NEW YORK SERIOUS INJURY UPDATE - 2015
WINNING STRATEGIES FOR THE DEFENSE

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I. The Significance of Perl (Statistical analysis)

A. A review of the Appellate Division's cases show a clear shift in how the courts treat threshold motions. Now, more than ever, the Appellate Division is quick to find that there are triable issues of fact.

1. Though courts will cite to Perl often, it seems that the preamble of the Perl is underemphasized. "In finding that two of these claims survive our scrutiny, we by no means signal an end to our skepticism, or suggest that of lower courts is unjustified" (Perl, 18 N.Y.3d 208, 215 [2011]).

II. Defense Strategies: Meeting your prima facie burden, and setting up winning issues

A. Meeting the prima facie burden on a threshold motion is not particularly difficult, but it does require particular attention to detail.

B. The first step in meeting the prima facie burden a defendant must address all of the injuries alleged in the bill of particulars and all of the categories of serious injury listed in the bill of particulars (see Ye v. Michal Taxi, Inc., 107 A.D.3d 673 [2nd Dept. 2013] [no prima facie for failing to address 90/180 which was alleged in the Bill of Particulars]; McFadden v. Barry, 63 A.D.3d 1120 [2nd Dept. 2009] [failure to meet prima facie for failing to address a specific injury claimed in the bill of particulars]).

C. The injuries alleged and categories of serious injury can be addressed in two ways. First, a defendant can argue that the plaintiff has full range of motion and thus there is no evidence of a "serious injury." Second, the defendant can argue that there is no evidence that the accident caused any injury.

1. These arguments are not necessarily mutually exclusive. If they both can be made, they both should be made.

D. The simplest way to meet the prima facie burden is to establish that the plaintiff has no range of motion deficits as to the permanent consequential and significant limitations categories.

E. As to 90/180 there are several ways to meet your prima facie burden.

1. The most common way to meet your burden is to rely on the plaintiff's deposition testimony. To do this, however, the deposition must adequately address the plaintiff's physical capabilities during the first 180 days after the accident.

a. Notably, just being unable to work-standing alone-is not sufficient to meet the 90/180 test. Thus, for a plaintiff who claims a broad inability to perform ordinary tasks, follow-up questions need to provide as much detail as possible about what the plaintiff could or could not do, and when they could not do it.

2. An additional way to establish a prima facie case regarding 90/180 is to prove a lack of causation. Proving a lack of causation will be discussed below. But, particularly in the Second Department, it is critical to advise the court that the causation defense is being applied to all of the categories of Insurance Law § 5102(d). The failure to clearly address the 90/180 has caused several defendants to lose their appeals. Avoid this result by specifically stating that causation evidence is addressing 90/180.

F. Setting up winning issues – is done primarily by raising a causation defense. This may involve any of several potential pieces of evidence, depending on the facts in your case:

1. Radiology Evidence: the best recognized piece of evidence, for establishing causation issues, is a radiology report. The more detailed the report the better. The report can establish either an absence of indications consistent with traumatic origin; or identify findings consistent with a non-traumatic etiology. (i.e. degeneration, congenital defect, etc.) Where non-traumatic etiology is indicated, it helps if the physician explains, in easy to understand terminology, how the findings seen on the film could not have occurred in the time period between the accident and the imaging study. Plaintiff's physician is then required to address this evidence.

2. Inconsistencies and Contradictions in the plaintiff's own medical records is a ripe source for evidence with which to raise the issue of causation.

a. The failure to address inconsistent or contradictory findings from plaintiff's own treating physicians, often those other than submitting an affirmation to oppose the motion, can render a plaintiff's expert's affirmation speculative on causation. For example, in Kaplan v. Vanderhans (26 A.D.3d 468 [2nd Dept. 2006]) the plaintiff's doctor failed to address notations in the medical records that the plaintiff had recovered a few months after the accident (see also Shaji v. City of New Rochelle, 66 A.D.3d 760 [2nd Dept. 2009]; Brown v. Tairi Hacking Corp., 23 A.D.3d 325 [2nd Dept. 2005]).

b. Notably, the plaintiff places their pre-accident medical condition at issue by commencing an action. Evidence of pre-existing conditions makes pre-accident medical records material and necessary (see M.C. v. Sylvia Marsh Equities, Inc., 103 A.D.3d 676 [2nd Dept. 2013]). Thus, the plaintiff's pre-accident medical

records are subject to discovery and should be disclosed to the defendant. If these conditions are more general (i.e. diabetes, or other health problems affecting daily living) – you might need your physician to offer an affirmation explaining how such conditions could be relevant to overall physical functionality and/or disability.

