Motions in Limine

Expert Witnesses

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Motion Practice During Trial (Motions *in limine* through Post Trial Motions)

I. Motions that should be made before trial

1. Summary Judgment Motions.

a. *Timing.* CPLR 3212(a) provides that a summary judgment shall be made no later than a date set by the court, which shall be no earlier than 30 days after the filing of the note of issue. In the event no such date is set, a summary judgment motion shall be made no later than 120 days after the note of issue has been filed. This deadline is strictly enforced and cannot be extended without leave of the court upon a finding of good cause (see Brill v City of New York, 2 NY3d 648, 652 [2004]; but see Bennett v St. John's Home, 128 AD3d 1428 [4th Dept.] [plaintiff waived claim that defendant's summary judgment motion was untimely by stipulating to extend the 120-day period before the motion was made and where the court accepted the stipulation], affd 26 NY3d 1033 [2015] [declining to consider the timeliness issue as unpreserved]). Good cause requires a "satisfactory explanation for the untimeliness" of the motion, regardless of the merits of the motion (Brill v City of New York, 2 NY3d at 652; see Miceli v State Farm Automobile Ins. Co., 3 NY3d 725 [2004]). Thus, an untimely, but meritorious, summary judgment motion will not be considered absent a showing of good cause for the delay. To be considered, an argument for good cause must be raised in the initial moving papers, and not for the first time in reply papers (see Nationstar Mortgage LLC v Weisblum, 143 AD3d 866 [2d Dept. 2016]; Goldin v New York and Presbyterian Hosp., 112 AD3d 578 [2d Dept. 2013]; Bissell v New York State Dept. of Transp., 122 AD3d 1434 [4th Dept. 2014]; Cabibel v XYZ Assoc., LP, 36 AD3d 498 [1st Dept. 2007]). **Note 1:** A local rule or a judge's part rules may shorten the 120-day period. In Kings County, Uniform Civil Term Rules of the Supreme

Court, Part C, Rule 6 requires litigants to move for summary judgment no later than 60 days after filing of the note of issue. The Second Department has upheld the 60-day deadline and has refused to extend it without a showing of good cause (see Goldin v New York and Presbyterian Hosp., 112 AD3d 578 [2d Dept. 2013]). In some cases, a preliminary conference order setting forth a date by which summary judgment motions must be filed will trump other rules (see Crawford v Liz Claiborne, 11 NY3d 810 [2008] [where local rule and judge's rule differed, local rule prevailed since the preliminary conference order directed summary judgment motions to be filed in accordance with the local rule]; Waxman v Hallen Construction Company, Inc., 139 AD3d 597 [1st Dept. 2016] [no good cause to extend the 60-day deadline set forth in a preliminary conference order of one judge simply because the reassigned judge's rules allowed for 120 days]). **Note 2:** A court can consider an untimely cross-motion for summary judgment if (1) the initial motion is timely, (2) the cross-motion involves the same or substantially similar issues as the initial motion, and (3) the cross-motion is a true cross-motion under CPLR 2215 (see Kershaw v Hospital for Special Surgery, 114 AD3d 75 [1st Dept. 2013]).

b. *Substance*. The movant must make a prima facie showing of entitlement to judgment as a matter of law by submitting proof, in admissible form, demonstrating the absence of any material issues of fact (Pullman v Silverman, 28 NY3d 1060, 1062 [2016], citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). If this initial burden has not been met, the motion must be denied regardless of the sufficiency of the opposing papers (see Pullman v Silverman, 28 NY3d at 1062, citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; but see Oleg Barshays D.C., P.C. v State Farm Insurance Co., 14 Misc.3d 74, 76 [App. Term, 2d & 11th Jud. Dists.

