NY CLS CPLR R 4515

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Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 45 Evidence (§§ 4501 — 4551)

R 4515. Form of expert opinion

Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.

History

Add, L 1962, ch 308; amd, L 1963, ch 808, § 1, eff Sept 1, 1963.

Annotations

Notes

Advisory Committee Notes:

This rule is new. It is based upon § 9 of the Model Expert Testimony Act and rule 58 of the Uniform Rules. It is designed to provide the trial judge with the discretion necessary to obtain the maximum benefits from the use of witnesses by limiting the abuse of hypothetical questions. It will permit the expert to state what he knows in a natural way; at the same time, it gives the cross-examiner full opportunity to discredit him. The rule is consistent with the major efforts by the medical and legal professions to cooperate in the administration of justice. See Margett, Standards of Practice for Doctors and Lawyers, 29 NYS Bar Bull 187 (1957).

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A. In General

1. Generally

Absent inability or incompetence of jurors, on basis of their day-to-day experience and observation, to comprehend the issues and to evaluate the evidence, the opinions of experts, which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper. Kulak v Nationwide Mut. Ins. Co., 40 N.Y.2d 140, 386 N.Y.S.2d 87, 351 N.E.2d 735, 1976 N.Y. LEXIS 2791 (N.Y. 1976).

In an action for common-law indemnity in which, owing to their failure to respond adequately to interrogatories, plaintiffs were precluded from offering any evidence concerning the injuries and damages sustained by a worker who recovered a default judgment against plaintiffs in a prior action, defendant's motion for summary judgment was properly granted, since determination of the reasonableness of the default judgment required proof in the instant action of the worker's damages; although the presumption of regularity of the default judgment would be sufficient to sustain the judgment against the defaulting plaintiffs, it would not be effective against the present indemnity defendant, who was never "vouched in" to the underlying action, and although CPLR § 4515 permits an expert witness to state an opinion without specifying the data upon which it is based, it does not avoid the necessity for presentation of such data, so that plaintiffs could not present an opinion as to which they were precluded from presenting the factual basis.

Caton v Doug Urban Constr. Co., 65 N.Y.2d 909, 493 N.Y.S.2d 453, 483 N.E.2d 128, 1985 N.Y. LEXIS 15179 (N.Y. 1985).

Expert's opinion may ordinarily be founded on facts deemed proven by judicial notice where opportunity for challenge and cross-examination of expert's opinion testimony is adequately and timely provided; however, trial court should not take judicial notice of necessary facts from hearsay source or from "unidentifiable or nonindisputable" sources outside record, or at time subsequent to close of testimony. At trial for fifth degree sale of controlled substance, court should not have taken judicial notice that drug Darvocet might be composed of controlled substance dextropropoxyphene, in order to provide predicate for People's expert's conclusion that Darvocet sold by defendant was controlled substance, where court relied on unidentified source and Physician's Desk Reference in instructing jury that propoxyphene (which expert testified was ingredient of Darvocet) was same as controlled substance dextropropoxyphene, and equally available inference existed that Darvocet was, in fact, composed of lawful propoxyphene derivative known as levopropoxyphene. People v Jones, 73 N.Y.2d 427, 541 N.Y.S.2d 340, 539 N.E.2d 96, 1989 N.Y. LEXIS 480 (N.Y. 1989).

An expert's opinion not based on facts in the record or personally known to the expert witness proves nothing. Cooke v Bernstein, 45 A.D.2d 497, 359 N.Y.S.2d 793, 1974 N.Y. App. Div. LEXIS 3952 (N.Y. App. Div. 1st Dep't 1974).

City's appraisal of subject property in condemnation procedures was not inadmissible for failure to contain comparable market data upon which its nine percent capitalization rate was based. Rochester v Iman, 51 A.D.2d 651, 378 N.Y.S.2d 203, 1976 N.Y. App. Div. LEXIS 11002 (N.Y. App. Div. 4th Dep't 1976).

In action for personal injuries resulting from traffic accident, trial court properly permitted police officer to testify, without having qualified him as expert, that road was wet and that this contributed to accident, because officer's testimony consisted of observations not requiring any particular expertise. Mead v Reilly, 238 A.D.2d 484, 656 N.Y.S.2d 653, 1997 N.Y. App. Div.

LEXIS 4099 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 930, 664 N.Y.S.2d 263, 686 N.E.2d 1358, 1997 N.Y. LEXIS 3163 (N.Y. 1997).

Defendants were not entitled to contend that testimony of plaintiff's expert was incredible and should have been rejected in its entirety where defendants cross-examined plaintiff's expert only briefly and presented no expert testimony to contradict his testimony or opinion. Kerryville Props. v Buvis, 240 A.D.2d 898, 658 N.Y.S.2d 544, 1997 N.Y. App. Div. LEXIS 6679 (N.Y. App. Div. 3d Dep't 1997).

CLS CPLR § 4515, which permits expert witness to state opinion without first specifying data on which it is based, did not avoid necessity for presentation of such data where expert's affidavit was proffered as sole evidence to obtain summary judgment. Martin v Vill. of Tupper Lake, 282 A.D.2d 975, 723 N.Y.S.2d 715, 2001 N.Y. App. Div. LEXIS 4153 (N.Y. App. Div. 3d Dep't 2001).

Expert is qualified to proffer an opinion if he or she is possessed of the requisite skill, training, education, knowledge, or experience from which it can be assumed that the information imparted or the opinion rendered is reliable; the competence of an expert in a particular subject may derive from long observation and real world experience, and is not dependent upon formal training or attainment of an academic degree in the subject. Miele v Am. Tobacco Co., 2 A.D.3d 799, 770 N.Y.S.2d 386, 2003 N.Y. App. Div. LEXIS 14098 (N.Y. App. Div. 2d Dep't 2003).

2. Procedural matters

Insurer's objection to hypothetical question posed to the first of two expert witnesses in action for failure to settle personal injury claim within policy limits as to the viability of insurer's defense served as a continuing objection and made it unnecessary to challenge other improper evidence of the same sort adduced from that witness and the second expert. Kulak v Nationwide Mut. Ins. Co., 40 N.Y.2d 140, 386 N.Y.S.2d 87, 351 N.E.2d 735, 1976 N.Y. LEXIS 2791 (N.Y. 1976).

In malpractice action against physicians who prescribed medications containing estrogen ("Ortho Novum" and "Estinyl") to treat plaintiff's irregular and heavy menstrual bleeding despite

warnings and contraindications in Physicians' Desk Reference (PDR), PDR was inadmissible hearsay and could not, by itself, establish applicable standard of care, because information contained in PDR can only be analyzed in context of patient's medical condition and expert testimony is necessary to interpret whether particular drug presented unacceptable risk; moreover, admission of PDR alone in place of expert testimony would result in standard of care established by drug manufacturers instead of medical professionals. Learned intermediary doctrine does not create new hearsay exception for use of Physicians' Desk Reference to establish standard of care in medical malpractice actions. Spensieri v Lasky, 94 N.Y.2d 231, 701 N.Y.S.2d 689, 723 N.E.2d 544, 1999 N.Y. LEXIS 3747 (N.Y. 1999).

Practice of impeaching expert by cross-examining him with regard to passages from treatise or book of recognized authority which is at variance or in conflict with opinion expressed by witness is not limited to those cases in which expert admits that he has read book or article concerning which he is being questioned, however, in order to lay proper foundation for use of such material on cross-examination, witness must concede its authoritativeness. Mark v Colgate University, 53 A.D.2d 884, 385 N.Y.S.2d 621, 1976 N.Y. App. Div. LEXIS 13720 (N.Y. App. Div. 2d Dep't 1976).

While testimony concerning expert's factual observations is admissible, expert opinion as to whether or not fire was incendiary invades jury's exclusive province of determining ultimate fact issue in case; accordingly, where defendant was being tried for arson in third degree, trial court clearly erred in allowing expert witness to testify that fire was incendiary in his opinion, and in failing to correct this error upon People's application; error was exacerbated by court's refusal to give expert witness charge since such charge is necessary to apprise jury of its broad discretion to accept or reject any or all of expert testimony. People v Abreu, 114 A.D.2d 853, 494 N.Y.S.2d 762, 1985 N.Y. App. Div. LEXIS 53865 (N.Y. App. Div. 2d Dep't 1985).

On plaintiff's motion for summary judgment, defendant could not avoid effect of unfavorable opinion testimony in deposition of one of its employees based on theory that employee did not qualify as expert and that all objections to questions at deposition had been reserved for trial,

since defendant could have demonstrated employee's supposed incompetence by either cross-examining him during deposition itself or by submitting evidence of such incompetence in its papers opposing summary judgment. Supreme Court properly denied defendant's motion to exclude deposition of one of its employees on ground that employee had rendered opinion evidence but had not been paid expert's fee; although witnesses may refuse to give expert testimony unless compensated, there is no evidentiary objection based on non-payment of such fees. Heffernan v Norstar Bank of Upstate New York, 125 A.D.2d 887, 510 N.Y.S.2d 248, 1986 N.Y. App. Div. LEXIS 63076 (N.Y. App. Div. 3d Dep't 1986).

Plaintiff's medical expert who testified in her behalf at personal injury trial was properly prohibited from testifying with respect to written report prepared by second physician where second physician did not testify at trial. Defendant's medical expert was properly permitted to testify at personal injury trial with respect to oral findings of radiologist who conducted CAT scans of claimant, even though radiologist did not testify, where expert read CAT scans and was able to independently arrive at opinion. Flamio v State, 132 A.D.2d 594, 517 N.Y.S.2d 756, 1987 N.Y. App. Div. LEXIS 49134 (N.Y. App. Div. 2d Dep't 1987).

In action for negligence in failing to provide ladder or other safety device to injured worker, third party defendant's expert was properly precluded from testifying as to custom and practice in industry where third party defendant failed to provide parties with CLS CPLR § 3101 notice. Guiga v JLS Constr. Co., 255 A.D.2d 244, 685 N.Y.S.2d 1, 1998 N.Y. App. Div. LEXIS 12715 (N.Y. App. Div. 1st Dep't 1998).

Order granting a mother's motion to strike the trial testimony of a doctor's medical expert in a medical malpractice action, to set aside the verdict, and for a new trial was error because, contrary to the mother's contention, N.Y. C.P.L.R. 4515 did not require an expert to make available for inspection all of the data he or she used to formulate an opinion; the expert witness testified that his secretary prepared the file for him to bring to court from Massachusetts and that she had inadvertently failed to include certain documents. There was no indication in the record that the expert consulted those documents either in preparation for trial or to refresh his

recollection prior to testifying. Cromp v Ahluwalia, 43 A.D.3d 1389, 842 N.Y.S.2d 842, 2007 N.Y. App. Div. LEXIS 10168 (N.Y. App. Div. 4th Dep't 2007), app. denied, 9 N.Y.3d 818, 852 N.Y.S.2d 14, 881 N.E.2d 1201, 2008 N.Y. LEXIS 95 (N.Y. 2008).

While expert may be compelled to testify to “facts” within his knowledge, he may not be compelled to give his “opinion” against his will. Hessek v Roman Catholic Church of Our Lady of Lourdes, 80 Misc. 2d 410, 363 N.Y.S.2d 297, 1975 N.Y. Misc. LEXIS 2189 (N.Y. Civ. Ct. 1975).

CLS CPLR § 4515, allowing expert witness to state opinion and reasons without first specifying data upon which it is based, does not apply to physician’s affidavit of merit accompanying late claim motion in medical malpractice action against state, since reason why § 4515 does not require exposition of expert’s analysis is because underpinnings of expert’s opinion are subject to revelation and scrutiny on cross-examination, and no such opportunity for cross-examination is present on late claim motion. Favicchio v State, 144 Misc. 2d 212, 543 N.Y.S.2d 871, 1989 N.Y. Misc. LEXIS 445 (N.Y. Ct. Cl. 1989).

