Article 51 of the Insurance Law provides that a plaintiff in a personal injury action arising out of negligence in the use or operation of a motor vehicle must establish that he/she has incurred a basic economic loss exceeding $50,000 or must establish that he/she has suffered "serious injury". Insurance Law § 5104(a), (b). Serious injury is defined as personal injury which results in one of the following :

- Death
- Dismemberment
- Significant disfigurement
- Fracture
- Loss of a fetus
- Permanent loss of use of a body organ, member, function or system
- Permanent consequential limitation of a body organ or member
- Significant limitation of use of a body function or system
- 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Insurance Law §5102(d).

Summary Judgment on Serious Injury Threshold

Generally :

The Court of Appeals has stated that where alleged limitations are so minor, mild or slight as to be considered insignificant within the meaning of the Insurance Law §5102(d), summary judgment is warranted. *See*, Licari v. Elliot, 57 N.Y.2d 203, 455 N.Y.S.2d 570 (1982).

The movant has initial burden of establishing a prima facie entitlement to summary judgment by submitting admissible evidence demonstrating that plaintiff did not sustain a serious injury arising out of the subject motor vehicle accident. Kearse v. New York City Transit Authority, 16 A.D.3d 45, 789 N.Y.S.2d 281 (2 Dept., 2005) (holding that defendant met his burden as the movant for summary judgment where he submitted admissible proof that the plaintiff suffered no disabilities causally related to the motor vehicle accident). Accordingly, the burden will shift to non-movant upon the movant's prima facie showing, whereby the non-movant must submit evidence in opposition to summary judgment. Id.

If the movant does not establish absence of a serious injury or lack of causation, summary judgment must be denied, regardless of the sufficiency of the non-movant's papers. For example, in Mariaca-Olmos v. Mizrhy, 226 A.D.2d 437, 640 N.Y.S.2d 604 (2 Dept,. 1996), defendants moved for summary judgment but failed to submit sufficient evidence to establish lack of serious injury or lack of proximate cause. Plaintiff submitted an MRI report in opposition to defendant's motion for summary judgment indicating "a centrally bulging annulus at the L5-S1 level." Because the defendant did not meet their burden, the motion should have been denied regardless of the sufficiency of the plaintiff's opposing papers. Summary judgment order reversed and complaint reinstated.

Medical Records, In Support of Summary Judgment :

It has long been established that an attorney's affirmation is sufficient to support a motion for summary judgment, when it is accompanied by documentary evidence and exhibits establishing a movant's right to relief. Lowe v. Bennett, 122 A.D.2d 728, 511 N.Y.S.2d 603 (1 Dept., 1986), *aff'd* 69 N.Y.2d 700, 512 N.Y.S.2d 364 (1986).

However, proof submitted in support of summary judgment motion, or in opposition thereto, must be in admissible form. Zeigler v. Ramadhan, 5 A.D.3d 1080, 744 N.Y.S.2d 211 (4 Dept., 2004) (unsworn, unsigned affidavit from plaintiff's physician was insufficient to raise a triable issue of fact). Specifically, movant for summary judgment on the issue of serious injury threshold may not rely on unsworn medical records in support of his/her motion. Dumont v. D.L. Peterson Trust, PHH, 307 A.D.2d 709, 762 N.Y.S.2d 743 (4 Dept., 2003); Nkhereanye v. Hillaire, 35 A.D.3d 419, 826 N.Y.S.2d 373 (2 Dept., 2006); Elder v. Stokes, 35 A.D.3d 799, 828, N.Y.S.2d 138 (2 Dept., 2006); Phillips v. Zilinsky, 39 A.D.3d 728, 834 N.Y.S.2d 299 (2 Dept., 2007); Nociforo v. Penna, — N.Y.S.2d —, 2007 WL 2127347 (2 Dept., 2007).

Notably, however, where plaintiff's counsel provides the unsworn medical records to the defendant, the defendant may use such records in support of his/her summary judgment motion. Wiegand v. Schunck, 294 A.D.2d 839, 741 N.Y.S.2d 360 (4 Dept., 2002), *citing,* Lowe v. Bennett, 122 A.D.2d 728, 511 N.Y.S.2d 603 (1 Dept., 1986), *aff'd* 69 N.Y.2d 700, 512 N.Y.S.2d 364 (1986); *see also*, Patton v. Matusick, 16 A.D.3d 1072, 791 N.Y.S.2d 753 (4 Dept., 2005).

Courts have recognized that a defendant for summary judgment may submit unsworn medical reports and records of the plaintiff's physicians to demonstrate a lack of serious injury. However, when the defendant does so, he/she "opens the door" for the plaintiff to rely on the same unsworn or unaffirmed reports and records in opposition of the motion. Kearse v. New York City Transit Authority, 16 A.D.3d 45, 47, 789 N.Y.S.2d 281, 283 (2 Dept., 2005), *citing* Pech v. Yael Taxi Corporation., 303 A.D.2d 733, 758 N.Y.S.2d 110 (2 Dept., 2003).

Further, it is clear that objective medical evidence is required and plaintiff's own deposition testimony will not suffice. In Marciniak v. Gerbino, 227 A.D.2d 531, 642 N.Y.S.2d 709 (2 Dept., 1996), defendants moved for summary judgment. Defendants submitted proof which established that the infant plaintiff did not suffer a serious injury. In opposition, plaintiffs submitted excerpts from the deposition testimony of the infant plaintiff and their bill of particulars. Plaintiffs' documents contained subjective complaints of pain, but no objective medical evidence to support these claims. The court held that the defendant's motion should

have been granted.