2006] [although movant's submissions did not establish a prima facie case, the court invoked its power to search the record and considered the opposition papers in determining that a prima facie case existed]). However, if this initial burden has been met, the burden then shifts to opponent to present proof, in admissible form, showing the existence of a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d at 324). With respect to the submissions of both the movant and the opponent, bare, conclusory assertions are insufficient (see Pullman v Silverman, 28 NY3d at 1062, citing Winegrad v New York Univ. Med. Ctr., 64 NY2d at 853). Also insufficient are expert conclusions that assume facts not supported by the evidence (see Abrams v Bute, 138 AD3d 179, 195 [2d Dept.], lv denied 28 NY3d 910 [2016] [internal citations omitted]). **Note:** Any movant for summary judgment runs the risk that the court will invoke its power to search the record and grant summary judgment in the opponent's favor without the need for a cross motion (see CPLR 3212[b]). This power, however, is limited to issues that were presented to the court on the motion (see Dunham v Hilco Construction Co., 89 NY2d 425 [1996]).

2. Motions pursuant to Frye v United States (293 F. 1013 [1923])

   a. *Timing.* While there is no prescribed time period within which to move for a Frye hearing, it is highly advisable that such a motion be made well in advance of trial to avoid delaying the proceedings and wasting the jury's time (see Larose v Pathare, 29 Misc3d 1203[A] [Sup. Court Richmond County] [2010]; Drago v Tishman, 4 Misc3d 354 [Sup. Court, N.Y. County 2004]).

   b. *General Acceptance.* Frye sets forth the threshold standard for admissibility of novel scientific evidence in New York State. Novel scientific evidence is admissible

as long as it is based upon "a principle or procedure [that] has 'gained general acceptance' in its specified field" (People v Wesley, 83 NY2d 417, 422 [1994], quoting Frye v United States, 293 F 1013, 1014). "[T]he particular procedure need not be 'unanimously endorsed' by the scientific community but must be 'generally accepted as reliable'" (*People v Wesley,* 84 NY2d at 423, quoting *People v Middleton*, 54 NY2d 42, 49 [1981]). 'Deduction, extrapolation, drawing inferences from existing data, and analysis are not novel methodologies and are accepted stages of the scientific process'" (*id.* quoting *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 71 [2d Dept. 2011]).

The burden of establishing general acceptance rests on the party seeking to introduce the scientific evidence (see Del Maestro v Greco, 16 AD3d 364 [2d Dept. 2005]). In assessing the reliability of novel scientific evidence, courts must not be concerned with the conclusions themselves, but rather the reliability of the scientific principles and methodologies on which those conclusions are based (see Parker v Mobil Oil Corp., 7 NY3d 434, 446-447 [2006]; Lugo v New York City Health & Hospitals Corp., 89 AD3d 42, 56 [2d Dept. 2011]). While the absence of textual support directly on point is relevant in assessing a theory's weight, it is irrelevant in determining the theory's admissibility (LaRose v Corrao, 105 AD3d at 1009-1010, citing Zito v Zabarsky, 28 AD3d at 46). As long as a "'synthesis of various studies or cases reasonably permits the conclusion reached by the . . . expert,'" the reliability of the expert's theory will have been demonstrated (LaRose v Corrao, 105 AD3d at 1010, quoting Zito v Zabarsky, 28 AD3d 42, 44 [2d Dept. 2006]).

Underscoring the reliability component is the Second Department's decision in *Krackmalnik v Maimonides Medical Center* (142 AD3d 1143 [2d Dept. 2016]). In *Krackmalnick*, plaintiff's expert espoused a novel theory

of causation relating to infant plaintiff's cerebral palsy (2014 WL 12625065 [Sup Ct, Kings County 2014]). Infant plaintiff was born with normal Apgar scores, no respiratory distress, no organ damage and no spasticity. She had a normal brain CT scan shortly after birth followed by a normal brain MRI four months later. Nevertheless, she began to exhibit neurological deficits, which became more profound and catastrophic over time. After holding a *Frye* hearing, Supreme Court rejected, as scientifically unreliable, plaintiff's expert's proposed theory that the child's neurological deficits were caused by perinatal hypoxic ischemic encephalopathy. In doing so, the Court rejected plaintiff's expert's theory that infant plaintiff's normal MRI four months after birth was the result of pseudonormalization. In the absence of any radiologic proof of brain atrophy months after infant plaintiff's birth, Supreme Court dismissed the scientific reliability of Dr. Adler's theory that infant plaintiff's progressive neurological disability was due to cerebral palsy associated with intrapartum hypoxia.

