defective condition, but simply for the purpose of establishing that the City received prior written notice of the claimed defect. As such, the map is admissible. *Larkin v. City of New York*, N.Y.L.J. March 14, 2000, P. 29 Col. 2 (Sup. Kings).

**WHO MAY LAY FOUNDATION FOR ADMISSION OF THE BIG APPLE MAP**

While an employee of the Big Apple Pothole & Sidewalk Protection Committee Inc., is competent to establish the requisite foundation for the admission of the Big Apple Map into evidence, the map is also admissible when a foundation is laid by an employee of the New York City Department of Transportation. This is usually accomplished pursuant to a *subpoena duces tecum* that is served on the City of New York, Department
of Transportation, for a particular witness, requiring the person to produce in court at the trial of the case the original “Big Apple” map that it received, or a certified copy of it, for the site in question.

A corporation which is served with a subpoena duces tecum must comply with it by producing the requested material and by providing someone who can testify about origin, purpose, and custody, and the trial court commits error in failing to require the corporation to compel a witness to appear. Castro v. Alden Leeds, Inc., 144 A.D.2d 613 (2nd Dept. 1988). This includes a municipal corporation, such as the City of New York.

“Whether the witness is a DOT employee or any other witness … it would be inappropriate for this court to preclude the introduction of the challenged map solely on the basis urged by the City, namely, that the witness is not a Big Apple employee. This court will not declare that an employee of Big Apple is the exclusive, categorical, foundation witness for the introduction of the map. Indeed, in the opinion of this court, that ruling would constitute a violation of established rules of evidence.” Larkin v. City of New York, N.Y.L.J. March 14, 2000, P. 29 Col. 2 (Sup. Kings).

BIG APPLE MAPS ARE ADMISSIBLE PUBLIC RECORDS

Pursuant to the pot hole law, N.Y.C. Admin. Code Sec. 7-201 (c) (3) [previously numbered Sec. 394a-1.0(d)], “[T]he commissioner of transportation shall keep an indexed record … of all written notices which the city receives … of the existence of such defective, unsafe, dangerous or obstructed conditions, which record shall state the date of receipt of each such notice, the nature and location of the condition stated to exist and the name and address of the person from whom the notice is received. This record shall be a public record. The record of each notice shall be maintained in the
... and shall be preserved ... for a period of not less than ten years.” (emphasis added).

In reviewing the Admin. Code and Gen. Mun. Law Secs. 50-f and 50-g (which also requires the city to index and maintain records of all notices of defect and notices of claim, by location), the Courts have held that under the law, it is the City which must keep accurate records of all notices of defect, from all sources. Shatzkamer v. Eskind, 139 Misc. 2d 672, at 679 and 682 (Civ. Kings 1988)(emphasis added). “[I]t is the City which has been made custodian of the records both for notices of claim and for the notices called for by the pot-hole law.” Bair v. City of New York, 131 Misc. 2d 734, at 739 (Sup. Kings 1986)(emphasis added).

“Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon.” Katz v. City of New York, 87 N.Y.2d 241, 243 (1995). “It is well settled that Big Apple maps filed with New York City Department of Transportation serve as prior written notice to the city of the defective conditions indicated on the maps (citations omitted).” Weinreb v. City of New York, 193 A.D.2d 596, 598 (2nd Dept. 1993).

In Weinreb, supra, the Appellate Division unanimously found that the Big Apple Maps gave the City of New York notice of the defective condition which the plaintiff alleged caused her injuries, and found that the lower court erred in failing to do so.

In Matter of Big Apple Pothole and Sidewalk Protection Committee v. Ameruso, 110 Misc. 2d 688 (Sup. N.Y. 1981), aff’d., 86 A.D.2d 986 (1st Dept. 1982), lv. den., 56 N.Y.2d 507 (1982), the court held that “[T]he maps in question do, by any standards,
constitute written notices as required by the statute.” 110 Misc. 2d at 691. The Court held that pursuant to the N.Y.C. Admin. Code, the City was required to keep a record of all written notices of defective conditions, and was mandated by law to record the notices given by the maps and did not have any discretion in this regard. 1d.

The Court found that the Big Apple maps were “far more detailed than the” City’s own forms for notification. 110 Misc. 2d at 690. The Court noted that the Sanborn Map Company was commissioned to perform the survey of defects, and as part of that arrangement, the company used trained field survey personnel to provide detailed maps. The maps show the location of the defects found by the surveyors and identify the nature of the defects by use of the different symbols that are keyed to the map legend.

Based on these statutes and decisions, this Court may take Judicial Notice of the fact that the Big Apple map is admissible as a public record maintained by the Department of Transportation, and is reliable with respect to notice of defective conditions. See, CPLR 4511; Sam & Mary Housing Corp. v. Jo/Sal Market Corp., 100 A.D.2d 901 (2nd Dept. 1984).

**CONCLUSION**

The Big Apple map is admissible as a record maintained by the Department of Transportation. See, CPLR 4540; 4518; 4539.

Once the map had been entered into evidence, plaintiff has established a *prima facie* case of prior written notice of a defective condition. Brown v. City of New York, N.Y.L.J. August 25, 1999, P. 23 Col. 3 (Civ. Bronx).

**Cause & Create**
Where a municipality affirmatively creates a condition, such as by removing a pole that protruded from the ground, written notice of the defective condition is not required. Cabrera v. City of New York, 21 A.D.3d 1047 (2nd Dept. 2005). See, Kiernan v. Thompson, 73 N.Y.2d 840. However, the defective condition must be one that is immediately apparent, and is not latent. See, Bielecki v. City of New York, 14 A.D.3d 301 (1st Dept. 2005); Oboler v. City of New York, 8 N.Y.3d 888 (2007). Albright v. City of New York, 25 A.D.3d 577 (2nd Dept. 2006). In Oboler, supra, the Court resolved a split in the Appellate Divisions created by Kushner v. City of Albany, 27 A.D.3d 851 (3rd Dept. 2006), aff’d, 7 N.Y.3d 726 (2006), where the appellate court expressly rejected the rationale of Bielecki, but found that an ineffectual pothole repair job which does not make the condition any worse is not an affirmative act of negligence. In affirming the decision in Kushner, the Court of Appeals did not mention this split in the Appellate Divisions, and merely referred to its prior decision in Amabile v. City of Buffalo, 93 N.Y.2d 471 (1999), which stated that constructive notice of a condition does not satisfy a requirement of prior written notice.

In Oboler, supra, the Court still left intact another exception to the prior written notice requirement: where a 'special use' confers a special benefit upon the municipality.

While the amended Administrative Code of the City of New York (§ 7-210) has effectively transferred the responsibility of maintaining a sidewalk from the City to the abutting landowner, the duty to maintain the curbstone still remains with the City. Irizarry v. The Rose Bloch 107 University Place Partnership, 12 Misc.3d 733 (Sup. Kings 2006).

INADMISSIBILITY OF CITY POLICY re: REPAIRS
By Sherri Sonin and Robert J. Genis

The City has nondelegable duty to maintain sidewalks. The City should be precluded from attempting to present evidence of its policies regarding sidewalk repairs, its priorities in performing said repairs, and its fiscal difficulties. Such policies not to repair the type of defect at issue is not a viable excuse. Zipkin v. City of New York, 196 A.D.2d 865 (2nd Dept. 1993), mot. for lv. to app. den., 82 N.Y.2d 665 (1994)(Court properly excluded evidence of such policies).

ADMISSIBILITY OF ADMINISTRATIVE CODE & D.O.T. RULES & REGULATIONS

By Sherri Sonin and Robert J. Genis

Pursuant to CPLR 4511, the Court must take judicial notice of and allow into evidence, the N.Y.C. Admin. Code, and the rules and regulations promulgated by the Department of Transportation pursuant to the Code and Charter of the City of New York, even if the plaintiff never claimed said items in his Bill of Particulars. Rothstein v. CUNY, 194 A.D.2d 533 (2nd Dept. 1993); Souveran Fabrics Corp. v. Virginia Fibre Corp., 32 A.D.2d 753 (1st Dept. 1969); See, Chanler v. Manocherian, 151 A.D.2d 432 (1st Dept. 1989).

In addition to the CPLR, the Administrative Code of the City of New York, Sec. 1-104(a) provides:

“All courts shall take judicial notice of all laws contained in the code, the charter, the local laws, ordinances, the health code, resolutions, and all of the rules and regulations adopted pursuant to law.”

In Elliott v. City of New York, 95 N.Y.2d 730, 724 N.Y.S.2d 397 (1999), the Court of Appeals clarified its prior holding in Guzman v. Haven Plaza Hous. Dev. Fund Co., 69 N.Y.2d 559, 565 fn. 3, 515 N.Y.S.2d 451 (19 ), and held that with the exception of those Code provisions which were approved or adopted by the Legislature or had their “origin in State law”, a Building Code violation has the effect of a violation of an ordinance (and not a statute), that is evidence of negligence. In Huerta v. N.Y.C.T.A., 290 A.D.2d 33, 735 N.Y.S.2d 5 (1st Dept. 2001), app. dis., 98 N.Y.2d 643, 744 N.Y.S.2d 758 (2002). the Appellate Division held that the maintenance of subway stations was a propriety function and was subject to the safety standards of the New York City Administrative Code. Thus, for the purposes of tort law, a governmental entity is liable for its failure to comply with the minimum regulatory standards that are applicable to a private similarly situated landowner.

Plaintiff should request that the Court take judicial notice of the following pertinent portions of said items, and allow said portions into evidence.

**ADMINISTRATIVE CODE**

Section 19-152 (a) “For the purpose of this subdivision, a substantial defect shall include any of the following:

4. a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch or where a sidewalk flag
contains one or more surface defects of one inch or greater in all horizontal
directions and is one half inch or more in depth.”

8. non-compliance with DOT specifications for sidewalk construction”.

19-152 (a-1). “For purposes of this subdivision, a hazard shall exist on any
sidewalk where there is any of the following:

5. a vertical grade differential between adjacent sidewalk flags greater than or
equal to one half inch or a sidewalk flag which contains one or more surface
defects of one inch or greater in all horizontal directions and is one half inch
or more in depth.

6. (b). All such work shall be done in accordance with such specifications and
regulations prescribed by the department.”

19-105 “Rules. The commissioner may promulgate rules to carry out the
provisions of this subchapter and the policies and procedures of the department in
connection therewith.”

19-158(f) “Rules and regulations. The commissioner of transportation is hereby
authorized to establish such rules and regulations as, in his or her judgment, shall be
deemed necessary for the purpose of carrying out the provisions of this section.”

RULES AND REGULATIONS OF THE DEPARTMENT OF
TRANSPORTATION, BUREAU OF HIGHWAY OPERATIONS

“Defective Sidewalks  2.0.2  “... any or all of the following conditions, among other,
shall constitute a defective sidewalk requiring reconstruction, repaving or repair.

a. The sidewalk pavement is either broken, missing, sunken or depressed,
undermined, bulging, slippery and slick, has an excessively rough surface or is
cracked to such an extent that pieces of the sidewalk pavement may be readily removed.

b. There is an abrupt variation in elevation along or across a sidewalk.”

**ADMISSIBILITY OF SUBSEQUENT REMEDIAL MEASURES**

By Sherri Sonin and Robert J. Genis

Where plaintiff has evidence of defendant’s subsequent remedial modifications to the defective conditions in issue, it behooves counsel to enter such records into evidence. Such records may be discoverable, Longo v. Armour Elevator Co., Inc., 278 A.D.2d 127 (1st Dept. 2000); Giannelli v. Montgomery Kone, Inc., 175 Misc. 2d 32 (Sup. Westchester 1997), and admissible.

In Henry v. Thyssenkrupp Elevator Corp., 24 Misc.3d 1234(A), 899 N.Y.S.2d 59 (Table), 2009 WL 2462255 (N.Y.Sup.), 2009 N.Y. Slip Op. 51746(U) (Sup. Kings 2009), in an elevator drop case, the defendant was ordered to provide the subsequent repair ticket that was generated on the day of the accident.

Where there are issues of control and maintenance then evidence of subsequent repairs is admissible and discoverable. Thus, in a seminal Second Department case the Court declared,"The cases are legion in holding that evidence of subsequent repairs is not discoverable or admissible in a negligence case… [except] if an issue of control and maintenance exists." Klatz v. Armor Elevator, 93 A.D.2d 633, 637(2d Dept., 1983). The Second Department has clung rather tenaciously to the Klatz doctrine in the ensuing years, refusing to allow the discovery of post accident repairs unless the circumstances of the case pose a question of maintenance or control. See e.g., Orlando v. City of New York, 306 A.D.2d 453(2d Dept. 2003);Watson v. FHE Services, Inc., 257 A.D.2d 618(2d Dept. 1999); Niemann v. Luca, (2d Dept. 1995).

**Here, a perusal of the pleadings reveals that the defendants have denied control of the elevator in question and have denied allegations concerning the existence of a maintenance contact, referring all questions of law and fact to judge and jury. Thus, defense counsel's assertion in the affidavit interposed in opposition to this motion that "Mainco acknowledges that a contract for maintenance and**
repair was in effect at the time of the incident" does not eliminate the question of control insofar it does not constitute an admission that eliminates all issues of law and fact in this regard [particularly in the absence of a copy of the contract itself] and does not establish whether the defendants were in control of this elevator at the time of the incident. Cf. Steinel v. 131/93 Owners Corp., 240 A.D.2d 301(lst Dept. 1997). The repair ticket is relevant and material to the resolution of these issues and is thus discoverable.