Expert Affidavits / Affirmations, In Support of Summary Judgment :

Increasingly, the courts have been dismissing an expert's opinion where it was based upon unsworn and/or unaffirmed medical reports. As stated above, an attorney affirmation submitted in support of a motion for summary judgment on the issue of serious injury threshold may only rely upon certified medical records. Dumont v. D.L. Peterson Trust, PHH, 307 A.D.2d 709, 762 N.Y.S.2d 743 (4 Dept., 2003); Nkhereanye v. Hillaire, 35 A.D.3d 419, 826 N.Y.S.2d 373 (2 Dept., 2006).

The same rule applies to expert affidavits, affirmations and/or expert medical reports which rely upon unsworn medical records. For example, a physician's affirmation will not be given any weight where it relies upon unsworn and unaffirmed medical records. Mahoney v. Zerillo, 6 A.D.3d 403, 774 N.Y.S.2d 378 (2 Dept. 2004); Cosentino v. Kelly, 41 A.D.3d 632, — N.Y.S.2d —, 2007 WL 1776065 (2 Dept., 2007); Furrs v. Griffith, — N.Y.S.2d —, 2007 WL 2247295 (2 Dept., 2007). Similarly, a chiropractor's affidavit may not rely upon unsworn or unaffirmed medical records. Moore v. Sarwar, 29 A.D.3d 752, 816 N.Y.S.2d 503 (2 Dept., 2006).

Recent decisions reveal that courts are willing to dismiss the opinions of experts where they are based upon inadmissible, unsworn medical records. Nkhereanye v. Hillaire, 35 A.D.3d 419, 826 N.Y.S.2d 373 (2 Dept., 2006)(affirmed medical report of orthopedist lacked probative value where it relied upon unsworn reports of others); Bycinthe v. Kombos, 29 A.D.3d 845, 815 N.Y.S.2d 693 (2 Dept., 2006) (plaintiff's examining physician report lacked merit because it was based upon unsworn and unaffirmed medical reports of others in coming to his conclusions); Earl v. Chapple, 37 A.D.3d 520, 830 N.Y.S.2d 275 (2 Dept., 2007) (same).

Expert Opinion : Contemporaneous Physical Examinations

"Where no explanation is offered for a significant delay between a physician's last treatment of the plaintiff and a proffered medical opinion, the opinion has been rejected as lacking probative value." Dooley v. Davey, 21 A.D.3d 1242, 804 N.Y.S.2d 432 (3 Dept., 2005), *citing* Davis v. Evan, 304 A.D.2d 1023, 758 N.Y.S.2d 203 (3 Dept., 2003). However, where the injury is opined to be permanent in nature, the requirement that a medical expert conduct a contemporaneous physical examination may be dispensed with. Dooley v. Davey, 21 A.D.3d 1242, 804 N.Y.S.2d 432 (3 Dept., 2005), *citing* Toure v. Avis Rent-A-Car, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) (accepting a medical expert's opinion of permanence when it was based upon a four-year-old examination); *See also,* D'Alba v. Yong-AE Choi, 33 A.D.3d 650, 823 N.Y.S.2d 423 (2 Dept., 2006) (declining to give weight to plaintiff's examining physician's report where it was not based upon a contemporaneous examination); Kotto v. JND Concrete & Brick Inc., 41 A.D.3d 415, 837 N.Y.S.2d 728 (2 Dept., 2007) (same).

In Attanasio v. Lashley, 223 A.D.2d 614, 636 N.Y.S.2d 834 (2 Dept., 1996), the defendant moved for summary judgment, based on plaintiff's lack of serious injury. Defendants submitted plaintiff's deposition testimony, physician's affirmations and medical reports which indicated that plaintiff returned to work 8 days after the accident that caused her injuries. In opposition, plaintiff submitted affidavits of two of the plaintiff's doctors who characterized her

alleged disability as "permanent." The Appellate Court rejected these affidavits because the plaintiff's physicians' examinations had been conducted four and six years prior to the motion. The findings of permanency were "merely conclusory in nature and without evidentiary value and insufficient to raise a triable issue of fact."

Significant Disfigurement

In Petrivelli v. Walz, 227 A.D.2d 735, 642 N.Y.S.2d 348 (3 Dept., 1996), a jury found that the plaintiff did not sustain any significantly disfiguring scars. Plaintiff moved to set aside the verdict as against the weight of the evidence. Plaintiff claimed four facial scars, one above his left eye which the plaintiff described as "a little bit of a scar there" which his glasses covered. The court noted that the plaintiff's own testimony was sufficient to establish that the verdict with respect to that scar should not be set aside. The court wrote that such a scar would clearly not be "readily discernable by an individual looking at plaintiff." A scar below the plaintiff's left eye was described by the defendant's examining physician as "virtually invisible" and "has healed well and very appropriately." Plaintiff also sustained a scar inside his lip which was unobservable and prevents reasonable observer from regarding the condition as unattractive, objectionable or the subject of pity or scorn. With respect to the "most significant scar" which was above the plaintiff's upper lip, approximately 2.3 cm, the jury found that this scar was not a significant disfigurement. The court again upheld the verdict, given the jury's opportunity to view the injured plaintiff and considering the evidence as to that scar.

Fracture

In Ives v. Correll 211 A.D.2d 899, 621 N.Y.S.2d 179 (3 Dept., 1995), a jury verdict for defendant was affirmed where plaintiff suffered a deviated septum, but no broken bones and only soft tissue injuries. In the absence of evidence that any bone was broken, the fact that plaintiff suffered a deviated septum did not support the claim of serious injury as defined as a fracture.

In Catalan v. Empire Storage Warehouse, Inc. 213 A.D.2d 366, 623 N.Y.S.2d 311 (2 Dept., 1995), the trial court did not err in refusing to charge the jury that a fracture of cartilage could constitute a serious injury as opposed to a fracture of bone. The appellate court reviewed the definition of "fracture" and reiterated that the legislative history indicating that the definition related to bones only. Verdict for defendant affirmed.