On appeal, the Second Department reversed. The Court noted that scientific reliability is not measured by whether "'a majority of the scientists involved subscribe to the conclusion,'" but by whether the theory espoused follows "'generally accepted scientific principles and methodology in evaluating clinical data to reach [the] conclusion[]'" (142 AD3d at 1144, quoting *Zito v Zabarsky*, 28 AD3d at 44). The Second Department concluded that plaintiff's expert's testimony was not based on novel theories and, in fact, did not even warrant a *Frye* hearing (*id.*).

c. *Foundation.* Even if novel scientific evidence meets the threshold "general acceptance" test under Frye, it still must meet the requirement for a proper foundation, i.e., a determination that "the accepted methods were appropriately employed in a particular case" (Parker v

Mobil Oil Corp., 7 NY3d at 447). "[E]ven though [an] expert is using reliable principles and methods and is extrapolating from reliable data, a court may exclude the expert's opinion if 'there is simply too great an analytical gap between the data and the opinion proffered'" (Cornell v 360 West 51st Street Realty, LLC, 22 NY3d 762, 781 [2014], quoting General Electric Co. V Joiner, 522 US 136, 146 [1997]). Thus, where the scientific studies do not show causation, but rather support a "risk," "linkage" or "association" between the scientific theory and the claimed injury, the expert's testimony should be precluded as without foundation (see Cornell v 360 West 51st Street Realty, LLC, 22 NY3d at 781).

3. Motions to Preclude Expert Testimony.

a. *Timing.* CPLR 3101(d)(1)(i) provides that, upon request, "each party shall identify each person upon whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." The ostensible purpose of the statute is to promote satisfactory disclosure so that the parties may adequately prepare for trial (see Silverberg v Community General Hosp. of Sullivan County, 290 AD2d 788 [3d Dept. 2002]). Contradictory testimony at trial may surprise and prejudice adversaries who have the right to rely on the expert disclosure in preparation of their defense (see Caccioppoli v City of New York, 50 AD3d 1079 [2d Dept. 2008]; Gregory v Mulligan, 266 AD2d 344 [2d Dept. 1999]). The problem is that there is no prescribed time within which a party is required to respond to a demand for an expert disclosure notice (see Rivers v Birnbaum, 102 AD3d 26 [2d Dept. 2012]). Indeed, a party can wait until the eve of trial to submit a CPLR 3101(d) notice, which effectively defeats

the purpose of the statute. A late CPLR 3101(d) notice precludes a party from effectively moving for summary judgment. Moreover, it may prompt a late request for a Frye hearing, or a late motion to preclude an expert from testifying on the ground that the proposed testimony contained in the expert disclosure notice is outside the scope of the pleadings. Such motions should be made in advance of trial if the basis for the motion is evident before the trial begins (see Rivera v Montefiore Medical Center, 28 NY3d 999 [2016] [trial court did not abuse its discretion in denying, as untimely, plaintiff's mid-trial motion to preclude defendant's expert testimony on the ground that the expert's CPLR 3101[d] notice was deficient]). However, in the absence of timely disclosure, it is almost impossible for the opponent to make such motions before jury selection begins.

(i) In Rivers v Birnbaum (102 AD3d 26), the Second Department acknowledged that there is no time within which a party must comply with a demand pursuant to CPLR 3101(d)(1)(i). There, defendants failed to respond to plaintiffs' request for expert disclosure more than a year after the request had been made. Plaintiffs had submitted their own expert disclosure notice and filed a note of issue before receiving any response to their request. When defendants moved for summary judgment, plaintiffs sought to preclude defendants' expert affirmations on the ground that defendants failed to respond to plaintiff's demand for expert disclosure pursuant to CPLR 3101(d)(1)(i) before the note of issue was filed. In rejecting plaintiff's argument, the Second Department concluded that CPLR 3101(d)(1)(i) "does not specify when a party must disclose its expected trial experts upon receiving a demand," nor does it set forth any sanction for noncompliance (id. at 35). Citing to the statute's language and its purpose of