However, this Court would further note that were control and maintenance not in issue, the relevance of materiality of this repair ticket in shedding light on the question of causation would warrant, at the very least, its discovery. Indeed, the highly technical nature of the issue of causation in an "elevator case" makes the information that is potentially available through this route extremely important. Notably, The First Department in contradistinction to the Second Department appears to agree with this approach. Thus in Franeklin v. New York El. Co., 38 A.D.3d 329(lst Dept. 2007), the Court held that "records of post accident repairs are discoverable subject to the proviso that they are not to be introduced at trial except upon a showing of relevance to the condition of the elevator at the time of the accident." See also Albino v. New York City Housing Authority, 52 A.D.3d 521(lst Dept. 2008)(evidence of repairs discoverable to show that a particular condition was dangerous); Longo v. Armor El. Co., 278 A.D.2d 127(lst Dept. 2000)(directing the production of reports of post accident repairs). See generally, Steinel v. 131/93 Owners Corp., supra, 240 A.D.2d 301/issues of maintenance, control, notice, or dangerous condition which may have permitted discovery of reports of post accident repairs, held not to be present in this case).

Indeed, in the wake of Second Department's decision in Klatz v. Armor Elevator, supra, 93 A.D.2d 633, a lower Court sitting in the Second Department opined that the "legion" of cases referred to in Klatz which held that evidence of subsequent repairs is not discoverable or admissible dealt solely with questions of admissibility rather than discovery. This court declined to follow Klatz opining that the record of a post accident repair could "shed light on the condition of equipment or machinery at the time of the accident." Giannelli v. Montgomery Kone, 175 Misc.2d 32(Supreme Court, Westchester County, 1997).

This Court believes that in so severely limiting the discovery of post accident repair tickets the commendable progress of the law in broadening of the scope of pre-trial discovery, see e.g., Mann ex rel. Akst v. Cooper Tire Co., 33 A.D.3d 24 (lst Dept. 2006), has suffered a serious set back and urges that Klatz v. Armor Elevator, supra, 93 A.D.2d 633, and its progeny be revisited in the appropriate circumstances and reconsidered and this limiting principle rejected. The plaintiff's motion is granted to the extent that the defendants are directed to provide to plaintiff within ten days of the date of this decision the repair ticket and any related records prepared in connection with repair of the elevator in question in the aftermath of the alleged incident wherein the plaintiff was allegedly injured.
SUBSEQUENT RECORDS ARE ADMISSIBLE

While generally evidence of subsequent modifications is inadmissible in a negligence action, under certain circumstances, they are admissible. Plaintiff should consent to limiting instructions being given to the jury prior to the admission into evidence of such evidence. See, PJI 1:65.

OWNERSHIP, MAINTENANCE & CONTROL

Records of subsequent incidents and repairs are admissible, as such records would resolve the issue of maintenance, ownership and control of the instrumentality. Scudero v. Campbell, 288 N.Y. 328 (1942); Richardson on Evidence, 11th Ed., P. 211. See, Reisiger v. County of Nassau, 119 A.D.2d 561 (2nd. Dept. 1986); Esteva v. Catsimatidis, 4 A.D.3d 210 (1st Dept. 2004); DeRoche v. Methodist Hospital of Brooklyn, 249 A.D.2d 438 (2nd Dept. 1998); Mazurek v. Home Depot U.S.A., Inc., 303 A.D.2d 960 (4th Dept. 2003). See also, Gordon v. City of New York, 245 A.D.2d 184 (1st Dept. 1997) Plaintiff’s counsel should carefully scrutinize the defendant’s Answer to the Summons and Complaint to see if the defendant has denied or been silent on the issues of ownership, control and maintenance of the property. Where the defendant has not admitted these issues, plaintiff may offer evidence of subsequent acts as probative evidence proving the defendant’s ownership or control.

EXISTENCE OF A DANGEROUS CONDITION


The court properly allowed plaintiff to testify with respect to defendant’s subsequent remedial actions in clearing the floor of water. “That testimony was admissible to establish the floor’s condition 5 to 10 minutes after plaintiff fell, which would permit an inference with respect to the condition of the floor at the time of plaintiff’s fall.” Mazurek v. Home Depot U.S.A., Inc., 303 A.D.2d 960, 961, 757 N.Y.S.2d 425, 426 (4th Dept. 2003).

In Petrilli v. Federated Dept. Stores, Inc., 40 A.D.3d 1339 (3rd Dept. 2007), the trial court properly admitted into evidence testimony of subsequent accidents.

**Evidence of a subsequent accident occurring under conditions similar to those existing at the time of the accident complained of is admissible and of probative value on the issue of whether a dangerous condition existed**, but cannot charge the defendant with notice of such a condition” (Galieta v Young Men's Christian Assn. of City of Schenectady, 32 AD2d 711, 712, 300 NYS2d 170 [1969] [citations omitted]; see Dudley v County of Saratoga, 145 AD2d 689, 690, 535 NYS2d 231 [1988], lv denied 73 NY2d 710, 539 NE2d 592, 541 NYS2d 764 [1989]). Here, plaintiff did not allege that he tripped over a deformity in the tile or slipped on a wet floor, but instead premised his claim on the allegation that the tiles are inherently slippery and, thus, inappropriate for use at a store entrance. The evidence of nine other individuals who slipped and fell in the same location under the same, clean dry conditions was thus relevant to the issue of whether the type of tile used by defendants created a dangerous condition. In addition, Supreme Court did not err in permitting three of those individuals to testify, appropriately limiting the testimony to establish that they fell and the condition of the floor at the time they fell. The court specifically instructed that the reports and testimony were admissible solely for the limited purpose of establishing whether a dangerous condition existed.

In Francklin v. New York Elevator Co., Inc., 38 A.D.3d 329 (1st Dept. 2007), the court affirmed the lower court for directing disclosure of all of its maintenance and repair records concerning the subject elevator for the six month period following the accident, and noted that they are not admissible except upon a showing of relevance to
the condition of the elevator at the time of the accident, and only if introduced in a way that does not reveal that repairs were made.

**SUBSEQUENT MODIFICATION ORDERED PRIOR TO INCIDENT**

Moreover, a party may submit a repair order or request a repair to a defective condition prior to the accident, but the order may not be effectuated until afterward. In this instance, the records would be admissible to show prior notice of the condition, the existence of the condition and the feasibility of the repair prior to the accident as a precautionary measure. Shvets v. Landau, 121 Misc. 2d 34, 35-36 (Sup. Kings 1983). In Salgado v. Herrera, 245 A.D.2d 439 (2nd Dept. 1997), the fact of a subsequent repair was admitted where the defendant could not recall whether there was a prior complaint about the subject condition.

**FEASIBILITY**


**NEGLIGENT DESIGN**


**IMPEACHMENT**


In Sescila v Great S. Bay Estates Homeowner's Assn., Inc., 69 AD3d 604 (2nd Dept. 2010), post-accident conduct was relevant and admissible.

On November 10, 2004, at approximately 6:15 a.m., the plaintiff was walking her dog on a sidewalk adjacent to a marina owned by the defendant. Several hours before the plaintiff left her house, the temperature dipped below freezing level. The weather was clear, and there had been no precipitation in the area for the six days prior to that date.

As the plaintiff approached the marina, she slipped on a large patch of ice that had accumulated on the sidewalk, fell, and allegedly sustained injuries. Immediately after the accident, she saw that a sprinkler located on the grounds of the marina was operating.

Subsequently, the plaintiff commenced the instant action, alleging, inter alia, that the defendant negligently created the icy condition upon which she slipped and fell. In the order appealed from, the Supreme Court granted the defendant's motion for summary judgment dismissing the complaint. We reverse.

On its motion, the defendant, whose "dock master" submitted an affidavit in which he maintained, inter alia, that he turned the marina's sprinkler system off for the winter several weeks before the accident, demonstrated its prima facie entitlement to judgment as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]) by establishing, inter alia, that it did not create the icy condition upon which the plaintiff slipped and fell (cf. Weising v Fairfield Props., 6 AD3d 427, 428 [2004]). However, in opposition, the plaintiff submitted evidence raising a triable issue of fact, including the affidavit of a person [*2]who had visited the area of the accident four days after the date of the accident. The affiant recounted that, at that time, sprinklers at the marina were operating and, moreover, "thrusting water onto the sidewalks . . . at and around the [m]arina." Certain photographs taken by the affiant corroborated that assertion. This was sufficient to raise a triable issue of fact as to whether the defendant created the icy condition on which the plaintiff slipped (cf. Roark v
Accordingly, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint.

**USE OF FORMER TESTIMONY**

**General Municipal Law 50-H hearing**

Pursuant to Gen. Mun. Law 50-h (4), a transcript of the testimony taken at an examination pursuant to the provisions of this section may be read in evidence by either party, in an action founded upon the claim in connection with which it was taken, at the trial thereof.

**EBT**

Pursuant to CPLR 3117(a)(3)(iii) the deposition testimony of any person may be used by any party for any purpose against any other party, where the witness is unable to attend or testify because of age, sickness, infirmity.

Pursuant to CPLR 3117(a)(2) the deposition testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee, or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence.

Pursuant to CPLR 3117(a)(3)(i) the deposition testimony of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules provided the court finds that the witness is dead.
Pursuant to CPLR 3117(a)(3)(ii) the deposition testimony of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules provided the witness is at a distance greater than 100 miles from the place of the trial or is out of state. This does not apply where the party procures the witnesses’ absence. See, Dailey v. Keith, 1 N.Y.3d 586 (2004)(defendant not able to use her EBT at trial as evidence-n-chief because she voluntarily left the state and refused to return for trial).

Pursuant to CPLR 3117(a)(3)(iii) the deposition testimony of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules provided the witness is unable to attend or testify because of age, sickness, infirmity.

Pursuant to CPLR 3117(a)(3)(iv) the deposition testimony of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules provided the party offering the testimony has been unable to procure the attendance of the witness by diligent efforts.

Pursuant to CPLR 3117(a)(4) the deposition testimony of person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances. In Jones v. Sherpa, 5 A.D.3d 634 (2nd Dept. 2004), plaintiff was properly permitted to depose her own treating physician after filing a note of issue and to use that deposition testimony in lieu of live testimony at trial.

Pursuant to CPLR 3117(c) substitution of parties does not affect the right to use depositions previously taken. Moreover, when an action has been brought in any court of
any state or of the United States and another action involving the same subject matter is
afterward brought between the same parties or their representatives or successors in
interest all depositions taken in the former action may be used in the latter as if taken
therein.

Pursuant to CPLR 3117(d) a party shall not be deemed to make a person his own
witness for any purpose by taking his deposition. At the trial, any party may rebut any
relevant evidence contained in a deposition, whether introduced by him or by any other
party.

**Trial Testimony**

Pursuant to CPLR 4517(a) (2), the prior trial testimony of a party or of any person
who was a party when the testimony was given or of any person who at the time the
testimony was given was an officer, director, member, employee, or managing or
authorized agent of a party, may be used for any purpose by any party who is adversely
interested when the prior testimony is offered in evidence.

Pursuant to CPLR 4517(a)(3)(i), the prior trial testimony of any person may be
used by any party for any purpose against any other party, if the witness is dead.

Pursuant to CPLR 4517(a)(3)(ii), the prior trial testimony of any person may be
used by any party for any purpose against any other party, if the witness is at a distance
greater than 100 miles from the place of the trial or is out of state.

Pursuant to CPLR 4517(a)(3)(iii), the prior trial testimony of any person may be
used by any party for any purpose against any other party, where the witness is unable to
attend or testify because of age, sickness, infirmity.
Pursuant to CPLR 4517(a)(3)(iv) the prior trial testimony of any person may be used by any party for any purpose against any other party, where the party offering the testimony has been unable to procure the attendance of the witness by diligent efforts.

Pursuant to CPLR 4517(a)(4),

“the prior trial testimony of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances subject to the right of any party to move for preclusion upon the ground that admission of the prior testimony would be prejudicial under the circumstances.”

This statutory rule of law supplements the common law right to use prior sworn testimony. Indeed, well before the CPLR came into being, the Court of Appeals permitted a party to use prior transcripts of a related proceeding as admissible evidence in chief. In re White’s Will, 2 N.Y.2d 309, 314 (1957). The key issue is whether there was an opportunity to cross-examine the witness at the earlier proceeding. Whether a party exercised its right to cross-examination is irrelevant; the question is whether cross-examination was available.

With the passage of the CPLR, the Court of Appeals continued to accept the admission into evidence of prior sworn testimony, noting that:

“The 1958 report of the legislative commission which prepared the new CPLR said this: 'The prior testimony exception to the hearsay rule offers the maximum guarantee of trustworthiness since the original statement was made in court, under oath and subject to cross-examination by a party who had the same motive to expose falsehood and inaccuracy as does the opponent in the trial where the testimony is sought to be used.' (2d Preliminary Report of Advisory Common Prac. and Pro. (N.Y.Legis.Doc., 1958, No. 13), p. 265.).” Fleury v. Edwards, 14 N.Y.2d 334, 339 (1964).
The Court noted that:

“The objective of all rules of evidence is to prevent failure of justice by putting before the fact triers for testing and acceptance or rejection such oral and documentary proofs as carry a high probability of trustworthiness (vide the exception as to dying declarations, Mattox v. United States, 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409, supra). Fair application of such standards calls for the admission of the testimony we are here concerned with and no binding rule of law prevents.” 14 N.Y.2d at 339.

In Fleury v. Edwards, 14 N.Y.2d 334 (1964), the Court of Appeals held that the prior sworn transcripts of hearing before the Motor Vehicle Bureau on the revocation or cancellation of a parties driving license was admissible in a subsequent civil trial arising out of a related personal injury lawsuit. The Court noted that:

“The precise issue posed, therefore, is whether the Legislature, by adopting section 348 of the Civil Practice Act (now CPLR Rule 4517), limited the power of the courts to admit this evidence. I agree with the Chief Judge that history and the statutory scheme reveal no such limitation.” 14 N.Y.2d at 340.

The Court further noted that:

“Our statutory provisions cover only a few of the hearsay exceptions developed by the courts and recognized in New York. (Compare CPLR 4517-4518, 4520-4534 with Uniform Rules of Evidence, rules 62-66; Wigmore, Evidence (3d ed., 1940), vol. 5, ss 1420-1684; vol. 6, ss 1690-1810.) The fact, therefore, that the Legislature has adopted a rule sanctioning the admission of testimony previously given in a related 'action' or 'special proceeding' does not imply a design to exclude the introduction of testimony given in an adversarial setting before an administrative officer or other administrative tribunal.” 14 N.Y.2d at 340-341.