3. The absence of contemporaneous treatment also goes to the issue of causation. "As the author of a recent article points out, a contemporaneous doctor's report is important to proof of *causation*; and examination by a doctor years later cannot reliably connect the symptoms with the accident" (Perl, 18 N.Y.3d at 219 [emphasis added]).

   a. The Appellate Division has latched on to this language from Perl. "While the Court of Appeals in Perl 'rejected a rule that would make contemporaneous quantitative measurements a prerequisite to recovery' it confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question" (Rosa v. Mejia, 95 A.D.3d 402 [1st Dept. 2012]; see Griffith v. Munoz, 98 A.D.3d 997 [2nd Dept. 2012] ["The absence of a contemporaneous medical report invites speculation as to causation.").

   b. The facts of Henry v. Peguero (72 A.D.3d 600 [1st Dept. 2010]) are instructive on the timeframe. The plaintiff was involved in an automobile accident but waited two weeks before beginning treatment. The First Department concluded that this was an unexplained gap in treatment warranting dismissal of the complaint.

      1. The result is the same whether it is called a gap in treatment or contemporaneous proof of an injury. The plaintiff must have obtained (1) some form of treatment that (2) qualitatively describes an injury (3) contemporaneous to an accident to raise an issue of fact as to causation.

4. Emergency Room records (as well as EMS records) can establish an "absence of trauma". Almost every injury allegation in any motor-vehicle case is premised on the assertion that the injury was caused as acute trauma from the one time event. Yet acute trauma is accompanied, necessarily, by cardinal signs of trauma. A finding of an abnormal condition, and/or any treatment for it, does not tell a physician how the condition got there. (If they find a broken arm, and put a cast on it, that tell a doctor how the fracture occurred) So merely being taken to the emergency room is not evidence of trauma or injury, and is often done, to err on the side of caution.

a. Emergency room physicians are expert in identifying, and stabilizing, acute trauma. If the records don't document findings consistent with the Bill of Particulars – as affirmative proof that the plaintiff's own treating physician (in the Emergency Dept.) established an 'absence of trauma'. Defense practitioners should consider use of a 'peer review' ER trauma expert, to clearly establish this issue in solid medical foundation.

b. Where a defendant establishes the "absence of trauma", the plaintiff's physicians should be required to address that evidence (from plaintiff's own records), if they are to opine that the injury does have a traumatic cause. For example, in Kester v. Sendoya, (123 AD3d 418 [1 st Dept. 2014]) the court noted specifically that defendants established "an absence of evidence of recent traumatic...injury". The plaintiff's treating Orthopedic surgeon failed to address this evidence, and this was a reason to affirm the dismissal.

G. Alvarez v. NYLL Management encapsulates the "typical" post-Perl threshold motion

1. Alvarez began as a 15-page order of the Supreme Court, Bronx County, grew into a 3-2 decision of the Appellate Division, First Department, and ended in a one-paragraph order of the Court of Appeals.

2. Perhaps what is most interesting about Alvarez is the rejection of the Perl argument that an injury is causally related to an accident simply because the plaintiff told a post-accident treating doctor that the plaintiff did not have complaints of pain before the accident.

3. The facts of Alvarez:

a. At the scene of the accident, the plaintiff told EMS that she had a "slight headache" and that she was "basically really nervous." EMS found no signs of trauma.

b. The plaintiff went to the Emergency Room and she made complaints of a headache and right shoulder pain. Notably, however, the doctor at the Emergency Room found that plaintiff had full range of motion in all extremities. The plaintiff was not admitted to the hospital.

c. 10 days later, the plaintiff sought medical care for the first time since her discharge from the ER. At this point, the plaintiff's lists of physical complaints grew to include headache; chest pain; back pain; neck pain; right shoulder pain; and bilateral knee pain.

