UPDATE AND REFRESHER ON UNDERINSURED AND UNINSURED MOTORISTS COVERAGE AND NO-FAULT LITIGATION, NEW YORK THRESHOLD LAWS

by

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AUTOMOBILE LITIGATION - 2015 UPDATE

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UNINSURED AND UNDERINSURED MOTORIST COVERAGE

I. Generally

a. Insured Person

An "insured" under the SUM endorsement is defined as including a relative of a named insured, and the spouse and relatives of the named insured or spouse (if they are residents of the same household).

i. Named Insured

In *Preferred Mutual Ins. Co. v. Fisher*, 4 N.Y.S.3d 558, 2015 N.Y. Slip Op. 02837 (3rd Dept. 2015), Preferred Mutual argued that the respondent (a young adolescent woman) was not a resident of her parents' home at the time of the accident and therefore was excluded form SUM coverage under the parents' insurance policy. The court concluded: "The documents in the record—consisting of a short affidavit of respondent, certain bank statements, communications from her medical providers and mailing labels—are insufficient to determine this issue, necessitating that a hearing be held." *Id.*

In *GEICO v. Johnson*, 123 A.D.3d 711, 997 N.Y.S.2d 709 (2nd Dept. 2014), the respondent R. Johnson was involved in a MVA in NY, driving a car that was owed by his sister, who lived in Ohio and was insured by State Farm. "The policy contained an endorsement for uninsured motorist coverage, which provided for liability limits of $100,000 per person and $300,000 per accident, but *excluded from the definition of an insured any person who is insured for uninsured motor vehicle coverage under another vehicle policy*." *Id.* (emphasis added). State Farm disclaimed coverage on the ground that R. Johnson was not an "insured" because "records showed that Johnson had uninsured motor vehicle coverage available through a policy issued to him by GEICO." *Id.* The court held "here, the exclusion contained in the uninsured

motorist coverage endorsement of State Farm's personal automobile liability policy is not permitted by law." *Id.* "Insurance law 3420(f)(1) requires that every automobile insurance policy contain an uninsured motor vehicle endorsement. Neither that statute nor any regulations applicable to it mentions any exclusions." *Id.*

b. Insured Events

An "insured event" under the SUM endorsement occurs when an "insured person" sustains injury caused by "accidents [that arise out of the] ownership, maintenance or use" of an uninsured or underinsured motor vehicle.

i. Use or Operation

In *Allstate Ins. Co. v. Staib*, 118 A.D.3d 625, 987 N.Y.S.2d 849 (1st Dept. 2014), an infant was injured when an unattended dog sitting in a parked car bit her as she walked by the vehicle. The court held that "the infant defendant's injuries did not arise out of the 'ownership, maintenance or use' of the automobile. Indeed, the vehicle itself did not produce the injury, nor did the accident arise out of the inherent nature of the vehicle. Rather, the *vehicle was merely the situs of the accident*, which is not sufficient to trigger coverage under the plain terms of the subject policy provision." *Id.* (emphasis added).

ii. Motor Vehicle

In *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 112 A.D.3d 166, 973 N.Y.S.2d 801 (2nd Dept. 2013), lv. To appeal granted, 22 N.Y.3d 1168, 985 N.Y.S.2d 469 (2014), the court confronted the issue of "whether a police vehicle qualifies as a 'motor vehicle,' as that term is used in a certain supplementary uninsured/underinsured motorist endorsement," and answered—

yes! NOTE: On March 31, 2015, the Court of Appeals ordered reargument and set the case down for argument during a future session.

In this case, Fitzgerald, a police officer, was riding as a passenger in a NYPD vehicle, which was driven by a fellow officer Knauss, when he was injured in an automobile accident with a vehicle that was underinsured. Fitzgerald demanded SUM arbitration seeking benefits from Knauss's insurance policy with State Farm, which had an endorsement defining "insured" as "the named insured (i.e., Knauss) and 'any other person while occupying . . . any other motor vehicle . . . being operated by [Knauss].'" *Id.* State Farm filed a petition to permanently stay the arbitration, arguing that Knauss was not an "insured"—Supreme Court granted the petition.

The Appellate Division held that "contrary to State Farm's contention, Vehicle and Traffic Law 125, instead of Vehicle and Traffic Law 388(2), should be used to define the term 'motor vehicle,' as it appears in the uninsured/underinsured motorist endorsement." The court went on to conclude that "police vehicles fall within the definition of a 'motor vehicle' under VTL 125 because they constitute a 'vehicle operated or driven upon a public highway which is propelled by any power other than muscular power,' and they do not fall within any of the exclusions provided in the state." *Id.*

c. Exclusions

In *GEICO v. Terrelonge*, 126 A.D.3d 792, 2015 N.Y. Slip Op. 01944 (2nd Dept. 2015), the pertinent "exclusions" section read as follows, the maximum payment under the SUM endorsement "shall be the difference between: (a) the SUM limits; and (b) the motor vehicle bodily injury liability insurance or bond payments received by the insured or the insured's legal representative, from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured." The defendant had $25,000 per person BI limits, which was tendered

completely. Plaintiff had a $100,000 per person BI limit and also carried SUM with a policy limit of $25,000. Ultimately, the court held that "once Simonis's insurance carrier tendered its $25,000 policy limits for one person, the exclusion in the SUM endorsement which limited SUM payments to the difference between the limits of SUM coverage and the insurance payment received by the appellant from any person legally liable for the appellant's bodily injuries applied. The language of the exclusion was not ambiguous, and must be enforced."