“The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation. Exceptions to the hearsay rules are being broadened and created where necessary. (See, e. g., Matter of White, 2 N.Y.2d 309, 160 N.Y.S.2d 841, 141 N.E.2d 416; Dallas County v. Commercial Union Assur. Co., 5 Cir., 286 F.2d 388, 395.) Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts in civil cases.” 14 N.Y.2d 341. See, Letendre v. Hartford Accid. & Indem. Co., 21 N.Y.2d 518 (1968).
Proof

Proof of unavailability may consist of unsworn letters by a witness. *Healy v. Rennert*, 9 N.Y.2d 202, 209 (1961). In the case of the death of a witness, see CPLR 4527.

Illness

In *In re Leshaw*, 254 A.D.2d 569, 570 (3rd Dept. 1998), the court permitted the prior transcripts into evidence of a witness that was not available to testify because of physical illness.

M.D. Testimony


A transcript of a medical doctor’s testimony may be used as evidence in chief in a subsequent related proceeding. *Palma S. v. Carmine S.*, 134 Misc. 2d 34, 36 (Family Ct. Kings 1986).

Other Issues

Depositions/Prior Testimony
In *Grebyonkin v 2301 Ocean Ave. Owners Corp.*, 60 AD3d 808 (2nd Dept. 2009),

Contrary to the contention of the defendant Makita U.S.A., Inc. (hereinafter Makita), the Supreme Court did not improvidently exercise its discretion in denying its motion to compel the plaintiff to demonstrate the circumstances of his accident during his continued videotaped deposition. **The demonstration or reenactment of an accident during discovery is not generally contemplated under the CPLR** (see e.g. *Madison v Spancrete Mach. Corp.*, 288 AD2d 888, 889 [2001]; *Sullivan v New York City Tr. Auth.*, 109 AD2d 879, 880 [1985]). Moreover, **Makita failed to demonstrate that the information it sought could not be obtained through the testimony of the plaintiff at his deposition or through other discovery devices** (see e.g. *Gatta v Makita U.S.A.*, 244 AD2d 457 [1997]; *Hyde v Chrysler Corp.*, 150 AD2d 343 [1989]), **and that the proposed demonstration would be conducted under conditions similar to those which prevailed at the time of the accident** (see generally *Blanchard v Whitlark*, 286 AD2d 925, 926 [2001]; *Santucci v Govel Welding*, 168 AD2d 845, 846 [1990]).

In *DiGiantomasso v City of New York*, 55 AD3d 502 (1st Dept. 2008),

Plaintiff filed a notice of claim against defendant City, and, four months after the accident, at a General Municipal Law § 50-h examination, unequivocally testified that she had tripped over a manhole cover that was protruding approximately 2½ inches above the ground. Plaintiff and the City were the only parties present at the section 50-h examination, and it is undisputed that no notice thereof was given to defendants-appellants, a contractor who had allegedly performed a water main installation in the intersection, and a contractor and resident engineer for a street resurfacing project that had allegedly included the intersection. At a deposition held almost three years after the accident, plaintiff testified that she was unable to say with certainty that she knew, on the day of the accident, that she had tripped over a manhole cover, but rather made that determination with certainty when she returned to the scene of the accident three weeks after the accident, and although she may have made that determination before the day she returned three weeks later, perhaps even as early as the day of the accident, she could not say for sure.

Appellants argue that plaintiff's section 50-h testimony is hearsay as to them and therefore may not be considered for the purpose of identifying the cause of plaintiff's fall, in opposition to their motions for summary judgment (citing, inter alia, *Fernandez v VLA Realty, LLC*, 45 AD3d 391 [2007] [defendant property owners entitled to summary judgment where plaintiff could not identify cause of fall at his deposition]). While appellants did not have the opportunity to cross-examine plaintiff at the section 50-h examination itself, their argument, which relies on *Claypool v City of New York* (267 AD2d 33 [1999] [plaintiffs' decedent's section 50-h testimony could not be used against defendant property owners where latter were not notified of section 50-h examination and did not take decedent's deposition before she died]), overlooks that appellants did have an opportunity to cross-examine plaintiff about her section 50-h testimony at her later
deposition. But even if plaintiff's section 50-h testimony were deemed inadmissible hearsay as to appellants, it was not the only evidence that plaintiff offered on the issue of causation in opposition to appellants' motions, and it thus may be considered along with the admissible deposition testimony (see Matter of New York City Asbestos Litig., 7 AD3d 285, 285 [2004] ["evidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination"]). In order to survive appellants' motions for summary judgment, plaintiff was not required to state for certain that she knew exactly what she tripped over the very instant that she tripped over it. To the extent that plaintiff's deposition testimony in this regard was vague or inconsistent with her section 50-h testimony, a credibility issue is raised to be decided by the jury, not the court on a motion for summary judgment. Certainly, plaintiff's deposition testimony, in conjunction with her section 50-h testimony, is more than sufficient to identify a protruding manhole cover as the cause of her trip and fall; indeed, plaintiff's deposition testimony would be sufficient in that regard even if considered alone.

Counsel seeking to use prior testimony should be aware of CPLR § 3117 [EBT] and CPLR § 4517 [trial]. In Knee v. A.W. Chesterton Co., 52 A.D.3d 355 (1st Dept 2008),

The deposition testimony of plaintiff's decedent showed that he was exposed to gaskets and gasket materials containing asbestos while working on a ship known as the Constellation at the Brooklyn Navy Yard, that dust from the asbestos gaskets was pervasive, and that he breathed it. Deposition testimony of the plaintiff and a second witness from an unrelated asbestos litigation and the plaintiff from a second unrelated asbestos litigation describes work involving gaskets on the same ship, under the same conditions, within the same time period, and identifies appellant as the manufacturer of the gaskets. Appellant was a party in these two other actions and present at all three depositions. We note that one of these witnesses may be available to testify at trial. We reject appellant's argument that these three witness depositions from other actions cannot be used for present purposes (see Berkowitz v A.C. & S., Inc., 288 AD2d 148, 149, 733 N.Y.S.2d 410 [2001]; Dollas v W.R. Grace & Co., 225 AD2d 319, 320, 639 N.Y.S.2d 323 [1996]). These depositions raise an issue of fact as to whether the decedent was exposed to asbestos contained in appellant's gaskets (cf. Reid v Georgia-Pac. Corp., 212 AD2d 462, 463, 622 N.Y.S.2d 946 [1995]).


With respect to Ford's argument that Mr. Herbst's video testimony should not have been allowed, the Civil Practice Law and Rules ("CPLR") §3117(a)(3)(v) states, in part:
the deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules, provided the court finds:

(v) upon motion or notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.

Mr. Herbst's testified in another similar case against Ford Motor Co. where counsel for Ford was present and cross-examined Mr. Herbst on the same issues. Plaintiffs gave notice to Ford that they intended to play Mr. Herbst's videotaped deposition testimony. This court gave numerous opportunities for Ford to move in limine of any known pretrial issues, instead, Ford waited until trial to raise the issue of playing Mr. Herbst's videotaped testimony. Pursuant to CPLR §3117(a) (3)(v), this court exercised its discretion in the "interests of justice" and in conformance with judicial economy to permit the showing of the videotaped testimony, rather than attempting to subpoena him from out-of-state.

In Adams v. Genie Indus., Inc., 53 AD3d 415 (1st Dept. 2008), a products liability action, the deposition testimony of a former employee was properly held admissible.

In Barnes v. City of New York, 44 A.D3d 39 (1st Dept. 2007), the court totally disregarded the clear language of Gen. Mun. Law § 50-h and held that a plaintiff must show unavailability of the plaintiff to use his/her transcript on his/her direct case, and cited the law with respect to EBTs and CPLR § 3117. This is the second time the court made bad law on this case, proving the adage “bad facts make bad law”.

In Martinez v. 123-16 Liberty Ave. Realty Corp., 47 A.D.3d 901 (2nd Dept. 2008), The defendants failed to show that the unsigned deposition transcripts of the various witnesses, submitted in support of the defendant Lee's motion and relied upon by Liberty in its cross motion, previously were forwarded to the relevant witnesses for their review pursuant to CPLR 3116(a). The transcripts did not constitute admissible evidence. The translated affidavit that lacked the translator's attestation also did not constitute admissible evidence (see CPLR 2101[b]). Accordingly, the defendants failed to establish their entitlement to summary judgment (see McDonald v Mauss, 38 AD3d 727, 832 N.Y.S.2d 291; Pina v Flik International, 25 AD3d 772, 808 N.Y.S.2d 752; Scotto v Marra, 23 AD3d 543, 806 N.Y.S.2d 603; Santos v Intown Associates, 17 AD3d 564, 793 N.Y.S.2d 477).
In Rivera v. N.Y.C.T.A., 54 AD3d 545 (1st Dept. 2008),

Plaintiffs now appeal from the judgments dismissing their respective complaints pursuant to the jury's verdict. They argue, inter alia, that the trial court erred in permitting defense counsel, over plaintiffs' objection, to read into evidence portions of the pretrial testimony given at depositions or General Municipal Law (GML) § 50-h hearings by nine plaintiffs, six of whom had settled before trial. Plaintiffs point out that none of them received notice of, or was represented at, the depositions and GML § 50-h hearings in other actions, and, on that basis, contend that each deposition or GML § 50-h hearing transcript is hearsay as to the plaintiffs in the other actions. For the reasons set forth below, we agree.

CPLR 3117(a)(2) provides that "the deposition testimony of a party or of any person who was a party when the testimony was given . . . may be used [at trial] for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence." The statute expressly provides, however, that the use of a deposition is authorized only "so far as admissible under the rules of evidence" (CPLR 3117[a] [emphasis added]). Thus, even assuming (without deciding) that CPLR 3117(a)(2), unlike CPLR 3117(a)(3) (setting forth the conditions for the use of "the deposition of any person"), permits the use of the deposition of a party against another party who did not receive notice of the deposition and was not present or represented at its taking (see Bianchi v Federal Ins. Co., 142 Misc 2d 82 [Sup Ct, NY County 1988]; but see Andrusziewicz v Atlas, 13 AD3d 325 [2004]; Siniscalchi v Central Gen. Hosp., 80 AD2d 849 [1981]; Weinstein-Korn-Miller, NY Civ Prac ¶ 3117.05 [2d ed]), deposition testimony otherwise satisfying the requirements of CPLR 3117(a)(2) still is not admissible unless it is shown that, as to each party against whom the deposition is to be used, it falls within an exception to the rule against hearsay (see United Bank v Cambridge Sporting Goods Corp., 41 NY2d 254, 264 [1976]). No such showing was made here.

While the deposition testimony of each plaintiff was admissible against that plaintiff as an admission (see Prince, Richardson on Evidence, §§ 8-201, 8-202 [Farrell 11th ed]), the status of such testimony as an admission of the plaintiff who testified did not render it admissible against the other plaintiffs (id. § 8-203; see also Claypool v City of New York, 267 AD2d 33, 35 [1999] [GML § 50-h testimony was not admissible at trial against parties who "were not notified and were not present at the hearing"])[FN1]. Neither were the depositions admissible under the hearsay exception for declarations against the declarant's interest, since none of the deponents was shown to have been unavailable to testify at trial (see Prince, Richardson, supra, § 8-404). Further, since none of the deponents testified at trial before his or her deposition was read into evidence, the deposition testimony was not admissible as a trial witness's prior inconsistent statement (cf. Letendre v Hartford Acc. & Indem. Co., 21 NY2d 518 [1968]; Campbell v City of Elmira, 198 AD2d 736, 738 [1993], affd 84 NY2d 505 [1994]; Prince, Richardson, supra, § 8-104).

We reject defendants' argument that plaintiffs stipulated to the admissibility at trial of testimony given by any plaintiff at a deposition or GML § 50-h hearing. In October
2004, counsel in all actions arising from the subject incident (nine of which were then pending) entered into a stipulation providing that all actions would be consolidated for a single trial on the issue of liability and that two of the eight law firms that then represented plaintiffs in those actions would represent all plaintiffs at the liability trial. The stipulation further provided:

"If the Transit Authority intends to call any of the Plaintiffs or read the testimony of any of those plaintiffs from either a 50-H hearing or a deposition[,] the attorney representing that individual plaintiff will also be allowed to participate in the trial."

Nothing in the above-quoted provision indicates an intention to expand the admissibility at trial of a plaintiff's deposition or GML § 50-h hearing testimony beyond what would have been the case in the absence of the stipulation.

A new trial is required because, on this record, the admission of the deposition and GML § 50-h testimony cannot be considered harmless error. At trial, three plaintiffs testified that, as they boarded the bus before the accident, they observed that the defendant bus driver appeared to be in physical distress of some sort. In contrast, the pretrial testimony read into the record by defendants included statements by several plaintiffs (none of whom testified at trial) to the effect that they did not notice anything unusual about the driver from the time they boarded the bus until the accident occurred. In his closing argument at trial, defense counsel referred the jury to this pretrial testimony as a basis for finding that the driver's loss of consciousness had been sudden and unanticipated. Indeed, defendants' appellate brief, in arguing that the verdict is supported by sufficient evidence, specifically points out that the jury may have been influenced by the pretrial testimony of the witnesses who did not notice anything amiss with the driver before the accident.

