Trial Motions

and

Motions in Limine

from the

Civil Perspective

New York State Bar Association
Young Lawyers Section Trial Academy
Cornell Law School - Ithaca, New York

Presented by: **Michael P. O'Brien**
O'Brien Law Firm, PLLC
30 Wall Street, 8th Floor
New York, NY 10005
Phone: 212-269-2290

Motions in limine and trial motions are powerful tools that can be used to secure a better result for your client at trial. The following is a general discussion of motions in limine and trial motions, along with some practical tips to remember when making or opposing these motions.

I. Motions in Limine

In Latin, "*in limine*" means "at the outset". In modern legal practice, a motion in limine is presented just prior to, or during, trial. In the law, "just prior to" can mean days, weeks, even months. To give you an idea of where a motion in limine fits into a trial, the following is a typical progression of a case on its way to trial after the Note of Issue and Certificate of Readiness are filed.

Your trial ready case will likely proceed as follows:

1. Pre-trial Conference / Jury Coordinating Part ("JCP")
2. Plaintiff's counsel is handed a "jury slip".
3. Jury selection takes place.
4. Assigned to a Trial Judge.
    a. Settlement negotiations occur.
    b. If the case cannot be settled, the judge will go over the details of the case (names of attorneys, witnesses, experts, etc.) and scheduling (parties, experts, how many days each party thinks it will need).

This is an appropriate time to tell the judge about any motions in limine you want to make, and often a judge will ask the parties if they have any motions or evidentiary issues to be considered at this time.

Be prepared to give your best argument in chambers because it is your first opportunity to convince the judge as to the merits of your motion. The judge will give your adversary time to respond and may request that you put motions in writing[1]. Afterwards, in the courtroom, you will have the opportunity to make your full motion on the record with citations.

5. Trial begins.
    a. Motions and other matters are argued and/or stipulated on the record, out of the jury's presence.
    b. Jurors enter the courtroom and are sworn in.
    c. Judge gives opening instructions.

[1] Read the judge's Part Rules carefully. They often contain detailed instructions on motions in limine, for example: "Any potential evidentiary question or procedural or substantive law matter not previously adjudicated shall be addressed prior to trial by way of a written or oral motion in limine. A written memorandum of law with citations to the Official Reports is strongly encouraged."

d. Parties give opening statements.

The purpose of a motion in limine is to permit a party to obtain a preliminary order or ruling before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting the use of such evidence. State of New York v. Metz, 241 A.D.2d 192, 198, 671 N.Y.S.2d 79 (1st Dept. 1998).

A trial judge has broad discretion as to the admissibility of evidence offered at trial. Radosh v. Shipstad, 20 NY2d 504, 285 NYS2d 60 (1967), and a ruling on a motion in limine, even when made in advance of trial and on paper, constitutes only an advisory opinion, which is not appealable as of right or by permission. Winograd v. Price, 21 AD3d 956 (2nd Dept. 2005).

Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. A court's ruling regarding a motion in limine is subject to change as the case unfolds, particularly if the actual testimony differs from what was contained in the party's motion. A party may prepare, serve and file motions in limine (prior to trial) to prevent the admission or mention of potentially improper evidence until the court has had an opportunity to rule on its admissibility. Coopersmith v. Gold, 636 N.Y.S.2d 399 (2nd Dept. 1996, aff'd 89 N.Y.2d 957, 655 N.Y.S.2d 857 (1997). Ordinarily, a party makes a pre-trial motion in limine when it believes that mere mention of certain evidence during trial would be highly prejudicial and could not be remedied by an instruction to disregard.

A motion in limine is an inappropriate substitute for a motion for summary judgment, and is also inappropriate to obtain relief in the nature of partial summary judgment. Rivera v City of New York, 306 AD2d 456, 457); Downtown Art Co. v Zimmerman, 232 A.D.2d 270, 648 N.Y.S.2d 101; Brewi-Bijoux v City of New York, 2010 NY Slip Op 04535 (2nd Dept. 2010).