In *GEICO v. Avelar*, 108 A.D.3d 672, 969 N.Y.S.2d 521 (2nd Dept. 2013), the court held that the following exclusion in a GIECO SUM endorsement was not ambiguous and should be construed according to its plain and ordinary meaning: "*to bodily injury* to an *insured* incurred while occupying a motor vehicle owned by that *insured*, if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made, or is not a newly acquired or replacement vehicle covered under the terms of this policy." *Id.* Thus, since respondent "was occupying a vehicle that she owned but was not covered under the subject policy" her demanded arbitration was permanently stayed. *Id.*

d. Duty to Provide Timely Notice of Claim

SUM, UM/UIM endorsements require, as a condition precedent to the right to apply for benefits, the claimant to give timely notice to the insurer of intention to make a claim. Of note, Regulation 35-D's SUM endorsement requires that notice be given "as soon as practicable." When this language appears in liability policies, the courts have interpreted this to mean that notice must be given within a reasonable period of time under all of the circumstances.

In *City of New York v. Zurich Am. Ins. Co.*, 117 A.D.3d 474, 985 N.Y.S.2d 510 (1st Dept. 2014), the court found proper/timely notice under these circumstances: "the City's … email to [plaintiff's employer's counsel] provided sufficient information for Zurich to timely disclaim

coverage. The City's email stated '[k]indly please forward this onto the right carrier,' and requested that [the employer's] insurance carrier 'pick it up now.' Counsel for [employer] forwarded this email and attachment in its entirety to an employee of [employer's] insurance broker, requesting that the information be sent 'to the right person.' And suggesting that in the event that 'the City is entitled to indemnity and or Al coverage, a take over would make the third party action a nullity.'" *Id.*

II. The Uninsured Motorist

a. Uninsured Person

A vehicle is "uninsured" when it was covered by an insurance policy at the time of the accident but the insurer subsequently disclaimed or denied coverage.

b. Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer

Insurance Law 3420(d)(2) sets forth that if "an insurer shall disclaim liability or deny coverage for death or bodily injury . . . it shall give written notice as soon as reasonably possible of such disclaimer or liability or denial of coverage to the insured and the injured person or any other claimant."

The Court of Appeals in *Keyspan Gas East Corp. v. Munich Reinsurance Am., Inc.*, 23 N.Y.3d 583, 992 N.Y.S.2d 185 (2014) recently made clear: "The legislature enacted section 3420(d)(2) to 'aid injured parties' by encouraging the expeditious resolution of liability claims (internal citations omitted). To effect this goal, the statute 'establishe[s] an absolute rule that unduly delayed disclaimer of liability or denial of coverage violates the rights of the insured [or] the injured part.' (internal citations omitted). Compared to traditional common-law waiver and estoppels defenses, section 3420(d)(2) creates a heightened standard for disclaimer that 'depends

merely on the passage of time rather than on the insurer's manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppels.'"

In *Highrise Housing & Scaffolding, Inc. v. Liberty Insurance Underwriters, Inc.*, 116 A.D.3d 647, 984 N.Y.S.2d 366 (1st Dept. 2014), the court provided that "if a claim falls within the scope of the policy's insuring agreement, an insurer must issue a timely disclaimer pursuant to Insurance Law 3420(d) to deny coverage based on an exclusion."

In *Ferreira v. Global Liberty Insurance Co. of N.Y.*, 119 A.D.3d 837, 989 N.Y.S.2d 388 (2nd Dept. 2014), the court provided that "an insurance company has an affirmative obligation to provide written notice of a disclaimer of coverage as soon as is reasonably possible, even where the policyholders' own notice of the claim to the insurer is untimely."

c. Stolen Vehicle

NOTE: a strong presumption of permissive use arises from proof of ownership, which can only be overcome by substantial evidence demonstrating that the vehicle was not operated with the owner's permission or consent.

In *State Farm Ins. Co. v. Walker-Pinckney*, 118 A.D.3d 712, 986 N.Y.S.2d 626 (2nd Dept. 2014), the court held "the vehicle owner's testimony that the vehicle was missing at the time of the accident, without more, was insufficient to overcome the presumption. Here, the sole witness at the framed issue hearing to testify in connection with the issue of permissive use was Woodley, the owner of the vehicle. Woodley's testimony established that, at some point, he noticed that the vehicle was 'missing,' that he reported this to police, and that, less than two days later, he ascertained that the vehicle had been towed to an impoundment lot. When Woodley recovered the vehicle, he saw that it had been seriously damaged, and this was the first time he learned that it had been in accident. Woodley testified that he did not know who was driving the

vehicle at the time of the accident, and that he did not give anyone permission to drive the vehicle at that time. However, Woodley further testified that both he and his wife had a set of keys to that vehicle, and that she was the last one to park the vehicle before Woodley noticed that it was 'missing.' Moreover, when Woodley recovered the vehicle from the impoundment lot, a set of keys were inside the vehicle."

d. Hit and Run

SUM/UM coverage is available to those plaintiff's involved in the typical "hit-and-run" scenario, whereby an unidentified vehicle leaves the scene.