promoting prompt settlements, the Court opined that the statute contemplates that disclosure might not occur until close to the commencement of trial (id. at 37-38). Nevertheless, the Court acknowledged the possibility that a trial court, in its discretion and under its authority to supervise discovery, may impose its own deadline for complying with a demand pursuant to CPLR 3101(d)(1(i), as well as its own sanctions for noncompliance (id. at 39)

b. *Qualifications.* A witness need not be a specialist in a particular field in order to qualify as an expert. As long as the witness is skilled in a particular field through experience, study or observation, the witness is qualified to render an expert opinion in that field (Meiselman v Crown Hts. Hosp., 285 NY 389, 398-399 [1941]; de Hernandez v Lutheran Medical Center, 46 AD3d 517 [2d Dept. 2007]). In the end, it is left to the trial court's discretion to determine whether an expert is qualified to testify (see People v Jones, 171 AD2d 691 [2d Dept. 1991]).

b. *Admissibility.* The decision to admit expert testimony remains within the trial court's discretion (see People v LeGrand, 8 NY3d 449, 455-456 [2007]; De Long v County of Erie, 60 NY2d 296 [1983]). To be admissible, an expert's testimony must be (1) necessary to explain something that is outside the ken of the jury and from which the jury would benefit and, (2) relevant. Expert testimony is admissible "where the conclusions to be drawn from the facts 'depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence'" (People v Cronin, 60 NY2d 430, 432 [1983], quoting Dougherty v Milliken, 163 NY 527, 533 [1900]). Thus, issues that call for a professional opinion or technical knowledge will often require testimony from an

expert. In cases that turn on eyewitness identification, with no corroborating evidence, a jury would benefit from expert testimony on the accuracy of the eyewitness identification (see People v LeGrand, 8 NY3d 449, 456-457 [2007]; see also People v Boone ___ NY3d ___, 2017 NY Slip Op 08713 [December 14, 2017] [where a witness's identification of defendant is at issue, and the witness and the defendant are of different races, the court, upon request, is required to charge the jury on the cross-race effect, even in the absence of expert testimony]).

c. *At Trial Ruling-An example*

Plaintiffs sought to supplement their CPLR 3101(d) notice, after openings, to include expert testimony as to two theories of negligence against defendants. The theories would be in the alternative placing liability either vicariously or as a specific act of negligence.

Defendants argued that plaintiffs were improperly attempting to add a new theory against them after the commencement of the trial. Defendants further claimed they were not on notice and that they prepared their defense based solely upon one type of liability-vicarious liability. Therefore, defendants argued that either plaintiffs be precluded from supplementing the 3101(d) notice to include a new theory of liability, or due to the prejudice to the defendants, a mistrial should be granted.

This issue arose following opening statements. In his opening statement, co-defendant asserted that he properly removed plaintiff's decedent's lymph node and that it was the hospital, not him, that was responsible for fixing the specimen for pathology. Immediately following openings, plaintiffs requested to amend the 3101(d) notice to include, based upon co-defendant's opening, whether it was the hospital's or the surgeon's decision to send a non-fixed specimen to pathology so that a flow

cytometry could be conducted. Plaintiffs contend this was always their theory and it was not a surprise, since the prior pleadings in this case had set forth this theory of liability.

The intent of CPLR 3101(d)(1)(i) is to provide all parties timely disclosure of expert witness information so that they may adequately and thoroughly prepare for trial (*see* Silverberg v. Community General Hosp. of Sullivan County, 290 A.D.2d 788 [3d Dept. 2002]). When a party wishes to supplement their disclosure, especially during the trial, a court must consider whether the belated disclosure is willful or intentional and whether it is prejudicial to the opposing party (see Young v. Long Island University, 297 A.D.2d 320 [2nd Dept. 2002]). CPLR3101(d)(1)(i) does not mandate that a party be precluded from proffering expert testimony merely because of noncompliance (see 1861 Capital Master Fund, LP v. Wachovia Capital Mkts., LLC, 95 A.D.3d 620 [1st Dept 2012]). It is left to the sound discretion of the trial court to address expert disclosure issues (SCG Architects v. Smith, Buss & Jacobs, LLP, 100 A.D.3d 619 [2nd Dept 2012]; McColgan v. Brewer, 84 A.D.3d 1573 [3rd Dept 2011]).