Plaintiffs submitted new expert disclosure pursuant to N.Y. C.P.L.R. 3101(d)(1)(i) and moved for leave to amend the complaint to add two causes of action based on an alleged violation of the Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA), 42 U.S.C.S. § 1395dd, but failed to submit an affidavit of merit or other evidentiary proof supporting the amendment; but, the trial court properly denied plaintiffs’ motion inasmuch as it was made on the eve of trial and plaintiffs failed to show extraordinary circumstances to justify amendment. However, there was no private right of action against individual physicians under the EMTALA. Lidge v Niagara Falls Mem'l Med. Ctr., 17 A.D.3d 1033, 794 N.Y.S.2d 190, 2005 N.Y. App. Div. LEXIS 4512 (N.Y. App. Div. 4th Dep't 2005).

B. Experts

i. Experts In Non-Medical Fields

3. Generally

Opinion testimony of plaintiff's expert witness was properly admitted where assumptions on which hypothetical question was based were fairly inferable from plaintiff's testimony and defendant's records. Livreri v Berliner, 123 A.D.2d 670, 507 N.Y.S.2d 41, 1986 N.Y. App. Div. LEXIS 60821 (N.Y. App. Div. 2d Dep't 1986).

In personal injury action, although precise basis for Supreme Court's ruling precluding defendant's expert from testifying was not in record before Appellate Division, ruling was proper where defendant failed to show that its failure to comply with CLS CPLR § 3101(d)(1) was unintentional or based on good cause, and defendant's notice of expert witness did not contain expert's qualifications, facts on which expert relied, or grounds for expert's conclusions. Douglass v St. Joseph's Hosp., 246 A.D.2d 695, 667 N.Y.S.2d 477, 1998 N.Y. App. Div. LEXIS 94 (N.Y. App. Div. 3d Dep't 1998).

City school district was not negligent in its supervision of child or in failing to stop her from playing on certain pieces of playground equipment while wearing adult's bicycling glove; no expert testimony was needed to prove degree or kind of supervision required. Eldridge v Long Beach City Sch. Dist., 255 A.D.2d 548, 680 N.Y.S.2d 657, 1998 N.Y. App. Div. LEXIS 12861 (N.Y. App. Div. 2d Dep't 1998).

In his direct testimony, expert need not specify data upon which his opinions are based or give reasons therefor. Richard M. Buck Constr. Corp. v 200 Genesee Street Corp., 109 A.D.2d 1056, 487 N.Y.S.2d 198, 1985 N.Y. App. Div. LEXIS 47531 (N.Y. App. Div. 4th Dep't 1985).

Plaintiffs were not entitled to vacatur of their default in opposing summary judgment motion where affirmation of their expert, which was sole competent evidence submitted in support of vacatur, did not prove meritorious cause of action. Gomez v Lotero, 273 A.D.2d 198, 709 N.Y.S.2d 441, 2000 N.Y. App. Div. LEXIS 6235 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff was not entitled to vacatur of jury's apportionment of 75 percent of fault to him and 25 percent to defendant where record, and especially testimony of defendant's expert, showed that

there was more than sufficient evidence that plaintiff was primarily responsible for accident, and jury verdict for defendant may not be set aside unless it plainly appears that evidence so preponderates in favor of plaintiff that verdict for defendant could not have been reached on any fair interpretation of evidence. Myers v S. Schaffer Grocery Corp., 281 A.D.2d 156, 721 N.Y.S.2d 347, 2001 N.Y. App. Div. LEXIS 1908 (N.Y. App. Div. 1st Dep't 2001).

4. Accountants

State's rejection of contractor's bid for renovation and expansion of state university surgery center was not arbitrary where contractor failed to comply with requirement that it show sufficient working capital for project; contractor's late submission of accountant's letter stating in conclusory fashion that contractor had sufficient working capital was insufficient to correct deficiencies in its bid. B. Milligan Contr. v State, 251 A.D.2d 1084, 674 N.Y.S.2d 204, 1998 N.Y. App. Div. LEXIS 7209 (N.Y. App. Div. 4th Dep't 1998).

5. Arborists; tree experts

County was entitled to summary judgment dismissing action for damage to plaintiff's car, incurred when allegedly decaying tree fell on it, where there was no competent evidence that county had constructive notice of defective condition of tree, even though (1) affidavit of plaintiff's arboriculture expert stated that, based on his examination of photos and videotape of fallen tree, it exhibited signs of decay that should have been evident before accident, and (2) affidavit of person who had lived in area for over 40 years stated that tree had been leaning for several years and that leaning got progressively worse. Quog v Town of Brookhaven, 286 A.D.2d 678, 730 N.Y.S.2d 145, 2001 N.Y. App. Div. LEXIS 8434 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 610, 740 N.Y.S.2d 694, 767 N.E.2d 151, 2002 N.Y. LEXIS 167 (N.Y. 2002).

6. Asset evaluation experts, generally

There was no basis for rejecting conclusions of divorced wife's appraiser as to value of marital property, or for requiring additional testimony, where (1) it ill-behooved husband to complain that appraiser's conclusions were based on incomplete factual information, because those deficiencies were direct result of husband's refusal to furnish such information or to provide access to premises for inspection, (2) "last minute" upward adjustment in appraiser's valuation, occasioned by his finally being made aware of true number of sites at mobile home park, also was product of husband's failure to cooperate, and (3) sales on which appraiser's conclusions were based were comparable in that, insofar as properties differed from those at issue, differences were noted and appropriate adjustments made. Gadomski v Gadomski, 245 A.D.2d 579, 664 N.Y.S.2d 886, 1997 N.Y. App. Div. LEXIS 12607 (N.Y. App. Div. 3d Dep't 1997), overruled in part, Redder v Redder, 17 A.D.3d 10, 792 N.Y.S.2d 201, 2005 N.Y. App. Div. LEXIS 2423 (N.Y. App. Div. 3d Dep't 2005).

Wife in divorce action was entitled to distributive award of $151,000, representing 50 percent of present value of husband's law license, where she supported him during law school and furthered his career, and she presented expert testimony that present value of license was $302,000, calculated by subtracting present value of average college graduate's lifetime income from present value of husband's lifetime projected earnings. Seeman v Seeman, 251 A.D.2d 487, 674 N.Y.S.2d 423, 1998 N.Y. App. Div. LEXIS 6858 (N.Y. App. Div. 2d Dep't 1998).

For purposes of equitable distribution, there was no increase in value of divorced husband's $^1/_3$ interest in corporation between date of his inheritance of that interest from his father and date of commencement of divorce action, even though gross value of corporate assets increased, where (1) husband used income generated from his shares to facilitate corporate buy-back of his siblings' stock, incurring corporate debt, (2) no marital assets were used in those purchases, (3) there was evidence that increase in gross value of corporate assets was offset by buy-back debt, and (4) court's finding of no increase in value of husband's interest was within framework of evidence, given differing valuations by husband's and wife's appraisers. Van Dyke v Van

Dyke, 273 A.D.2d 589, 709 N.Y.S.2d 672, 2000 N.Y. App. Div. LEXIS 6696 (N.Y. App. Div. 3d Dep't 2000).

In divorce action, award of $12,695 in marital property to wife was properly based on (1) wife's own expert's testimony that husband's enhanced earning capacity as result of his medical training during marriage was $557,042, (2) finding that about 22 percent of that sum ($126,950) was marital property in view of medical training that husband received before, during, and after marriage, and (3) finding that 10 percent of that marital asset should go to wife in view of short duration of parties' sporadic cohabitation and lack of support provided by wife during marriage. Kumar v Dudani, 281 A.D.2d 178, 721 N.Y.S.2d 629, 2001 N.Y. App. Div. LEXIS 2251 (N.Y. App. Div. 1st Dep't), app. denied, 97 N.Y.2d 603, 735 N.Y.S.2d 492, 760 N.E.2d 1288, 2001 N.Y. LEXIS 3372 (N.Y. 2001).

Divorce action would be remitted for hearing to determine wife's equitable share of husband's business where wife was unable to submit evidence of value of that business because (1) retained expert could not testify due to conflict of interest, (2) conduct of trial during tax season prevented retention of another financial expert on short notice, and (3) wife's request for adjournment was improvidently denied. Sutka v Sutka, 281 A.D.2d 470, 722 N.Y.S.2d 52, 2001 N.Y. App. Div. LEXIS 5558 (N.Y. App. Div. 2d Dep't 2001).

Divorce judgment would be modified as to equitable distribution of husband's disability pension where report of wife's own appraiser revealed that only part, rather than all, of that pension was considered deferred compensation, and thus only that part was subject to equitable distribution. Beshara v Beshara, 281 A.D.2d 577, 722 N.Y.S.2d 573, 2001 N.Y. App. Div. LEXIS 3094 (N.Y. App. Div. 2d Dep't 2001).

In valuing husband's interest in law partnership for purposes of equitable distribution in divorce action, court properly adopted valuation made by wife's expert, rather than that made by husband's expert, where (1) husband's expert conceded that his methodology, which used withdrawal analysis and death analysis, had never been accepted by any court, that he had never used that method before, that death benefit was not available to husband on demand, that

withdrawal benefit was artificially low, that death benefit value was more accurate than withdrawal value, and that “excess earnings” approach was more common method of valuing practice, and (2) wife’s expert, using excess earnings method, relied on his previous experience in valuing interests of partners in other large New York City law firms, ascertained compensation level of senior associates in such firms engaged in same area of practice as that of husband, and adjusted their compensation upward to reflect higher hourly billing rate attributable to him. Husband’s interest in his law partnership’s unfunded, nonqualified retirement plan was not too speculative to be valued as marital asset for purposes of equitable distribution in divorce action where (1) partnership historically had been profitable enough to make payments called for by plan to retired partners, (2) there was no indication that husband, who was 50 years old and had more than 10 years as partner in firm, would not continue as partner until retirement, and (3) wife’s expert valued husband’s interest in plan at $412,700, $460,400, or $479,400, depending on whether husband retired at age 50, 56, or 62. There was no merit in husband’s claim that court violated “double counting” rules by failing to consider his maintenance and child support obligations when awarding 50 percent of his law practice appreciation and future unfunded retirement benefits to wife where (1) court properly accepted excess earnings method, used by wife’s expert, for valuation of law practice, (2) wife’s expert first subtracted $538,000 from husband’s earnings stream, (3) that adjustment, representing reasonable compensation for senior associate possessing husband’s skills, was excluded from calculation of value of appreciation of husband’s law practice during marriage and was not used as part of formula to evaluate his law license, and (4) because $538,000 was not capitalized, converted, and distributed as marital asset, it remained available for maintenance payments without impacting rules against double counting. Douglas v Douglas, 281 A.D.2d 709, 722 N.Y.S.2d 87, 2001 N.Y. App. Div. LEXIS 2317 (N.Y. App. Div. 3d Dep't 2001).

In veterinary malpractice action for over-anesthetizing and improperly monitoring race horse during arthroscopic surgery for removal of bone chip from fetlock, with result that horse died of cardiac and respiratory arrest in recovery stall, evidence supported jury’s finding that horse’s fair market value was $100,000, despite opinion of defendants’ expert that value was $20,000,

where (1) plaintiff owner testified that horse showed tremendous amount of talent, had "fantastic" disposition with ability to learn quickly, and had made significant racing accomplishments in relatively short period with minimal training, (2) licensed horse trainer familiar with horse was ready and willing to buy him for $75,000 in 1993, which offer remained viable even after trainer learned about bone chip, and (3) licensed thoroughbred trainer and horse breeder, who was very familiar with horse and experienced in buying, selling, and evaluating horses, described horse as "very nice," "very well balanced," "very fast and sound," and healthy, and opined that horse was worth $125,000 in 1993. Kenny v Lesser, 281 A.D.2d 853, 722 N.Y.S.2d 302, 2001 N.Y. App. Div. LEXIS 3003 (N.Y. App. Div. 3d Dep't 2001).