In *National Continental Ins. Co. v. Brojaj*, 114 A.D.3d 614, 980 N.Y.S.2d 765 (1st Dept. 2014), the Appellate Division in a one paragraph opinion summarily concluded that "Supreme Court, based on the evidence presented at a framed issue hearing, concluded that there was no contact between the truck driven by respondent and an unidentified car. Respondent's testimony was not credited by Supreme Court and there is no basis to upset such finding."

e. Actions Against MVAIC

In *Archer v. MVAIC*, 118 A.D.3d 5, 985 N.Y.S.2d 96 (2nd Dept. 2014), plaintiff, a pedestrian, was allegedly injured in a hit and run accident. Within 4 weeks following the MVA, he served a notice of intention to make a claim against MVAIC. Then, almost three years after the MVA, the plaintiff commenced a proceeding pursuant to Insurance Law 5218 for permission to commence an action against MVAIC. The application was granted (outside of the 3 year SOL), and then six months after that, plaintiff commenced an action against MVAIC by filing a Summons and Complaint. After extensive motion practice, default judgment was entered against MVAIC.

The Court explained: "This case does not fall within the scope of Insurance Law 5214 because it does not involve a claim against MVAIC stemming from a judgment entered upon the default or consent of an uninsured defendant. Rather, MVAIC was involved because the identity of the offending motorist was unknown, which permitted the plaintiff, with the approval of the court, to commence an action against MVACI directly, pursuant to Insurance Law 5218. Insurance law 5218 authorizes a court to permit the commencement of an action against MVAIC directly, if, inter alia, 'all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operate and either the identity of the motor vehicle and the owner and operator cannot be established, or the identity of the operator, who was operating the motor vehicle without the owner's consent, cannot be established.' Where an action is commenced directly against MVAIC, the concerns underlying the enactment of Insurance Law 5214—protecting MVAIC from the defaults of, or possible collusion by, uninsured defendants—are not implicated. Thus, Insurance Law 5214 'does not bar the entry of a default judgment against MVAIC in an action in which MVAIC is the named defendant and has defaulted." (internal citations omitted).

III. The Underinsured Motorist

a. Trigger of Coverage

In *GEICO v. Lee*, 120 A.D.3d 497, 991 N.Y.S.2d 105 (2nd Dept. 2014), the claimant was a passenger in a GEICO insured vehicle with "bodily injury liability limits in the amount of $300,000 per person and $300,000 per accident." The allegedly at-fault vehicle was insured by Allstate with a "split limit" policy containing bodily limits of $100,000 per person and $300,000 per accident. Plaintiff received the full $100,000 from Allstate, then plaintiff demanded arbitration of a SUM claim against GEICO—"arguing that the per-person liability coverage

afforded under the alleged tortfeasor's Allstate policy was less than the per-person liability coverage afforded under the GEICO policy." GEICO sought to stay arbitration and argued that its SUM coverage was not triggered because both the GEICO and Allstate policies provided for aggregate liability limits of $300,000 per accident and, therefore, the tortfeasor was not an underinsured motorist.

The court concluded, after a full review of the purpose of SUM policies, that "a comparison of the two policies at issue, in light of the particular circumstances of this case, demonstrates that an individual such as [plaintiff-passenger] would be afforded greater per-person bodily injury liability coverage under the GEICO policy than under the Allstate policy. Under the Allstate policy, Lee was limited by the 'per person' bodily injury liability limit to the recovery, in tort, of $100,000. The GEICO policy-a single limit policy-provided $300,000 of liability coverage for bodily injury to any one injured person. Since the per-person bodily injury liability insurance limits of coverage provided by the Allstate policy are in a lesser amount than the per-person bodily injury liability insurance limits of coverage provided by the GEICO policy, the SUM provision of the GEICO policy was triggered." *Id.*

b. Consent to Settle

In *Ducz v. Progressive Northeastern Ins. Co.*, 113 A.D.3d 849, 978 N.Y.S.2d 906 (2nd Dept. 2014), "the petitioner sent correspondence to the respondent advising it that a high-low arbitration was being offered by the insurer for the alleged tortfeasor, and of a potential claim under the supplementary underinsured motorist (SUM) endorsement in the event that the arbitration award exceeded the alleged tortfeasor's policy limits." The respondent/claimant requested the SUM carrier's consent to proceed with the high-low arbitration and the SUM carrier declined to consent because it did not want to waive its right to subro against the

tortfeasor. From here, the claimiant commenced a proceeding to compel the SUM carrier to consent to the high-low arbitration and to proceed with the SUM arbitration. The court denied the claimant's application because "she failed to establish that she exhausted the alleged tortfeasor's policy through settlement" and "the relief may not be sought in a CPLR article 75 proceeding." *Id.*

c. Offset/Reduction in Coverage

In *Santoro v. GEICO*, 117 A.D.3d 1026, 986 N.Y.S.2d 572 (2nd Dept. 2014), the court held that where GEICO's policy included "Supplementary Uninsured/Underinsured Motorist" coverage amounting to $300,000, the plaintiff's alleged damages in action for breach of contract against GEICO as SUM carrier were limited to $275,000 because the plaintiff had already received the sum of $25,000 from the tortfeasor's underlying insurer.

NOTE: The Appellate Division, Second Department, also discussed and noted that "'while consequential damages resulting from a breach off the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contacting.' (citing *Panasia Estates, Inc. v. Hudson Ins. Co.*, 10 N.Y.3d 200 (2008), the only consequential damages *asserted by the plaintiff are an attorney's fee and costs and disbursements resulting from this affirmative litigation, which are not recoverable*." *Id.* (emphasis added).