The potential prejudice from this ruling is obvious to both sides; however, in weighing the relevant factors in this particular case plaintiffs were allowed to supplement the 3101(d) notice.

Rationale: Plaintiffs' theory of liability did not change. Even if plaintiffs' original intent was to offer evidence of the doctor's negligence, based upon the deposition testimony of the hospital witness, which demonstrated joint responsibility between the doctor and the hospital staff, the hospital should have anticipated the possible supplement to the expert's testimony. Thus, the argument of "trial by ambush" was without merit. Plaintiffs

were merely buttressing their theory in light of the statements made during openings (Sadek v. Wesley, 117 A.D.3d 193 [1st Dept 2014]).

In addition, any prejudice would be alleviated by the granting of an adjournment or by the fact that the hospital had ample time to discuss this issue with an expert if desired (see McCluskey v. Shapiro, 273 A.D.2d 284 [2nd Dept 2000]).

In conclusion, plaintiffs' conduct was neither willful nor intentional, but rather the consequence of reacting to the proposed testimony alluded to in opening statements.

II. *In Limine* Motions

a. *Definition*. An *in limine* motion is a motion that seeks an evidentiary ruling. It does not involve the merits of the underlying controversy and does not affect a substantial right of a party (see Rondout Elec. v Dover Union Free School Dist., 304 AD2d 808, 811 [2d Dept. 2003]). Thus, a motion that effectively seeks dismissal should never be made at trial before a plaintiff has rested. Such a motion is not an *in limine* motion, but rather is akin to a summary judgment motion, the submission of which would be untimely (see Ofman v Ginsberg, 89 AD3d 908 [2d Dept. 2011]; West Broadway Funding Associates v Friedman, 74 AD3d 798 [2d Dept. 2010]; City of New York v Mobil Oil Corp., 12 AD3d 77 [2d Dept. 2004]).

b. *Motions to Preclude Testimony- Hearsay*

Any out-of-court statement offered for its truth is inadmissible hearsay. A party may seek an evidentiary ruling on the admissibility of a statement prior to the testimony being received at trial. An out-of-court statement may be received

under one of the following recognized exceptions, provided that the evidence is reliable and the probative worth of the statement is not outweighed by its prejudicial effect (see Nucci v Proper, 95 NY2d 597, 602 [2001]).

(i) *Declaration Against Interest.* A party may seek to introduce an out-of-court statement made by a nonparty on the ground that it is a declaration against interest. To qualify as a declaration against interest, the following four criteria must be satisfied:

"(1) the declarant is unavailable; (2) the declaration when made was against the pecuniary, proprietary or penal interest of the declarant; (3) the declarant had competent knowledge of the facts; and (4) there was no probable motive to misrepresent the facts" (Basile v Huntington Utilities Fuel Corp., 60 AD2d 616, 617 [2d Dept. 1977], citing Richardson, Evidence [Prince, 10th ed.], §257).

The moving party may assert that any statement contrary to the position taken during the trial should be admissible for its truth. The counter argument of course is that the statement constitutes hearsay and would not qualify as a declaration against interest

(ii) *Excited Utterance.* To qualify under the excited utterance exception to the hearsay rule, the statement must be made while under the influence of a startling event that is "'sufficiently powerful to render [the declarant's] normal reflective processes inoperative'" (People v Cantave, 21 NY3d 374, 381 [2013], quoting People v Vasquez, 88 NY2d 561, 574 [1996]; see People v Leach, 137 AD3d 1300 [2d Dept. 2016]). Essential to this exception "'is that the declarant spoke while under the stress or influence of the excitement caused by the event, so that [the declarant's] reflective capacity was stilled'" (People v Cantave, 21 NY3d at 381, quoting People v Nieves, 67 NY2d 125, 135 [1986]).