We reject plaintiffs' argument that the trial court erred in giving the jury an emergency charge based on PJI 2:14. As we stated in deciding a prior appeal in one of these actions, the issue to be tried was "whether defendant bus driver's loss of vehicular control was attributable to an unforeseeable medical emergency" (Rivera v New York City Tr. Auth., 11 AD3d 333 [2004]). It is of no moment that the bus driver's loss of consciousness did not arise from circumstances external to the driver himself, since evidence was presented from which the jury could find that his loss of consciousness was "a sudden and unforeseen emergency not of the actor's own making" (Caristo v Sanzone, 96 NY2d 172, 175 [2001]; see also McGinn v New York City Tr. Auth., 240 AD2d 378, 379 [1997] [a vehicle operator "who experiences a sudden medical emergency will not be chargeable with negligence provided that the medical emergency was unforeseen"] [internal quotation marks and citations omitted]). For this reason, plaintiffs' argument that they were entitled to judgment notwithstanding the verdict is without merit.

**Frye hearing is not prior trial testimony**

In Haller v Gacioch, 68 AD3d 1759 (4th Dept. 2009), an appellate court made a questionable determination.

Plaintiff appeals from a judgment entered upon a jury verdict finding that, although defendant Gerald M. Gacioch, M.D. was negligent in leaving a cardiac sheath in
plaintiff’s decedent without administering systemic anticoagulation medication, that negligence was not a substantial factor in causing decedent’s injuries. On appeal, plaintiff contends that Supreme Court erred in refusing to permit the prior testimony of her expert adduced at a Frey hearing to be read to the jury pursuant to CPLR 4517 (a) (4). We reject plaintiff’s contention, because that testimony does not constitute “prior trial testimony” within the meaning of CPLR 4517 (a) (4).

Conclusion

The dispositive fact is whether there was an opportunity to cross-examine the witness. Even if a party waived its right to cross-examination, as long as it had the opportunity to do so, there can be no prejudice.

Where the defendant had a full and fair opportunity to cross-examine the witness in question, plaintiff may read their transcripts. It is irrelevant if present counsel does not like the cross-examination that another attorney performed.


Insurance Coverage

Admissibility


Evidence that a defendant carries liability insurance is generally inadmissible (see Leotta v Plessinger, 8 NY2d 449, 461 [1960], rearg denied 9 NY2d 688 [1961]; Simpson v Foundation Co., 201 NY 479, 490 [1911]). The rationale underlying this rule is twofold. First, “it might make it much easier to find an *818 adverse verdict if the jury understood that an insurance company would be compelled to pay the verdict” (Loughlin v Brassil, 187 NY 128, 135 [1907]). Second, evidence of liability insurance injects a collateral issue into the trial that is not relevant as to whether the insured acted negligently. Although we have acknowledged that liability insurance has increasingly
become more prevalent and that, consequently, jurors are now more likely to be aware of the possibility of insurance coverage, we have continued to recognize the potential for prejudice (see Oltarsh v Aetna Ins. Co., 15 NY2d 111, 118-119 [1965]; see also Barker and Alexander, Evidence in New York State and Federal Courts § 4:63, at 260-261 [5 West’s NY Prac Series 2001] [“Because the prejudice quotient is obvious, the rule barring such evidence is one of the least controversial in the law of evidence”]).

The rule, however, is not absolute. If the evidence is relevant to a material issue in the trial, it may be admissible notwithstanding the resulting prejudice of divulging the existence of insurance to the jury. For example, we have held that evidence that a defendant insured a premises is relevant to demonstrate ownership or control over it (see Leotta, 8 NY2d at 462). Likewise, it was proper to allow cross-examination of a physician regarding the fact that the defendant’s insurance company retained him to examine the plaintiff in order to show bias or interest on the part of the witness (see Di Tommaso v Syracuse Univ., 172 App Div 34, 37 [4th Dept 1916], aff’d without op 218 NY 640 [1916]).

Here, we perceive no abuse of discretion in Supreme Court’s evidentiary ruling. Such evidence may be excluded if the trial court finds that the risk of confusion or prejudice outweighs the advantage in receiving it (see Kish v Board of Educ. Of City of N.Y., 76 NY2d 379, 384-385 [1990]). In this case, plaintiff speculated during the colloquy that a verdict in defendant’s favor could result in a $100 benefit-at the time of the expert’s death, disability or retirement-based on the expert’s shareholder status in OMSNIC. The trial court’s finding that any such financial interest was likely “illusory” and that the possibility of bias was attenuated was reasonable on this record. Absent a more substantial connection to the insurance company-or at least something greater than a de minimis monetary interest in the carrier’s exposure-the court did not engage in an abuse of discretion in precluding the testimony. We note that a voir dire of an expert outside the presence of the jury can better aid the court in exploring the potential for bias.

Pigott, J. (concurring). I concur with the majority’s conclusion but write separately because, in my view, courts should no longer treat insurance coverage as the third rail of trial practice such that it can neither be mentioned, even incidentally, nor be the basis of appropriate inquiry as to possible bias, as in the ruling here. It is routine-even statutory—that jurors be asked if they are “a shareholder, stockholder, director, officer or employee . . . in any insurance company issuing policies for protection against liability for damages for injury to person or property” (CPLR 4110 [a]). The reason for the question is obvious. Someone who is so situated may have a tendency to find for a defendant even though, according to the way we conduct our trials, insurance may never be mentioned again.

Enter the defendant in this case who, by way of a motion in limine, sought to prevent the jury from learning that defendant’s expert suffers the very disability that would have subjected them to a challenge to the favor—that he owns stock in a company that writes liability insurance. In fact, he owns stock in the very insurance company that will be required to pay any judgment rendered against the defendant.
in this case. The jury should be made aware of that fact. To keep this information from them means they are arriving at a verdict without all the material facts before them—something every court seeks to prevent.

It is common knowledge that most defendants carry insurance. Indeed, most prospective jurors are cognizant of the significant role in litigation that liability insurance plays, be it business, homeowner’s or automobile insurance (see e.g. Oltarsh v Aetna Ins. Co., 15 NY2d 111, 118 [1965] [“it is the rare individual who today does not know that ‘defendants in negligence cases are insured and that an insurance company and its lawyer are defending’ ” (citation omitted)].)

This is not to say that evidence of insurance should be admitted as a matter of course; there must always be a legitimate basis for its admission. However, in my view, there are **4 appropriate instances when insurance evidence should be admitted to establish a party’s or a witness’s bias or interest, and trial courts should not shy away from admitting it if, after conducting the appropriate balancing test, they think that its admission is relevant under the circumstances. The admission of such evidence can be accompanied by a limiting instruction if the court believes it appropriate. Moreover, because trial courts have the discretion to place limitations on the scope of the questioning relative to such evidence, defendants can be assured that the admission of such evidence will serve its intended, relevant purpose of showing potential bias or interest without undue prejudice to the defendant.

Ordinarily, in a case such as the one before us, a court should reserve decision on the motion until the expert takes the stand and can be questioned, outside the presence of the jury, about his interest in defendant’s insurance company and any possible bias. Then a reasoned ruling could be made. Because plaintiff did not request such an opportunity, under these facts, I concur in the majority’s decision to affirm.

**Res Ipsa Loquitur**

In Morejon v. Rais Construction, 7 N.Y.3d 203 (2006), the Court noted that while *res ipsa loquitur* creates an inference of negligence, the doctrine is nothing more than the introduction of facts to prove negligence by circumstantial evidence. It is only when that circumstantial evidence is “so convincing and the defendant’s response was so weak that the inference of defendant’s negligence is inescapable,” that summary judgment or a directed verdict will lie for the plaintiff. This will be a rare occurrence. While the
plaintiff may not be granted summary judgment, they may avoid dismissal of their case. See, *Cubeta v. York International Corp.*, 30 A.D.3d 557 (2nd Dept. 2006).


Merely because the plaintiff has proven *res ipsa loquitur* does not mean that the plaintiff is entitled to summary judgment or that he/she is not comparatively negligent. *Manning v. Curtice-Burns, Inc.*, 12 A.D.3d 1091, 784 N.Y.S.2d 781 (4th Dept. 2004).


In *Brisbon v. Mount Sinai Hosp.*, 8 Misc.3d 47, 798 N.Y.S.2d 648 (App. Term 1st Dept. 2005), the court noted that a “protective hand railing of the type here involved ‘do[es] not generally fall in the absence of negligence (e.g., improper installation, maintenance or repair), and the mere act of [holding onto the railing] does not make the accident plaintiff’s fault or put the [railing] under the plaintiff’s control’ (citation omitted).” See, *Lukasinski v. First New Amsterdam Realty, LLC*, 3 A.D.3d 302, 770 N.Y.S.2d 307 (1st Dept. 2004)(door mounted on hinges does not normally fall off in the

An issue of fact exists “as to whether control of the presence sensors on the subject door by Circuit City was of ‘sufficient exclusivity to fairly rule out the chance that the defect was caused by some agency other than [Circuit City’s] negligence’ (citations omitted).” O’Connor v. Circuit city Stores, Inc., 14 A.D.3d 676, 789 N.Y.S.2d 252 (2nd Dept. 2005).

“[E]xclusivity of control ‘does not mean that the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant’s door’ (citations omitted).” Roman v. Board of Education of the City of New York, 9 A.D.2d 305, 307, 780 N.Y.S.2d 5, 7 (1st Dept. 2004). “The lack of evidence of the precise instrumentality that caused the injury does not bar application of res ipsa loquitur. Where as here, the injury is one that would not occur without negligence and the condition of the injured plaintiff prevented him from ascertaining the cause of his injuries, the exclusiveness of the defendant’s control together with the helplessness of the plaintiff is sufficient (citations omitted).” 9 A.D.3d at 7-8, 780 N.Y.S.2d at 307. See, Fields v. King Kullen Grocery Co., 28 A.D.3d 513, 813 N.Y.S.2d 495 (2nd Dept. 2006)(no actual or constructive notice, but issue of fact as to exclusivity to rule out the chance the defective condition was caused by an agency other than the defendant’s negligence).

A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence to provide a non-negligent explanation for the collision; discovery is not needed and a motion for summary judgment under such circumstances is not premature. Rainford v. Han, 18 A.D.3d 638, 795 N.Y.S.2d 645 (2nd Dept. 2005); Niyazov v. Bradford, 13 A.D.3d 501, 786 N.Y.S.2d 582 (2nd Dept. 2004).

Even in a medical malpractice case, *res ipsa loquitur* may be used and may lead to the granting of a motion for summary judgment. Thomas v. New York University Medical Center, 283 A.D.2d 316, 725 N.Y.S.2d 35 (1st Dept. 2001).


In *Jappa v Starrett City, Inc.*, 67 AD3d 968 (2nd Dept. 2009)

In the lobby of a building owned by the defendant in which the plaintiff resided, the plaintiff was injured when tile fell from the drop ceiling and struck her head, neck, shoulder, and arm. After issue was joined, the defendant moved for summary judgment dismissing the complaint on the ground that it did not have actual or constructive notice of the alleged ceiling defect. Thereafter, the plaintiff cross-moved for leave to amend her bill of particulars to assert a theory of negligence based on the doctrine of *res ipsa loquitur*.

The defendant failed to demonstrate that it would be prejudiced as a result of permitting the plaintiff to amend her bill of particulars to assert a theory of negligence under the doctrine of *res ipsa loquitur* (see Lipari v Babylon Riding Ctr., Inc., 18 AD3d 824, 826 [2005]).

The defendant established, prima facie, that it had no actual or constructive notice of a defective condition in the ceiling (see Fyall v Centennial El. Indus., Inc., 43 AD3d 1103 [2007]). In opposition, the plaintiff failed to raise a triable issue of fact as to the defendant's actual or constructive notice (see CPLR 3212 [b]). However, proof that tiles
falling from a ceiling is an occurrence that would not ordinarily occur in the absence of negligence, the ceiling of the lobby was in the exclusive control of the defendant, and no act or negligence on the plaintiff’s part contributed to the accident, would be a basis for liability under the doctrine of res ipsa loquitur (see Dittiger v Isal Realty Corp., 290 NY 492 [1943]; Fyall v Centennial El. Indus., Inc., 43 AD3d at 1104). Here, the defendant did not negate the applicability of that doctrine. Accordingly, the Supreme Court properly denied the defendant's motion and granted the plaintiff's cross [*2]motion.

In Dolaway v Urology Assoc. of Northeastern N.Y., P.C., 72 AD3d 1238 (3rd Dept. 2010)

When plaintiff Arthur L. Dolaway (hereinafter plaintiff) underwent endoscopic surgery to remove a kidney stone, two broken pieces of guide-wire sheathing were left in his ureter. Alleging that plaintiff was injured as a result of defendant surgeon’s failure to, among other things, remove all of the sheathing at the conclusion of the surgery, plaintiffs commenced this medical malpractice action. Defendants later moved for summary judgment dismissing the complaint, and Supreme Court (Dawson, J.) denied the motion, noting the undisputed fact that foreign objects had been left in plaintiff’s body. Citing Kambat v St. Francis Hosp. (89 NY2d 489 [1997]), the court determined that plaintiffs—who had no expert witness—could rely on the doctrine of res ipsa loquitur and, therefore, the opinion of defendants’ expert that leaving the sheathing in plaintiff’s ureter was not a deviation from the standard of care served only to raise a question of fact. When the parties appeared for trial, however, Supreme Court (Muller, J.) entertained defendants’ motion in limine and held that plaintiffs’ claim could not succeed in the absence of expert evidence rebutting the opinion of defendants’ expert as to the standard of care. Supreme Court also found res ipsa loquitur to be inapplicable and dismissed the complaint. [*2]Plaintiffs now appeal.