NO-FAULT LITIGATION, NEW YORK THRESHOLD LAWS

IV. Generally

a. Insurance Law § 5102(a)

In any action by or on behalf of a covered person against another covered person for bodily injuries arising out of negligence in the use and/or operation of a motor vehicle within New York, there shall be no right of recovery for non-economic loss, except in cases where a serious injury can be found, or for basic economic loss.

b. Insurance Law § 5102(d)

A "serious injury" is defined as an injury resulting in: (1) death, (2) dismemberment, (3 significant disfigurement, (4) fracture, (5) loss of a fetus, (6) permanent and total loss of use of a body organ, member, function or system, (7) permanent consequential limitation of use of a body organ or member, (8) significant limitation of use of a body function or system, (9) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

c. Covered Vehicles

In *Graham v. Gerow*, 126 A.D.3d 1549, 2015 N.Y. Slip Op. 02657 (3rd Dept. 2015), plaintiff was struck by a farm tractor with an attached field plow when it crossed the center line of the highway and collided with plaintiff. The court provided, "in any event, plaintiffs are correct that, because there is no dispute that defendants' farm tractor and the attached field plow were being used exclusively for agricultural purposes, the serious injury threshold requirement is not applicable." *Id.*

V. The Threshold Categories

a. Significant Disfigurement

In *Cross v. Labombard*, _ N.Y.S.3d _, 2015 WL 1565769 (3rd Dept. 2015), the court found that there was a question of fact regarding this category as to plaintiff's surgical scars on her left shoulder. Plaintiff "averred that the location of the scars was uncomfortable because straps from dresses, swimsuits, and bras rubbed in that area. If she were to wear clothing that exposed her shoulders, the scars would be visible, at least to some extent. She also noted, as supported by photographs, that the scars were different in color from the surrounding skin and that one scar is slightly puckered."

In *Forster v. Novic*, _ N.Y.S.3d _, 2015 WL 1826164 (3rd Dept. April 23, 2015), court held that "defendants established prima facie that plaintiff did not sustain 'significant disfigurement' as a result of the motor vehicle accident. Their plastic surgeon described the scar on plaintiff's forehead as 'well healed' and 'barely perceptible,' and their neurologist noted that the scar was 'hardly visible'; a photograph taken by the plastic surgeon bears out these descriptions. In opposition, plaintiff failed to submit a recent photograph of the scar to rebut defendants' showing (internal citations omitted)."

In *Christopher V. v. James A. Leasing, Inc.*, 115 A.D.3d 462, 982 N.Y.S.2d 32 (1st Dept. 2014), the plaintiff attempted to, in opposition to defendant's summary judgment motion, raise for the first time in their supplemental BOP a new SI claim under this category. The court rejected a claim under this category because "both the emergency room records and plaintiff's testimony contradicted the supplemental bill of particulars' allegation as to the nature and location of the [facial] scar."

In *Raucci v. Hester*, 119 A.D.3d 1044, 989 N.Y.S.2d 164 (3d Dept. 2014), the court held that "the photographs in the record [were] adequate to create an issue of fact as to whether a

reasonable person observing plaintiff's surgical scars [stemming from an extensive right hip procedure] would consider them 'unattractive or objectionable.'"

In *Knight v. M & M Sanitation Corp.*, 122 A.D.3d 683, 996 N.Y.S.2d 330 (2nd Dept. 2014), the plaintiff claimed a SI under this category due to the fact "the force from the impact loosened his existing front upper dental bridge, *which he received approximately 12 years earlier because he was missing several front teeth*." (emphasis added). The Court found that plaintiff's disfigurement "predated the accident, and therefore, was not causally related to it." *Id.*

In *Sanchez v. Dawson*, 120 A.D.3d 933, 991 N.Y.S.2d 494 (4th Dept. 2014), the court upheld the jury's determination that a 4 inch surgical scar on plaintiff's neck was not significant disfigurement.

b. Fracture

Another important development can be drawn from *Knight*, 122 A.D.3d 683 (2nd Dept. 2014), where again the plaintiff tried to first raise an SI in their BOP (rather than initially in the complaint), but this time the claim was a fractured tooth or jawbone. The BOP alleged "loosening of the plaintiff's 'existing dental structure in his mouth leading to teeth loss' and need for multiple surgical tooth extractions." The court upheld the trial court's denial of plaintiff's request to charge the jury with a fracture category SI and noted that, regardless, there was no proof to support the claimed fracture.

In *Fisher v. Hill*, 114 A.D.3d 1193, 980 N.Y.S.2d 196 (4th Dept. 2014), the court reversed the lower court's decision that the defendants had failed to meet their initial burden in a motion to dismiss establishing that plaintiff did not sustain a serious injury. The defendants proffered, in support of their motion, an affirmed report of a neuroradiologist (who presumably performed a causality review at the bequest of the carrier). The report concluded that any

objective medical findings related "only to a preexisting condition in plaintiff's spine." More importantly though, the court held that "the equivocal observation of [plaintiff's] neurosurgeon, made 15 months after the accident, that

c. Loss of Fetus

In *Leach v. Ocean Black Car Corp.*, 122 A.D. 3d 587, 996 N.Y.S.2d 307 (2nd Dept. 2014), the Second Department reviewed the legislative history of the "loss of a fetus" category which was added to § 5102(d) in 1984. The court ultimately held that "the plain meaning of the term 'loss of a fetus' ***does not*** include the premature birth of a living child. Rather, this category of damgages is applicable where, as a result of an automobile accident, a viable pregnancy terminated with loss of the fetus." *Id.* (emphasis added).

d. Permanent Loss of Use

It is important to note that under this category you must claim a **"total"** loss of use. In the often cited Court of Appeals' decision *Oberly v. Bangs Ambulance*, 96 N.Y.2d 295 (2001), the Court dismissed the notion that this category could encompass "partial" loss of use and held that the plaintiff's mere limitation of use of his arm, although permanent, did not establish a serious injury.