In proceeding for equitable distribution of parties' marital property, there was no merit in divorced husband's claim that court erred in awarding maintenance to wife because that award derived from same income stream used to value husband's professional engineering license where (1) expert valued husband's earning capacity without his license, determined his anticipated earnings with license until retirement, and then arrived at present value of his enhanced earnings, (2) court could award maintenance based on income stream represented by husband's earning capacity without license, because that income was not capitalized, converted into marital property, and distributed, (3) to extent that only portion of license was subject to equitable distribution because husband had completed 2 years of his education before marriage, income stream attributable to undistributed portion of license was available for purposes of maintenance, and (4) husband's base income (that is, income that he would have been expected to earn without his license), when combined with undistributed portion of his license, was amply sufficient to support court's award of maintenance. Erickson v Erickson, 281 A.D.2d 862, 723 N.Y.S.2d 521, 2001 N.Y. App. Div. LEXIS 3231 (N.Y. App. Div. 3d Dep't 2001).

In divorce action, testimony of wife's expert was admissible regarding value of husband's dental practice and dental license and enhancement of parties' earning capacities attributable to graduate degrees earned during marriage. Hartnett v Hartnett, 281 A.D.2d 900, 722 N.Y.S.2d 199, 2001 N.Y. App. Div. LEXIS 2674 (N.Y. App. Div. 4th Dep't 2001).

When a physician being sued for malpractice opined that a patient's arthritic condition was due to recurrent traumatic knee injuries, similar to famous athletes the physician named, who the physician had not treated, rather than his own malpractice, this opinion testimony was inadmissible hearsay because it was not based on (1) the physician's personal knowledge of the facts on which it rested, (2) facts and material in evidence, (3) out-of-court material from a witness subject to full cross-examination, or (4) out-of-court material accepted in the profession as a basis for an opinion accompanied by evidence of its reliability, so its admission required a new trial. Casiero v Stamer, 308 A.D.2d 499, 764 N.Y.S.2d 470, 2003 N.Y. App. Div. LEXIS 9644 (N.Y. App. Div. 2d Dep't 2003).

7. —Economists

Expert testimony by an economist on the effect of projection of past wage increments on lost future earnings was admissible in a personal injury action where the offer of proof was specific, based upon past union contracts and statistics of wages of labor and construction industries similar to plaintiff's which provided a solid and logical foundation for the evidence to be introduced, surrounded by safeguards to avoid undue speculation. Dennis v Dachs, 85 A.D.2d 223, 448 N.Y.S.2d 1, 1982 N.Y. App. Div. LEXIS 14968 (N.Y. App. Div. 1st Dep't 1982).

In action for breach of contract and unjust enrichment or quantum meruit in connection with plaintiff's provision of services to defendant under alleged oral contract, court did not unduly restrict defendant's examination of his expert witness by precluding witness from characterizing plaintiff's over-all job and testifying as to value of plaintiff's services, in rebuttal to testimony of plaintiff's expert, since (1) defense expert's personal knowledge was so limited temporally that any opinion formulated on his observations would be too speculative to be admissible, where his personal knowledge was based on his observation of plaintiff's activities made during 15 to 20 visits to job site during early months of 18-month project, and (2) defendant elected not to examine his expert by hypothetical questions. Super v Abdelazim, 139 A.D.2d 863, 527 N.Y.S.2d 591, 1988 N.Y. App. Div. LEXIS 4563 (N.Y. App. Div. 3d Dep't 1988).

Defendant was entitled to summary judgment dismissing medical malpractice action for "wrongful birth" of child born blind where (1) mother's only legally cognizable injury was increased financial obligation arising from extraordinary medical treatment rendered child during her minority, (2) sole evidence of child's needs was mother's testimony that child attended school with special education program, received speech therapy and mobility training, needed assistance in daily activities, and had baby-sitter after school paid for by mother, (3) there was no proof of financial obligations incurred, such as doctor bills or invoices for special equipment, (4) baby-sitter cost was not necessarily connected to child's blindness, because mother had hired baby-sitter for her other children when they were same age, and (5) testimony of expert economist did not fill in foundational gaps in medical proof, and his testimony as to costs of raising blind child was properly stricken as deficient and speculative. Needs of blind child are not obvious, and that subject should not go to jury without expert testimony. DePeigne v Medical Ctr., 251 A.D.2d 47, 674 N.Y.S.2d 14, 1998 N.Y. App. Div. LEXIS 6413 (N.Y. App. Div. 1st Dep't 1998).

In action for obstetrical malpractice on behalf of premature child whose cerebral palsy and spastic diplegia left him unable to walk and almost totally dependent on others for his personal needs, jury's award of $2 million for impairment of earning capacity was properly set aside where plaintiff's response to defendants' demand for expert witness information was inadequate in that it failed to set forth in reasonable detail facts and opinions on which economist was expected to testify. Karney by Karney v Arnot-Ogden Mem'l Hosp., 251 A.D.2d 780, 674 N.Y.S.2d 449, 1998 N.Y. App. Div. LEXIS 6740 (N.Y. App. Div. 3d Dep't), amended, 688 N.Y.S.2d 923, 1998 N.Y. App. Div. LEXIS 9351 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 92 N.Y.2d 942, 681 N.Y.S.2d 470, 704 N.E.2d 223, 1998 N.Y. LEXIS 3719 (N.Y. 1998).

In medical malpractice action, hospital was not entitled to have verdict for plaintiffs set aside on ground of excessive damages, even though total award of $9,437,482 included $3,000,000 for impaired earning capacity, where academic success of infant plaintiff's father and older brother, and importance of education in his family, made it highly likely that, but for his injuries, he would

have obtained at least college degree and received commensurate financial benefits, and hospital failed to rebut testimony of plaintiffs' economist. Altman v Alpha Obstetrics & Gynecology, P.C., 255 A.D.2d 276, 679 N.Y.S.2d 642, 1998 N.Y. App. Div. LEXIS 11582 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 801, 687 N.Y.S.2d 625, 710 N.E.2d 272, 1999 N.Y. LEXIS 80 (N.Y. 1999).

Defendant's claim that jury's award for past medical expenses incurred by plaintiff's wife was duplicative of its award for plaintiff's past loss of earnings was not preserved for appellate review where defendant did not object to charge on lost wages or to verdict sheet that listed as separate damage items plaintiff's lost wages and his wife's medical expenses; in any event, record did not support defendant's claim that plaintiff's economist included value of health insurance in calculation of lost fringe benefits. Myers v S. Schaffer Grocery Corp., 281 A.D.2d 156, 721 N.Y.S.2d 347, 2001 N.Y. App. Div. LEXIS 1908 (N.Y. App. Div. 1st Dep't 2001).

One defendant's motion to preclude testimony of certain expert witnesses was properly denied where there was no evidence of intentional or willful failure to disclose that testimony, which offered no surprises, and there was no prejudice to defendants. Judgment for plaintiff would be modified by vacating award of damages for future medical expenses, and new trial on sole issue of such damages would be granted unless plaintiff stipulated to reduce verdict for future medical expenses to $1,733,439, where expert economist testified that cost of plaintiff's future medical care was $1,733,439, and record did not support award of any greater amount. Hersh v Przydatek, 286 A.D.2d 984, 730 N.Y.S.2d 916, 2001 N.Y. App. Div. LEXIS 8893 (N.Y. App. Div. 4th Dep't 2001).

8. Attorneys

In action against insurer for failure to settle negligence action within limits of automobile liability policy, expert opinions of independent attorneys as to the possibility, in general, of adequate representation of an insured by the attorney selected by the insurer if that attorney is not informed of the limits of liability of the pertinent insurance policy involves matter as to which the

daily experience of jurors provides no basis for a determination, and such opinion testimony is admissible. Opinion testimony of two independent attorneys in suit against insurer for failure to settle within policy limits as to the viability of three defenses interposed by the insurer and likelihood of a plaintiff's verdict in excess of the limit of liability under policy involved in the case, by presuming to apply general experience to the particulars of the individual case, trespassed on the jury's domain and prejudice to the insurer was in direct proportion to the degree of qualification of the attorney expert. It was error, over objection, to permit attorneys called as expert witnesses to express their opinions as to the significance to be attached to testimony of deputy sheriff with respect to his observations of driver of automobile in which plaintiff was a passenger and as to whether $7,500 represented a realistic evaluation of the plaintiff's claim for settlement purposes. Kulak v Nationwide Mut. Ins. Co., 40 N.Y.2d 140, 386 N.Y.S.2d 87, 351 N.E.2d 735, 1976 N.Y. LEXIS 2791 (N.Y. 1976).

In legal malpractice action, it is for trial court to state standard of reasonable professional care, and it is for jury to decide whether there was deviation from such standard; thus, court properly permitted plaintiff's expert to state his opinion that defendant's conduct fell below ordinary and reasonable skill and knowledge commonly possessed by member of legal profession, while disallowing same expert to testify what that standard consisted of. Entelisano Agency, Inc. v Felt, 135 A.D.2d 1096, 523 N.Y.S.2d 314, 1987 N.Y. App. Div. LEXIS 52951 (N.Y. App. Div. 4th Dep't 1987), app. denied, 71 N.Y.2d 804, 528 N.Y.S.2d 829, 524 N.E.2d 149, 1988 N.Y. LEXIS 583 (N.Y. 1988), cert. denied, 489 U.S. 1070, 109 S. Ct. 1351, 103 L. Ed. 2d 819, 1989 U.S. LEXIS 1328 (U.S. 1989).

Defendants were entitled to summary judgment dismissing action for accounting malpractice where (1) they submitted expert's detailed affidavit, which dealt fully with plaintiff's claims and averred that defendants' actions were consistent with accepted accounting practice, and (2) conclusory affidavits of administrator of plaintiff estate and estate's attorney, both made without personal knowledge of relevant facts, were insufficient to show that defendants deviated from

accepted accounting practice. Estate of Burke v Peter J. Repetti & Co., 255 A.D.2d 483, 680 N.Y.S.2d 645, 1998 N.Y. App. Div. LEXIS 12636 (N.Y. App. Div. 2d Dep't 1998).

Defendants were not entitled to vacatur of default judgment in action for breach of contract, even if their attorney were responsible for some delay, where (1) they persistently ignored plaintiff's discovery demands, willfully defied court orders, repeatedly failed to appear in court, and took no action to ascertain status of their case, and (2) their conclusory allegation that they had no contractual relationship with plaintiff was insufficient to prove meritorious defense. MRI Enters., Inc. v Amanat, 263 A.D.2d 530, 693 N.Y.S.2d 211, 1999 N.Y. App. Div. LEXIS 8378 (N.Y. App. Div. 2d Dep't 1999), app. dismissed, 94 N.Y.2d 876, 705 N.Y.S.2d 7, 726 N.E.2d 484, 2000 N.Y. LEXIS 61 (N.Y. 2000).

Attorney engaged in professional misconduct in violation of CLS Code of Prof Respons DR 1-102(a)(5) and CLS Code of Prof Respons DR 2-106(A) where she charged client $22,400 for her pre-discharge work on divorce that raised no compelling legal issues, couple's marriage lasted less than 3 years and produced no children, there were thus no custody, visitation, or child support issues, neither spouse claimed spousal maintenance, wife had no meritorious claim to husband's clearly separate assets, there was virtually no marital property to be distributed, and experts testified that action was "fairly simple" and that fee was clearly excessive. In re Keiser, 263 A.D.2d 609, 694 N.Y.S.2d 189, 1999 N.Y. App. Div. LEXIS 7718 (N.Y. App. Div. 3d Dep't 1999).

In legal malpractice action, lack of expert evidence that defendants failed to use requisite care, skill, and diligence commonly possessed by members of legal profession did not preclude summary judgment for plaintiffs where defendants' failure to timely interpose answer, resulting in default judgment and ultimate settlement of underlying action, was prima facie evidence of legal malpractice, and ordinary experience of fact finder provided sufficient basis for judging adequacy of defendants' professional service. Shapiro v Butler, 273 A.D.2d 657, 709 N.Y.S.2d 687, 2000 N.Y. App. Div. LEXIS 7231 (N.Y. App. Div. 3d Dep't 2000).