Motion in Limine and the Doctrine of "Law of the Case"

The doctrine of law of the case applies to legal determinations that were resolved on the merits in a prior decision and to the same questions presented in the same case. The law of the case "is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned." *See* Oyster Bay Assocs. L.P. v. Town Bd. of Oyster Bay, 21 A.D.3d 964, 801 N.Y.S.2d 612 (citing Martin v. Cohoes, 37 N.Y.2d 162, 371 N.Y.S.2d 687, 332 N.E.2d 867 (1975)).

The decision of the Appellate Division on a prior appeal constituted the law of the case and was binding on the Supreme Court. Shroid Cont. v. Dattoma, 250 A.D.2d 590, 672 N.Y.S.2d 389 (2nd Dept. 1998).

Other Cases

Ofman v. Ginsberg, 89 AD 3d 908 (2nd Dept. 2011)

The plaintiff commenced an action to recover damages for legal malpractice and breach of contract. After jury selection and opening statements, the defendant made a motion in limine (based on the doctrine of collateral estoppel) to preclude the plaintiff from adducing any evidence whether a stipulation of settlement was intended to act as a general release. Although the defendant characterized the motion as one for in limine relief, he argued that the cause of action alleging legal malpractice could not be maintained because of collateral estoppel. The defendant did not raise this objection or defense in his answer or his original motion to dismiss the complaint. Accordingly, a defense based on the doctrine of collateral estoppel was waived. The "motion in limine" was, in effect, an untimely motion for summary judgment. The motion should have been denied, and the Appellate Division reinstated the complaint.

Gaona-Garcia v. Gould, 2011 Slip Op 51028 (Supreme Court, Bronx County 2011)

The underlying cause of action was for personal injuries sustained as a result of a motor vehicle accident. A central issue in the case was whether the force generated by the impact between the two vehicles was sufficient to cause the plaintiff's alleged injuries. The plaintiff made a motion in limine to preclude the testimony of an accident reconstruction expert and a biomechanical engineering expert. [The standard of admissibility for expert testimony in New York which is based on scientific principles or procedures is governed by the "general acceptance test" set forth in Frye v. United States, 293 F. Supp. 1013 (D.C. Cir. 1923). New York courts have repeatedly declined to accept the federal standard for admitting scientific evidence established under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 589 (1993).]

The plaintiff argued that the Court has a twofold duty under Frye: (1) to review proffered evidence to ascertain whether it is scientifically reliable and (2) to determine whether that evidence is "generally acceptable" in the scientific community.

The Court denied the plaintiff's motion because (1) under CPLR 4515, plaintiffs are within their right to cross-examine defendant's experts regarding the basis of their opinions BUT the statute

does not provide any support for excluding the scientific evidence and (2) *Frye* does not require trial courts to engage in their own independent review of a proposed expert's methodology and resultant conclusions. Rather, the purpose of the *Frye* test is to "ensure that courts to not rely upon an expert's testimony regarding a novel procedure, methodology or theory unless it has been generally accepted within the relevant scientific community as leading to reliable results. In other words, the *Frye* test emphasizes counting scientists' votes rather than on verifying the soundness of a scientific conclusion.

In Gaona-Garcia, the court found that accident reconstruction and biomechanical engineering are generally accepted as reliable in the scientific community. The expert testimony will be admitted at trial for the jury's consideration and the weight to be accorded their expert testimony is a matter to be determined by the trier of fact. The plaintiff's motion in limine to preclude the testimony of the defendant's experts was denied.

Frye v. Montefiore Med Ctr., 2012 NY Slip Op 06185 (Appellate Division, First Department)

In this medical malpractice case, the 37-week old infant-plaintiff was delivered with an encephalocele, a skin-covered, sac-like protrusion of brain tissue through an opening in the back of the skull. At least two defendants settled after summary judgment motions were denied. The remaining defendants then moved in limine under *Frye* to preclude the plaintiff's causation expert from testifying at trial that the alleged departures (including failure to diagnose and failure to perform a C-section) caused some of the infant's neurological damage by contending that his opinions are not generally accepted in the medical community. The defendants submitted affidavits from medical experts upon whose articles the plaintiff's expert relied, all of whom refuted plaintiff's expert's conclusions based upon their articles. The defendant's motions to preclude were granted and the complaint was dismissed.