e. Permanent Consequential Limitation of Use & Significant Limitation of Use

i. Court of Appeals

As a refresher, we begin here with the principles that were laid out by the Court in *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). In the case at hand, the plaintiff's physician opined that MRI and CT-scan imaging revealed bulging and herniated discs after the motor vehicle collision and upon physical exam plaintiff had muscle spasms and decreased range

of motion in their lumbar spine. The physician opined that this was causally related to the accident and "resulted in restriction of use and activity of the injured areas and permanent limitation of his spine and peripheral nervous system[,]" and further provided that this caused plaintiff difficulty in sitting, standing and/or walking for extended periods of time. The Court held this proof to be sufficient enough to establish a serious injury because it sufficiently laid forth the qualitative nature of plaintiff's limitations and backed by objective medical proof.

Also of significant import, *Famkumar v. Grand Style Trans. Enter.*, the Court again found plaintiff's proof sufficient to defeat a motion for summary judgment, whereby the Court noted "the qualitative assessment of [plaintiff's] condition [as rendered by plaintiff's physician who performed knee surgery,]" and that the meniscus tear had permanently lost its functional stability with the onset of scar tissue, range of motion loss, and persistent pain—which all would be permanent.

ii. First Department

In *Macdelinne F. v. Jimenez*, 126 A.D.3d 549, 2015 N.Y. Slip Op. 02188 (1st Dept. 2015), the court found that "plaintiffs raised a triable issue of fact as to the existence of a 'significant' or 'permanent consequential' limitation of use by submitting affirmations by a radiologist who found that the MRI showed evidence of a tear in the posterior horn of the medial meniscus and Macdelinne's treating physicians, who found limitations in range of motion at a recent examination and opined that the knee injury was caused by the accident."

In *Susino v. Panzer*, _ N.Y.S.3d _, 2015 WL 1636698 (1st Dept. April 14, 2015), the court, interestingly enough, made this conclusion: "defendant failed to establish prima facie that plaintiff did not sustain a serious injury as a result of the accident, *since his own experts found significantly limited ranges of motion in plaintiff's cervical and lumbar spine, with a 65%*

limitation in the range of motion in her back nearly two years after the accident. Moreover, while defendant's radiologist opined that the MRI films of plaintiff's cervical and lumbar spine showed only preexisting degenerative conditions, defendant also submitted other MIR reports finding disc bulges and herniations and plaintiff's treating physician's report causally relating the injures to the accident.:"

In *Trezza v. MTA*, 113 A.D.3d 402, 978 N.Y.S.2d 40 (1st Dept. 2014), the court held that plaintiff had established at trial at least a question of fact as to the significant limitation of use category. "[P]laintiff established through quantitative assessments that, for a significant period, the accident seriously limited use of her right should by cuasing tendinits, ongoing nerve impringment, and pain. As proof of significant limitation, plaintiff presented corroborative MRI results . . . . Other medical records indicated that range of motion in the shoulder was limited [following an arthroscopic shoulder surgery]." *Id.*

In *Diaz v. Guzman*, 115 A.D.3d 448, 982 N.Y.S.2d 21 (1st Dept. 2014), the court found that plaintiff failed to proffer medical evidence to substantiate range of motion loss continuing for a significant time or of a permanent nature for her claimed back injuries, but plaintiff "raised triable issues of fact as to whether she suffered a serious injury to her right knee, including a torn medial meniscus, by the affirmed reports of her surgeon, who, after performing arthroscopic surgery, opined that she suffered a permanent injury causally related to the subject accident, and of a physician who measured limitations in range of motion ***before and after the surgery***." *Id.*

In *Kendig v. Kendig*, 115 A.D.3d 438, 981 N.Y.S.2d 411 (1st Dept. 2014), the court rejected plaintiffs claimed wrist injury due to the fact that "plaintiff failed to produce objective medical evidence of her claimed wrist injuries in admissible form. In any event, her medical submissions showed only 'mild' neuropathy in the period following the accident, and did not

provide objective evidence of the extent and duration of any alleged resulting physical limitations." *Id.*

In *Acosta v. Vidal*, 119 A.D.3d 408, 988 N.Y.S.2d 485 (1st Dept. 2014), the court upheld dismissal of plaintiff's complaint, the court reiterated that "minor limitations are insufficient to support a serious injury claim"; there, the court noted that plaintiff's orthopedic surgeon "failed to address the conflicting findings made by plaintiff's physical therapist of normal range of motion in all parts one week after the accident." *Id.*

In *Kang v. Almanzar*, 116 A.D.3d 540, 984 N.Y.S.2d 42 (1st Dept. 2014), the plaintiff could not prove a permanent consequential limitation to her shoulder but "plaintiff raised an issue of fact as to whether she suffered a significant limitation in the shoulder, by submitting the affirmation of her treating orthopedic surgeon, who found qualitative limitations that persisted for almost two years after the accident, and required arthroscopic surgery to repair, following conservative treatment." *Id.*

In *Vargas v. Moses Tax Inc.*, 117 A.D.3d 560, 986 N.Y.S.2d 84 (1st Dept. 2014), the court only needed one paragraph to opine that "plaintiff raised an issue of fact in opposition to defendants' prima facie showing by submitting her treating orthopedic surgeon's affirmation that, while performing arthroscopic surgery, he observed and repaired tears to the medial and later meniscus, and that in his opinion those injuries were directly caused by the accident. The surgeon also found restricted and painful range of motion in the left knee ***before and after surgery***, when compared to a normal knee and to the uninjured right knee."

iii. Second Department

In *Marshall v. Marshall*, 117 A.D.3d 805, 986 N.Y.S.2d 168 (2nd Dept. 2014), the court cursorily held that plaintiff's alleged brain injury did not cross threshold under either category.