1. Restrictions in motion were found in the plaintiff's neck and back.

2. Plaintiff's range of motion in her knees was "normal."

3. While restrictions were found in plaintiff's shoulders, the restrictions were *identical* between her injured and *uninjured* shoulder.

4. MRI's of the plaintiff's knees were normal.

5. An MRI of the plaintiff's neck found disc desiccation and bulges at C2-C5.

6. A bone spur was identified in the plaintiff's shoulder that was impinging on the supraspinatus tendon.

d. The plaintiff underwent arthroscopic surgeries of her right shoulder and right knee.

4. The legal roots of Alvarez

a. As discussed below, Alvarez is really a continuation of case law discussing when an expert's opinion is inadmissible for a lack of foundation.

b. In Matott v. Ward (48 N.Y.2d 455 [1979]) the Court of Appeals held that in order for an expert's opinion to be admissible, the expert must provide such details that "it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis."

c. What constitutes a "rational basis" has been recently reviewed by the Court of Appeals in the toxic tort context in Parker v. Mobil Oil Corp. (7 N.Y.3d 434, 447 [2006]) and Cornell v. 360 West 51st Street Realty, LLC (22 N.Y.3d 762 [2014]).

1. Although Parker and Cornell were toxic tort cases, all four departments of the Appellate Division has applied Parker to non-toxic tort cases (see Johnson v. Guthrie Medical Group, P.C., 125 A.D.3d 1445 [4th Dept. 2015] [applying Parker to expert testimony in medical malpractice case]; Alexander v. Dunlop Tire Corp., 81 A.D.3d 1134 [3rd Dept. 2011] [applying Parker to products liability case regarding defective tires]; LaMasa v.

Bachman, 56 A.D.3d 340 [1st Dept. 2008] [applying Parker to hold that experts opinions had sufficient foundation in "serious injury" case]; Alston v. Sunharbor Manor, LLC, 48 A.D.3d 600 [2nd Dept. 2008] [applying Parker to hold that expert opinions were admissible in wrongful death case resulting from thermal burns]).

d. Both Parker and Cornell explore general causation and specific causation. General causation means that it is possible for an injury to be caused by a type of event. For example, a car accident is capable of causing an injury. Specific causation, on the other hand, examines whether the incident at issue in a case actually caused the plaintiff's injuries. For example, did a particular rear-end collision cause a cervical herniation or was it caused by unrelated degeneration?

e. The plaintiff in Parker contended that his exposure to gasoline caused him to suffer from AML. Benzene, which is a component of gasoline, has been associated with causing AML. The Parker plaintiff's expert contended that because the plaintiff was exposed to gasoline, which contained benzene, that exposure must have caused the plaintiff's AML. The Court of Appeals held that this was insufficient because the question was " the relationship, if any, between exposure to gasoline containing benzene as a component and AML" (Parker, 7 N.Y.3d at 449-450). Stated differently, it was not enough for the expert to assume that gasoline exposure caused AML simply because one of its components can cause AML.

f. In Cornell, the plaintiff alleged that exposure to mold caused her to suffer from several ailments. In opposition to the defendants' summary judgment motion, the plaintiff's expert relied on government regulations and studies that noted an "association: between some of the plaintiff's conditions and mold. None of those articles stated that mold actually caused any of the conditions. The Court of Appeals held that this evidence was not sufficient to establish proof of general causation because government regulations are legally irrelevant and studies showing an association do not prove causation.

g. As to specific causation, the plaintiff's expert's opinion was also insufficient. First, the plaintiff's expert could not identify what

agent actually caused the plaintiff's condition. Second, the plaintiff's expert made a differential diagnosis to determine that the plaintiff's condition was caused by mold. The Court of Appeals rejected this approach in this case because proof of general causation is a prerequisite to performing a differential diagnosis. Additionally the Court of Appeals rejected the plaintiff's expert's discussion of how he performed a differential diagnosis and held:

"As [defendants' expert] attested, many of the medical conditions that Cornell attributes to her mold exposure (e.g. asthmatic symptoms) are common in the general population; additionally, many of her symptoms may be ascribed to non-mold-related diseases. Yet, [plaintiff's expert] does not explain what other possible causes he ruled out or in, much less why he did so. He stated that he performed a panoply of diagnostic tests, but does not give any results. [Defendants' expert], upon review of Cornell's medical records, stated that physical findings and laboratory data did not substantiate mold-related illness; for example, Cornell tested negative for mold allergies, but positive for other inhalation allergies. [Plaintiff's expert] does not dispute this, or explain how any of the diagnostic findings are consistent with his differential diagnosis. Instead, he broadly states his conclusion that Cornell's medical problems are mold-induced, based on differential diagnosis."