(iii) *Present Sense Impression.* "[S]pontaneous descriptions of events made substantially contemporaneously" with the observation of the events are admissible, provided that there is sufficient corroboration (People v Brown, 80 NY2d 729, 734-735 [1993]; see People v Jones, 28 NY3d 1037 [2016]).

(iv) *Business Record Exception.* Records generated in the regular course of business pursuant to CPLR 4518(a) or certified pursuant to CPLR 4518(c) fall within a recognized exception to the hearsay rule (see e.g. Berkovits v Chaaya, 138 AD3d 1050, 1051 [2d Dept. 2016] ["A hearsay entry in a hospital record is admissible under the business record exception to the hearsay rule if the entry is germane to the diagnosis or treatment of the patient"]).

(v) *Dying Declaration.* Statements that are made with "a sense of impending death, with no hope of recovery" (People v Nieves, 67 NY2d 125, 132 [1986]; see also People v Elder, 108 AD3d 1117 [4th Dept. 2013]). Expressions of belief or suspicions, as opposed to factual statements, are inadmissible (see People v Gumbs, 143 AD3d 403 [1st Dept. 2016], lv. denied 28 NY3d 1145 [2017]).

c. *Party Admission*

Unlike a declaration against interest, a party admission does not have to be against the declarant's interest at the time it was made (see People v Swart, 273 AD2d 503, 505 [3d Dept. 2000]). As long as the statement is inconsistent with a party's position at trial and there is proof connecting the party to the statement, the statement is admissible as a party admission (see Coker v Bakkal Foods, Inc., 52 AD3d 765, 766 [2d Dept. 2008]; see also Kamolov v BIA Group, LLC, 79 AD3d 1101, 1102 [2d Dept. 2010]).

Even assuming the statement is inconsistent with the position at trial, there must be sufficient proof linking the statement to party (see Cuevas v Alexander's, Inc., 23 AD3d 428, 429 [2d

Dept. 2005]; Gunn v City of New York, 104 AD2d 848, 849-850 [2d Dept. 1984]). "[S]ince the source of the statement remains, at best, unclear, [movant] failed to establish that [defendant's] records contain an admission so as to otherwise justify the statement's disclosure to the jury" (Echeverria v City of New York, 166 AD2d 409,410 [2d Dept. 1990]).

d. *Motion in Limine - Attempting to limit damages*

A defendant may move to preclude a plaintiff from pursuing a loss-of-chance theory, i.e. limit damages. Generally, such a basis for the motion in limine would be considered premature.

Initially, it should be noted that whether New York has adopted a loss-of-chance theory of liability remains an unresolved question of law (see e.g. Wild v Catholic Health System, 21 NY3d 951 [2013] [declining to review, as unpreserved, defendant's claim that New York State has not yet adopted the loss-of-chance theory of liability]). Nevertheless, a plaintiff's inquiries into whether a defendant's actions deprived plaintiff of an appreciable chance of a cure are proper to establish proximate cause. In determining proximate cause, a "plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances of survival or cure, as long as the jury can infer that it was probable that some diminution in the chance of survival had occurred" (Jump v Facelle, 275 AD2d 345, 346 [2d Dept. 2000]; see also D.Y. v Catskill Regional Medical Center, ___ AD3d ___ , 2017 N.Y. Slip Op. 08577 [3d Dept. 2017]; Clune v Moore, 142 AD3d 1330 [4th Dept. 2016]; Fellin v Sahgal, 35 AD3d 900 [2d Dept. 2006]).

Thus, in proving proximate cause, a plaintiff may show that a failure to diagnose diminished plaintiff's chance of a better outcome (see Goldberg v Horowitz, 73 AD3d 691, 694 [2d Dept. 2010]; Alicea v Ligouri, 54 AD3d 784, 786 [2d

Dept.2008]). In contrast, a defendant may urge the court to adopt the proportionate recovery standard set forth in Birkbeck v Central Brooklyn Medical Group, (2001 N.Y. Slip Op. 40133[U] [Sup. Ct. Kings County]). However, nothing in the New York cases cited by Birkbeck require a plaintiff to quantify, in percentages, the loss of a chance of a cure. Of course, a jury may consider what impact a plaintiff's poor prognosis or diminished life expectancy may have on any pecuniary loss (see Schneider v Memorial Hospital for Cancer and Allied Diseases, 100 AD2d 583, 584 [2d Dept. 1984]). However, there is no requirement that a plaintiff's recovery be specifically limited to a percentage of chance of survival.