In *Dicariano v. County of Rockland*, 111 A.D.3d 879, 976 N.Y.S.2d 116 (2nd Dept. 2014), the Second Department reversed a jury verdict that found for plaintiff and dismissed plaintiff's complaint in its entirety, concluding that the claimed significant limitation was "fleeting in duration" and as to the permanent consequential limitation category—"the plaintiff failed to establish that, during a 'recent' examination, there was a limitation of motion to his knee that was a consequence." *Id.*

iv. Third Department

In *Cross v. Labombard*, _ N.Y.S.3d _, 2015 WL 1565769 (3rd Dept. 2015), the court found that the defendant's met their burden to defeat a claim under this category by submitting a report of an IME physician "who concluded that plaintiff's injuries were mild and related to a 2002 snowmobiling accident and 2003 spinal fusion surgery, as well as a one-vehicle accident that occurred in January 2010, about two weeks after the subject accident." To counter, the plaintiff submitted the records and affirmation of her treating orthopedic surgeon "who provided a thorough and qualitative assessment of the current condition of plaintiff's neck and shoulder, and how these parts of her body are limited from otherwise normal use. He sufficiently distinguished the current symptoms from those attributable to the 2002 accident and related surgery by noting that she had returned to her normal daily activities without pain in the neck and shoulder for several years following the earlier accident." However though, it appeared to the court that the treating orthopedic surgeon "did not have all of the accurate or necessary information about the two accidents [subject MVA and the MVA 2 weeks after]" because other records, mainly how plaintiff described the accident to happen, conflicting with the orthopedic surgeons opinion. Thus, the court held "considering the other record evidence, and that [the

orthopedic surgeon] relied on incomplete or inaccurate information, he did not have a sufficient basis for reaching his conclusion that [plaintiff's] injuries were causally related to the December 2009 accident rather than the January 2010 accident" and affirmed summary judgment for defendants as to this category.

In *Clausi v. Hall*, _ N.Y.S.3d _, 2015 WL 1470715 (3rd Dept. April 2, 2015), the court found that the plaintiff raised a triable issue of fact as to this category in regards to her lumbar spine. Plaintiff submitted the affirmation of her primary care physician, with whom she had treated with before and after the MVA. The PCP "detailed his review of the reports of the MRIs taken following plaintiff's accident, which revealed a broad-based intraforaminal disc bulge, foraminal stenosis and nerve root compression, as well as EMG study reports indicating radiculopathy with nerve root denervation. [PCP] affirmation set forth plaintiff's symptoms, in qualitative terms, based upon his examinations shortly after the accident, and also provided objective, quantitative evidence of plaintiff's limitations based upon recent tests."

In *Raucci v. Hester*, 119 A.D.3d 1044, 989 N.Y.S.2d 164 (3rd Dept. 2014), the court held that plaintiff established prima facie case of a serious injury under this category based on an affidavit from the plaintiff orthopedic surgeon which averred that "although the surgery had helped to alleviate plaintiff's cervical pain, it [the following is from the affidavit] '*resulted in permanent limitations in the range of motion in her cervical spine . . . because approximately 12% or so of functional motion is divided among each subaxial element of lumbosacral spine'* [end affidavit] and plaintiff would lose approximately 25% of her flexion and extension and the same approximate amount of loss in her cervical spine." *Id.*

In *Benson v. Varnette*, 121 A.D.3d 1350, 995 N.Y.S.2d 634 (3rd Dept. 2014), the court held that "plaintiff submitted sufficient evidence from which the jury could rationally conclude

that she sustained a significant limitation of the use of her cervical spine. She presented expert medical evidence from . . . her pain management physician, supported by objective tests and imaging studies, that the accident caused muscle spasms in her neck, reduced curvature of her cervical spine, crepitus, injury to her facet joints and a bone spur . . . [the physician] opined that the accident caused a cervical spine injury that resulted in 50% limitation of plaintiff's ability to push, pull, sit, reach and perform her activities of daily living."

v. Fourth Department

In *Downie v. McDonough*, 117 A.D.3d 1401, 984 N.Y.S.2d 710 (4th Dept. 2014), the court held that plaintiff failed to prove a significant/consequential limitation of use because "the records of plaintiff's own chiropractor reflect that, less than four months after the accident, plaintiff exhibited normal flexion, extension, and right lateral bending, with restrictions of approximately 10% to 11% in left lateral bending and bilateral rotation. Those limitations are 'minor, mild or slight' and thus are properly characterized as 'insignificant' or inconsequential within the meaning of the statute." *Id.* The court also held that plaintiff's submitted excerpts from her own deposition, where she testified "basically every day I would have some type of headache," were not enough to qualify as a serious injury without proof "that [her] headaches in any way incapacitated [her] or interfered with [her] ability to work or engage in activities at home."

NOTE: in dissent Judge Whalen opined that daily headaches can qualify as a serious injury, distinguishing them from "ubjective complaints of occasional, transitory headaches" (citing *Licari v. Elliott*, 57 N.Y.2d 230 (1982)). Judge Whalen also added that there was indeed proof of incapacitation or interference with plaintiff's ability to work as she had to quit her job as a house cleaner due to pain.