(Cornell, 22 N.Y.3d at 785).

h. These cases and their progeny are the legal roots of Alvarez. They establish that it is not enough for an expert to simply state an opinion without sufficiently identifying a foundation that is scientifically accepted. Alvarez has held that discussing evidence of degeneration is required for an expert to show that there is an adequate foundation for a causation opinion.

5. The Defendants' Threshold Motion in Alvarez

a. In support of their motion, the defendants submitted an expert opinion from a radiologist.

1. The radiologist explained that the plaintiff's shoulder injury was caused by a bone spur which is a degenerative condition not caused by the accident.

2. The radiologist provided a detailed explanation as to why the plaintiff's knee injuries were caused by degeneration and not trauma.

3. The radiologist also provided detailed explanations as to why the findings on the plaintiff's cervical and lumbar films were not caused by trauma.

b. The defendants also presented the opinion of an orthopedist.

1. The orthopedist reviewed the MRIs and openly questioned the causal relationship of the injuries and whether the surgery performed on the plaintiff's shoulder and knee was even necessary given the lack of evidence of injury.

c. In opposition, the plaintiff submitted an affirmation from her surgeon.

1. Notably, plaintiff's surgeon did not address any of the findings in the plaintiff's medical records *or* in the defendant's expert's reports on the issue of causation.

2. The expert's entire opinion on causation was: "It is my opinion that all of the above injuries are causally related to the motor vehicle accident on April 4, 2009 and are not degenerative changes."

D. The Supreme Court Granted Summary Judgment To The Defendants

1. The Supreme Court summarized the plaintiff's medical history and the opinions of the defendants' experts and held that the defendants established their prima facie entitlement to summary judgment.

2. As to the plaintiff's expert, the Supreme Court held that his opinions were insufficient because they failed to address not only the opinions of the defendants' experts with regard to degeneration, but also the inconsistent entries in the plaintiff's own medical records.

6. A Divided First Department Affirms The Grant Of Summary Judgment

a. Presiding Justice Gonzalez, along with Justices Sweeny and Freedman held that the Supreme Court properly granted summary judgment to the defendant.

1. The majority decision found that the defendants met their prima facie burden by presenting evidence of full range of motion and MRI reports from the defendants' experts and the plaintiff's own radiologists who found that there was degeneration in the plaintiff's cervical spine and right shoulder as well a normal MRI of the right knee. Additionally, the majority noted that the plaintiff's treating physician found full range of motion in the plaintiff's right knee as well as identical loss of motion in both the injured and uninjured shoulder.

2. The majority also concluded that the plaintiff failed to raise a triable issue of fact. In addressing the insufficiency of plaintiff's expert's opinion, the majority held:

"Indeed, the surgeon failed to address or contest the detailed findings of preexisting degenerative conditions by defendants' experts, which were acknowledged in the reports of plaintiff's own radiologists. Moreover, the surgeon's failure to address plaintiff's history of arthritis or the earlier, conflicting findings by plaintiff's other physician of normal knee range of motion and the same range of motion in both shoulders, warrants summary judgment dismissing those serious injury claims" (Alvarez v. NYLL Management, 120 A.D.3d 1043 [1st Dept. 2014] [internal citations omitted]).

3. Finally, the majority concluded that plaintiff's 90/180 claim was appropriately dismissed based on the failure to allege an incapacitation for at least 90 days in her bill of particulars.

b. Justices Moskowitz and Kapnick dissented from their colleagues. They agreed that the 90/180 claim should be dismissed. They also agreed that the defendant met its prima facie burden.

1. The dissenting justices concluded, however, that the plaintiff's surgeon's finding of tears during surgery

combined with plaintiff's report that she never sustained prior injuries were sufficient to establish proof of causation.