In Spevak v. Spevak, 213 A.D.2d 622, 624 N.Y.S.2D 232 (2 Dept., 1995), a fracture of a structure that allegedly held one of the plaintiff's baby teeth in place did not constitute a serious injury where the subject tooth was successfully treated by pushing it back into position. Verdict for defendant affirmed.

In Amodio v. Noto, 229 AD.2d 366, 644 N.Y.S.2d 556 (2 Dept., 1996) a sworn medical report demonstrating that plaintiff sustained fractured ribs established the existence of a triable issue of fact with respect to the issue of whether she sustained a serious injury. Summary judgment dismissing the complaint reversed.

Loss of a Fetus

In Gilphilin v. Ware, 205 A.D.2d 353, 613 N.Y.S.2d 594 (1 Dept., 1994), an order granting summary judgment to defendant was affirmed. Plaintiff's opposition to the motion consisted of unsworn statements not based upon any diagnostic tests which measured the alleged harm to plaintiff's fetus when x-rays were taken after the accident and plaintiff was unaware that she was pregnant. There was no other evidence that plaintiff's abortion was advisable because of the harm caused to the fetus by the accident or ensuing treatment.

Permanent Loss of Use of a Body Organ, Member, Function or System

The New York Court of Appeals has established that "only a total loss of use is compensable under the 'permanent loss of use' exception to the no-fault remedy." Oberly v. Bangs Ambulance, Inc., 751 N.Y.2d 295, 727 N.Y.S.2d 378 (2001) (holding that alleged continued pain and cramping suffered by plaintiff was not a "total loss of use" sufficient to show a "serious injury"); *See also,* Beutel v. Guild, 28 A.D.3d 1192, 813 N.Y.S.2d 342 (4 Dept., 2006); Ellis v. Emerson, 34 A.D.3d 1334, 825 N.Y.S.2d 608 (4 Dept., 2006); Ellithorpe v. Marion, 34 A.D.3d 1195, 824 N.Y.S.2d 836 (4 Dept., 2006).

Courts have been hesitant to find a serious injury under the "permanent loss of use" criterion when the plaintiff has suffered a soft-tissue injury, such as herniated or bulging discs. In Slisz v. Miga, 14 A.D.3d 953, 789 N.Y.S.2d 775 (4 Dept., 2005), the Court held that the plaintiff had not met his burden under the "permanent loss of use" exception to the no-fault remedy where the plaintiff had not submitted any evidence that he had sustained a "total loss" of use of his lumbar spine. *See also,* Schou v. Whiteley, 9 A.D.3d 706, 780 N.Y.S.2d 659 (3 Dept., 2004) (holding that neither the removal of the plaintiff's discs nor the loss of use of certain cervical and lumbar vertebrae constitutes a total loss of use); Raugalas v. Chase Manhattan Corporation., 305 A.D.2d 654, 760 N.Y.S.2d 204 (2 Dept., 2003) (plaintiff did not suffer a total loss of use of her cervical or lumbar spine).

Permanent Consequential Limitation or Significant Limitation of Use

"In order to establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted by plaintiff must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system." Toure v. Avis Rent-A-Car Systems, 98 N.Y.2d 345, 353, 746 N.Y.S.2d 865 (2002). The Court of Appeals in Toure v. Avis Rent-A-Car Systems established that an expert's conclusory findings, without support, will not suffice to establish a serious injury under the Insurance Law. *See also,* Sarkis v. Gandy, 15 A.D.3d 942, 789 N.Y.S.2d 578 (4 Dept., 2005) (holding that plaintiff did not sustain a serious injury where plaintiff's experts made only conclusory, unsupported findings with respect to range of motion); Simpson v. Feyrer, 27 A.D.3d 881, 811 N.Y.S.2d 788 (3 Dept., 2006); Hock v. Aviles, 21 A.D.3d 786, 801 N.Y.S.2d 572 (1 Dept., 2005).

"Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a

serious injury. Pommells v. Perez, 4 N.Y.3d 566, 574, 797 N.Y.S.2d 380 (2005); Kearse v. New York City Transit Authority, 16 A.D.3d 45, 789 N.Y.S.2d 281 (2 Dept., 2005); John v. Engel, 2 A.D.3d 1027, 768 N.Y.S.2d 527 (3 Dept., 2003).

In quantifying the limitations of use a plaintiff has incurred, he/she is required to show more than a "mild, minor or slight limitation of use." Miki v. Shufelt, 285 A.D.2d 949, 728 N.Y.S.2d 816 (3 Dept., 2001). In Miki v. Shufelt, the court held that the plaintiff failed to establish either a permanent consequential limitation of use or a significant limitation of use where the plaintiff's own experts characterized the disability as "mild". Further, the court stated that findings of limited range of motion failed to establish a serious injury where the medical experts provided no details as to these findings and failed to show how they were ascertained. *See also,* Brandt-Miller v. McArdle, 21 A.D.3d 1152, 801 N.Y.S.2d 834 (3 Dept., 2005).