COMMENT: defendant proffered the following proof to establish (and convince the court) that plaintiff did not sustain a serious: "the affirmed report or an orthopedic surgeon who examined plaintiff less than three months after the accident, reviewed her medical records, and concluded that there was no objective evidence to substantiate plaintiff's subjective complaints of pain or to warrant further orthopedic treatment. He concluded instead that plaintiff sustained only a cervical spine sprain or strain as a result of the accident, which had resolved by the time of the examination (internal citations omitted). The orthopedic surgeon noted that plaintiff exhibited no palpable spasm, motor deficits, or objective sensory deficits, and had full range of motion in her cervical spine. Defendant also submitted copies of plaintiff's medical records, including an X-ray report from the date of the accident. The X-rays revealed no fractures, disc herniations, subluxations, soft tissue swelling, or any other abnormalities in her cervical, thoracic, or lumbosacral spine. In addition, defendant submitted excerpts from plaintiff's deposition, in which plaintiff testified that she returned to her physically demanding job as a full-time house cleaner less than two months after the accident, and that she performed the same duties both before and after the accident. Plaintiff further testified that there are no activities in which she is unable to participate because of the accident, although she is somewhat limited in '[r]ock climbing [and] some physical sports.'" *Id.*

In *Clark v. Aquino*, 113 A.D.3d 1076, 978 N.Y.S.2d 546 (4th Dept. 2014), the court listed various reasons how plaintiff had raised a question of fact to defeat defendant's summary judgment motion as to the significant limitation category; importantly, the court made note—"it is undisputed that, at a minimum, plaintiff suffered a cervical sprain or strain in the accident, and that her medical records demonstrate that she continuously complained of chronic neck and shoulder pain that restricted her activities."

f. 90/180 Days & Substantially All of Customary Daily Activities

i. 90 out of the 180 Days Following the MVA

In *Griffo v. Colby*, 118 A.D.3d 1421, 988 N.Y.S.2d 763 (4th Dept. 2014), the court upheld a summary judgment motion in favor of defendants: "defendants met their respective burdens by submitting plaintiff's deposition testimony, which established that he was not prevented 'from performing substantially all of the material acts which constituted his usually daily activities' for at least 90 out of the 180 days following each accident."

ii. Substantially All

In *Macdelinne F. v. Jimenez*, 126 A.D.3d 549, 2015 N.Y. Slip Op. 02188 (1st Dept. 2015), the plaintiff testified that she "was confined to bed and home for only one to two weeks after the accident" and provided "evidence that her doctors directed her to refrain from participating in gym class, taking stairs, running, or jumping"—the court found this to be—"insufficient to raise an issue of fact whether she was prevented from performing substantially all of her customary daily activities.

In *Hernandez v. Sollo*, 120 A.D.3d 628, 990 N.Y.S.2d 888 (2nd Dept. 2014), the court found that plaintiff had raised a triable issue of fact in regards to this category because at her deposition she testified that prior to the MVA she had worked as a babysitter "five to six days a week for approximately eight hours a day" and post MVA "she was unable to continue working due to neck and hand pain."

In *French v. Symborski*, 118 A.D.3d 1251, 987 N.Y.S.2d 724 (4th Dept. 2014), a dismissal of this category was upheld where the plaintiff failed to meet their burden. Through an affidavit of plaintiff treating physician (which the court noted was insufficient), which stated

plaintiff "has a 'disability related to his neck . . . in the range of 30 to 60 percent," the physician failed to elaborate on any decreased range of motion findings and failed to address an exacerbation of a pre-existing injury.

NOTE: Judge Whalen dissented (again, *see* Downie above) because he opined that defendant failed to meet their burden for the following reasons: (1) defendant did not establish what plaintiff's customary daily activities consisted of and thereby could not prove which activities plaintiff could not do, (2) Judge Whalen noted that defendant focused too heavily (almost entirely) on plaintiff's absence of lost time from work, and (3) he found that defendant's prove of plaintiff's ability to do daily activities 3 years after the MVA was wholly irrelevant. Lastly, Judge Whalen made note that plaintiff had actually met their burden because plaintiff offered proof that he was on a restricted/light duty schedule at work in a nuclear power plant. BUT BEWARE: Judge Whalen's position here is quite inconsistent with a significant amount of prior case law that rejected claims under this category based on reduced/restricted work hours.

In *Johnson v. KS Transp. Inc.*, 115 A.D.3d 425, 982 N.Y.S.2d 15 (1st Dept. 2014), the court held that plaintiff failed to meet their burden under this category: "The fact that plaintiff missed more than 90 days of work is not determinative (internal citation omitted). Further, her testimony that she can no longer 'dance like [she] used to' or go grocery shopping alone" was insufficient to prevail under this category. *See also* *Nicholas v. Cablevision Sys., Inc.*, 116 A.D.3d 567, 984 N.Y.S.2d 332 (1st Dept. 2014) (noting "[t]hat plaintiff missed more than 90 days of work is not determinative of the 90/180-day injury.").

In *Vargas v. Marte*, 123 A.D.3d 471, 999 N.Y.S.2d 373 (1st Dept. 2014), plaintiff raised a triable issue of fact under this category—plaintiff "presented evidence that he was terminated from employment 45 days after his accident due to his injuries." *See also* *Swift v. N.Y. Transit*

Authority, 115 A.D.3d 507, 981 N.Y.S.2d 706 (1st Dept. 2014) (holding that plaintiff raised a triable issue of fact because plaintiff underwent arthroscopic knee surgery twice, 2.5 and then 3.5 months post MVA, and submitted a "letter from plaintiff's employer terminating her employment due to her inability to return to work for more than a year.").