Court properly construed partnership agreement in light of federal tax laws and properly received expert testimony thereon where agreement was plainly drafted with eye to tax consequences. Harber Phila. Ctr. City Office v Tokai Bank, 281 A.D.2d 179, 721 N.Y.S.2d 519, 2001 N.Y. App. Div. LEXIS 2199 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 713, 729 N.Y.S.2d 440, 754 N.E.2d 200, 2001 N.Y. LEXIS 1376 (N.Y. 2001).

9. Automobile accident experts, generally

In personal injury action arising from traffic accident, defendants' expert witness was improperly permitted to testify that defendant driver did not violate any statute or regulation in backing up tractor-trailer, because application and interpretation of Vehicle and Traffic Law are for court to decide. LaPenta v Loca-Bik Ltee Transp., 238 A.D.2d 913, 661 N.Y.S.2d 132, 1997 N.Y. App. Div. LEXIS 4714 (N.Y. App. Div. 4th Dep't 1997).

In personal injury action, expert testimony as to significance of force of impact between 2 vehicles involved in subject accident was not necessary where matter was within ordinary knowledge and experience of jury. Murphy v Crecco, 255 A.D.2d 300, 679 N.Y.S.2d 418, 1998 N.Y. App. Div. LEXIS 11564 (N.Y. App. Div. 2d Dep't 1998).

Town was entitled to dismissal of motorist's action based on allegedly negligent design, construction, and maintenance of road, even though motorist's consultant averred that "[t]he roadway is...sloped at an excessive rate," "[t]he pavement is in very poor condition," and "[t]he road is only 16 feet wide," where consultant was not licensed professional engineer, and his affidavit did not provide any specific facts or observations supporting those conclusions and did not reference industry standards or practices that, if implemented, would have remedied claimed defects. Mosher v Town of Oppenheim, 263 A.D.2d 605, 692 N.Y.S.2d 784, 1999 N.Y. App. Div. LEXIS 7703 (N.Y. App. Div. 3d Dep't 1999).

Defendants were not entitled to summary judgment dismissing motor vehicle negligence action where parties' submissions, including photographs of vehicles involved in accident and affidavits of experts regarding points of impact and trajectories of vehicles, raised triable issues of fact as

to how accident occurred and fault of parties. Gaynor v Deskey Assocs., 273 A.D.2d 41, 708 N.Y.S.2d 872, 2000 N.Y. App. Div. LEXIS 6380 (N.Y. App. Div. 1st Dep't 2000).

Defendants, whose disabled bus was stationary in right lane of highway when it was rear-ended by plaintiff's vehicle, were entitled to summary judgment dismissing action for personal injuries where (1) such rear-end collision created presumption that accident was due to plaintiff's fault, (2) plaintiff's claim that his view was blocked by vehicle in front of him and that collision occurred when front vehicle suddenly changed lanes did not show that defendants were negligent, and (3) plaintiff's claim that defendants were negligent in failing to pull bus onto shoulder, allegedly in violation of CLS Veh & Tr § 1201(a), was based on expert's opinion that there was ample coasting distance in which to remove bus onto shoulder, and that opinion was pure speculation in absence of first-hand evidence of speed of bus when it became disabled. Russo v Sabella Bus Co., 275 A.D.2d 660, 713 N.Y.S.2d 315, 2000 N.Y. App. Div. LEXIS 9934 (N.Y. App. Div. 1st Dep't 2000).

In personal injury action arising from motor vehicle collision involving defendant city transit authority's bus, report of authority's superintendent was inadmissible where it was based on standards higher than those imposed by common law. Karoon v N.Y. City Transit Auth., 286 A.D.2d 648, 730 N.Y.S.2d 331, 2001 N.Y. App. Div. LEXIS 8836 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff injured in chain-reaction, 4-vehicle accident was entitled to have expert testify concerning deployment of air bag as proving impact speed of plaintiff's vehicle where (1) plaintiff's expert disclosure was sufficient under CLS CPLR § 3101(d)(1)(i), (2) there was no demonstrable prejudice or surprise to defendant, and (3) any deficiency in disclosure or potential prejudice was obviated when defendant received full disclosure of proposed expert testimony one week before retrial, which had been ordered on unrelated ground. Castellani v Bagdasarian, 286 A.D.2d 870, 730 N.Y.S.2d 891, 2001 N.Y. App. Div. LEXIS 8890 (N.Y. App. Div. 4th Dep't 2001).

In products liability action, expert who had never taken courses in mechanical engineering was nevertheless qualified to testify that negligent design of 3-wheeled recreational vehicle rendered

it unstable and difficult to steer, given his knowledge of mathematics and physical engineering principles, his teaching and practical engineering background, peer review of his presented papers, small opportunity for potential rate of error, availability of mathematic and engineering principles to test his theory, and testimony that his theory was grounded on long-standing uncontradicted mathematic and engineering principles. Wahl v American Honda Motor Co., 181 Misc. 2d 396, 693 N.Y.S.2d 875, 1999 N.Y. Misc. LEXIS 317 (N.Y. Sup. Ct. 1999).

In personal injury action arising from motor vehicle accident, witness who qualified as expert in biomechanical and biomedical engineering was permitted to render opinion as to general formula of forces on objects based on facts in evidence, but was precluded from rendering opinion based on his report and testimony at “Frye” hearing, as source of data and methodology employed by him in reaching his conclusion was not generally accepted in relevant scientific or technical community, and he lacked training and experience to testify that plaintiff did not sustain “serious injuries” as result of accident. Clemente v Blumenberg, 183 Misc. 2d 923, 705 N.Y.S.2d 792, 1999 N.Y. Misc. LEXIS 645 (N.Y. Sup. Ct. 1999).

10. —Accident reconstruction experts

Plaintiff’s accident reconstruction expert properly utilized photograph of single skid mark taken by State Trooper shortly after accident which is subject of suit, and direct, positive identification of skid mark was not necessary as circumstances indicated reasonable degree of relevance and because picture itself was received into evidence without objection, and circumstances surrounding its taking provided sufficient foundation for future testimony relative to skid mark. Soulier v Hughes, 119 A.D.2d 951, 501 N.Y.S.2d 480, 1986 N.Y. App. Div. LEXIS 55881 (N.Y. App. Div. 3d Dep't 1986).

Court properly precluded plaintiff’s counsel from questioning his expert with regard to certain skid marks located at scene of accident where expert was not qualified to testify on accident reconstruction and there was no proof that skid marks were made by any vehicle involved in

collision. Coffey v Callichio, 136 A.D.2d 673, 523 N.Y.S.2d 1011, 1988 N.Y. App. Div. LEXIS 649 (N.Y. App. Div. 2d Dep't 1988).

Court properly granted partial summary judgment dismissing complaint against driver and owner of truck that collided with plaintiffs' car, which was struck from rear by another vehicle and forced into oncoming traffic lane occupied by truck while plaintiff's car was stopped in preparation for turning left behind 2 other vehicles that had just completed their left turns, where truck driver testified that he was traveling at less than 50 miles per hour when he first saw plaintiffs' car and that he already had his foot on brake "an instant" later when he first saw impact that forced plaintiffs' car into his lane, one traffic reconstructionist concluded that truck driver was traveling between 49 and 54 miles per hour before applying his brakes and 38 to 41 miles per hour at time of collision with plaintiffs' car and that truck driver's reaction times were reasonable in light of distances and speeds involved, and opposing traffic analyst's scenario would have required truck driver to begin braking when he saw first vehicle turn left and to anticipate that plaintiffs' car would be struck from rear and pushed into his path; law presumes no such prescience and imposes no such duty, especially where, as here, driver was faced with emergency not of his own creation. Smith v Brennan, 245 A.D.2d 596, 664 N.Y.S.2d 687, 1997 N.Y. App. Div. LEXIS 12581 (N.Y. App. Div. 3d Dep't 1997).

Northbound motorist was entitled to summary judgment dismissing wrongful death action against him where plaintiff's decedent, who was traveling south, crossed into northbound lane only one second before vehicles collided, and speculative affidavit of plaintiff's expert containing alternative explanations concerning how accident occurred was insufficient to defeat motion. Van Ostberg v Crane, 273 A.D.2d 895, 709 N.Y.S.2d 774, 2000 N.Y. App. Div. LEXIS 6894 (N.Y. App. Div. 4th Dep't), reh'g denied, 716 N.Y.S.2d 351, 2000 N.Y. App. Div. LEXIS 9714 (N.Y. App. Div. 4th Dep't 2000).

11. —Blood alcohol content (BAC) testing

Alcohol technician was competent to perform breath alcohol screening tests, on which county highway department mechanic's suspension from employment was based, where technician successfully completed 3-day training program regarding use of approved "evidential breath testing device," she was familiar with pertinent regulatory requirements for breath alcohol testing procedures published in Federal Register, she had performed 478 breath alcohol tests, none of which had been questioned, and mechanic submitted no evidence that technician failed to comply with training or proficiency requirements of 49 CFR 40.51. Aubin v County of Jefferson, 245 A.D.2d 1126, 667 N.Y.S.2d 530, 1997 N.Y. App. Div. LEXIS 13953 (N.Y. App. Div. 4th Dep't 1997).

In prosecution for driving while intoxicated and other crimes, court properly allowed prosecution to ask hypothetical questions of its expert witness testifying on retrograde extrapolation of alcohol in blood; expert without personal knowledge of facts of case may be questioned in hypothetical form. People v Cross, 273 A.D.2d 702, 711 N.Y.S.2d 533, 2000 N.Y. App. Div. LEXIS 7435 (N.Y. App. Div. 3d Dep't 2000).

12. —Officer as accident investigator

In personal injury action arising from traffic accident, police officer's testimony that he made notation on police accident report that "causing [sic] factor for the accident" was plaintiff's "inattention" invaded jury's exclusive province to decide factual issues such as causation. LaPenta v Loca-Bik Ltee Transp., 238 A.D.2d 913, 661 N.Y.S.2d 132, 1997 N.Y. App. Div. LEXIS 4714 (N.Y. App. Div. 4th Dep't 1997).

In personal injury action against operator of car repair shop for negligent repairs allegedly causing brakes to fail and plaintiff to swerve off road and hit stanchion in median, plaintiff was entitled to new trial under CLS CPLR § 4404 where (1) court allowed defense counsel to question police officer about alleged connection between position of plaintiff's car after accident and skid marks depicted in photo, (2) there was no evidence that skid marks shown in photo were even present on date of accident, which occurred over 2 years earlier, (3) officer's opinion,

from which jury could have inferred that skid marks were made by plaintiff's car, was thus improperly based on fact not in evidence, and (4) officer was asked to offer opinion, involving calculation of coordinates, that was beyond ordinary expertise of police officer responding to accident scene. Schembre v Atomic Spring & Alignment Co., 281 A.D.2d 531, 722 N.Y.S.2d 64, 2001 N.Y. App. Div. LEXIS 2614 (N.Y. App. Div. 2d Dep't 2001).

13. —Seat belt experts

Defendant's expert was qualified to testify as to whether decedent vehicle passenger would not have struck her head on windshield if she had been wearing seat belt where expert held bachelor's and master's degrees in civil engineering, he was department chairman and professor of civil engineering at community college, he was member of Association for the Advancement of Automotive Medicine, he had evaluated approximately 700 accidents involving seat belt usage, he had testified in New York courts about 15 times on subject, and he had reviewed number of studies regarding use and efficiency of seat belts. Aylesworth v Evans, 225 A.D.2d 850, 638 N.Y.S.2d 982, 1996 N.Y. App. Div. LEXIS 2049 (N.Y. App. Div. 3d Dep't 1996).