III. Trial Motions

1. *Motion for Judgment During Trial (Directed Verdict)*. CPLR Rule 4401 provides, in part, that "[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified." Thus, unless the basis for the motion is a damaging admission, a motion made by either a plaintiff or a defendant for a directed verdict must be made at the close of the adversary's case. If it is made prior to the close of the opponent's case, the motion will be denied as premature, even if there is merit to the motion (see Griffin v Clinton Green South, LLC, 98 AD3d 41 [1st Dept. 2012]); Cass v County Coop Ins. Co., 94 AD2d 822 [3d Dept. 1983]).

   Example - Medical Malpractice Cases. Sometimes a defendant will move for an order granting a directed verdict pursuant to CPLR § 4401 on the grounds that the evidence submitted is legally insufficient to establish proximate cause. Specifically, defendant may claim that nothing in plaintiffs' proof

demonstrates that the departures deprived plaintiff of a substantial loss of chance of survival, or that an earlier diagnosis would have increased the chance of survival.

In cases alleging medical malpractice, a plaintiff must establish proximate cause by presenting sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing plaintiff's injury (see Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2d Dept. 2005]). The fact that an "'expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased [the] injury'" is irrelevant, "'as long as evidence is presented from which the jury may infer that the defendant's conduct diminished plaintiff's chance of a better outcome or increased [the] injury'" (Alicea v Ligouri, 54 AD3d 784, 786 [2d Dept. 2008], quoting Flaherty v Fromberg, 46 AD3d 743, 745 [2d Dept. 2007]; see Semel v Guzman, 84 AD3d 1054, 1055-1056 [2d Dept. 2011]).

Where there is sufficient proof from which the jury may infer that defendant's negligence resulted in a delayed diagnosis which, in turn, decreased plaintiff's chance for a better outcome (see Semel v Guzman, 84 AD3d at 1056), that is sufficient. A jury can infer that plaintiff would have had a better outcome had defendant's omissions not delayed the diagnosis (see Goldberg v Horowitz, 73 AD3d 691 [2d Dept. 2010]).

2. *Motion for Judgment (Lack of Informed Consent).* CPLR Rule 4401-a provides that after a plaintiff's case, a court must grant a defendant's motion to dismiss a plaintiff's lack of informed consent claim if the plaintiff has failed to present expert testimony. The difference between this Rule and CPLR Rule 4401 is that it applies only to lack of informed consent claims and requires mandatory dismissal in the absence of expert testimony.

3. *Motion for a Continuance or a Mistrial*. "At any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice" (CPLR 4402). A motion for a mistrial or a continuance is committed to the sound discretion of the trial court. Motions for a continuance are usually granted when an unexpected event arises at trial and an adjournment is a reasonable remedy (see Notrica v North Hills Holding Co., LLC, 43 AD3d 1119 [2007]).

4. *Motion for a New Trial or to Confirm or Reject or Grant Other Relief after Reference to Report or Verdict of Advisory Jury*. CPLR Rule 4403 refers to the verdict of an advisory jury or the report of a referee. The Court may accept or reject the verdict or recommendation and can make its own findings. A party moving to confirm, rehear or reject the findings has 15 days from the rendering of the advisory verdict or recommendation within which to do so.

5. *Post-Trial Motion for Judgment and New Trial (CPLR Rule 4404[a])*. Such motions shall be made "before the judge who presided at the trial within fifteen days after decision, verdict or discharge of the jury" (CPLR Rule 4405). This limitation is inapplicable where the relief is granted on the court's own motion.

There are five types of relief contemplated under a motion pursuant to CPLR Rule 4404(a):

(a) Judgment Notwithstanding the Verdict (JNOV). CPLR Rule 4404(a) provides that a court, upon motion or on its own initiative, may set aside a verdict and direct judgment in favor of a party entitled to judgment as a matter of law.