7. The Case Is Sent To The Court of Appeals

a. Because the Appellate Division dismissed the case with two justices dissenting the plaintiffs were able to seek review from the Court of Appeals as of right (CPLR 5601[a]).

b. Before the Court of Appeals, the plaintiff argued that the defendants did not meet their prima facie entitlement to summary judgment because the medical records they submitted in support of the motion documented restrictions of motion of certain body parts.

c. The plaintiff also argued that proof of causation was "not necessary," but that her expert's one sentence opinion on causation which was based on the plaintiff's statement that she had no prior injuries was sufficient to prove a causal connection between her injuries and the accident. Thus, the plaintiff argued that the existence of range of motion deficits was all that was required to raise an issue of fact.

d. NYSTLA filed an amicus brief as well. Its argument was not premised on the laws of evidence that would apply to every case. Rather, NYSTLA claimed that the majority in Alvarez violated the separation of powers doctrine because Article 51 of the Insurance Law does not specifically require plaintiffs to refute evidence of pre-existing conditions. In essence, NYSTLA attempted to make automobile accident cases a separate species of tort that would allow for speculative expert opinion solely because the Legislature did not specifically state that plaintiffs in automobile accident cases must have expert opinion that is not conclusory and/or speculative.

e. In contrast to NYSTLA, the defendants relied on the rules of evidence. The defendants argued that the opinion of its radiologist, which was consistent with the plaintiff's radiologists' opinion, was sufficient to meet their prima facie burden. Additionally, the defendants noted that the finding of full range of motion at an IME combined with the IME doctor's review of the plaintiff's medical

records also established a prima facie entitlement to summary judgment.

f. Next, the defendants argued that the plaintiff's surgeon's opinion was conclusory and insufficient to raise a triable issue of fact. The defendants also noted that the position of the dissenting justices (i.e. plaintiff telling their doctor that there were no prior injuries is sufficient to establish causation) would do nothing more than lower the bar for summary judgment motions generally. To allow such a low showing to raise an issue of fact would be to do nothing more than allow conclusory testimony to raise an issue of fact.

g. Additionally, the defendants noted that the plaintiff's expert's failure to address why the opinions of the defendants' experts and the evidence of degeneration in the plaintiff's own medical records did not impact his opinion on causation rendered that opinion speculative.

h. The defendants then distinguished the Court of Appeals' decision in Perl v. Meher (18 N.Y.3d 208 [2011]). In Perl, the only evidence of degeneration was contained in the opinion of the defendant's expert radiologist. Thus, the defendants argued, when the plaintiff's experts addressed that opinion a question of fact was raised. In Alvarez, however, there was more evidence of degeneration than the opinion of the defendant's radiologist. Accordingly, the defendants argued that the plaintiff's expert was required to address these additional pieces of evidence.

i. The Court of Appeals affirmed the Appellate Division's majority. The Court held that "[t]he Appellate Division correctly concluded that plaintiff failed to raise a triable issue of fact whether she suffered a serious injury within the meaning of Insurance Law § 5102(d) as a result of the underlying motor vehicle accident" (Alvarez v. NYLL Management, 24 N.Y.3d 1191 [2015]).

8. Lessons Learned From Alvarez

a. The key to success in Alvarez was both distinguishing Perl (and reconciling it's result with the Matott and Pommels reasoning); and avoiding trying to show that one doctor's opinion was "right" and the other was "wrong." Instead, attacking the foundation of the plaintiff's expert's opinion is what carried the day. The plaintiff's doctor simply did not consider, much less address, much

of the evidence in the plaintiff's own treatment records. The surgeon was seemingly unaware of the absence of evidence of acute trauma, as well as the degeneration identified in plaintiff's records. This showed that the opinion lacked "reliability", and was both conclusory (because it had no substantive explanation) and speculative. In order to find that there was an issue of fact a court would have to assume that the plaintiff's expert: (1) was aware of this evidence, and had considered it; (2) that it did not change his opinion; and (3) that the reasons his opinion remained the same was premised on a scientifically acceptable theory.