We find merit in plaintiffs’ argument that Supreme Court (Muller, J.) erred in concluding that the evidentiary doctrine of res ipsa loquitur was inapplicable. Inasmuch as Supreme Court (Dawson, J.) had previously determined that res ipsa loquitur was available to plaintiffs and no appeal was taken from that legal determination, the doctrine of law of the case should have been applied to give it preclusive effect at the time of trial (see Briggs v Chapman, 53 AD3d 900, 902 [2008]; Anderson v Anderson, 5 AD3d 1105, 1106 [2004]; Brown v State of New York, 250 AD2d 314, 320 [1998]; 28 NY Jur 2d Courts and Judges § 236). In addition, under the circumstances here, expert testimony is not necessary to enable the jury to conclude that, more likely than not, the resulting injury was caused by the surgeon’s negligence (see Kambat v St. Francis Hosp., 89 NY2d at 497; LaPietra v Clinical & Interventional Cardiology Assoc., 6 AD3d 1073, 1074-1075 [2004]; Escobar v Allen, 5 AD3d 242, 243 [2004]; Delaney v Champlain Val. Physicians Hosp. Med. Ctr., 232 AD2d 840, 841 [1996]). Nor did defendants’ proffer of expert evidence tending to rebut that conclusion “disqualify this case from consideration under res ipsa loquitur” (Kambat v St. Francis Hosp., 89 NY2d at 497). Rather, at trial, it would

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merely raise[ ] alternative inferences to be evaluated by the jury in determining liability” (id. At 497).

In Singh v United Cerebral Palsy of N.Y. City, Inc., 72 AD3d 272 (1st Dept. 2010)

On December 5, 2003, plaintiff Sianna Singh was walking with a colleague in an enclosed walkway between two buildings owned and occupied by defendants United Cerebral Palsy of New York City, Inc. and United Cerebral (sic) of New York City Community Mental Retardation Services Company, Inc. (collectively UCP). The automatic swinging doors leading into the second building were open as plaintiff approached. Plaintiff’s colleague, who was walking one or two steps ahead of plaintiff, walked through the doors without incident. As plaintiff walked through, the doors allegedly closed and hit her on her right and left shoulders, causing injury. According to plaintiff, the automatic doors’ motion sensor, which was mounted over the top of the doors, was defective because it failed to detect her as she walked through the doorway.

It is undisputed that UCP’s maintenance staff was not responsible for doing repairs on the automatic doors or the sensor mechanism. Instead, UCP contacted defendant/third-party defendant Miric Industries Incorporated on an as-needed basis to perform work at the building. If Miric received a call about the doors, Miric called third-party defendant Reliable Door Corp. to actually perform the work. Although Reliable’s witness did not recall making any repairs on the doors, an invoice dated May 14, 2002 indicates that Reliable adjusted the motion sensor on that date.

Plaintiff alleges that UCP had both actual and constructive notice of the alleged defect in the automatic doors and was otherwise negligent in failing to conduct regular inspections of the doors. In particular, plaintiff contends that UCP failed to maintain proper alignment of the electronic beam that causes the doors to open and close. In addition, plaintiff invokes the doctrine of res ipsa loquitur, contending that this type of accident would not normally occur absent negligence. UCP commenced a third-party action against Miric and Reliable, asserting claims for contribution or indemnification or both.

UCP moved for summary judgment dismissing plaintiff’s complaint or in the alternative for conditional summary judgment on its common-law indemnification claims against Miric and Reliable. Miric cross-moved for summary judgment dismissing the complaint and the third-party complaint as against it, and Reliable cross-moved for summary judgment dismissing the third-party complaint as against it. Supreme Court denied all the motions (2009 NY Slip Op 30315[U]). We modify to the extent of granting Miric’s cross motion for summary judgment.

A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it (Mandel v 370 Lexington Ave., LLC, 32 AD3d 302, 303 [2006]).
To charge a defendant with constructive notice, the defect must be visible and apparent, and must exist for a sufficient time before the accident to permit the defendant’s employees to discover and remedy it (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]).

UCP met its burden of showing that it neither created nor had actual or constructive notice of the alleged defect in the doors’ sensor mechanism, and plaintiff failed to raise an issue of fact in opposition (see Narvaez v New York City Hous. Auth., 62 AD3d 419 [2009], lv denied 13 NY3d 703 [2009]; Clark v New York City Hous. Auth., 7 AD3d 440 [2004]). Sam Radoncic, UCP’s building services director, testified at his deposition that he was responsible for addressing complaints about the doors. Radoncic, who passed through the doors several times each week, never observed them malfunction in any way. Nor in the five years before plaintiff’s accident did anyone inform Radoncic of any incidents where the doors closed on someone.

Although plaintiff claims to have observed problems with the automatic doors at some time prior to her accident, she conceded that she never complained to her supervisor or to the maintenance personnel at UCP. Likewise, there is no evidence that plaintiff’s coworkers, who, according to plaintiff, “got stuck” between the doors, made any complaints about those incidents (see Levine v City of New York, 67 AD3d 510 [2009]).

Plaintiff’s claim that UCP was negligent in failing to conduct regular inspections of the motion sensor is unavailing. The duty of a property owner to reasonably inspect premises arises in situations distinct from the facts here, such as where a statute imposes the duty (see Watson v City of New York, 184 AD2d 690 [1992]; Showverer v Allerton Assoc., 306 AD2d 144 [2003]) or where an object capable of deteriorating is concealed from view (see Hayes v Riverbend Hous. Co., Inc., 40 AD3d 500, 501 [2007], lv denied 9 NY3d 809 [2007]). Moreover, although plaintiff’s expert identified the defect as the inadequate positioning of the sensor, there was no showing that a routine inspection would have uncovered that specific problem (see Lee v Bethel First Pentecostal Church of Am., 304 AD2d 798, 800 [2003] [“failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect” (internal quotation marks and citations omitted)]). Thus, we decline to find, under these circumstances, that UCP had a duty to regularly inspect the sensor mechanism.

Nevertheless, we conclude that plaintiff raised issues of fact as to the applicability of the doctrine of res ipsa loquitur. In order to submit a case to a trier of fact based on this theory of negligence, a plaintiff must establish that the event (1) was of a kind that “ordinarily does not occur in the absence of someone’s negligence; (2) [was] caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) [was not] due to any voluntary action or contribution on the part of the plaintiff” (Morejon v Rais Constr. Co., 7 NY3d 203, 209 [2006] [internal quotation marks and citation omitted]). UCP does not dispute that the first factor was satisfied. Nor does it point to any proof in the record that plaintiff contributed in any way to the accident.
UCP focuses on the second factor, arguing that the sensor mechanism was not within its exclusive control because Reliable was responsible for performing repair work on the doors. However, res ipsa loquitur does not require sole physical access to the instrumentality causing the injury and can be applied in situations where more than one defendant could have exercised exclusive control (Banca Di Roma v Mutual of Am. Life Ins. Co., Inc., 17 AD3d 119, 121 [2005]). In addition, there was no exclusive maintenance contract between UCP and Reliable; rather Reliable performed work on the doors on an as-needed basis. We find that the fact that Reliable may have occasionally performed repair services on the sensor mechanism does not, as a matter of law, remove the sensor from UCP’s exclusive control (see Stone v Courtyard Mgt. Corp., 353 F3d 155, 160 [2d Cir 2003]).

Thus, this case stands in stark contrast to Hodges v Royal Realty Corp. (42 AD3d 350 [2007]), an elevator accident case in which we declined to apply res ipsa loquitur against a building’s managing agent. We found that the agent did not have exclusive control over the elevator since the building owner, by way of a written service contract, had ceded all responsibility for the daily operation, repair and maintenance of the elevator to an outside company. Since there is no such exclusive service contract here, an issue of fact exists as to UCP’s exclusive control of the sensor mechanism.

Finally, UCP argues that it lacked exclusive control because the doors were used by the public on a daily basis and anyone walking through them could have done something to affect the doors’ sensor. In Ianotta v Tishman Speyer Props., Inc. (46 AD3d 297, 299 [2007]), we declined to dismiss a similar res ipsa loquitur claim in an elevator door-strike case because the infrared device controlling the door was out of the public’s access. Likewise, here, since the motion sensor was located on top of the automatic doors, there is no real likelihood that the public could have altered it (see Pavon v Rudin, 254 AD2d 143, 146 [1998] [“The appropriate target of inquiry is whether the broken component itself was generally handled by the public, not whether the public used the larger object to which the defective piece was attached”]). Because issues of fact exist as to the applicability of the doctrine of res ipsa loquitur, UCP is not entitled to summary judgment dismissing the complaint.

The court correctly denied UCP’s and Reliable’s respective motions for summary judgment on the third-party complaint because there are triable issues of fact as to whether plaintiff’s accident was due to Reliable’s negligence (see Espinal v Melville Snow Contrs., 98 NY2d 136 [2002]; Mendez v Union Theol. Seminary in City of N.Y., 17 AD3d 271, 272 [2005]). The evidence in the record shows that Reliable was the only entity that performed any work on the doors. Although Reliable’s witness could not recall whether the company repaired the doors before plaintiff’s accident, a work invoice shows that, in May 2002, Reliable adjusted the motion sensor, the very instrument in issue here. In light of this evidence and plaintiff’s testimony that she had observed problems with the doors prior to her accident, Reliable’s negligence, or lack thereof, cannot be determined as a matter of law.

However, the court should have granted Miric’s cross motion for summary judgment because there was no proof that Miric performed work on the automatic doors. Nor was there any showing that Miric agreed to oversee the quality of or inspect Reliable’s work.
Miric’s role was merely to make a phone call to Reliable. Simply put, there is no evidence that Miric in any way caused or contributed to plaintiff’s injuries.

**Habit**

Where the defendant physician in a medical malpractice case has no specific recollection of the incident at issue, she may testify as to her protocol under similar circumstances to establish her conduct during the incident at issue. *Biesiada v. Suresh*, 309 A.D.2d 1245, 764 N.Y.S.2d 739 (4th Dept. 2003).

In *Greenberg v. N.Y.C.T.A.*, 290 A.D.2d 412, 736 N.Y.S.2d 73 (2nd Dept. 2002), in a slip and fall case taking place on a subway, the court erred in not allowing the plaintiff to testify that he had observed the defendant’s employees cleaning the A train at the Lefferts Boulevard Station often, and that every A train originating from Lefferts Boulevard in the early morning has a soapy substance put on the floor. The testimony would have established a routine of the defendant, and should have been admitted as circumstantial evidence that the defendant engaged in that routine on the morning in question and thereby created the hazardous condition upon which Greenberg slipped and fell.

In *Thomas v Samuels*, 60 AD3d 1187 (3rd Dept. 2009)

At the close of the trial, Supreme Court suggested and, over plaintiff's objection, then gave the jury an instruction regarding evidence of defendant's habit in performing surgeries. The jury found in defendants' favor and, on appeal, plaintiff contends that the court's instruction on habit evidence was inappropriate and constituted reversible error. Defendants concede that the instruction was error due to the varying conditions encountered during surgical procedures (*see Rivera v Anilesh*, 8 NY3d 627, 635 [2007]; *Gushlaw v Roll*, 290 AD2d 667, 670 [2002]). The error, however, was harmless because there was no real evidence of defendant's habits in performing biopsy surgeries and defense counsel did not rely on evidence of habit in the opening or closing arguments to the jury. Also, there was ample evidence to support the verdict, including the testimony by defendant and defendants' medical experts that, given the location of the incision made, it would have been virtually impossible for defendant to cut or cauterize in the area where the long thoracic nerve was located. Finally, it is mere speculation that the
instruction concerning defendant's habits confused the jury or resulted in the five/six verdict. For these reasons, we conclude that Supreme Court's addition of the evidence of habit instruction to an otherwise accurate, thorough and complete charge does not constitute reversible error here (see CPLR 2002; Nestorowich v Ricotta, 97 NY2d 393, 400-401 [2002]; see also Towers v Hoag, 40 AD3d 244, 246 [2007]; Walker v State of New York, 111 AD2d 164, 165-166 [1985]).

In Rivera v. Anilesh, 8 N.Y.3d 627 (2007), the Court reiterated that doctors can testify as to their custom and practice how they never commit malpractice.

In this malpractice action by a patient against her dentist, we are asked whether the dentist's routine procedure for administering an anesthetic injection is admissible as habit evidence supporting an inference that the same procedure was used when treating the patient. Based on the record before us, we conclude that the habit and routine practice testimony is admissible.

Query: would the Court allow a driver to testify that he/she never speeds or runs a red light, so they didn’t do it here, or a pedestrian to say I always look where I was going, and while I don’t remember what happened here, I must have paid attention?

In Sarmiento v. Klar Realty Corp., 35 AD3d 834 (2nd Dept. 2006),

The Supreme Court properly denied Olah's motion for summary judgment dismissing the contractual indemnity cause of action. Olah established its prima facie entitlement to summary judgment by submitting Zucchi's purchase order, which contained no indemnity clause, and by submitting the testimony of its president, Dan Olah, that no indemnification clause was attached to the purchase order he had received. In opposition, however, Zucchi submitted the deposition of its secretary, who testified that it was her custom to attach by paper clip a piece of paper containing an indemnification clause to every purchase order she mailed. She could not recall, however, the mailing of the particular purchase order transmitted to Olah. The secretary's testimony concerning her office custom and practice was sufficient to raise a triable issue of fact as to whether an indemnification clause was or was not part of the parties' contract (see Tracy v William Penn Life Ins. Co. of N.Y., 234 AD2d 745, 748, 650 NYS2d 907 [1996]; Washington v St. Paul Surplus Lines Ins. Co., 200 AD2d 617, 618, 606 NYS2d 726 [1994]).

**Conduct of Trial**

In Beshay v Eberhart L.P. #1, 69 AD3d 779 (2nd Dept. 2010)
Following the opening statement of the plaintiffs' counsel, both Eberhart and Bosch made separate motions pursuant to CPLR 4401 (a) for judgment as a matter of law. In response to a question from the trial court, the plaintiffs' counsel indicated that he would not change his opening statement if given a chance to "reopen." The court granted both motions. The plaintiffs appeal from the judgment dismissing the complaint. We modify.

