Serious Injury Threshold

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

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). Where the defendant moves for summary judgment on the issue of serious injury, the defendant 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 (2nd 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 plaintiff

upon defendant's prima facie showing, whereby plaintiff must submit evidence in opposition to defendant's motion. Id.

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 (1st 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 (4th 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 (4th Dept. 2003). 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 (4th Dept. 2002), *citing*, Lowe v. Bennett, 122 A.D.2d 728, 511 N.Y.S.2d 603 (1st 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 (4th Dept. 2005).

Courts have recognized that a defendant moving 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 (2nd Dept. 2005), *citing* Pech v. Yael Taxi Corp., 303 A.D.2d 733, 758 N.Y.S.2d 110 (2nd Dept. 2003).

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.S.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").

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 (4th 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 (3rd 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 Corp., 305 A.D.2d 654, 760 N.Y.S.2d 204 (2nd 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 (4th 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 (3rd Dept. 2006); Hock v. Aviles, 21 A.D.3d 786, 801 N.Y.S.2d 572 (1st Dept. 2005).

_____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 (3rd 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 (3rd 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 (2nd Dept. 2005); John v. Engel, 2 A.D.3d 1027, 768 N.Y.S.2d 527 (3rd Dept. 2003).

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 (1st 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 (2nd 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 (3rd 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 (3rd 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.

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 the180 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 (1st 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). 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 (1st 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).

Further, 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 (3rd 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 (1st 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.

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 (1st 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 (2nd 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 (2nd 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 (1st Dept. 2006) (holding that 18 month unexplained gap in treatment warranted summary judgment in favor of defendants on issue of serious injury threshold).

In Perez v. Rodriguez, 25 A.D.3d 506, 809 N.Y.S.2d 15 (1st 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 (1st 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.

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 (1st 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 (1st 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 (3rd 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 (1st 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, — N.Y.S.2d —, 2006 WL 2506416 (1st 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 (1st Dept. 2005) (plaintiff's submissions failed to establish a causal connection between the claimed injuries and the subject automobile accident.)