Supreme Court was not required to strike testimony of defendant's engineering expert, including his opinion that plaintiff was not using seat belt at time of accident and that if she had been using it, her head would not have struck windshield. Carson v De Lorenzo, 238 A.D.2d 790, 657 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 3944 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 810, 666 N.Y.S.2d 99, 688 N.E.2d 1381, 1997 N.Y. LEXIS 3628 (N.Y. 1997).

As result of clear language and import of Geier v American Honda Motor Co., 529 US 861, which held that claims based on negligent failure to design vehicle to contain air bag safety restraint are preempted by Department of Transportation's Federal Motor Vehicle Safety Standards, manufacturer of plaintiff's car in present action arising from automobile accident was entitled to partial summary judgment dismissing claims that it was negligent in not introducing air bag system into car's design, and plaintiff would be precluded from introducing testimony, expert or otherwise, tending to show that presence of air bag might have saved those injured in

accident, including deceased passenger who was not wearing seat belt at time of accident; however, complaint would not be summarily dismissed to extent that claim was made that design of safety belt restraint installed was defective or that manufacturer negligently failed to sufficiently warn passengers of need to use both automatic shoulder harness and voluntary lap belt. Chevere v Hyundai Motor Co., 188 Misc. 2d 449, 729 N.Y.S.2d 272, 2001 N.Y. Misc. LEXIS 226 (N.Y. Sup. Ct. 2001).

14. —Traffic control markings, devices and the like

In action against town and county by motorist injured in collision at intersection of streets maintained by them and regulated by stop sign, alleging that traffic signal light should have been installed, plaintiffs failed to overcome defendants' prima facie entitlement to qualified immunity where (1) defendants presented expert opinion and 1986 county traffic engineering report concluding that neither traffic signal nor additional sign at intersection was warranted, (2) plaintiffs' civil engineer opined that intersection was not "designed, maintained, and operated in accordance with standard and appropriate acceptable good and safe design practices," and (3) raw statistics indicating 9 other accidents at or near intersection between 1989 and 1993, without any descriptive details, did not show that defendants breached their continuing duty to review traffic plan in light of its actual operation. Schuster v McDonald, 263 A.D.2d 473, 692 N.Y.S.2d 721, 1999 N.Y. App. Div. LEXIS 7893 (N.Y. App. Div. 2d Dep't 1999).

City was not negligent in failing place skip lines on highway before intersection where plaintiff presented no proof that such markings were required under New York Manual of Uniform Traffic Control Devices, and plaintiff's expert testified that (1) sole applicable reference in manual was provision "that any roadway with pavement sixteen feet or wider may be marked to indicate lane use" and (2) such markings are intended to prevent vehicles from wandering from lane to lane. Even if city should have placed skip lines on highway before intersection, plaintiff failed to prove that such failure was proximate cause of traffic accident where (1) plaintiff's expert merely speculated that skip lines would have alerted plaintiff to fact that highway had 4 lanes at

intersection, (2) defendant motorist's statement that if he had known that highway had 4 lanes at intersection, he would have been "more cautious" before turning in front of plaintiff's oncoming vehicle was self-serving, and (3) at most, failure to mark intersection merely furnished condition or occasion for occurrence of accident rather than one of its causes. Long v Cleary, 273 A.D.2d 799, 709 N.Y.S.2d 741, 2000 N.Y. App. Div. LEXIS 6815 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 763, 715 N.Y.S.2d 216, 738 N.E.2d 364, 2000 N.Y. LEXIS 3758 (N.Y. 2000).

In claim by pedestrian who was hit by motor vehicle as she was crossing street between intersections, state's 10-month study of those intersections, on basis of which it upgraded warning signs but did not install traffic control signals, was not rendered inadequate by either limited amount of time spent at site or by failure to take pedestrian count where (1) there is no requirement that such study include minimum number of hours at site, (2) although pedestrian's expert testified that state should have spent at least 2 days counting number of pedestrians, it was not shown how doing so would have altered state's decision, (3) pedestrian's expert also testified that he was "not suggesting that a pedestrian warrant should have been issued in this case," (4) little or no pedestrian traffic was observed at site during study, and (5) there was no prior history of pedestrian accidents there. State did not violate its continuing duty to monitor effectiveness of warning signs after they were installed where pedestrian submitted no proof of changed conditions or accidents that would have required replacement of warning signs with traffic signal, and pedestrian's expert never addressed that issue during his testimony. Romeo v State, 273 A.D.2d 934, 709 N.Y.S.2d 783, 2000 N.Y. App. Div. LEXIS 6975 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 767, 719 N.Y.S.2d 647, 742 N.E.2d 123, 2000 N.Y. LEXIS 3540 (N.Y. 2000).

City was entitled to summary judgment dismissing personal injury action where (1) there was no evidence that its alleged negligence in failing to post or replace overhead sign was proximate cause of accident, (2) plaintiff's expert evidence was speculative and conclusory, and (3) photos and sign card from city's Bureau of Traffic Operations, on which plaintiff relied, were

inadmissible evidence of post-accident repairs or installations. Sosa v City of New York, 281 A.D.2d 469, 721 N.Y.S.2d 565, 2001 N.Y. App. Div. LEXIS 2375 (N.Y. App. Div. 2d Dep't 2001).

15. Banking experts

On consideration of plaintiff's motion for summary judgment, Supreme Court properly refused to exclude opinion evidence contained in deposition of employee of defendant bank on defendant's contention that no foundation had been laid to qualify employee as expert in banking matters, since employee's qualifications were sufficiently established by his position as vice-president of defendant, by his affirmation of his familiarity with reasonable standards of commercial banking practice, and by fact that defendant had previously opposed summary judgment motion based partially on opinion in affidavit of same employee. Heffernan v Norstar Bank of Upstate New York, 125 A.D.2d 887, 510 N.Y.S.2d 248, 1986 N.Y. App. Div. LEXIS 63076 (N.Y. App. Div. 3d Dep't 1986).

16. Behavioral experts, generally

In personal injury action against landlord by tenant who was assaulted in her apartment building, which did not have front door look, expert in criminal behavior analysis who did not have formal training in psychology or behavioral sciences nevertheless was competent to testify that minimal security afforded by lock and intercom would not have deterred intruder considering serial nature of his past crimes, his conduct and verbal behavior, and his use of knife during attacks; expert's skill, training, knowledge and experience were adequate to support assumption that his opinion was reliable. Price by Price v New York City Hous. Auth., 92 N.Y.2d 553, 684 N.Y.S.2d 143, 706 N.E.2d 1167, 1998 N.Y. LEXIS 4046 (N.Y. 1998).

Fact that plaintiff's expert was not psychiatrist went to weight, not admissibility, of his testimony that plaintiff was suffering from conversion hysteria where expert was doctor who had expertise in field. Smith v City of New York, 238 A.D.2d 500, 656 N.Y.S.2d 681, 1997 N.Y. App. Div. LEXIS 3990 (N.Y. App. Div. 2d Dep't 1997).

Family Court properly suspended father's visitation where allegations that child was sexually traumatized were supported by testimony of experts, who examined her and outlined negative effects that father's visitation was having on her, and order provided for resumption of supervised visitation on father's fulfillment of specified conditions. Amanda H. v Paul Robert W., 251 A.D.2d 578, 674 N.Y.S.2d 773, 1998 N.Y. App. Div. LEXIS 7472 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 813, 681 N.Y.S.2d 474, 704 N.E.2d 227 (N.Y. 1998).

Court properly awarded sole custody of child to mother, despite contrary recommendations of court-appointed experts and law guardian, where both experts found mother (as well as father) to be fit parent, court did not arbitrarily disregard contrary opinions, court fully explained its reasons for rejecting those recommendations, and court's reasoning was supported by record. Hopkins v Wilkerson, 255 A.D.2d 319, 679 N.Y.S.2d 412, 1998 N.Y. App. Div. LEXIS 11574 (N.Y. App. Div. 2d Dep't 1998).

Finding that father sexually abused his daughter was sufficiently supported by daughter's out-of-court statements as corroborated by validation testimony of expert witness. In re Megan G., 266 A.D.2d 835, 698 N.Y.S.2d 375, 1999 N.Y. App. Div. LEXIS 11693 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 761, 707 N.Y.S.2d 142, 728 N.E.2d 338, 2000 N.Y. LEXIS 213 (N.Y. 2000).

Evidence in child protection proceeding supported finding that respondent sexually abused his girlfriend's 2 children where (1) children's out-of-court statements were sufficiently corroborated by expert's testimony that children became anxious, fearful, and angry when giving details of abuse and displayed behavior consistent with that of children who have been sexually abused, (2) there was non-hearing testimony that children engaged in inappropriate sexual behavior, and (3) fact that children at times recanted allegations of abuse did not render their initial statements incredible, given their mother's advice to recant and their fear of respondent. In re Shawn P., 266 A.D.2d 907, 697 N.Y.S.2d 901, 1999 N.Y. App. Div. LEXIS 11697 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 760, 706 N.Y.S.2d 81, 727 N.E.2d 578, 2000 N.Y. LEXIS 158 (N.Y. 2000).

17. —Probation officers

Court properly relied on professional evaluations by psychologist and probation officer as to likelihood that juvenile presented significant risk to community if not placed with State Office of Children and Family Services. In re Raoul E., 266 A.D.2d 47, 698 N.Y.S.2d 30, 1999 N.Y. App. Div. LEXIS 11367 (N.Y. App. Div. 1st Dep't 1999).

Adjudicated juvenile delinquent was properly placed on probation for 2 years with counseling and community service where his acts, if committed by adult, would be first degree sexual abuse, he lacked insight into his multiple criminal acts and their impact on victim, Family Court properly relied on evaluations by psychiatrist and probation officer as to need for probation and treatment, and such disposition was least restrictive alternative consistent with needs of juvenile and community. In re Sherrod B., 275 A.D.2d 665, 713 N.Y.S.2d 352, 2000 N.Y. App. Div. LEXIS 10018 (N.Y. App. Div. 1st Dep't 2000).

18. —Psychologists

Mother was properly awarded permanent custody of her daughter where mother was competent and decent parent, attuned and attached to daughter, there was strong bond between daughter and her half-siblings through mother, and psychologist retained by daughter’s law guardian emphasized need for continuity of home environment in which daughter had thrived. Victor L. v Darlene L., 251 A.D.2d 178, 674 N.Y.S.2d 371, 1998 N.Y. App. Div. LEXIS 7368 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 816, 683 N.Y.S.2d 760, 706 N.E.2d 748, 1998 N.Y. LEXIS 4062 (N.Y. 1998).

Finding in divorce action that child’s best interests would be served by awarding temporary custody to father was sound where it was based on recommendations of law guardian and psychologist, who had experience with special needs of children with learning disabilities.

Barbato v Barbato, 251 A.D.2d 612, 675 N.Y.S.2d 552, 1998 N.Y. App. Div. LEXIS 7931 (N.Y. App. Div. 2d Dep't 1998).

Sole custody of child was properly transferred from mother to father where 2 child-care protective caseworkers and child's treating psychologist recommended that result, mother tested positive for cocaine, child had used drugs and alcohol, he exhibited detailed knowledge of drug culture and freely used vulgar language, he claimed to have witnessed murder committed by mother's friend, unidentified males loitered around mother's dark and littered apartment, psychologist ascribed child's out-of-control behavior to lack of guidance and structure in his life, and child showed "pretty clear positive behavior change" after visiting father, who was gainfully employed and actively pursuing therapy for child. Family Court did not abuse its discretion in failing to obtain independent psychological evaluations of parties to child custody proceeding where mother did not make such request until middle of trial, there was no claim that parties had psychological problems, and father presented expert testimony of psychologist, who was cross-examined by mother's attorney. Gray v Jones, 251 A.D.2d 765, 674 N.Y.S.2d 174, 1998 N.Y. App. Div. LEXIS 6739 (N.Y. App. Div. 3d Dep't 1998).