A dismissal of a complaint after the opening statement of a plaintiff's attorney is warranted only where it can be demonstrated either (1) that the complaint does not state a cause of action, (2) that a cause of action that is otherwise stated is conclusively defeated by something interposed by way of a defense and clearly admitted as a fact, or (3) that the counsel for the plaintiff, in his or her opening statement, by some admission or statement of fact, so completely compromised his or her case that the court was justified in awarding judgment as a matter of law to one or more defendants (see Ballantyne v City of New York, 19 AD3d 440, 440-441 [2005]; see also CPLR 4401; Hoffman House, N.Y. v Foote, 172 NY 348, 350 [1902]; Schomaker v Pecoraro, 237 AD2d 424, 425-426 [1997]; De Vito v Katsch, 157 AD2d 413, 416-417 [1990]).


The plaintiff was injured while performing construction work in a building owned by the defendant 62-25 30th Avenue Realty, LLC, and leased by the defendant Zahmel Restaurant Supply Corp., doing business as Zahner's Cash & Carry. On a prior appeal, we determined that the [*2]Supreme Court should have granted the plaintiff's motion pursuant to CPLR 4404(a), inter alia, for judgment as a matter of law on the issue of liability pursuant to Labor Law § 240(1) (see Castillo v 62-25 30th Ave. Realty, LLC, 47 AD3d 865, 866).

The defendants now contend that in the subsequent trial on the issue of damages, the trial court committed several evidentiary errors, the cumulative effect of which warrants a new trial (see Bayne v City of New York, 29 AD3d 924, 926). We agree with the defendants.

First, the trial court erroneously precluded the jury from considering a videotape taken by a videographer hired by the defendants to observe the plaintiff as he conducted his daily activities (see Zegarelli v Hughes, 3 NY3d 64, 69). "[A]ny discrepancy between the tape and the videographer's description in a written report of what he saw . . . would have been a proper matter for cross-examination" (id.).

Second, the trial court improvidently exercised its discretion in precluding the defendants from questioning the plaintiff's treating orthopedist regarding the underlying factual allegations that led to the suspension of his license to practice medicine, a topic which would have had a bearing on his credibility if called to testify by the plaintiff (see Badr v Hogan, 75 NY2d 629, 634; Matter of Czop v Czop, 21 AD3d 958, 960; Spanier v
New York City Tr. Auth., 222 AD2d 219). Further, after the plaintiff failed to call that orthopedist to the stand, the trial court erred in failing to grant the defendants' request for a missing witness charge (see O'Brien v Barretta, 1 AD3d 330, 332; McDowell v Eagle Trans. Corp., 303 AD2d 655, 656; Adkins v Queens Van-Plan, 293 AD2d 503, 504).

Third, the trial court should have permitted the defendants to cross-examine the plaintiff on a matter that was directly relevant to his claim that his injuries limited his ability to have sexual relations (see Feldsberg v Nitschke, 49 NY2d 636, 643).

The trial court also improvidently exercised its discretion in conditioning its grant of the defendants' request for a hearing to determine the structure of the judgment pursuant to CPLR article 50-B upon the defendants up-front payment of the fees of the plaintiff’s expert, thereby, in effect, imposing a sanction in the sum of $5,000 upon the defendants (see Miller v John A. Keeffe, P.C., 164 AD2d 933, 936).

In Sutton v Kassapides, 73 AD3d 1021 (2nd Dept. 2010) the same trial judge as in Castillo, was involved in a medical malpractice case.

The plaintiff was deprived of a fair trial in this medical malpractice action as a result of the cumulative effect of the improper conduct of the trial court, both during cross-examination and in its charge to the jury (see Matter of Travelers Indem. Co. v Mohammed, 14 AD3d 710 [2005]; Ougourlian v New York City Health & Hosps. Corp., 5 AD3d 644, 645 [2004]; Perkins v New York Racing Assn., 51 AD2d 585, 586 [1976]). In addition, the trial court erred in giving an “error in judgment” charge (see Nestorowich v Ricotta, 97 NY2d 393, 399 [2002]; PJI 2:150). There was no evidence that the defendant surgeon, Elias Kassapides, had to consider and choose among medically acceptable alternatives regarding the treatment of the plaintiff (see Nestorowich v Ricotta, 97 NY2d at 399-400; Rospierski v Haar, 59 AD3d 1048, 1049 [2009]; Vanderpool v Adirondack Neurosurgical Specialists, P.C., 45 AD3d 1477, 1478 [2007]; Martin v Lattimore Rd. Surgicenter, 281 AD2d 866 [2001]). Accordingly, we remit the matter to the Supreme Court, Queens County, for a new trial before a different Justice.

In Pink v. Ricci, 74 AD3d 1773 (4th Dept. 2010),

Plaintiffs commenced this action seeking damages for injuries sustained by Raymond Pink (plaintiff) when Matthew Ricci (defendant) allegedly struck him during a fight that also involved other fellow spectators at a youth hockey game. Defendant thereafter pleaded guilty to assault in connection with the fight. Plaintiffs moved, inter alia, to compel defendant to respond to plaintiffs’ discovery demands, which included requests for copies of all court and police records from the criminal proceedings against defendant. In addition, plaintiffs sought to compel defendant to respond to questioning during his deposition concerning the records sought and the criminal proceedings. Defendant cross-moved, inter alia, for a protective order with respect to the records involving the criminal proceedings (first cross motion), and thereafter [*2]cross-moved to dismiss his own counterclaim (second cross motion), which asserted that plaintiff and others acting in concert with him caused defendant to experience “a great deal of emotional stress, anxiety and, upon information and belief, physical injury.” Plaintiffs did
not oppose the second cross motion, and Supreme Court granted it. We conclude that the
court properly granted plaintiffs’ motion to compel and denied defendant’s first cross
motion. Defendant did not regain his statutory privilege of confidentiality by virtue of his
having withdrawn his counterclaim inasmuch as his similar cross claims against the
remaining defendants remain viable (see Best v 2170 5th Ave. Corp., 60 AD3d 405
[2009]; Rodriguez v Ford Motor Co., 301 AD2d 372 [2003]; Lott v Great E. Mall, 87
AD2d 978 [1982]; see generally Green v Montgomery, 95 NY2d 693, 701 [2001];
Commercial Union Ins. Co. v Jones, 216 AD2d 967 [1995]). We further conclude,
however, that the court erred in sua sponte directing defendant “to fully respond to . . .
trial questioning on the issue of his arrest and criminal proceedings arising from the
[fight],” and we therefore modify the order by vacating that directive. The admissibility
of evidence at trial lies primarily within the discretion of the trial court rather than the
motion court (see generally Carlson v Porter [appeal No. 2], 53 AD3d 1129, 1132
[2008], lv denied 11 NY3d 708 [2008]; Goldner v Kemper Ins. Co., 152 AD2d 936
[1989], lv denied 75 NY2d 704 [1990]).

In Strochia v Celentano Provisions, Inc., 69 AD3d 607 (2nd Dept. 2010)

The Supreme Court erroneously dismissed the complaint, in effect, for failure
to join Bovis Lend Lease (hereinafter Bovis), a general contractor, as a necessary
party. The plaintiff, who was not a protected person under the Labor Law (see generally
Civic & Social Club, 47 NY2d 970, 971 [1979]), did not allege any Labor Law violations
in his complaint. Instead, the plaintiff commenced this action solely against Celentano
business as New Town Masonry, under a theory of common-law negligence. As such,
under the circumstances of this case, joining Bovis as a party was not necessary in order
to accord complete relief between the plaintiff and the respective defendants, nor would
Bovis have been inequitably affected by any judgment in the action (see CPLR 1001 [a]).

We note that Justice Hart's conduct during the trial was improper and
consisted, inter alia, of his continuous, wrongful interjection into the trial
proceedings.

In Rodriguez v City of New York, 67 AD3d 884 (2nd Dept 2009)

The plaintiffs moved pursuant to CPLR 4404 (a), inter alia, to set aside the verdict in
the [*2]interest of justice, and for a new trial on the issue of damages, maintaining that
they were deprived of a fair trial by virtue of several erroneous evidentiary rulings, as
well as improper conduct on the part of defense counsel and the trial court. We agree.

CPLR 4404 (a) provides that, "[a]fter a trial . . . by a jury, upon the motion of any
party or on its own initiative, the court may set aside a verdict . . . and . . . may order a
new trial . . . in the interest of justice." A motion pursuant to CPLR 4404 (a) should not
be granted unless the movant presents evidence to establish that "substantial justice has
not been done, as would occur, for example, where the trial court erred in ruling on the
admissibility of evidence, there is newly-discovered evidence, or there has been
misconduct on the part of attorneys or jurors" (Gomez v Park Donuts, 249 AD2d 266,
267 [1998] [citations omitted]; see Lucian v Schwartz, 55 AD3d 687 [2008]; Langhorne v County of Nassau, 40 AD3d 1045 [2007]). The interest of justice thus requires a court to order a new trial where comments by an attorney for a party's adversary deprived that party of a fair trial or unduly influenced a jury (see Huff v Rodriguez, 64 AD3d 1221, 1223 [2009]).

Specifically, in his opening statement, defense counsel stated that Rodriguez, who alleged that he was unable to work as a result of back injuries he sustained from the fall, was disabled due to "lung problems," sepsis, and his treatment with interferon for hepatitis C. In his summation, defense counsel referred to the testimony of Rodriguez's vocational economic analyst as "totally incredible" and a "kind of tweaker." Additionally, during the course of summarizing the testimony of an economic analyst retained by the plaintiffs, defense counsel exclaimed, "[w]hat a liar," when describing the analyst and the analyst's statement that he did not have a calculator with him at trial. In addition, defense counsel rhetorically asked "[w]hy do they lie to you?" when telling the jury that the case was about fair and adequate compensation for the injuries Rodriguez sustained in the accident. Defense counsel went on to state: "It's not a lottery. It's not a game. It's not 'here's the American dream, come over here, fall off a scaffold, get a million dollars.' " Finally, defense counsel also told the jury that, from the beginning of his testimony, Rodriguez's treating chiropractor was "not being honest, is not being truthful."

Such comments, which were not isolated, were plainly prejudicial and designed to deprive the plaintiffs of their right to a fair trial (see Brooks v Judlau Contr., Inc., 39 AD3d 447, 449 [2007], revd on other grounds 11 NY3d 204 [2008]; see also McArdle v Hurley, 51 AD3d 741, 743 [2008]; Vazquez v Costco Cos., Inc., 17 AD3d 350, 352 [2005]). The underlying principle is that litigants are entitled, as a matter of law, to a fair trial free from improper comments by counsel or the trial court (see e.g., DeCrescenzo v Gonzalez, 46 AD3d 607, 608 [2007]). The comments by defense counsel were inflammatory and unduly prejudicial, and should have been precluded by the trial court (see O'Neil v Klass, 36 AD3d 677, 677-678 [2007]; Pagano v Murray, 309 AD2d 910, 911 [2003]). In Pagano v Murray, we held that comments similar to those of the defense counsel here were "particularly improper and unbecoming because [the defendant] offered no expert witness on his behalf" (id. at 911; see also Grasso v Koslowe, 38 AD3d 599 [2007]).

Defense counsel, in his opening statement, commented that Rodriguez had come down with sepsis, "which is an incredibly dangerous blood borne infection." The plaintiffs' counsel objected, arguing that there would be no testimony with regard to that issue or condition. The trial court overruled the objection and went on to comment about Rodriguez's assorted other unrelated medical conditions.

Later, during the defendants' cross-examination of Rodriguez, the plaintiffs objected to the question of whether Rodriguez was familiar with the radiographs of his lower back. Rodriguez responded that he did not recall. The trial court overruled the objection and said, in the presence of the jury: "Counselor, again, it's subject to connection. It's a big problem you have here."
These statements, taken together with certain other comments made by the trial
court, evince a course of conduct by which the trial court unduly injected itself into the
cross-examination (see O'Brien v Barretta, 1 AD3d 330, 332 [2003]; Mantuano v
Mehale, 258 AD2d 566, 567 [1999]; Gerichten v Ruiz, 80 AD2d 578 [1981]), thus further
serving to deprive the plaintiffs of a fair trial (see Butler v New York City Hous. Auth., 26
AD3d 352, 353-354 [2006]; Vazquez v Costco Cos., Inc., 17 AD3d at 352; cf. Huff v
Rodriguez, 64 AD3d at 1223), a fundamental right to which all litigants, regardless of the
merits of their case, are entitled (see DeCrescenzo v Gonzalez, 46 AD3d at 608; Desinor
v New York City Tr. Auth., [*3]34 AD3d 521 [2006]; Habenicht v R. K. O. Theatres, 23
AD2d 378, 379 [1965]; Salzano v City of New York, 22 AD2d 656, 657 [1964]). These
troublesome comments created an atmosphere in which there was a significant
probability that the jury was distracted from the issues presented in the case and, hence, a
new trial is warranted on this ground as well (see DeCrescenzo v Gonzalez, 46 AD3d at
608).

The trial court also erred in ruling that the plaintiffs' counsel could not utter the word
"disability" in front of the jury, while permitting defense counsel to use that word in front
of the jury with seeming impunity.

In addition, since it was established that the medical records of Rodriguez's treating
physician were business records made in the ordinary course of business, the trial court
should have allowed those records into evidence (see Wilbur v Lacerda, 34 AD3d 794,
795 [2006]; see also Crisci v Sadler, 253 AD2d 447, 449 [1998]; CPLR 4518).
Accordingly, the plaintiffs were deprived of a fair trial by this improper evidentiary
ruling as well, which provides a further basis on which a new trial in the interest of
justice is warranted (see Langhorne v County of Nassau, 40 AD3d at 1048; Durant v
Shuren, 33 AD3d 843, 844 [2006]; Stevens v Atwal, 30 AD3d 993, 994 [2006]).