Lastly, in *Mena v. White City Car & Limo, Inc.*, 117 A.D.3d 441, 985 N.Y.S.2d 234 (1st Dept. 2014), the defendants used the plaintiff's own BOP against them to defeat a 90/180 claim. The BOP alleged "that [plaintiff] was confined to bed for about one week, and his testimony that he was home from work for only five days." Plaintiff failed to submit counter evidence.

iii. "Medically Connected"

In *Poole v. State*, 121 A.D.3d 1224, 995 N.Y.S.2d 751 (3rd Dept. 2014), the Third Department took issue with defendant's expert (a neurologist, who performed a review of the records and examined plaintiff once): "Although [defense neuro] opined that claimaint suffered a 'minor cervical sprain' and that his 'ongoing symptoms' are not related to the accident, he did not 'adequately address [claimant's] condition or limitations within the first 180 days following the accident, *which was necessary to foreclose the 90/180-day category of serious injury*." *Id.* (emphasis added).

Going back to *Raucci v. Hester*, 119 A.D.3d 1044, 989 N.Y.S.2d 164 (3rd Dept. 2014) (see above under section II (a) 'significant disfigurement'), the court noted that although plaintiff had expressed subjective complaints of back pain to her physicians, "there is no evidence that plaintiff's physicians placed any restrictions on her daily activities within the 180-day period following the accident." *Id.*

In *Shelley v. McCutcheon*, 121 A.D.3d 1243, 995 N.Y.S.2d 247 (3rd Dept. 2014), the court held that defendant failed to meet their initial burden because "Ioia [the IME doctor]—who

examined plaintiff approximately 16 months after the accident—did not 'adequately address plaintff's condition or limitations within the first 180 days following the accident, which was necessary to foreclose the 90/180-day category of serious injury."

In *Galarza v. J.N. Eaglet Publishing Grp, Inc.*, 117 A.D.3d 488, 985 N.Y.S.2d 494 (1st Dept. 2014), the plaintiff had missed 5 months of work following the MVA, but "since plaintiff's assertion that he was out of work for more than 90 days after his accident was not supported by any evidence of a medically determined injury caused by the subject accident, he failed to raise an issue of fact." *Id.*

g. Do Emotional and/or Psychological Injuries Qualify?

In *Dudly v. Imbesi*, 121 A.D.3d 1461, 995 N.Y.S.2d 810 (3rd Dept. 2014): "With respect to his alleged psychological injuries, plaintiff proffered the unsworn report of a psychologist who opined that his psychological status has 'deteriorated significant' since the April 2010 accident."

In *Hill v. Cash*, 117 A.D.3d 1423, 985 N.Y.S.2d 345 (4th Dept. 2014), the court held that post-traumatic stress syndrome ("PTSD") may constitute "may constitute such an injury when it is causally related to a motor vehicle accident and demonstrated by objective medical evidence." Of note, "PTSD may be demonstrated without diagnostic testing for purposed of Insurance Law 5102(d) by symptoms objectively observed by treating physicians and established by the testimony of the injured plaintiff and others who observe the injured plaintiff." (internal citations omitted).

h. Where do Soft Tissue Injuries Fit In? Or do they?

In *Greenberg v. Macagnone*, 126 A.D.3d 937, 2015 N.Y. Slip Op. 02450 (2nd Dept. 2015), the defendants initially met their burden of showing that plaintiff did not sustain a SI by submitting an affirmed medical report of IME doctor, who (to no one's surprise) opined that

everything was caused from a "preexisting degenerative disc disease." The court, however, found that plaintiff raised a triable issue of fact based upon submitted affirmation of plaintiff's treating physician, who reviewed plaintiff's medical records, her history, and his own to treatment of plaintiff to opine "with a reasonable degree of medical certainty that the plaintiff's motor vehicle accident on March 10, 2011 was and is the competent producing cause of [the plaintiff's] right lateral recess disc herniation at L5-S1 with compression of the right S1 nerve root." *Id.*

In *Balram v. CJ Transportation*, _ N.Y.S.3d _, 2015 WL 1542558 (2nd Dept. April 8, 2015), defendant failed to meet their burden of demonstrating that the plaintiffs did not suffer a serious injury. Defendants attempted to rely on the unsworn medical reports of plaintiff's treating physicians. "Those reports stated that each plaintiff sustained, inter alia, a bulging disc or a disc herniation as a result of the accident, accompanied by a specified decrease in cervical and lumbar ranges of motion. Those findings were supported by objective tests, including MRI reports as to each plaintiff (internal citations omitted). These submissions failed to eliminate all triable issues of fact as to whether the plaintiff's sustained serious injuries as a result of the subject accident.

In *Mulligan v. City of New York*, 120 A.D.3d 1155, 993 N.Y.S.2d 24 (1st Dept. 2014), the court noted that "a tear of the meniscus, standing alone, without any evidence of limitations caused by the tear, is not sufficient to raise a triable issue of fact."

In *Downie v. McDonough*, 117 A.D.3d 1401, 984 N.Y.S.2d 710 (4th Dept. 2014), the court reiterated the well-settled rule that "proof of a herniated [or bulging] disc, without additional objective medical evidence establishing that the accident resulted in significant

physicial limitations, is not along sufficient to establish a serious injury." *Id.* (citing *Pommells v. Perez*, 4 N.Y.3d 566 (2005); *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 (2002)).