Courts have increasingly required that, in order to establish the extent or degree of the alleged physical limitations resulting from a herniated disc or other spinal injury, plaintiff must submit evidence in admissible form, which quantifies the extent or degree of the alleged physical limitations resulting therefrom. For example, in Burke v. Carney, 37 A.D.3d 1107, 829 N.Y.S.2d 358 (4 Dept., 2007), the court held that even though one of plaintiff's physicians concluded that the plaintiff had sustained a disc herniation, this evidence was insufficient to establish an issue of fact relating to the serious injury threshold because the physician failed to establish the extent or degree of the alleged physical limitations resulting from the disc injury. The court stated that the physician's opinion was based largely on plaintiff's subjective complaints of pain, and further, noted that the physician failed to specifically set forth the tests he conducted, the result from those tests, and failed to support his conclusions concerning the restrictions and limitations resulting from plaintiff's injuries. Id., at 1108; *see also,* Cossentino v. Kelly, 41 A.D.3d 632, — N.Y.S.2d —, 2007 WL 1776065 (2 Dept., 2007). The Second Department in Nociforo v. Penna, — N.Y.S.2d —, 2007 WL 2127347 (2 Dept., 2007), required the plaintiff's examining orthopedist to not only set forth the range of motion finding, but also compare those findings with what is normal. Even though the physician did indicate plaintiff's range of motion, the court refused to find an issue of fact with regard to serious injury because those findings were not compared to the normal limits. *See also,* Cotto v. JND Concrete & Brick, Inc., 41 A.D.3d 415, 837 N.Y.S.2d 728 (2 Dept., 2007); Caldwell v. Grant, 31 A.D.3d 1154, 818 N.Y.S.2d 700 (4 Dept., 2006).

Various cases have held that plaintiffs successfully provided a qualitative assessment of his/her significant physical limitations. The Fourth Department held proof of a herniated disc to be sufficient evidence of a serious injury when it was accompanied by postoperative reports which confirmed the discogenic pain, by evidence that intradiscal electrothermal therapy failed to relieve the pain, and by an affidavit of plaintiff's neurosurgeon which stated that plaintiff was unable to work as a result of his injuries, which he causally linked to the motor vehicle accident. Ellithorpe v. Marion, 34 A.D.3d 1195, 824 N.Y.S.2d 836 (4 Dept., 2006). *See also,* Flanagan v. Klein, 35 A.D.3d 1174, 825 N.Y.S.2d 895 (4 Dept., 2006) (plaintiff raised an issue of material fact on the issue of serious injury threshold where the plaintiff submitted physician reports, chiropractic records, MRI reports and an affidavit from the treating chiropractor which quantified plaintiff's injuries with objective medical findings and diagnostic tests).

In John v. Engel, the court held that even though plaintiff's MRI showed a herniated disc at C5-6, plaintiff's injury did not constitute a serious injury because the plaintiff's medical records revealed no evidence of objective tests to determine any loss of range of motion or spasm or muscle weakness or tingling sensations. *See also,* Grimes-Carrion v. Carroll, 17 A.D.3d 296, 794 N.Y.S.2d 30 (1 Dept., 2005) (holding that plaintiff did not establish a serious injury under either the permanent consequential limitation qualifier or the significant limitation qualifier where expert did not quantify spinal range of motion limitations until over 3 years after the accident); *but see,* Desulme v. Stanya, 12 A.D.3d 557, 785 N.Y.S.2d 477 (2 Dept., 2004) (holding that quantified limitations of range of motion established a serious injury).

Plaintiff's subjective complaints of pain, without any objective medical evidence in support, are insufficient to establish a serious injury. Gonzalez v. Green, 24 A.D.3d 939, 805 N.Y.S.2d 450 (3 Dept., 2005) *citing,* Scheer v. Koubeck, 70 N.Y.2d 678, 679, 518 N.Y.S.2d 788 (1987) (holding that pain alone cannot establish a basis for a serious injury).

Courts have also required plaintiffs to establish a causal connection between the MRI findings and the alleged "limitations" of use. In Davis v. Evan, 304 A.D.2d 1023, 758 N.Y.S.2d 203 (3 Dept., 2003), the Court held that plaintiff failed to establish a serious injury under the permanent consequential limitation and significant limitation of use categories, where the plaintiff failed to "explain how a cervical MRI revealing cervical herniated discs supports a finding of permanent loss of function in her thoracic spine, or to identify any other objective or diagnostic tests utilized to support the conclusion of loss of thoracic spine function." In Davis, the plaintiff could point to an MRI showing a disc herniation, but without some kind of causal connection between the disc herniation and the claimed limitations of use, plaintiff could not establish a serious injury.

Fasce v. GRZ Associates, 229 A.D.2d 563,646 N.Y.S.2d 153 (2 Dept., 1996) involved two plaintiffs. The orthopaedist's affirmation with respect to the first plaintiff indicated that eleven months after the accident, she had a "deficit in the left cervical rotation at 25," thus raising a triable issue of fact as to whether or not she sustained a "significant limitation of a use of body function or system." This medical evidence raised a triable issue of fact as to whether plaintiff suffered a serious injury. However, with respect to the second plaintiff, the plaintiff's chiropractor's affidavit failed to provide objective evidence to the degree or extent of the alleged "significant limitation" and was insufficient to defeat defendant's motion for summary judgment.

In Lincoln v. Johnson, 225 A.D.2d 593, 639 N.Y.S.2d 124 (2 Dept., 1996), defendants moved for summary judgment based on plaintiff's lack of serious injury. In opposition, plaintiff submitted an unsworn report by her treating physician which was held to be inadmissible. The only other admissible evidence submitted by the plaintiff was a doctor's affidavit which failed to cite any objective tests which he performed in reaching his conclusions. Moreover, that affidavit indicated that the plaintiff suffered only minor, mild or slight limitations of use, which are insufficient to establish serious injury. Significantly, the court held that the doctor's use of the words "permanent,""significant limitation" and "consequential limitation" in describing the plaintiff's injuries was clearly tailored to meet the statutory requirements and therefore insufficient to establish "serious injury." Denial of summary judgment reversed and complaint dismissed.