While on the topic of improper conduct by counsel, in Doody v Gottshall, 67
AD3d 1347 (4th Dept. 2009)

We conclude with respect to the order in appeal No. 2, issued following the trial on
damages, that the court properly set aside the verdict and ordered a new trial "on its own
[*2]initiative . . . in the interest of justice" based upon the misconduct of defendants'
atorney (CPLR 4404 [a]). During the course of the trial, defendants' attorney failed
to abide by the court's rulings, made inflammatory remarks concerning plaintiff's
ounsel and expert witnesses, repeatedly expressed his personal opinions regarding
the cause and severity of plaintiff's injuries and made arguments to the jury on
summation that were not supported by the evidence. We therefore agree with the
court that the misconduct of defendants' attorney deprived plaintiff of a fair trial
(see Stewart v Olean Med. Group, P.C., 17 AD3d 1094, 1096-1097 [2005]; Kennedy v
Children's Hosp. of Buffalo [appeal No. 3], 288 AD2d 918 [2001]). Based on our
conclusion that plaintiff is entitled to a new trial on damages, there is no need to address
the merits of plaintiff's post-trial motion concerning the amount of the jury's verdict on
damages inasmuch as that motion is moot.
We further conclude, however, that the court erred in disqualifying defendants' attorney and his firm from representing defendants at the retrial. A party is entitled to be represented by counsel of his or her own choosing, and defendants, at a minimum, should have been afforded a reasonable opportunity to be heard on the issue of disqualification (see generally S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 443 [1987]). In addition, defendants were entitled to a reasonable opportunity to be heard before the court imposed upon them "the costs incurred in the trial for the live medical experts consisting of transportation, and time charged, which will need to be duplicated in the second damages trial" (see 22 NYCRR 1000.16 [a]; Deeb v Tougher Indus., 216 AD2d 667, 668 [1995]; Benatovich v Koessler, 209 AD2d 984 [1994]). We therefore modify the order in appeal No. 2 accordingly.

MISSING WITNESS

INAPPLICABILITY OF A MISSING WITNESS CHARGE AGAINST PLAINTIFF’S NON-TESTIFYING DOCTOR

By Sherri Sonin and Robert J. Genis

A person becomes injured in an accident. He or she then goes to a doctor. Their doctor then refers them to various specialists and various tests are performed. The question then arises is, must the plaintiff produce at trial every single health care provider involved in their care? While common sense tells us “no”, plaintiff’s counsel may be concerned with an adverse “missing witness” charge to the jury if they fail to do so. See, PJI 1:75. Under certain circumstances, such a charge is not appropriate.

Cumulative Testimony

It has been long and well-recognized that a missing witness charge should not be given against the plaintiff for failing to call treating doctors where their testimony would be cumulative to the testimony given in the case by other experts. Dowling v. 257 Associates, 235 A.D.2d 293 (1st Dept. 1997); Zivkovic v. Grossman, 203 A.D.2d 76 (1st


The “missing witness(es)” testimony may be made even more cumulative and unnecessary where the testimony that they might be expected to give is in evidence, either through notes and medical records admitted into evidence. Rojas v. Greyhound Lines, Inc., 254 A.D.2d 188 (1st Dept. 1998); Jellema v. 66 West 84th Street Owners Corp., 248 A.D.2d 117 (1st Dept. 1998); Kane v. Linsky, 156 A.D.2d 333 (2nd Dept. 1989); Contorino v. Florida OB/GYN Association, P.C., 259 A.D.2d 460, 460-461 (2nd Dept. 1999); Belmont v. Palm Beach Club, Inc., 244 A.D.2d 904 (4th Dept. 1997); Stevens v. Brown, 249 A.D.2d 909, 910 (4th Dept. 1998).

Thus, where plaintiff did not call two treating doctors, whose expected testimony was that the plaintiff sustained a herniated disk as a result of the accident, was already in the record through reports and other expert testimony, their testimony would have been

Moreover, where the court disallows evidence of aggravation of plaintiff’s preexisting condition, the testimony of a prior treating may not be relevant to the question of damages. Diorio v. Scala, 183 A.D.2d 1065, 1067 (3rd Dept. 1992).

In Coore v Franklin Hosp. Med. Ctr, 35 AD3d 195 (1st Dept. 2007),

The court properly denied defendant's request for a missing witness charge with respect to a social worker whose entire treatment record of plaintiff was admitted into evidence and used extensively by defendant in support of her position, and whose testimony, therefore, would have been cumulative (see Williams v Bright, 230 AD2d 548, 557 [1997], appeal dismissed 90 NY2d 935 [1997]).

**Control**

Where the prior treating doctor is no longer under the plaintiff’s control, the missing witness charge is inappropriate. Pagan v. Ramirez, 80 A.D.2d 848 (2nd Dept. 1981).


Where the plaintiff has switched doctors or no longer used the treating doctor, particularly where there is a passage of time prior to trial, control should not be inferred. Diorio v. Scala, 183 A.D.2d 1065, 1067 (3rd Dept. 1992); Colezetti v. Pircio, 214 A.D.2d 926, 927 (3rd Dept. 1995). Former treating doctors may be neither under the control of
the party nor willing to provide testimony favorable to the patient who left them to go to other doctors. Oswald v. Heaney, 70 A.D.2d 653, 654 (2nd Dept. 1979).

Moreover, the court may consider the substantial cost of calling every treating doctor in making its determination. Oswald v. Heaney, 70 A.D.2d 653, 654 (2nd Dept. 1979).

Non-Medical Witnesses

In Popolizio v County of Schenectady, 62 AD3d 1181 (3rd Dept. 2009), we find that Supreme Court properly denied defendant's request for a missing witness charge as to plaintiff's son, daughter and brother-in-law. Defendant did not request such a charge until well after the close of proof and, moreover, was unable to demonstrate that their testimony would not have been cumulative (see People v Gonzalez, 68 NY2d 424, 427-428 [1986]; Gagnon v St. Clare's Hosp., 58 AD3d 960, 961 [2009]).

When counsel wishes to have the court issue a missing witness charge, a timely objection must be made after a proper foundation is made. 3134 E. Tremont Corp. v. 3100 Tremont Assoc., 37 A.D.3d 340 (1st Dept 2007):

Defendant's request for such an inference was not timely (see Thomas v Triborough Bridge & Tunnel Auth., 270 A.D.2d 336, 704 N.Y.S.2d 879 [2000]), and was not adequately supported. Defendant did not demonstrate that the potential witness was available to plaintiff or under its control, and did not explain why it, defendant, had not subpoenaed the purportedly missing witness (cf. Crowder v Wells & Wells Equip., 11 A.D.3d 360, 783 N.Y.S.2d 552 [2004]).

Missing Documents


A party seeking an adverse inference charge against an opponent who has failed to produce a document must make a prima facie showing that the document in question actually exists, that it is under the opponent's control, and that there is no reasonable explanation for failing to produce it (see Wilkie v New York City Health & Hosps. Corp., 274 A.D.2d 474, 711 N.Y.S.2d 29; Cidieufort v New York
City Health & Hosps. Corp., 250 A.D.2d 720, 721, 673 N.Y.S.2d 188; Scaglione v Victory Mem. Hosp., 205 A.D.2d 520, 520-521, 613 N.Y.S.2d 213). Here, a Touro representative testified that he never sought or received the accident report, and an Arco representative testified that he was unable to locate the document after performing a search. Accordingly, the plaintiff failed to establish her entitlement to an adverse inference charge based upon the missing accident report (see Mathis v New York Health Club, 288 A.D.2d 56, 57, 732 N.Y.S.2d 341; Wilkie v New York City Health & Hosps. Corp., supra at 474-475; cf. Cusumano v New York City Tr. Auth., 75 A.D.2d 801, 427 N.Y.S.2d 644).


As with all other charges, foundation must be established. There is no cause of action in New York for negligent spoliation of evidence. Ortega v. City of New York, 9 N.Y.3d 69 (2007), but depending on the circumstances, the striking of a pleading may be warranted.

In Payano v. Milbrook Properties, Ltd., 39 A.D.3d 518 (2nd Dept. 2007), in preparation for surgery, the injured plaintiff gave her MRI films to her surgeon for review. It was later revealed that the films were lost.

Under the circumstances here, it cannot be presumed that the plaintiffs are the parties responsible for the disappearance of the MRI films or, more importantly, that the films were discarded by the plaintiffs in an effort to frustrate discovery (see O'Reilly v Yavorskiy, 300 A.D.2d 456, 457, 755 N.Y.S.2d 81; McLaughlin v Brouillet, 289 A.D.2d 461, 735 N.Y.S.2d 154; cf. Behrbom v Healthco Intl., 285 A.D.2d 573, 728 N.Y.S.2d 96). Moreover, the plaintiffs are also prejudiced by the loss of the MRI films (see O'Reilly v Yavorskiy, supra at 457).
CONCLUSION

Where possible, plaintiff’s counsel should make sure that they have met at least one of the above-mentioned criterion to avoid having a missing witness instruction given to the jury.

APPLICABILITY OF A MISSING WITNESS CHARGE AGAINST DEFENDANT’S EXAMINING DOCTOR

By Sherri Sonin and Robert J. Genis

When a defendant retains a physician to conduct a physical examination of a plaintiff in a personal injury lawsuit, and the defendant fails to produce its physician as a witness at trial, it may constitute reversible error to fail to give a missing witness charge.

This long standing rule of law was reiterated in Leahy v. Allen, 221 A.D.2d 88 (3rd Dept. 1996)(cited in Prince, Richardson on Evidence, 11th Ed., 1997 Cumulative Supplement, Sec. 3-140).

In Leahy v. Allen, supra, the Court held:

“It has long been the rule that where a party fails to call an available witness in support of his or her case and such witness is under that party’s control and in a position to provide noncumulative evidence favorable to the opposing party, the jury should be permitted to draw an adverse inference by reason thereof (citations omitted).”

“In this regard, the prevailing case law makes clear that one person’s testimony properly may be considered cumulative of another’s only when both individuals are testifying in favor of the same party (citations omitted). … To hold otherwise would lead to an anomalous result. Indeed, if the testimony of a defense physician who had examined a plaintiff and confirmed the plaintiff’s assertion of a serious injury were deemed cumulative to the evidence offered by the plaintiff, thereby precluding the missing witness charge, there would never be an occasion to invoke such charge.” 221 A.D.2d 88, 91-92.

This rule has been adopted by the Appellate Division, First Department. In Grey v. United Leasing, Inc., 91 A.D.2d 932 (1st Dept. 1983), the Appellate Division held that the lower Court commit error (I) by erroneously sustaining defense objections to
plaintiff’s counsel’s comments on summation of the failure of the defendant to produce its examining physician, and (2) further compounded its error by failing to give a missing witness instruction to the jury, against the defendant, for its failing to call its examining doctor. 91 A.D.2d at 933. See also, Seligson, Morris & Neuburger v. Fairbanks Whitney Corp., 22 A.D.2d 625, 630-631 (1st Dept. 1965).

The Appellate Division, First Department, has similarly held that the missing witness charge should be given where the defendant fails to testify or produce a witness as to matters involving liability. See, Jarrett v. Madifari, 67 A.D.2d 396, 408 (1st Dept. 1979).


In Brooks v. Judlau Contracting Inc., 39 A.D.3d 447 (2nd Dept. 2007), the lower court erred when it failed to do so, resulting a new trial on the issue of damages:

First, the plaintiffs were entitled to a missing witness charge with respect to a physician who examined the injured plaintiff on Judlau's behalf. When a doctor who examines an injured plaintiff on the defendant's behalf does not testify at trial, an inference generally arises that the testimony of such witness would be unfavorable to the defendant. The defendant may defeat this inference by demonstrating that the testimony
would be merely cumulative, the witness was unavailable or not under the defendant's control, or the witness would address matters not in dispute (see Arroyo v City of New York, 171 A.D.2d 541, 544, 567 N.Y.S.2d 257; Levande v Dines, 153 A.D.2d 671, 672, 544 N.Y.S.2d 864). Here, Judlau failed to defeat the inference. Indeed, the witness was outside the courtroom when Judlau decided not to call him. Accordingly, the trial court erred in denying the plaintiffs' request for a missing witness charge with respect to the doctor.

Second, Judlau's counsel created an atmosphere that deprived the plaintiffs of a fair trial, not by an isolated remark during summation, but by continual and deliberate efforts to divert attention from the issues (see Vassura v Taylor, 117 A.D.2d 798, 799, 499 N.Y.S.2d 120; Mercurio v Dunlop, Ltd., 77 A.D.2d 647, 647, 430 N.Y.S.2d 140). For example, Judlau's counsel repeatedly denigrated the ethics and veracity of the plaintiffs' witnesses and their counsel (see Clarke v New York City Tr. Auth., 174 A.D.2d 268, 276, 580 N.Y.S.2d 221; Weinberger v City of New York, 97 A.D.2d 819, 820, 468 N.Y.S.2d 697; Taormina v Goodman, 63 A.D.2d 1018, 1018, 406 N.Y.S.2d 350). The inflammatory and prejudicial comments made by Judlau's counsel so contaminated the proceedings as to deny the plaintiffs their right to a fair trial (see Vassura v Taylor, supra; Bagailuk v Weiss, 110 A.D.2d 284, 287, 494 N.Y.S.2d 205).

Third, the trial court erred, in effect, in dismissing the derivative claim of the injured plaintiff's wife for loss of services. The evidence at trial was sufficient for the court to submit that claim to the jury (see Valentine v Lopez, 283 A.D.2d 739, 744, 725 N.Y.S.2d 714).

In Hanlon v. C.M. Campisi, 49 A.D.3d 603 (2nd Dept. 2008), the trial erred in failing to give a missing witness charge with respect to the defendant’s examining orthopedic surgeon.