Family Court properly transferred physical custody of child from mother to father where that change was recommended by both law guardian and court-appointed psychologist based on proof that mother repeatedly violated visitation order, made numerous false sexual abuse allegations against father, and tried to diminish relationship between father and child. Guidice v Burruano, 255 A.D.2d 911, 679 N.Y.S.2d 915, 1998 N.Y. App. Div. LEXIS 12114 (N.Y. App. Div. 4th Dep't 1998).

Court properly relied on professional evaluations by psychologist and probation officer as to likelihood that juvenile presented significant risk to community if not placed with State Office of Children and Family Services. In re Raoul E., 266 A.D.2d 47, 698 N.Y.S.2d 30, 1999 N.Y. App. Div. LEXIS 11367 (N.Y. App. Div. 1st Dep't 1999).

Court properly allowed non-custodial father to have unsupervised visitation with his 12-year-old son, even though father had engaged in improper sexual contact with mother's daughter from

prior marriage between 1988 and 1991 when daughter was 13 to 15 years old, where (1) father and son had close relationship without any improper conduct, (2) after 2 evaluations of father, court-ordered psychologist concluded that supervised visitation was not warranted, because “additional taboos...would have to be crossed for [father] to act out sexually against his son,” and there was “considerable documentation that men who act out sexually against girls are not equally prone to act out sexually against boys,” and (3) no proof was offered that unsupervised visitation would have detrimental impact on son. Frize v Frize, 266 A.D.2d 753, 698 N.Y.S.2d 764, 1999 N.Y. App. Div. LEXIS 12113 (N.Y. App. Div. 3d Dep't 1999).

In personal injury action against employer by employee whose heel was fractured in fall at construction site, court properly precluded employee’s psychologist from testifying as to employee’s psychological injury where (1) offer of proof showed that psychologist was unable to apportion psychological injury caused by fall, (2) employee’s inability to work due to psychological injury related to employer’s failure to have workers’ compensation insurance, (3) because psychologist’s testimony was relevant to separate cause of action under Workers’ Compensation Law, it was irrelevant to issue of damages at present trial and would have prejudiced employer, and (4) psychologist’s testimony would have improperly interjected issue of lack of insurance into case. Britvan v Plaza at Latham LLC, 266 A.D.2d 799, 698 N.Y.S.2d 759, 1999 N.Y. App. Div. LEXIS 12119 (N.Y. App. Div. 3d Dep't 1999).

Absent extraordinary circumstance of domestic violence, neither testimony of witnesses nor reports of experts is necessary to prove that one parent’s intentional murder of the other is prima facie proof that murdering parent has neglected children simply by committing that heinous act. Eight-year-old boy, whose father had been convicted of intentionally murdering both boy’s mother and daughter of boy’s present legal custodians, was not of suitable age to signify his assent to visitation with father where court-appointed psychologist described boy as “average,” boy had to repeat third grade because of low grades and inattentiveness, and there was no evidence that he was mature enough to truly understand and appreciate his father’s incarceration and emotional and other ramifications of visiting with him. Best interests of

children, aged 8 and 3, would be fostered by denying visitation with their incarcerated father, who had been convicted of intentionally murdering both their mother and daughter of their present legal custodians, where court-appointed psychologist specifically found that such visitation would interfere with children's attachment to their custodians, he recommended that visitation be avoided until children were stabilized in their new setting, and father offered no contrary expert evidence. In re Scott "JJ", 280 A.D.2d 4, 720 N.Y.S.2d 616, 2001 N.Y. App. Div. LEXIS 1401 (N.Y. App. Div. 3d Dep't 2001).

Inmate violated prison disciplinary rules against interfering with employee, assaulting staff, engaging in violent conduct, being out of place, refusing to obey direct order, and making threats, despite his claim that he was suffering from mental disease or defect at time of incident, where hearing officer properly considered inmate's mental condition at time of incident and found, on basis of testimony of psychologist who examined inmate after incident, that inmate was responsible for his actions. Mawhinney v Goord, 281 A.D.2d 670, 720 N.Y.S.2d 855, 2001 N.Y. App. Div. LEXIS 2040 (N.Y. App. Div. 3d Dep't 2001).

In father's proceeding to obtain custody of unmarried parties' child, mother was not entitled to have decision granting custody to father set aside where (1) psychologist's alleged unfairness to mother occurred during her pretrial session with him and thus was known to her at time of hearing and was not "new evidence," (2) mother's complaint of psychologist's alleged bias toward her was not explored on his cross-examination, (3) mother did not show how evaluation by another psychologist would have resulted in different decision, (4) proof of disciplinary proceedings against psychologist and his alleged bias toward mother merely impeached his credibility and was not new evidence warranting new hearing, and (5) record fully supported court's decision. Esterle v Dellay, 281 A.D.2d 722, 721 N.Y.S.2d 695, 2001 N.Y. App. Div. LEXIS 2302 (N.Y. App. Div. 3d Dep't 2001).

Evidence did not warrant change of custody of divorced parties' 3 younger children from father, who had been awarded custody of all 4 children in 1992, to mother, who claimed to have overcome her alcoholism and drug dependency in 1996, even though father was more strict and

demanding than mother, had less nurturing parenting style, and expected more from children than did mother, where (1) father had adequately provided for children's needs for many years while mother was unable to do so, (2) he had good relationship with 3 younger children, who were doing well in school, (3) court-appointed psychologist concluded that all 4 children had been damaged by mother's alcoholism and attributed most of blame to mother for parties' failure to deal effectively with alcoholism issue with children, and (4) adverse inference was warranted from mother's failure to present testimony from her treating psychiatrist that she was able to take Dexedrine, which she had previously abused, with no danger of abusing it and that she was not in danger of resuming her drinking. Father's motion to strike testimony of psychologist appointed by court to evaluate parties, mother's parents, and children could not be summarily denied where (1) during direct examination of court-appointed psychologist, who had been called by mother as her witness, it was revealed that psychologist had been paid additional fee of $800, and (2) by paying additional fee without seeking further order of court, mother created appearance of impropriety. Gary D. B. v Elizabeth C. B., 281 A.D.2d 969, 722 N.Y.S.2d 323, 2001 N.Y. App. Div. LEXIS 2721 (N.Y. App. Div. 4th Dep't 2001).

19. —Social workers

Husband was entitled to divorce on ground of cruel and inhuman treatment where he testified to marked change in wife's religious beliefs and practices and ensuing conduct toward him, and certified social worker testified to detrimental effect that continued cohabitation would likely have on husband. Gray v Gray, 245 A.D.2d 584, 664 N.Y.S.2d 878, 1997 N.Y. App. Div. LEXIS 12592 (N.Y. App. Div. 3d Dep't 1997).

Mother's parental rights were properly terminated for mental illness where she had long history of psychiatric treatment, she had not responded to medication, she believed that she could talk to television and to angels and that sun followed her around, social worker testified that mother exhibited inappropriate behavior when caring for child, and psychiatrist testified that mother was schizophrenic, that her psychological problems would continue, and that she would not be able

to care for child in times of stress. In re Christine K., 255 A.D.2d 513, 680 N.Y.S.2d 615, 1998 N.Y. App. Div. LEXIS 12619 (N.Y. App. Div. 2d Dep't 1998).

In child protection proceeding alleging sexual abuse of 5-year-old girl and 8-year-old boy, children's out-of-court descriptions of abuse were sufficiently corroborated by testimony of social worker who conducted validation interviews where she was expert in child sexual abuse, she concluded that manner of children's disclosure of incidents and their other anxious behavior was consistent with that of sexually abused children and showed that they had not been coached, and although another expert criticized social worker's interviewing techniques, it was undisputed that children exhibited behavioral symptoms consistent with sexual abuse—as when, in first session, girl hid under chair while describing abuse. In re Elizabeth G., 255 A.D.2d 1010, 680 N.Y.S.2d 32, 1998 N.Y. App. Div. LEXIS 12329 (N.Y. App. Div. 4th Dep't 1998), app. dismissed, 93 N.Y.2d 848, 688 N.Y.S.2d 494, 710 N.E.2d 1093, 1999 N.Y. LEXIS 61 (N.Y. 1999), app. dismissed, 1999 N.Y. LEXIS 77 (N.Y. Feb. 11, 1999), app. denied, 93 N.Y.2d 814, 697 N.Y.S.2d 561, 719 N.E.2d 922, 1999 N.Y. LEXIS 2176 (N.Y. 1999).

In child protection proceeding under CLS Family Ct Act Art 10, children's statements to third persons concerning physical abuse by their mother's paramour were sufficiently corroborated where (1) caseworker testified that paramour admitted spanking children and that, at unannounced visit to house, she saw bruises on younger child in various stages of healing, (2) paramour's sister described bruises on younger child and paramour's striking of older child, (3) paramour's mother acknowledged that she observed younger child with "marks on his back," (4) classroom aide stated that older child several times came to school smelling of urine, (5) school officials expressed both concern about older child's lack of personal hygiene and view that his behavior indicated physical discipline, and (6) school social worker testified that after older child was placed in foster care, his behavior improved, and he no longer needed restraining. In re Michael "W", 263 A.D.2d 684, 692 N.Y.S.2d 856, 1999 N.Y. App. Div. LEXIS 8052 (N.Y. App. Div. 3d Dep't 1999).

Wife was entitled to divorce on ground of cruel and inhuman treatment where husband engaged in hour-long shouting and screaming sessions 3 to 4 times per week, refused to join family dinners 2 to 3 nights per week, committed physical acts against inanimate objects on numerous occasions over 2 to 3 years preceding wife's departure from marital residence, wife usually remained passive during husband's erratic episodes, wife testified to adverse effect of husband's behavior on her mental and physical well-being, and adverse psychological effect was confirmed by clinical social worker as qualified expert witness. Clinical social worker who began treating wife when wife departed from marital residence was qualified to testify regarding diagnosis and prognosis of wife's condition and to render opinion as to cause of that condition where wife testified that husband's conduct caused her to become fearful and withdrawn, to shake and cry frequently, to have trouble sleeping, and to experience pain in her neck and leg. Ridley v Ridley, 275 A.D.2d 941, 714 N.Y.S.2d 396, 2000 N.Y. App. Div. LEXIS 9622 (N.Y. App. Div. 4th Dep't 2000).

20. —Vocational rehabilitation experts

In personal injury action, court properly admitted testimony of defendant's vocational rehabilitation expert where (1) plaintiffs sought preclusion based on defendant's late disclosure of jobs that expert believed injured plaintiff capable of performing, (2) expert's testimony was substantially same as his testimony at first trial, (3) plaintiffs did not show prejudice or intentional or willful nondisclosure, (4) plaintiffs in rebuttal presented testimony of 3 potential employers of injured plaintiff who were interviewed by expert, and (5) each potential employer testified that expert's testimony concerning qualifications needed for subject positions was inaccurate and that none would hire plaintiff based on his physical limitations and required medications. Lopez v Kenmore-Tonawanda Sch. Dist., 275 A.D.2d 894, 713 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 4th Dep't 2000).

In personal injury action, testimony of defendant's vocational rehabilitation expert was not unduly speculative where it was consistent with testimony of other witnesses that injured plaintiff

was capable of performing certain kinds of work. Lopez v Kenmore-Tonawanda Sch. Dist., 275 A.D.2d 894, 713 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 4th Dep't 2000).

In personal injury action, defendant’s vocational rehabilitation expert was properly allowed to testify briefly about his own disabilities and those of his wife and employee by way of background regarding his work in area of vocational rehabilitation. Lopez v Kenmore-Tonawanda Sch. Dist., 275 A.D.2d 894, 713 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 4th Dep't 2000).