In Trebing v. Jeffrey, 226 A.D.2d 448, 640 N.Y.S.2d 592 (2 Dept., 1996) the defendant moved for summary judgment dismissing plaintiff's claims for non-economic loss. Plaintiff submitted the affirmation of his treating neurologist which stated that the plaintiff suffers from syringomyelia, which was confirmed by magnetic resonance imaging, and a 40 degree loss of range of motion of her left and right lateral rotation of her neck. The court held that this was sufficient to create a question of fact of whether plaintiff sustained a serious injury. Summary judgment order reversed.

In Muratore v. Tierney, 229 A.D.2d 1018, 645 N.Y.S.2d 178 (4 Dept., 1996), defendants moved for summary judgment. Defendants submitted an affidavit of the orthopaedic surgeon who performed an independent medical examination of the plaintiff and reviewed plaintiff's medical records and reports of the treating physician. The defendant's doctor asserted there was no objective evidence that the plaintiff sustained a serious injury. Plaintiff's treating physician's affidavit merely repeated their subjective complaints of pain and consisted of "conclusorily assertions tailored to meet the statutory requirements" and was thereby insufficient to establish "serious injury." Dismissal affirmed.

90/180 Day Limitation

The Insurance Law provides that the plaintiff may establish a serious injury by showing that she has a medically determined injury or impairment of a non-permanent nature which prevents her from performing substantially all of the material acts which constitute her usual and customary daily activities at least 90 days out of the 180 days immediately following the accident. Insurance Law §5102.

"When construing the statutory definition of a 90/180-day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment." Thompson v. Abbasi, 15 A.D.3d 95, 788 N.Y.S.2d 48 (1 Dept., 2005). The Court of Appeals has stated that there is no serious injury under the 90/180 limitation qualifier where the plaintiff returned to work within a month after the accident and admitted that he "resumed his usual schedule" thereafter. Licari v. Elliot, 57 N.Y.2d 203, 238, 455 N.Y.S.2d 570, 574 (1982); *see also,* Furrs v. Griffith, — N.Y.S.2d —, 2007 WL 2247295 (2 Dept., 2007). The Court in Licari further noted that the plaintiff was able to "maintain his daily routine for most of each day" following the accident. Id.

In Thompson v. Abbasi, *supra.,* the court found that the plaintiff had not sustained a serious injury under the 90/180-day qualifier. Specifically, the court stated, "[i]n light of plaintiff's admission that he only missed one week of work, his unsubstantiated claim that his injuries prevented him from performing substantially all of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident is insufficient to raise a triable issue of fact." Id. at 101. *See also,* Arrowood v. Lowinger, 294 A.D.2d 315, 742 N.Y.S.2d 294 (1 Dept., 2002) (holding that plaintiff's unsubstantiated claims that he was unable to do household chores was insufficient to establish a serious injury under the 90/180-day limitation exception to the no-fault remedy). In Hasner v. Budnik, 35 A.D.3d 366, 826 N.Y.S.2d 387 (2 Dept., 2006), the court found that the plaintiffs' admissions that they both

missed fewer than 10 days of work as a result of the accident undermined their claim that they had sustained a serious injury under the 90/180-day qualifier.

One way which plaintiff's have successfully quantified their limitations under the 90/180 category of serious injury is to submit physical therapy notes regarding which activities could not be performed without pain. In Fortino v. Fayetteville-Manluis Central School District, 16 A.D.3d 1124, 791 N.Y.S.2d 245 (4 Dept., 2005), the plaintiff raised an issue of fact with respect to the 90/180 day limitation by submitting "physical therapy notes regarding the gardening and yard work [which] reveal that [those] activities caused plaintiff increased pain". This was sufficient to establish that plaintiff may have sustained a serious injury because she was not able to substantially perform all of her daily activities.

Courts have been unwilling to find a "serious injury" under the 90/180-day limitation where the plaintiff's treating physician's placed no restrictions on her, instead provided her with a neck brace and the suggestion that she take "a strong dosage of Motrin." Gonzalez v. Green, 24 A.D.3d 939, 805 N.Y.S.2d 450 (3 Dept., 2005).

Courts have found that medical findings that support the 90/180-day limitation exception to the no-fault remedy must be based on findings which relate to plaintiff's condition three months after the accident, or examinations and tests which were contemporaneous to the accident. Toussaint v. Claudio, 23 A.D.3d 268, 803 N.Y.S.2d 564 (1 Dept., 2005). In Toussaint v. Claudio, the court found that reports of defense medical experts, based on examinations of the plaintiff conducted six years after the subject automobile accident, and which only addressed plaintiff's current condition were insufficient to establish that plaintiff had not suffered a serious injury under the 90/180-day limitation category.

In Cullum v.Washington, 227 A.D.2d 370,. 642 N.Y.S.2d 86 (2 Dept., 1996), defendants moved for summary judgment, submitting proof in admissible form that plaintiff did not suffer a serious injury. Plaintiff failed to submit medical evidence of a permanent injury or a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for a period of not less than 90 days during the 180 day period immediately following the injury. Self serving and contradictory comments made by the plaintiff regarding her inability to perform her usual and customary daily activities for three months after the accident, without more, were insufficient to defeat a motion for summary judgment. Summary judgment to defendant affirmed.

In Boyd v. Pierce, 225 A.D.2d 867, 638 N.Y.S.2d 808 (3 Dept., 1996), the defendant moved for summary judgment. Plaintiff's injury to her non-dominant thumb resulted in a 15 degree loss of flexion, however, there was no proof that the injury was permanent nor did the plaintiff submit evidence challenging the opinion of the defendant's medical expert that this is a mild limitation. The opinion of plaintiff's doctors that she was curtailed from performing her usual and customary daily activities for not less than 90 days of the first 180 days following the accident, lacked probative force as they were based solely upon plaintiff's subjective history of headaches and dizziness. Plaintiff also acknowledged that she rejoined the work force 69 days after the accident and two months after the accident was able to do housework, cook and drive

her car. Summary judgment affirmed.