The plaintiff commenced the present action, alleging that the rotator cuff tear which she sustained was proximately caused by the negligence of the defendants in causing the subject motor vehicle accident. During the course of discovery, the defendants produced an affirmed medical report prepared by Dr. David Benatar, who examined the plaintiff on behalf of the defendants and concluded that the subject motor vehicle accident was "the causative factor for [the plaintiff's] right shoulder complaints." At trial, the defendants' expert radiologist, their only witness, testified that the plaintiff's rotator cuff tear was degenerative in nature. After the expert concluded her testimony, the defendants rested their case. Thereafter, at an off-the-record precharge conference, the plaintiff's attorney requested a missing witness charge with regard to Benatar, whom the defendants did not call to testify at trial. The Supreme Court denied the application.
Under the circumstances of this case, the plaintiff's request for a missing witness charge was promptly made (see *Dukes v Rotem*, 191 AD2d 35, 599 N.Y.S.2d 915; *Trainor v Oasis Roller World*, 151 AD2d 323, 543 N.Y.S.2d 61; see also *Follett v Thompson*, 171 AD2d 777, 567 N.Y.S.2d 497) and therefore was not untimely. Turning to the merits, "[w]hen a doctor who examines an injured plaintiff on the defendant's behalf does not testify at trial, an inference generally arises that the testimony of such witness would be unfavorable to the defendant. The defendant may defeat this inference by demonstrating that the testimony would be merely cumulative, the witness was unavailable or not under the defendant's control, or the witness would address matters not in dispute" (*Brooks v Judlau Constr. Inc.*, 39 AD3d 447, 449, 833 N.Y.S.2d 223). Here, the defendants failed to defeat the inference. Therefore, the plaintiff is entitled to a new trial on the issue of damages, including the issue of serious injury.

**Defendant**


In *Zito v. City of New York*, 49 A.D.3d 872 (2nd Dept. 2008),

The court also erred in denying the plaintiff's request for a missing witness charge regarding the defendants' ballistics expert. A party is entitled to a missing witness charge when the party establishes that "an uncalled witness possessing information on a material issue would be expected to provide noncumulative testimony in favor of the opposing party and is under the control of and available to that party" (*Jackson v County of Sullivan*, 232 AD2d 954, 955, 648 N.Y.S.2d 808; see *Zeeck v Melina Taxi Co.*, 177 AD2d 692, 576 N.Y.S.2d 878; *Kupfer v Dalton*, 169 AD2d 819, 565 N.Y.S.2d 188). Here, it is undisputed that the ballistics expert was available and under the defendants' control, and the charge would have allowed the jury to infer that the expert's testimony would not have contradicted the evidence offered by the plaintiff with respect to the direction of the bullet, which was a central issue in the case (see *Goverski v Miller*, 282 AD2d 789, 723 N.Y.S.2d 526).

In *Brown v. City of New York*, 50 A.D.3d 937 (2nd Dept. 2008),
Contrary to the defendants' contention, the Supreme Court properly granted the plaintiffs' request for a missing witness charge with respect to the defendant Julio A. Torro, the driver of the vehicle that allegedly struck the van of the injured plaintiff, Joe S. Brown. Torro, who at all relevant times was represented by counsel, and who had previously given deposition testimony, inexplicably failed to appear at the trial to testify. A jury may, but is not required to, draw the strongest inference that the opposing evidence permits against a party who fails to testify at trial (see Crowder v Wells & Wells Equip., Inc., 11 AD3d 360, 361, 783 N.Y.S.2d 552; Farrell v Labarbera, 181 AD2d 715, 716, 581 N.Y.S.2d 226; see also Noce v Kaufman, 2 NY2d 347, 353, 141 N.E.2d 529, 161 N.Y.S.2d 1).

CONCLUSION

Where applicable, plaintiff should lay foundation for a missing witness charge against the defendant that fails to produce their examining physician, and then request such a charge. See, PJI 1:75.

Voir Dire

In Zgrodek v McInerney, 61 AD3d 1106 (3rd Dept. 2009),

We find merit in plaintiffs' argument that Supreme Court placed unduly restrictive time constraints on the questioning of prospective jurors. Over plaintiffs' objections, both before and after voir dire, the court limited questioning in each round to 15 minutes. While the trial court is accorded discretion in setting time limits for voir dire (see 22 NYCRR 202.33; Horton v Associates in Obstetrics & Gynecology, 229 AD2d 734, 735 [1996] [60 minutes for first round and 30 minutes for subsequent rounds upheld]), the 15 minutes allowed for each round under the circumstances of this case was unreasonably short (see Implementing New York's Civil Voir Dire Law and Rules, at 6, http://www.nycourts.gov/publications/pdfs/ImplementingVoirDire2009.pdf [NY St Unified Ct Sys, Jan. 2009, accessed Feb. 25, 2009] [stating that "(i)n a routine case a reasonable time period to report on the progress of voir dire is after about two or three hours of actual voir dire"]). This case involved close factual and medical issues, and evidence from several experts was presented at trial. Issues implicated involved, among others, proof regarding four distinct injuries and four surgeries, challenges to causation regarding each injury, the relevance and impact of plaintiff's preexisting conditions, the weight to be given evidence from several experts...
with markedly varying opinions, and consideration of appropriate compensation for a variety of asserted injuries. Notwithstanding that liability was not an issue, the case was not simple and straightforward. **We cannot conclude from this record that plaintiffs were not prejudiced by the extremely short time permitted for voir dire.**

Here, making no award for past pain and suffering after finding that plaintiff sustained a serious injury was a material deviation from reasonable compensation. Moreover, it cannot be discerned from the record which injuries the jury found were related to the accident or which one (or more) they found to be a serious injury. Under such circumstances, and in light of both the previously discussed error in voir dire and the likelihood that the verdict resulted from an impermissible compromise, we conclude that a new trial on all issues (except liability which defendant conceded) is required *(cf. Ciatto v Lieberman, 1 AD3d at 557; Califano v Automotive Rentals, 293 AD2d at 436-437).*

**E-Trials**

When jurors use the internet, what happens? In **People v. Rios**, 26 Misc.3d 1225(A), 2010 WL 62522,1 2010 N.Y. Slip Op. 50256(U) (Sup. Bronx 2010), the court found that where a juror sent an e-mail request during a trial that a witness be her Facebook ‘friend’, that the defendants' motions to set aside the verdicts on the basis of juror misconduct should be denied on the grounds that defendants have failed to meet their burden of establishing that the misconduct prejudiced a substantial right of defendants. In **People v. Jamison**, 24 Misc.3d 1238(A), 2009 WL 2568740, 2009 N.Y. Slip Op. 51800(U) (Sup. Kings 2009), a juror googled a defense attorney, but that did not rise to the level of misconduct to set aside the verdict. Similarly, **People v. Lara**, 44 A.D.3d 488 (1st Dept. 2007), the misconduct of juror in collecting weather information from internet did not create substantial risk of prejudice warranting setting aside of verdict.

The PJI has been amended to keep up with the internet.

**PJI 1:10. Do Not Visit Scene**

Since this case involves something that happened at a particular location, you may be tempted to visit the location yourself. Please do not do so. Even if you happen to live near
the location, please avoid going to it or past it until the case is over. **In addition, please do not attempt to view the scene by using computer programs such as Google Earth.** Viewing the scene either in person or through a computer program would be unfair to the parties, since the location as it looked at the time of the accident and as it looks now may be very different. This case involve a location as it existed at the time of the accident, not as it exists today. Thus, you should rely on the evidence that is presented here in court to determine the circumstances and conditions under which the accident occurred. Also, in making a visit without the benefit of explanation, you might get a mistaken impression on matters not properly before you, leading to unfairness to the parties who need you to decide this case based solely upon the evidence that is relevant to this matter.

**PJI 1:11. Discussion With Others - Independent Research**

In fairness to the parties to this lawsuit, it is very important that you keep an open mind throughout the trial. Then, after you have heard both sides fully, you will reach your verdict only on the evidence as it is presented to you in this courtroom, and only in this courtroom, and then only after you have heard the summations of each of the attorneys and my instructions to you on the law. You will then have an opportunity to exchange views with each member of the jury during your deliberations to reach your verdict. Please do not discuss this case either among yourselves or with anyone else during the course of the trial. **Do not do any independent research on any topic you might hear about in the testimony or see in the exhibits, whether by consulting others, reading books or magazines or conducting an internet search of any kind. All electronic devices including any cell phones, Blackberries, iphones, laptops or any other personal electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case.** In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court’s practice. **It is important to remember that you may not use any internet services, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial, which includes the law, information about any of the issues in contention, the parties, the lawyers or the court. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences, either directly, or through your favorite electronic means.**

For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as a juror but you are not in the courtroom.

While this instruction may seem unduly restrictive, it is vital that you carefully follow these directions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom. Not only does our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information to affect your judgment, is unfair and prejudicial to the parties and could lead to this case’s having to be retried.

Accordingly, I expect that you will seriously and faithfully abide by this instruction.
Biographies of Authors

**SHERRI SONIN, ESQ.**

Sherri Sonin is a senior and founding partner in the law firm of SONIN & GENIS, ESQS. Ms. Sonin is a trial attorney specializing in plaintiffs’ negligence, personal injury, medical malpractice and products liability cases in the New York State Courts. Ms. Sonin is a member of the Million Dollar Advocates Forum and has obtained numerous multi-million dollar verdicts and settlements.

Some of her more notable cases include a $4 million verdict for a man injured in a motor vehicle accident, a $2.5 million dollar settlement in a medical malpractice case, a $1.5 million verdict against the City of New York for the wrongful death of a student that was assaulted outside a school, and a $1.2 million settlement for an injured construction worker.

In addition to trying cases, Ms. Sonin is a past Associate Editor of the National Trial Lawyer magazine and Editor of the Bronx Bar Journal, The Advocate, and has been published in those journals as well as the New York Law Journal, the New York State Trial Lawyers Quarterly, New York State Trial Lawyers Bill of Particulars, the Queens Bar Journal and the Insurance, Negligence and Compensation Law Section Journal of the New York State Bar Association.

Ms. Sonin has lectured at the American Bar Association’s National Convention, and has Chaired programs and lectured extensively for the New York State Trial Lawyers Association, and has taught CLE programs for the Association of the Bar of the City of New York, the Bronx County Bar Association, the Bronx Women’s Bar Association, and the Rockland County Women’s Bar Association.
Ms. Sonin is a past Dean of the New York State Trial Lawyers Institute, a long time Director of the New York State Trial Lawyers Association, a past President of the Bronx Women’s Bar Association, a past Vice President of the Metropolitan Women’s Bar Association, a past Vice President of the Jewish Lawyers Guild, a past Director of the Bronx County Bar Association, was a member of the Amicus Committee for the New York State Trial Lawyers Association, and has served on the Judicial Screening Committees of various bar associations.

Ms. Sonin is a graduate of the Syracuse University College of Law, and while a member of its Law Review, was an Editor of the Annual Survey of New York Law.

ROBERT J. GENIS, ESQ.

Robert J. Genis is a senior and founding partner in the law firm of SONIN & GENIS, ESQS. Mr. Genis is a trial attorney specializing in plaintiffs negligence, personal injury, wrongful death, medical malpractice and products liability cases in the State and Federal Courts of New York and New Jersey, and has litigated cases in a number of other states. Mr. Genis has obtained numerous multi-million dollar verdicts and settlements, is a member of the Million Dollar Advocates Forum, and was repeatedly inducted into the Super Lawyers.

He has successfully represented numerous victims of negligence, medical malpractice, lead poisoning, police brutality and false arrest, construction accidents, premises and vehicular accidents, elevators/escalators accidents, municipal wrongdoing,
and other significant injuries. Some of his note-worthy verdicts include: a $10 million dollar verdict for the wrongful death of a man caused by inadequate security; an $8 million verdict for a man that slipped and fell on pigeon poop on a staircase of an elevated subway station for an aggravation of a pre-existing spinal condition, a $6.5 million verdict in a wrongful death case on behalf of a chronic alcoholic on welfare who at the time of her slip & fall had a .316 BAC level (no comparative negligence), her daughter (the plaintiff) was a methadone addict on welfare, and a $3 million verdict for an aggravation of a soft tissue condition in a man involved in a car accident, where the man was unemployed and permanently disabled at the time of his accident; A $3 million settlement for a dairy clerk of a supermarket that fell off a truck while unloading goods and sustained RSD in a rural upstate county; a $2.5 million settlement in a medical malpractice; a verdict in excess of $2.4 for a chiropractor that sustained an injury to her neck in a hotel; a verdict in excess of $2 million for a pedestrian hit by a police car; a verdict for $1.5 million in a medical malpractice case; a verdict for $2 million against the City of New York for a bicyclist injured due to a pothole; $1.75 million verdict for a bicyclist injured on ice; a settlement for $1.5 million for a worker that sustained an electric shock; a verdict for $1.35 million to a woman that broke her wrist in a subway station; a settlement for $1.125 million in a wrongful death caused by EMS’s delay in responding to a call to “911”. He received national attention on behalf of Teron Francis, who became brain damaged and on life support as a result of medical malpractice.

In addition to trying cases, Mr. Genis is a past Associate Editor of the National Trial Lawyer magazine and Past Editor in Chief of the Bronx Bar Journal, The Advocate, and has been published in those journals as well as the New York Law Journal, where he
has been a frequent contributor, as well as the *New York State Trial Lawyers Quarterly*, *New York State Trial Lawyers Bill of Particulars*, the *Queens Bar Journal* and the *Insurance, Negligence and Compensation Law Section Journal* of the New York State Bar Association. Some of his articles have been cited in McKinney’s and other treatises.

Mr. Genis is a long time Director of the New York State Trial Lawyers Association, Past Vice President of the *Jewish Lawyers Guild*, a past Director of the *Bronx County* and the *Bronx Women’s Bar Associations*, and a past Secretary of the Tort Litigation Committee of the *Association of the Bar of the City of New York*. He has served on the Judicial Screening Committees of various bar associations and the Independent Democratic Screening Committee.

Mr. Genis has lectured Chaired and moderated numerous CLE programs and has lectured extensively for the *New York State Trial Lawyers Association*, has Chaired its annual Evidence Seminar and taught at its Decisions Seminar for many years, and has also lectured for the *Association of the Bar of the City of New York*, the *Bronx County Bar Association* and the *Bronx Women’s Bar Association*, on numerous topics.

Mr. Genis has handled numerous high profile cases that have attracted national and international media attention on TV, radio, newspapers and the internet.

Mr. Genis is a graduate of the Syracuse University College of Law.