In action by injured construction worker under CLS Labor § 240(1), worker’s employer was entitled to compel worker to submit to independent examination by employer’s vocational rehabilitation expert, and that expert’s testimony was admissible, where employer showed special circumstances by citing then-recent Kavanagh v Ogden Allied Maintenance Corp., 92 N.Y.2d 952, which significantly changed law by holding that defendant may compel plaintiff to submit to testing by vocational rehabilitation expert under CLS CPLR § 3101. Edbauer v Bd. of Educ., 286 A.D.2d 999, 731 N.Y.S.2d 309, 2001 N.Y. App. Div. LEXIS 9083 (N.Y. App. Div. 4th Dep't 2001).

21. Building construction experts, generally

Even though expert who testified in behalf of homeowners, whose roof collapsed after snowstorm, did not examine the roof until after it was repaired, the court’s reception of his opinion as to the cause of the collapse had an ample evidentiary foundation, including the fact that the witness examined photographs taken immediately after the roof collapsed, which photographs, he testified, clearly showed that there was neither a material failure nor a design failure but, rather, a disassembly of the roof truss due to improper connection at the time of construction. Gary v Country Club Acres, Inc., 47 A.D.2d 788, 366 N.Y.S.2d 57, 1975 N.Y. App. Div. LEXIS 9102 (N.Y. App. Div. 3d Dep't 1975).

In personal injury action, court erroneously admitted, over objection, testimony of plaintiffs’ expert witness which referred to standards in New York City Administrative Code which were

enacted and became applicable after construction of ceiling involved in suit. Carelli v Demoro-Grafferi, 121 A.D.2d 673, 504 N.Y.S.2d 441, 1986 N.Y. App. Div. LEXIS 58662 (N.Y. App. Div. 2d Dep't 1986).

In action for injuries sustained when door, which had been placed against wall in storeroom of plaintiff's employer by defendant construction company, fell and struck plaintiff as he was removing items from storeroom, it was error to admit opinion of plaintiff's expert, in response to hypothetical question, that he assumed that door had been bumped into repeatedly over 3-week storage period, causing it to become unstable, since there was no testimony presented indicating that door had in fact been disturbed; such error was not cured by instructing jury to disregard expert's testimony as to "something striking the bottom of the door" or by charging jury that they could reject an expert's opinion if they found facts to be different from those which formed basis for his opinions. De Tommaso v M. J. Fitzgerald Constr. Corp., 138 A.D.2d 341, 525 N.Y.S.2d 632, 1988 N.Y. App. Div. LEXIS 2077 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 701, 535 N.Y.S.2d 595, 532 N.E.2d 101, 1988 N.Y. LEXIS 3353 (N.Y. 1988).

Out-of-possession landlord could not be held liable for plaintiff's injuries where plaintiff's expert testified that closed trap door was not structurally defective, door became unsafe only after it was left in open position, former New York State Industrial Code provisions in 12 NYCRR §§ 16.2(e), 16.5, and 16.8 did not impose statutory duty on landlord to equip trap doors with moveable railing or other devices to prevent injury, and OSHA regulations and ANSI Code are non-statutory provisions that could not be basis of constructive notice imputed to landlord. Conti v Kimmel, 255 A.D.2d 201, 680 N.Y.S.2d 90, 1998 N.Y. App. Div. LEXIS 12403 (N.Y. App. Div. 1st Dep't 1998).

Neither league that sponsored recreational basketball game nor school district that owned gymnasium in which game was played was entitled to summary judgment dismissing action by 16-year-old player, who was injured when he ran out of bounds and crashed into brick wall behind basket, despite defendants' claim that plaintiff was experienced player who assumed risk of such injury, where plaintiff submitted expert's opinion that wall should have been padded

because out-of-bounds area beyond end-line of court was less than recommended minimum safety standard of 3 feet, and such evidence raised triable issue of fact as to whether dimensions of court and lack of padding created dangerous condition beyond usual dangers inherent in sport of basketball. Greenburg by Payne v Peekskill City Sch. Dist., 255 A.D.2d 487, 680 N.Y.S.2d 622, 1998 N.Y. App. Div. LEXIS 12633 (N.Y. App. Div. 2d Dep't 1998).

Out-of-possession landlord was entitled to judgment under CLS CPLR § 4401 dismissing during trial action for slip and fall on staircase by commercial tenant's employee where employee failed to prove that landlord violated any specific statutory provision, and expert testimony attempting to prove that landlord violated NYC Admin Code § 27-375 was unavailing because that provision applies only to interior stairs, and subject staircase did not meet definition of interior stairs in NYC Admin Code § 27-232. Walker v 127 W. 22nd St. Assocs., 281 A.D.2d 539, 722 N.Y.S.2d 250, 2001 N.Y. App. Div. LEXIS 2644 (N.Y. App. Div. 2d Dep't 2001).

22. —Architects

Where trial court determined that scope of architect's expertise did not embrace daily maintenance of temporary lighting systems, it was not abuse of discretion to exclude testimony of architect, plaintiff's expert witness, as to accepted standards relating to temporary lighting on construction sites, in action for injuries sustained when plaintiff allegedly fell over paint cans while working in building under construction, wherein plaintiff contended that temporary lighting was not properly maintained and was not functioning when accident occurred. Molinari v Conforti & Eisele, Inc., 54 A.D.2d 1113, 388 N.Y.S.2d 782, 1976 N.Y. App. Div. LEXIS 15092 (N.Y. App. Div. 4th Dep't 1976).

In action for fall while plaintiffs were leaving hotel, on theory that defendants negligently installed and maintained covered carpeted walkway leading from main entrance to parking lot, defendants were entitled to summary judgment, even though plaintiffs' architect opined that raised edging around carpet and location of carpet edge relative to parking lot curb created tripping hazard, where plaintiffs admitted that neither of them knew what caused fall, and thus

any finding of proximate cause would have to be based on mere speculation. Silva v Village Square of Penna, Inc., 251 A.D.2d 944, 674 N.Y.S.2d 873, 1998 N.Y. App. Div. LEXIS 7767 (N.Y. App. Div. 3d Dep't 1998).

23. —Engineers

Even assuming that storm window frame was defective, homeowners were entitled to summary judgment dismissing negligence cause of action by window washer who fell from ladder while washing exterior surface of upstairs bedroom window, because washer failed to show that owners created defective condition or had notice of it, where storm windows were installed by third party, owners denied having experienced any problem or observed any defect in operating or cleaning storm windows, washer did not report any such problem to them on day of accident, and although washer's engineering expert concluded that inadequately secured condition of storm window frame would be obvious to anyone who operated or handled it, washer removed storm windows from their frames before accident and must have been aware of alleged defect, and thus owners had no duty to warn him of obvious condition. Wozniak v Filler, 245 A.D.2d 444, 666 N.Y.S.2d 670, 1997 N.Y. App. Div. LEXIS 13075 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff failed to raise triable issue of fact as to whether defendant was negligent in applying wax or polish its floor, which allegedly created slippery condition causing plaintiff to fall, where affidavit of plaintiff's engineering expert failed to show that defendant did not conform to relevant industry standards. Beyda v Helmsley Enters., 245 A.D.2d 479, 666 N.Y.S.2d 40, 1997 N.Y. App. Div. LEXIS 13262 (N.Y. App. Div. 2d Dep't 1997).

United States Postal Service (USPS) employee, who was injured when his foot went through floor of trailer supplied by defendants, raised triable issues of fact as to whether floor was defective before delivery of trailer to USPS and whether defect had existed long enough that defendants should have discovered it where both mechanical engineer, who was working as quality manager, and general supervisor of maintenance for USPS opined that, considering smoothness and discoloration of wood around hole and accumulation of rust and grime on beam

under hole, hole had existed for period of days before delivery. Mechanical engineer, who was working as quality manager, and general supervisor of maintenance for United States Postal Service both had requisite skill, training, education, knowledge, or experience to give their opinions concerning appearance of newly splintered wood. Butera v Schaefer, 251 A.D.2d 976, 674 N.Y.S.2d 249, 1998 N.Y. App. Div. LEXIS 6984 (N.Y. App. Div. 4th Dep't 1998).

24. Chemists

Mall owner was not entitled to summary judgment in action for slip and fall, allegedly from excess wax on floor near entrance, where plaintiff submitted photos of stains discovered after fall on leg and seat of her pants, and those stains appeared to be from floor wax and remained after washing, even though (1) on day of accident, injured plaintiff told mall security that she did not slip on anything in particular, (2) security officer who inspected floor found it clean and dry, (3) mall's general manager stated that he never received any complaints or other accident reports regarding condition of floor in entrance area, and (4) senior research chemist stated that floor products used in mall were "slip resistant"; chemist's affidavit could not be read as expert opinion that those products could not be negligently applied. Boyea v Pyramid Champlain Co., 251 A.D.2d 855, 674 N.Y.S.2d 478, 1998 N.Y. App. Div. LEXIS 7409 (N.Y. App. Div. 3d Dep't 1998).

25. Elevator maintenance and repair

Plaintiff's expert witness was properly permitted to testify as to adequacy of defendant's maintenance of subject elevator where such testimony "helped to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." Sanders v Otis Elevator Co., 232 A.D.2d 327, 649 N.Y.S.2d 19, 1996 N.Y. App. Div. LEXIS 11201 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 813, 657 N.Y.S.2d 405, 679 N.E.2d 644, 1997 N.Y. LEXIS 463 (N.Y. 1997).

In tenant’s action against city housing authority for injuries sustained when elevator located on authority’s property suddenly closed on tenant’s head, tenant was entitled to jury instruction that authority violated statutory standard of care governing kinetic energy and force limitations for elevator power doors where tenant adduced testimony, in form of expert’s response to hypothetical question, indicating that authority had not complied with specified provisions of city’s building and administrative codes and National Elevator Safety Code. Love v New York City Hous. Auth., 251 A.D.2d 553, 674 N.Y.S.2d 750, 1998 N.Y. App. Div. LEXIS 7492 (N.Y. App. Div. 2d Dep't 1998).

In negligence action against New York City Housing Authority (NYCHA) arising from attack on plaintiffs in disabled elevator of NYCHA’s building, plaintiffs raised triable issue of fact as to whether NYCHA breached its common-law duty to take minimal precautions to protect tenants from foreseeable harm where former housing police officer, who had served as commanding officer of elevator vandalism squad, testified that it was “common knowledge” that criminals disabled types of elevators operating in NYCHA’s buildings so as to trap their victims, that such incidents happened daily throughout NYCHA’s housing projects, that NYCHA was well aware of problem, and that outdated and defective “swing hatch door” elevators created safety threat that easily could have been remedied at minimal cost. Also, plaintiffs raised triable issue of fact as to whether NYCHA’s alleged negligence in failing to provide minimal security precautions was proximate cause of attack and their injuries where (1) expert testimony of former housing police officer indicated that criminal attacks in elevators would have been deterred if NYCHA had installed warning devices signaling that elevators were rendered inoperative, and (2) plaintiffs’ testimony as to exactly how crime occurred—that assailant was able to disable and reengage elevator at will, thus trapping his victims without danger of detection—was enough to allow jury to find that crimes and plaintiffs’ injuries were direct result of NYCHA’s negligence. Jiggets v New York City Hous. Auth., 263 A.D.2d 426, 693 N.Y.S.2d 601, 1999 N.Y. App. Div. LEXIS 8437 (N.Y. App. Div. 1st Dep't 1999).

In action by elevator mechanic for personal injuries sustained while repairing elevator when protruding pin caught his shirt sleeve and drew his arm into moving mechanical parts located in building's motor room, affidavit of mechanic's expert was insufficient to raise triable issue of fact as to whether there were any pre-modification design defects regarding elevator manufacturer/installer's placement of selector panel or shutoff switch where affidavit cited no code violations or departures from specific industry standards prevailing at time of manufacture. Cornwell v Otis Elevator Co., 275 A.D.2d 649, 713 N.Y.S.2d 321, 2000 N.Y. App. Div. LEXIS 9944 (N.Y. App. Div. 1st Dep't 2000).