In Rennell v. Horan, 225 A.D.2d 939, 639 N.Y.S.2d 171 (3 Dept., 1996) the defendant moved for summary judgment as plaintiff did not sustain a serious injury. Plaintiff submitted no medical evidence that she suffered a permanent loss of use of a body organ, member, function or system. Although there was proof that she continued to experience some pain and discomfort, there was no objective evidence supporting her claim of permanency. With respect to her claim that she was unable to perform substantially all of her usual and customary daily activities for at least 90 days of the 180 days immediately following the accident, plaintiff's injuries did not prevent her from driving her car and shopping for groceries. Plaintiff was unemployed at the time of the accident and started a new job less than three months after she was injured. Restrictions on her activities and sports, even accepting them to be true, were not shown to be medically indicated or to affect a significant portion of her usual activities. Summary judgment affirmed.

In Hewan v Callozzo, 223 A.D.2d 425, 636 N.Y.S.2d 336 (1 Dept., 1996), Plaintiffs' claims that they were unable to resume their daily activities for 90 out of the 180 days following the accident were unsupported by any proof of confinement, incapacity or other substantial curtailment of daily activities sufficient to make out a prima facie showing of serious injury. Dismissal of plaintiffs' complaint for failure to establish a serious injury was affirmed.

Pommells v. Perez , 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005)

On April 28, 2005, The Court of Appeals issued a decision in response to three separate appeals: Pommells v. Perez, Brown v. Dunlop, and Carrasco v. Mendez. The facts of each case were relatively similar. In each case, the defendant had moved for summary judgment on the basis that the plaintiff's alleged soft-tissue injuries did not constitute a serious injury under Insurance Law §5102(d).

Gap in Treatment :

In Pommells v. Perez, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005), Court of Appeals held that a gap in treatment puts into question the reliability of the medical expert's conclusions about causation and also the seriousness of the injuries themselves. The Court specifically stated, "[a] plaintiff who terminates therapeutic measures following the accident while claiming 'serious injury' must offer some reasonable explanation for doing so." Id. at 574, 797 N.Y.S.2d at 385. In dismissing the Pommells v. Perez complaint, the Court observed that the Plaintiff provided no such explanation where plaintiff stopped physical therapy 6 months following the accident and failed to seek any medical treatment until years later, for purposes of litigation.

However, by the same reasoning, the Court reinstated the Brown complaint, finding that the plaintiff's explanation for discontinuation of treatment was sufficient to survive summary judgment. In the Brown v. Dunlop facts, the defendant also raised the issue of causation by pointing out a two and a half year gap in treatment. The Court denied summary judgment in favor of defendants on the issue of serious injury in Brown v. Dunlop, however, because the plaintiff refuted defendant's summary judgment motion by showing that the plaintiff stopped getting medical care after the treating doctors determined that further therapy would be palliative, recommended that plaintiff stop treatment, and instructed plaintiff to continue exercises at home.

Pre-existing Medical Condition or Intervening Medical Problem:

In Pommells v. Perez, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005) the Court of Appeals also dealt with the issue of a plaintiff's pre-existing medical condition or intervening medical problem on summary judgment. The Court held that when the defendant moves for summary judgment and raises an issue of whether a pre-existing medical condition caused the alleged injury, the plaintiff must address the question of whether the symptoms and/or injuries were actually caused by the accident to survive summary judgment.

In order to raise the issue, the defendant must provide more than a conclusory statement by a medical professional that a pre-existing condition is present. In re-instating the Brown v. Dunlop complaint, the Court found that the defendant had not raised an issue of a pre-existing condition by offering a "conclusory notation" by one of the Defendant's doctors, when all other doctors in the case (including defendant's other doctors) concluded that the injury was caused by the accident.

However, in the deciding on the Carrasco v. Mendez facts, the Court found that defendant had sufficiently raised the issue of whether the injury was caused by a pre-existing

condition where the doctor had closely examined the plaintiff and the plaintiff's medical records and concluded that the injury was not caused by the subject motor vehicle accident. The court noted that the plaintiff's own treating doctor came to the same conclusion.

Therefore, a showing that a pre-existing condition caused the plaintiff's injury should include what materials the doctor relied upon in reaching the conclusion. A conclusory opinion alone will not shift the burden to the plaintiff to refute the defendant's allegations.

A plaintiff opposing summary judgment where the defendant sufficiently raises the issue of a pre-existing condition must submit admissible evidence directly addressing the alleged pre-existing condition. A doctor's opinion that the injury was caused by the accident is not enough. The plaintiff must discuss, explain or refute the existence of the pre-existing condition to survive summary judgment.

Gap In Treatment : Case Law Update

Since Pommells v. Perez, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005), the Appellate Division has continued to hold that an unexplained gap in treatment is fatal to a plaintiff's claim where the defendant moves for summary judgment on the issue of the serious injury threshold.

In Colon v. Kempner, 20 A.D.3d 372, 799 N.Y.S.2d 213 (1 Dept., 2005), the court held that a three year unexplained gap in plaintiff's treatment warranted summary judgment in favor of defendant on issue of serious injury threshold, where plaintiff declined to receive any treatment and only planned on seeing a doctor "in the future, if it gets worse".