b. Since Alvarez has been decided by the Appellate Division it has been cited three times by the First Department (see Ocean v. Hossain (2015 N.Y. Slip Op. 02840 [1st Dept. 2015]; Angeles v. Versace Inc., 124 A.D.3d 544 [1st Dept. 2015]; Rivera v. Fernandez & Ulloa Auto Group, 123 A.D.3d 509 [1st Dept. 2014]). In *all* of those cases, the issue of the sufficiency of the plaintiffs' experts' primarily revolved around the plaintiffs' experts' reviews of the plaintiffs' own medical records. Thus, it appears that the Appellate Division is very concerned with the plaintiffs' expert considering and addressing the available medical records.

c. In Rivera, like Alvarez, the 3 justice majority of the Appellate Division held that the plaintiff's expert failed to raise a triable issue of fact and granted summary judgment to the defendants. The majority opinion in Rivera cited to the court's own prior Alvarez decision, which was subseqeuently affirmed by the Court of Appeals. The Rivera plaintiff has taken an appeal to the Court of Appeals as of right. The Court of Appeals will be deciding a second case from the same department of the Appellate Division on the same issue in less than a year.

H. Another issue going to a causation defense in some respects is the "gap in treatment" defense.

1. In Pommels v. Perez (4 N.Y.3d 566) the Court of Appeals judicially blessed the gap in treatment doctrine. "While a cessation of treatment is not dispositive-the law surely does not require a record of needless treatment in order to survive summary judgment-a plaintiff who

terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so" (Pommels, 4 N.Y.3d at 574).

2. The Court of Appeals addressed gap–in-treatment next in Ramkumar v. Grand Style Transportation Enterprises Inc. (22 N.Y.3d 905 [2013]). There, the plaintiff testified "they cut me off like five months." The Court of Appeals concluded that this statement was sufficient to raise a triable issue of fact as to whether there was an acceptable cessation in treatment. The Ramkumar decision tells a cautionary tale for defendants. They cannot leave vague testimony on the issue of gap in treatment floating in a deposition transcript. Once counsel identifies a gap in treatment by reviewing the plaintiff's medical records, it is important to obtain as many details as possible about why the gap exists, and offer this information in the motion --- to force an explanation that is sufficient.

III. Attacking the Plaintiff's Attempts to Raise an Issue of Fact

A. The plaintiffs often raise an issue of fact by producing evidence of range of motion limitations. However, functional range of motion varies from person to person, and the courts have found that large numbers – percentage wise – do not constitute "significant" limitations. Using the plaintiff's daily activities --- is a good argument --- to address whether a limitation is 'significant', to the extent it is causing inability to perform activities.

1. The Appellate Division, Third Department has held that restrictions of 20% or less are insignificant as a matter of law (see Trotter v. Hart, 285 A.D.2d 772 [3rd Dept. 2001]). The Second Department has held that restrictions of 15% are insignificant as a matter of law (see Ibragimov v. Hutchins, 8 A.D.3d 235 [2nd Dept. 2004]; Waldman v. Dong Cook Chang, 175 A.D.2d 202 [2nd Dept. 1991]).

2. Notably, our research has not located any cases suggesting that the Second Department disagrees with the 20% threshold set by the Third Department. In fact, the Second Department has cited to Trotter on several occasions (see McMullin v. Walker, 68 A.D.3d 943 [2nd Dept. 2009]; Stanley v. Rowe, 9 A.D.3d 359 [2nd Dept. 2004]; Mendes v. Codianni, 8 A.D.3d 636 [2nd Dept. 2004]).

3. Going even a step further, there is case law from the First Department that would consider a restriction of 33% to be insignificant. In Sone v. Qamar (68 A.D.3d 566 [1st Dept. 2009]) the court held that a restriction of 20 degrees in the plaintiff's lumbar flexion was insignificant. Notably, the AMA guide (5th edition) placed a "normal" value of range of motion of 60 degrees. Thus, there was a 33% restriction in motion, yet the First Department awarded summary judgment to the defendant.

4. To substantiate the alleged restriction of motion, the plaintiffs must identify the objective testing used to make those findings (see Bacon v. Bostany, 104 A.D.3d 625 [2nd Dept. 2013]).

B. The plaintiff can also attempt to raise an issue of fact on causation. This issue can be the most important in a case. As Perl teaches, even the most troubling of plaintiff's claims can go forward if the plaintiff submits an admissible physician affirmation on the issue of causation. If, however, the plaintiff's expert's affirmation can be disregarded because of a lack of foundation, then the defendant's prima facie showing is effectively unrefuted.