"To sustain a determination that a jury verdict is not supported by sufficient evidence, as a matter of law, there must be 'no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury

on the basis of the evidence presented at trial'" (Nicastro v Park, 113 AD2d 129, 132 [2d Dept. 1985], quoting Cohen v Hallmark Cards, Inc., 45 NY2d 493, 499 [1978]). In deciding whether a jury's verdict is legally sufficient, the trial court must view the evidence in a light most favorable to the prevailing party, giving the prevailing party the benefit of every favorable inference that can reasonably be drawn from the evidence (Szczerbiak v Pilat, 90 NY2d 553, 556 [1997]).

It is not the function of the court to weigh the evidence when making this determination, but rather it is a question of law. The motion must be determined whether, as a matter of law, judgment should be awarded in the movant's favor.

(b) Setting Aside the Verdict as Against the Weight of the Evidence. CPLR Rule 4404(a) permits a judge to set aside a verdict as against the weight of the evidence.

Whether a jury's verdict is against the weight of the evidence involves a discretionary determination. A jury verdict is against the weight of the evidence if the jury could not have reached the verdict based on "any fair interpretation of the evidence" (Ramirez v Mezzacappa, 121 AD3d 770 [2d Dept. 2014]). "Only where the jury's resolution of a factual issue is clearly at variance with the proffered testimony does the failure to set aside the verdict and direct a new trial constitute an abuse of discretion" (Fisk v City of New York, 74 AD3d 658, 659 [1st Dept. 1990]). Where a court finds that the verdict is against the weight of the evidence, the relief is a new trial.

(c) New Trial on Damages. The amount of damages to be awarded is a question for the jury, "whose determination is entitled to great deference" (Fryer v Maimonides Medical Center, 31 AD3d 604, 608 [2d Dept. 2006]). A court may order a new trial on damages only where the court finds that the jury's award deviates materially from reasonable compensation

(see CPLR 5501[c]; Quijano v American Transit Ins. Co., 155 AD3d 981 [2d Dept. 2017]). In determining what is reasonable compensation, courts may look to comparable cases for guidance (Quijano v American Transit Ins. Co., 155 AD3d 881).

(d) Hung Jury. CPLR Rule 4404(a) authorizes a court to order a new trial when "the jury cannot agree after being kept together for as long as is deemed reasonable by the court."

(e) Interest of Justice. A court may order a new trial in the interest of justice.

IV. Timing of Motions - Preservation

A motion will effectively preserve an issue for appeal if it is specific and is made contemporaneously with the alleged error so that the trial court has the opportunity to remedy the error (see People v Balls, 69 NY2d 641 [1986]).

1. Examples:

(a) Mistrial Motions. A motion for a mistrial should be preceded by a specific, contemporaneous objection in order to preserve an issue for appeal (see People v Romero, 7 NY3d 911 [2006]; People v White, 153 AD3d 1369 [2d Dept. 2017]; Rivera v Bronx-Lebanon Hosp. Ctr., 70 AD2d 794 [1st Dept. 1979]; Schein v Chest Serv. Co., 38 AD2d 929 [1st Dept. 1972]). Thus, an attorney who objects to comments on summation should not wait until the end of summation to voice his or her objection in a motion for a mistrial. While some attorneys may not wish to disrupt the flow of an adversary's summation, it is crucial that the attorney nonetheless challenge any objectionable remarks in a timely fashion in order to preserve an error on summation. However, in certain civil

cases, a court may entertain an untimely motion for a mistrial in the interest of justice (see Smith v Rudolph, 151 AD3d 58 [1st Dept. 2017]).

(b) Motion for a Trial Order of Dismissal. A general motion for a trial order of dismissal will not preserve a specific claim on appeal (see CPL 470.05[2]; People v Gray, 86 NY2d 10 [1995]).

VI. Tips on How to Write an Effective Motion.

1. Clarity
2. Specificity
3. Brevity
4. Principled
5. Disclose Adverse Authority