In Teodoru v. Conway Transport Service, Inc., 19 A.D.3d 479, 798 N.Y.S.2d 466 (2 Dept., 2005), the court granted summary judgment in favor of defendant where plaintiff offered no explanation for 2 1/2 year gap in treatment for her alleged injuries. *See also,* Gomez v. Epstein, 29 A.D.3d 950, 818 N.Y.S.2d 101 (2 Dept., 2006) (plaintiff's unexplained four year gap in treatment warranted summary judgment in favor of defendant); Rubensccastro v. Alfaro, 29 A.D.3d 436, 815 N.Y.S.2d 514 (1 Dept., 2006) (holding that 18 month unexplained gap in treatment warranted summary judgment in favor of defendants on issue of serious injury threshold); Hasner v. Budnik, 35 A.D.3d 366, 826 N.Y.S.2d 387 (2 Dept., 2006) (plaintiffs failed to adequately explain a 4 1/2 year gap and a 5 1/2 year gap in treatment).

In Perez v. Rodriguez, 25 A.D.3d 506, 809 N.Y.S.2d 15 (1 Dept., 2006), the court granted summary judgment in favor of the defendant on the issue of serious injury threshold where plaintiff failed to explain a three year gap in treatment. The court found that the sworn affirmation by plaintiff's physician, who examined her more than three and one-half years after the accident, was insufficient to raise an issue of fact with regard to the serious injury threshold. Notably, the court further stated that the plaintiff's doctor "neglected to discuss the prolonged gap in plaintiff's treatment and, indeed, exacerbated the significance of that unexplained gap by stating that the plaintiff is 'permanently disabled as a result of the automobile accident [...] her condition is chronic and permanent and she has suffered partial but significant impairments to the spine, shoulder and left knee *which requires surgery and will necessarily require future medical care at least in the nature of therapy and steroid injections.*'" Id.

The dissenting opinion, however, stated that the cessation of treatment by the plaintiff

had the "appearance of a determination that further treatment would not provide a resolution to the injuries or pain." Specifically, the dissent quoted the Court of Appeals in Pommells v. Perez, for the proposition that "the law surely does not require a record of needless treatment in order to survive summary judgment." Perez v. Rodriguez, 25 A.D.3d 506, 809 N.Y.S.2d 15, *quoting,* Pommells v. Perez, 4 N.Y.3d 566, 797 N.Y.S.2d 380. Although this argument did not succeed in Perez v. Rodriguez, it may be a successful argument for another plaintiff, who chose not to continue insignificant treatment.

In Mullings v. Huntwork, 26 A.D.3d 214, 810 N.Y.S.2d 443 (1 Dept., 2006), the court held in favor of a defendant moving for summary judgment on the serious injury threshold where plaintiff failed to explain a gap in treatment. In this case, the plaintiff stopped physical therapy in 2002 and began acupuncture treatment instead. At the end of that year, back surgery was recommended, but the plaintiff ceased all treatment and elected not to have the surgery. The court held that plaintiff failed to explain why she ceased treatment or why she decided to forego the surgery and granted defendant's motion for summary judgment.

In Moore v. Sarwar, 29 A.D.3d 752, 816 N.Y.S.2d 503 (2 Dept., 2006), the court held that an affidavit of plaintiff's chiropractor, who failed to explain a one and one-half year gap in treatment, was insufficient to raise an issue of material fact in response to the defendant's prima facie showing that plaintiff had not sustained a serious injury. The court further held that the chiropractor's findings that the plaintiff's back injuries were caused by the subject motor vehicle accident were speculative where the chiropractor failed to acknowledge plaintiff's prior motor vehicle accident which also resulted in back injuries.

The court in Garner v. Tong, 27 A.D.3d 401, 811 N.Y.S.2d 400 (1 Dept., 2006) denied defendant's motion for summary judgment based upon the serious injury threshold where plaintiff's medical expert's affidavit adequately explained that plaintiff reduced the frequency of his treatment because it was not offering him any further benefit.

In Quezada v. Luque, 27 A.D.3d 205, 810 N.Y.S.2d 463 (1 Dept., 2006), the court held that the plaintiff's medical expert's affidavit was insufficient to raise an issue of material fact where the physician's physical examination of the plaintiff took place four years prior to making of the affidavit and where the plaintiff failed to seek any kind of treatment over a four year period.

In Tuna v. Babendererde, 32 A.D.3d 574, 819 N.Y.S.2d 613 (3 Dept., 2006), the court granted defendant's motion for summary judgment where the plaintiff had an unexplained gap in treatment for 19 months. (*See also,* Baez v. Rahamatali, 24 A.D.3d 256, 808 N.Y.S.2d 171 (1 Dept., 2005) (holding that 20-month unexplained gap in treatment precluded finding that plaintiff suffered a serious injury).

In Chan v. Casiano, 36 A.D.3d 580, 828 N.Y.S.2d 173 (2 Dept., 2007), the court held that the plaintiff's orthopedist failed to submit objective medical proof relating to causation, where neither the plaintiff's nor her physician adequately explained the four and a half year gap in treatment between the conclusion of medical treatment in 2002 and the physical examination which was subsequently conducted in January of 2006, in direct response to the defendant's

summary judgment motion.

Pre-Existing Injury: Case Law Update

Since Pommells v. Perez, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2006), the Appellate Division has dealt with the issue of a plaintiff's pre-existing injury on a motion for summary judgment pursuant to the serious injury threshold.

In Agard v. Bryant, 24 A.D.3d 182, 805 N.Y.S.2d 348 (1 Dept., 2005), defendant was entitled to summary judgment on the issue of serious injury threshold where he submitted the sworn report of a radiologist which established that the plaintiff's injuries resulted from degenerative processes and not the automobile accident. Plaintiff failed to submit any admissible evidence on the issue of causation in opposition.