In a *Frye* motion, "the party offering expert testimony bears the burden of demonstrating its reliability where a credible challenge to the underpinning of the expert theory has been raised." In the instant Frye case, none of the theories on causation offered by the plaintiff's expert was demonstrated as being generally accepted in the relevant medical or scientific community.

II. Trial Motions

Civil Practice Law and Rules – Article 44 Trial Motions

CPLR 4401. Motion for judgment during trial.
Any 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. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties. ("Judgment as a matter of law")

CPLR 4402. Motion for continuance or new trial during trial.
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 on such terms as may be just.

CPLR 4403. Motion for new trial or to confirm or reject or grant other relief after reference to report or verdict of advisory jury.
Upon the motion of any party or on its own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing. The motion shall be made within fifteen days after the verdict or the filing of the report and prior to further trial in the action. Where no issues remain to be tried the court shall render decision directing judgment in the action.

CPLR 4404. Post-trial motion for judgment and new trial.
(a) Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.
(b) Motion after trial where jury not required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue.

CPLR 4405. Time and judge before whom post-trial motion made.
A motion under this article shall be made before the judge who presided at the trial within fifteen days after decision, verdict or discharge of the jury. The court shall have no power to grant relief after argument or submission of an appeal from the final judgment.

CPLR 4406. Single post-trial motion.
In addition to motions made orally immediately after decision, verdict or discharge of the jury, there shall be only one motion under this article with respect to any decision by a court, or to a verdict on issues triable of right by a jury; and each party shall raise by the motion or by demand under rule 2215 every ground for post-trial relief then available to him.

A judge granting a motion on the basis of admissions is very rare (but possible, at least in theory). More commonly, the motion for judgment as a matter of law (CPLR 4401) is made at the close of plaintiff's case. Then, at the close of all the evidence, parties will make motions that "no prima facie case has been made out" (if the motion is directed at the plaintiff) or that "no legally sufficient defense has been proved" (when directed against the defendant). These are also commonly called "motions for a directed verdict".

The judge will most likely deny your motion for a directed verdict (or at least reserve decision on it) even if the judge believes your argument is meritorious. Remember the practical considerations when a judge decides whether to grant, deny or reserve decision on a motion for a directed verdict. By denying or reserving decision on the motion, the judge can let the case go to the jury, and if the verdict is for the party the judge believes was entitled to it, the verdict can be left undisturbed. But if the jury comes back the "wrong" way, the court can grant judgment notwithstanding the verdict on a CPLR 4404 motion. Then, if the trial judge is reversed on appeal, there is no need for a new trial – the jury's verdict can simply be reinstated.

The CPLR is silent on the standard to be used in determining whether the movant is entitled to judgment. The Court of Appeals has stated that a direction of a verdict is supportable only when "by no rational process could the trier of the facts base a finding in favor of [the party opposing the motion] upon the evidence…presented," Blum v. Fresh Grown Preserve Corp., 292 N.Y.241, 255 (1944).

"A motion for judgment as a matter of law pursuant to CPLR 4401 or 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party." Adler v. Bayer, 2010 NY Slip Op 07300 (App. Div., 2nd 2010); see, Hamilton v. Rouse, 46 AD3d 514, 516; Tapia v. Dattco, Inc., 32 AD3d 842, 844. In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (Szczerbiak v. Pilat, 90 NY2d 553, 556). Or, was there evidence on which rational people could conclude that the winning party was entitled to the verdict? Cohen v. Hallmark Cards, 45 N.Y.2d 493, 410 N.Y.S.2d 282 (1978).

The Court of Appeals has held that failure to make a timely motion for a directed verdict under CPLR 4401 constitutes a waiver of any claim to judgment as a matter of law. *See* Miller v. Miller, 68 N.Y.2d 871, 508 N.Y.S.2d 418 (1986) (plaintiff, who failed to move for a directed verdict on the question whether he had suffered a "serious injury" under the No-Fault law, thereby conceded that the question was for the jury).