1. A plaintiff's physician's opinion on causation is usually based on the plaintiff having some sort of symptom or injury after an accident. The best way to attack these opinions is not necessarily to impugn their substance, but rather to question their foundations.

2. "As with any other type of evidence, we recognize the danger in allowing unreliable or speculative information (or 'junk science') to go before the jury with the weight of an impressively credentialed expert behind it" (Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 447 [2006]). Thus, the plaintiff's expert's opinions, like all expert opinion, must be based on a factual foundation. Absent a foundation, an expert opinion cannot be considered.

3. A physician relying on an oral history provided solely by the plaintiff cannot render a competent opinion. Edwards v. Devine (111 A.D.3d 1370 [4th Dept. 2013]) is controlling on this issue. The plaintiff's doctor, like many doctors, did not review the plaintiff's pre-accident medical records yet concluded there was a causal relationship between a car accident and the plaintiff's injuries. The court held this opinion was "purely speculative and thus insufficient to raise an issue of fact as to causation because the physician began treating plaintiff after the accident and did not review plaintiff's pre-accident medical records" (Edwards, 111 A.D.3d at 1370, quoting Kwitek v. Seier, 105 A.D.3d 1419, 1420 [4th Dept. 2013]).

   Similarly in Farmer v. Ventkate Inc. (117 A.D.3d 562 [1st Dept. 2014]) the plaintiff's doctor relied solely on the history provided by plaintiff to rebuff the defendant's evidence of a pre-existing condition. The Appellate Division held that this opinion was insufficient to raise an issue of fact.

4. Additionally, the plaintiff's physician must adequately address the defendant's proof of a pre-existing condition. This issue has spawned conflicting case law. On the one hand, there is a body of law that requires a plaintiff's expert to address issues of degeneration when raised by a defendant. For example in Larkin v. Goldstar Limo Corp. (46 A.D.3d 631 [2nd Dept. 2007]) the Appellate Division held that "[t]he failure of the plaintiff's experts to address these findings rendered speculative any

conclusions that they made that the plaintiff's spinal restrictions were causally related to the subject accident." On the other hand, there is a body of case law which indicates that as long as the plaintiff's doctors adequately attributes the injury to another plausible cause such as the accident. For example in Yuen v. Arka Memory Cab Corp. (80 A.D.3d 481, 482 [1st Dept. 2011], quoting Linton v. Nawaz, 62 A.D.3d 434 [1st Dept. 2009], aff'd 14 N.Y.3d 821 [2010]) the court held "[a]lthough plaintiff's expert did not express address Dr. Montalbano's non-conclusory opinion that the injuries were degenerative and/or congenital in origin, by attributing the injuries to a different, yet altogether equally plausible cause, that is, the accident, he rejected the defense expert's opinion and his opinion was entitled to equal weight."

IV. Trial Issues

A. Unlike the posture at the motion stage, it is for the plaintiff to prove that a "serious injury" exists at trial. Like the approach taken during summary judgment, at trial, there should be an attempt to preclude the plaintiff's experts from testifying. The same arguments can and should be made, preferably via motion in limine before the start of trial.

1. An attempt to preclude a witness from testifying must be made prior to the conclusion of the expert's testimony otherwise it is waived. "Defendant failed to preserve for our review his contention in his post-trial motion that Supreme Court erred in allowing plaintiffs to present certain expert testimony based on the lack of proper foundation for that testimony inasmuch as defendants did not object to the admissibility of the testimony of the plaintiffs' experts until after that testimony was completed and the plaintiff had rested." Wall v. Shepard (53 A.D.3d 1050, 1050-1051 [1st Dept. 2008], quoting Koplick v. Lieberman, 270 A.D.2d 460 [2nd Dept. 2000] [internal quotation marks omitted]).

B. Even if the plaintiff's expert is allowed to testify, a challenge can be made at the close of the plaintiff's evidence that the plaintiff did not meet his prima facie burden. If that motion is not made again at the close of the case, however, the complaint can be deemed waived (see Miller v. Miller, 68 N.Y.2d 871 [1986]; Kamara v. City of New York, 299 A.D.2d 316 [2nd Dept. 2002]).

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