In Montgomery v. Pena, 19 A.D.3d 288, 798 N.Y.S.2d 17 (1 Dept., 2005), the court granted the defendant's motion for summary judgment where the plaintiff failed to come forth with any "objective proof" on the issue of causation. Specifically, the plaintiff's submissions in opposition to the defendant's motion for summary judgment on the issue of serious injury threshold failed to directly address the pre-existing conditions that the defendant pointed to in his submissions. *See also,* Maye v. Stearns, 19 A.D.3d 902, 798 N.Y.S.2d 152 (3 Dept., 2005) (holding that plaintiff's chiropractor's affidavit which stated conclusion that plaintiff had no previous contributing history was insufficient to establish a triable issue of fact where the chiropractor was unaware of the plaintiff's prior injuries and did not address them in his report.)

In Carter v. Full Service, Inc., 29 A.D.3d 342, 815 N.Y.S.2d 41 (1 Dept., 2006), the plaintiff was involved in a prior motor vehicle accident only nine days before the subject motor vehicle accident and the sole injury alleged was a left-knee ACL tear. The plaintiff's expert testified at trial that the subject motor vehicle accident was the cause of the injury, but did not provide any explanation of how he concluded that the second accident, rather than the first accident, caused the injury. In light of the plaintiff's lack of evidence on the issue of causation, the First Department upheld the trial court's directed verdict in favor of the defendant. The court also based its finding on the defendant's medical expert's testimony that plaintiff's injury could not have been caused by the second, subject motor vehicle accident because the impact did not generate sufficient force to cause the injury.

In Hernandez v. Almanzar, 32 A.D.3d 360, 821 N.Y.S.2d 30 (1 Dept., 2006), the court granted summary judgment in favor of defendants on the issue of serious injury threshold where the defendants submitted plaintiff's own deposition testimony that she had been involved in two prior motor vehicle accidents in support of its claim that plaintiff's injuries were pre-existing. Although plaintiff submitted evidence in opposition that his treating doctors concluded that the injuries had been caused by the subject motor vehicle accident, the court held that the plaintiff did not come forward with sufficient evidence on the issue of causation because none of the doctors explained the basis for the claim that the injuries were caused, not exacerbated, by the subject motor vehicle accident. *See also,* Smith v. Brito, 23 A.D.3d 273, 804 N.Y.S.2d 82 (1 Dept., 2005) (plaintiff's submissions failed to establish a causal connection between the claimed injuries and the subject automobile accident.)

Pre-Existing Degenerative Disc Disease Held NOT to Shift Burden :

In a recent decision from the Supreme Court, Erie County, Honorable John M. Curran discussed the burden on the movant for summary judgment at length. In Ashquabe v. McConnell, 14 Misc.3d 211, 829 N.Y.S.2d 427 (Sup. Ct. Erie Cty., 2006), the court held that the defendant, as the movant for summary judgment, did not meet its burden to establish a prima facie case on the issue of serious injury threshold. The defendant put forth an expert opinion that the plaintiff's condition was a result of degenerative cervical disc disease and argued that, pursuant to the Supreme Court's decision in Pommells v. Perez, by pointing to a pre-existing condition, the defendant shifted the burden to the plaintiff to explain away the evidence of degeneration. Interestingly, the court took judicial notice of the fact that many adults over the age of 30 and most adults over 50 have degenerative changes in their spine and that many such changes are asymptomatic. Id. at 4, *citing,* Hunter v. New York, Ontario & Wester R.R. Co., 116 N.Y. 615 (1889); Erie County Bd. of Social Welfare v. Holiday, 14 A.D.2d 832, 220 N.Y.S.2d 679 (4 Dept., 1961). The court reasoned that pursuant to these generally known facts, Pommells would require burden shifting in almost every serious injury threshold case involving spinal injuries. Avoiding this "broad holding", the court found that "a finding of degeneration in the spine must be accompanied by something more such as pre-accident radiological tests establishing the pre-accident degenerative changes [...]". Judge Curran went on to hold that when a defendant's summary judgment motion is based solely on its expert's opinion that the plaintiff suffered from a degenerative disc condition, the defendant has failed to meet its burden on summary judgment. *See also,* Clark v. Perry, 21 A.D.3d 1373, 810 N.Y.S.2d 645 (4 Dept., 2003) (burden shifts from defendant to plaintiff where defendant pointed out degenerative disc condition which had been previously known and treated prior to the accident); Caldwell v. Grant, 31 A.D.3d 1154, 817 N.Y.S.2d 553 (4 Dept., 2006) (burden shifted from defendant to plaintiff where defendant pointed out a "preexisting degenerative injury" to the plaintiff's spine); D'Alba v. Yong-AE Choi, 33 A.D.3d 650, 823 N.Y.S.2d 423 (2 Dept., 2006) (plaintiff's examining physician failed to address the defendant's examining radiologist's finding attributing the condition of the plaintiff's cervical spine to degenerative processes).

In Mack v. Pullum, 37 A.D.3d 1063, 829 N.Y.S.2d 774 (4 Dept., 2007), the Fourth Department held that the defendants made out a *prima facie* case as movant for summary judgment, but that plaintiff raised an issue or fact in opposition thereto. Specifically, plaintiff submitted medical reports of a physician who concluded that, although plaintiff had degenerative changes in her spine, those degenerative changes were asymptomatic prior to the accident. Further, the physician established the extent or degree of the alleged physical limitation resulting from those conditions that the plaintiff alleged had been aggravated as a result of the accident. Note that it is unclear from this opinion whether defendant shifted the burden solely by pointing to degenerative disc disease, however, this decision demonstrates that a plaintiff may explain away the prior degenerative condition by pointing out, via a physician's affidavit, that the degenerative changes were asymptomatic prior to the motor vehicle accident.