And, the Appellate Division, Second Department has held that "[b]y failing to move for a directed verdict pursuant to CPLR 4401 on the issue of negligence at the close of evidence, the plaintiff implicitly conceded that the issue was for the trier of fact;…" Hurley v. Cavitolo, 239 AD2d 559 (2d Dept. 1997).

Also note that the Third and Fourth Departments have held that the failure to raise excessiveness or inadequacy arguments on a post-trial motion permits the appellate division to avoid considering such arguments. Homan v. Herzig, 55 AD3d 1413 (4th Dept. 2008); Smetanick v. Erie Ins. Group, 16 AD3d 957 (3d Dept. 2005).

Defendants should move to dismiss each of plaintiff's causes of action as insufficient as a matter of law. Plaintiffs should likewise move for a directed verdict in support of each of their causes of action. Then, both sides should move for judgment as a matter of law at the close of all evidence. Always remember to include all the grounds that you plan to raise on appeal in the event that the motion is denied.

Immediately after the verdict, attorneys will make (and many judges will inquire whether there are any) motions to set aside the verdict (also called "J.N.O.V." motions, or judgment notwithstanding the verdict). These motions can be, and are often, the same or similar arguments used in motions at the close of plaintiff's case and/or the close of all the evidence.

Regarding CPLR 4402, a court may grant a motion for a mistrial, or as it is also called, a motion for the withdrawal of a juror, upon the request of either party. This motion may be granted, with or without conditions in the discretion of the court, "when it appears that owing to some accident or surprise, defect of proof, unexpected and difficult questions of law, or like reason a trial cannot proceed without injustice to a party." Matter of Taylor, 271 App. Div. 947, 67 N.Y.S.2d 823, 825 (4th Dep't 1947).

Again, consider the practical considerations from the court's perspective - a continuance or delay in the trial is often preferable to an entirely new trial because it avoids the necessity of conducting a new voir dire, repeating testimony, preparing new opening statements, and the costs associated with each.

Medical Malpractice

Nunez v. NYC Health & Hospitals, 110 AD3d 686 [2nd Dept., 2013]
This case involved allegations that the hospital failed to properly diagnose the Plaintiff's pre-term labor and delayed delivery despite an indication of fetal distress several days after presentation, causing the infant to suffer from lack of oxygen resulting in cerebral palsy and other injuries. The Court held that the Defendant was deprived of a fair trial because of "the court's excessive intrusion into the examination of witnesses, and by the nature and extent of its questioning and comments. Further, "the court deprived the defendant of a fair trial by issuing a supplemental jury instruction pursuant to Noseworthy v. City of New York, 298 NY 76 [1948]."

(1) Preclusion of expert testimony: the Trial Court precluded the testimony of two experts as cumulative (which rests in the sound discretion of the trial court). However, the 2nd Department found that limiting that testimony could have cured the cumulative effect of this had a significant prejudicial effect on the Defendant;

(2) Trial Court's intrusion into witness questioning: While the trial court had the authority to elicit and clarify the defense witnesses' testimony, the record shows that on repeated occasions…it did not do so in an even-handed and temperate manner (trial court responded "Tah-dah" when plaintiff's expert acknowledged that pus could have a yellowish tinge, and could be a sign of infection)

(3) *Noseworthy* instruction: Under Noseworthy, a plaintiff has a reduced burden of proof if they are unable to describe events due to a disability. The Second Department viewed Noseworthy as inapplicable because the infant's inability to testify about the events surrounding his birth was not the result of memory loss stemming from the defendant's alleged negligence.

Harden v. Faulk, 111 AD3d 1380 [4th Dept. 2013]
This case involved a defendant physician who treated the Plaintiff's ankle. The jury found the defendant not negligent. The Plaintiff moved for a new trial under CPLR 4404, contending he was denied a fair trial due to judicial error, judicial misconduct and misconduct of special counsel. The Plaintiff argued that a comment made by a juror regarding the Plaintiff's Medicare benefits implied a double recovery, however the Fourth Department affirmed the denial of the Plaintiff's motion because it deemed the court's curative instruction to be sufficient.

Porcelli v. Northern Westchester Hospital Center, 110 AD3d 703 [2nd Dept. 2013]
The Second Department held that the trial judge's excessive intervention in the proceedings, as well as the cumulative effect of the trial court's improper conduct, deprived her of a fair trial. The Court found that the repeated conflict between the court and plaintiff's counsel, at all phases of trial and often in the presence of the jury, unnecessarily injected personality issues into the case, which militated against a fair trial. The trial justice demonstrated a propensity to interrupt, patronize, and admonish the plaintiff's counsel, and gave the plaintiff's counsel significantly less leeway with regard to examination and cross-examination of witnesses than that which was afforded the defendants' counsel.

You lost …now what?

Before the jury is excused:

- Poll the jury. Most judges do this without a request from counsel. It is reversible error if the jury is not polled upon request of a litigant. See the Court of Appeals decision in Duffy v. Vogel (2009 Slip Op 02448), where the court notes New York's long history with a right to poll the jury: "…[A] verdict may not be deemed 'finished or perfected' until it is recorded, and that it may not be validly recorded without a jury poll where one has been sought, (see Warner v. New York Cent. R.R. Co., 52 NY 437, 442 [1873]), have been uncontroversial propositions."

- Demand to see the verdict sheet. Look for an inconsistent verdict or any other mistakes. Fix any errors before the jury is discharged.

After the jury is excused:

- Oral motion to set aside the verdict. This gives you the chance to have the verdict overturned on the spot. It is unlikely after a long trial that you will be able to cite, during an oral motion, every piece of evidence and testimony you need to support your motion; each and every inconsistency and/or mistake in the record; and all the case law and statutory authority needed to prevail on your motion. So make the following requests on the record:

- Additional time to make a written motion. Ask the judge to consider the time it takes to obtain the full trial transcript, the time you will need to analyze the entire transcript and evidence, and the time required to research and draft the motion. By statute, the written motion is due a mere 15 days after the verdict is rendered (CPLR 4405). Typically judges will grant anywhere from 30 to 60 days additional time to file a written motion;

- Leave to amend the relief requested in the oral motion; and

- Stay entry of judgment until determination of the written motion (the winning party will seek to enter judgment as fast as possible to start the clock).

A Note About Timely Objections:

Make *timely* objections and/or demands for a mistrial whenever there are:

1. Errors in evidentiary submissions; or

2. Prejudicial comments.

"[W]e cannot permit counsel to press a challenged error after proceeding in a manner constituting a waiver of an objection" (Schein v Chest Service Co., Inc., 38 AD2d 929 [1972]; *see* Virgo v Bonavilla, 49 NY2d 982 [1980]; Kraemer v Zimmerman, 249 AD2d 159 [1998]; Bonilla v. New York City Health & Hosps. Corp., 229 AD2d 371 [1996]). However, the First Department directed a new trial, despite the absence of preservation, because of other egregious errors including "numerous improper and prejudicial remarks by plaintiff's counsel, inter alia, appealing to the jurors' class bias, prejudice or passion." Tehozol v. Anand Realty Corp., 41 AD3d 151, 152 (1st Dept. 2007).

CPLR 4404(a)

Where a jury award deviates materially from what would be "reasonable compensation" for an injured plaintiff's injuries, the award should be modified so that the award constitutes reasonable compensation. Kane v. Coundorous, 11 AD3d 304 (1st Dept. 2004); Carlos v. W.H.P. 19 LLC, 301 AD2d 423 (1st Dept. 2003); Donlon v. City of New York, 284 AD2d 13 (1st Dept. 2001).

A failure to award any future pain and suffering damages cannot be reconciled with a finding of a permanent injury. Lamanna v. Jankowski, 52 AD3d 340 (1st Dept. 2008). A jury's failure to award damages on a particular issue, where the proof submitted on the issue is undisputed and/or uncontroverted, is inadequate and against the weight of the evidence. Ramos v. NYCHA, 280 AD2d 325 (1st Dept. 2001).

Other Trial Motions to be aware of:

> CPLR 3025. Amended and supplemental pleadings
> (a) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.
> (b) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.