26. Fire experts

Despite conflicting expert testimony as to ignition source of kitchen fire, circumstantial evidence in products liability action supported findings that automatic coffeemaker manufactured and sold by defendants was defective and that defect was substantial factor in causing fire where, inter alia, fire was confined to corner of kitchen where coffeemaker had been used, hole was burned in counter where coffeemaker was located, and other possible sources of fire were investigated and rejected. Opinion stated in fire report as to origin of kitchen fire was inadmissible in products liability action against manufacturer and seller of allegedly defective coffeemaker. General Accident Fire & Life Assur. Corp. v North Am. Sys., 240 A.D.2d 920, 658 N.Y.S.2d 757, 1997 N.Y. App. Div. LEXIS 6673 (N.Y. App. Div. 3d Dep't 1997).

27. Geologists

Substantial evidence supported Commissioner of Environmental Conservation's grant of permit for mining of about 2 million cubic yards of sand and gravel from about 25 acres of 40-acre site over 20-year period where (1) commissioner carefully balanced need for farmland with need for mineral resources, (2) geologist's testimony supported conclusions that only about 14 acres of prime farmland would be lost to project and that there was need for additional aggregate, (3) Department of Transportation project listing and letters from several companies indicated that

proposed mine would provide much needed addition to construction materials market in area, and (4) mining company's principal testified that there was market for gravel and that he had received calls from businesses inquiring as to status of mining application. Town of Preble v Zagata, 263 A.D.2d 833, 693 N.Y.S.2d 766, 1999 N.Y. App. Div. LEXIS 8285 (N.Y. App. Div. 3d Dep't 1999).

28. Handwriting experts

Testimony of handwriting expert was not necessary to support finding that inmate violated prison disciplinary rules by writing threatening letter and graffiti; in absence of expert testimony, hearing officer, as trier of fact, may make his or her own comparison of handwriting samples. Garcia v Selsky, 266 A.D.2d 772, 699 N.Y.S.2d 500, 1999 N.Y. App. Div. LEXIS 12126 (N.Y. App. Div. 3d Dep't 1999).

Designating petition purporting to nominate candidate for judge would be invalidated as permeated with fraud where signature gatherers were paid on illegal per-signature basis, handwriting expert's testimony proved that improper alterations of petition were made and that some alterations were initialed by persons other than those who witnessed signatures, and number of invalidated signatures left candidate below minimum number required. Adams v Klapper, 182 Misc. 2d 51, 696 N.Y.S.2d 758, 1999 N.Y. Misc. LEXIS 439 (N.Y. Sup. Ct.), aff'd, 264 A.D.2d 696, 695 N.Y.S.2d 295, 1999 N.Y. App. Div. LEXIS 8942 (N.Y. App. Div. 2d Dep't 1999).

29. Insurance experts

In action against automobile liability insurer for failure to settle personal injury action within policy limits, estimation as to the probable outcome of the particular personal injury action did not require expert opinion after the testimony given in the personal injury action had been presented to the jury in the bad faith action, and opinion testimony of two independent attorneys as to the likely verdict in the personal injury action was inadmissible. A witness who is familiar

with practices of insurers and defendants in evaluating personal injury and property damage claims may testify, in suit against insurer for failure to settle within policy limits, as to considerations relevant to the assessment of personal injury claims by insurers in general and to describe the materiality and weight customarily ascribed to each and as to the practice in settlement of claims followed by insurers in general as well as by their attorneys. Kulak v Nationwide Mut. Ins. Co., 40 N.Y.2d 140, 386 N.Y.S.2d 87, 351 N.E.2d 735, 1976 N.Y. LEXIS 2791 (N.Y. 1976).

Credible testimony of 2 insurance adjusters, who valued necessary repairs for water damage during claims settlement process, supported finding that insurer's payment to insured landlord was due and owed to company that performed repairs, and thus assignment of insurance claim payment by property manager's vice-president to repairing company was not fraudulent where vice-president acted within scope of his authority, even though both property manager and repairing company filed for bankruptcy on day after insurer sent out claim check. Washington 1993 Inc. v Reles, 255 A.D.2d 741, 680 N.Y.S.2d 713, 1998 N.Y. App. Div. LEXIS 11928 (N.Y. App. Div. 3d Dep't 1998).

30. Pharmacists

In a wrongful death action in which the critical issue for the jury's determination was the effect, if any, upon the decedent's organs of the decedent's chronic ingestion of drugs that had been prescribed by defendant physician, the trial court erred in refusing to admit opinion testimony by plaintiff's expert pharmacologist where, though the expert was not licensed to practice medicine, his training in phramacology rendered him qualified to express an opinion on the question at issue. Karasik v Bird, 98 A.D.2d 359, 470 N.Y.S.2d 605, 1984 N.Y. App. Div. LEXIS 16487 (N.Y. App. Div. 1st Dep't 1984).

Inmate violated prison disciplinary rule against using controlled substances where urinalysis test performed at prison resulted in positive readings for opiates, more specialized tests performed at independent laboratory identified opiate as morphine, and prison pharmacist and

representative from manufacturer of urinalysis technology testified that inmate's medication would not produce positive results for opiates. Quartieri v Goord, 251 A.D.2d 849, 674 N.Y.S.2d 807, 1998 N.Y. App. Div. LEXIS 7411 (N.Y. App. Div. 3d Dep't 1998).

31. Physical or vocational therapists

Plaintiffs did not sustain serious injuries under CLS Ins § 5102(d) where (1) orthopedist's finding that first plaintiff had sustained permanent loss or use of body organ, member, function, or system was improperly based on subjective complaints of pain, (2) although same orthopedist's conclusion that second plaintiff had sustained serious injury was based on MRI results, he did not indicate that he reviewed MRI films, and he did not attach copy of sworn MRI report to his affidavit, and (3) affidavit of physical therapist was of limited probative value in opposition to affirmed reports prepared by board-certified orthopedic surgeon submitted by defendants. Shay v Jerkins, 263 A.D.2d 475, 692 N.Y.S.2d 730, 1999 N.Y. App. Div. LEXIS 7879 (N.Y. App. Div. 2d Dep't 1999).

In personal injury action, court properly admitted testimony of defendant's vocational rehabilitation expert where (1) plaintiffs sought preclusion based on defendant's late disclosure of jobs that expert believed injured plaintiff capable of performing, (2) expert's testimony was substantially same as his testimony at first trial, (3) plaintiffs did not show prejudice or intentional or willful nondisclosure, (4) plaintiffs in rebuttal presented testimony of 3 potential employers of injured plaintiff who were interviewed by expert, and (5) each potential employer testified that expert's testimony concerning qualifications needed for subject positions was inaccurate and that none would hire plaintiff based on his physical limitations and required medications. Testimony of defendant's vocational rehabilitation expert was not unduly speculative where it was consistent with testimony of other witnesses that injured plaintiff was capable of performing certain kinds of work. Defendant's vocational rehabilitation expert was properly allowed to testify briefly about his own disabilities and those of his wife and employee by way of background regarding his work in area of vocational rehabilitation. Lopez v Kenmore-Tonawanda Sch. Dist.,

275 A.D.2d 894, 713 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 4th Dep't 2000).

In action by injured construction worker under CLS Labor § 240(1), worker's employer was entitled to compel worker to submit to independent examination by employer's vocational rehabilitation expert, and that expert's testimony was admissible, where employer showed special circumstances by citing then-recent Kavanagh v Ogden Allied Maintenance Corp., 92 NY2d 952, which significantly changed law by holding that defendant may compel plaintiff to submit to testing by vocational rehabilitation expert under CLS CPLR § 3101. Edbauer v Bd. of Educ., 286 A.D.2d 999, 731 N.Y.S.2d 309, 2001 N.Y. App. Div. LEXIS 9083 (N.Y. App. Div. 4th Dep't 2001).

32. Plumbers

Defendants were not entitled to summary judgment dismissing action for water damage to plaintiffs' apartment based on defendants' allegedly negligent maintenance of their terrace drain where plaintiff stated that he saw dirt surrounding and inside drain when he inspected it, defendants failed to adduce evidence ruling out possibility that obstruction was at least partly caused by dirt from their terrace flower pots and that intrusion of water into plaintiffs' apartment was caused by percolation of standing water through defects in terrace floor or drain, deposition testimony of defendants' expert plumber about environmental dirt and pipe scales was surmise based on general knowledge rather than direct observation of subject drain, and defendants could be held responsible for keeping their terrace drain clean regardless of source of dirt. Zilversmit v Etingin-Silver, 251 A.D.2d 83, 674 N.Y.S.2d 295, 1998 N.Y. App. Div. LEXIS 6549 (N.Y. App. Div. 1st Dep't 1998).

33. Polygraph experts

Testimony regarding polygraph test of complainant was admissible at hearing on whether town police officer should be dismissed from his employment for, inter alia, allegedly subjecting

complainant to unwanted sexual contact where such testimony was relevant, and there was substantial evidence of reliability of machine and qualifications of operator. Ost v Supervisor of Woodstock, 251 A.D.2d 724, 673 N.Y.S.2d 768, 1998 N.Y. App. Div. LEXIS 6464 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 488, 707 N.E.2d 443, 1998 N.Y. LEXIS 4260 (N.Y. 1998).

34. Prison corrections officers

In action for injuries in ski accident, alleging faulty equipment, expert witness need not give technical reasons or bases for opinion on direct examination; they may be left for development on cross-examination. An experienced skier, often involved in investigating and reconstructing ski accidents, who was currently writing a book on safe design and use of recreational equipment, including ski bindings, qualified as expert. Tarlowe v Metropolitan Ski Slopes, Inc., 28 N.Y.2d 410, 322 N.Y.S.2d 665, 271 N.E.2d 515, 1971 N.Y. LEXIS 1249 (N.Y. 1971).

Inmate violated prison disciplinary rule against using controlled substances where urinalysis test performed at prison resulted in positive readings for opiates, more specialized tests performed at independent laboratory identified opiate as morphine, and prison pharmacist and representative from manufacturer of urinalysis technology testified that inmate’s medication would not produce positive results for opiates. Quartieri v Goord, 251 A.D.2d 849, 674 N.Y.S.2d 807, 1998 N.Y. App. Div. LEXIS 7411 (N.Y. App. Div. 3d Dep't 1998).

Inmate violated prison disciplinary rule against possession of unauthorized organizational insignia or materials where search of inmate’s cell produced drawing depicting gang-related symbols and slogans, inmate admitted possessing drawing but stated that he borrowed it from another inmate and had no idea of its significance, and testimony against inmate included that of correction officer who had received special training regarding prison gangs. Feliciano v Selsky, 263 A.D.2d 810, 694 N.Y.S.2d 798, 1999 N.Y. App. Div. LEXIS 8274 (N.Y. App. Div. 3d Dep't 1999).

Inmate violated prison disciplinary rule against possessing unauthorized organizational materials where misbehavior report was supported by inmate's own testimony and testimony of correction officer who was expert in gang-related material. Smith v Selsky, 273 A.D.2d 661, 711 N.Y.S.2d 365, 2000 N.Y. App. Div. LEXIS 7194 (N.Y. App. Div. 3d Dep't 2000).

35. Products liability experts, generally

In products liability action against alleged seller of defective bungee cord, plaintiff's expert witness was properly allowed to testify about results of testing that he performed on exemplar bungee cords, even though defendant was not notified of such testing and did not have its counsel or expert present, where defendant had no right to such notice or presence, defendant easily could have acquired exemplars from any of its nationwide chain of stores, and thus no prejudice was shown. Simpson v K-Mart Corp., 245 A.D.2d 991, 667 N.Y.S.2d 90, 1997 N.Y. App. Div. LEXIS 13725 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 813, 674 N.Y.S.2d 279, 697 N.E.2d 180, 1998 N.Y. LEXIS 1280 (N.Y. 1998).

In action for property damage allegedly caused by defendant's blasting operations, professional engineer with expertise in fields of civil, structural, and environmental engineering was qualified to render opinion as to likely cause of damage to plaintiffs' property. Professional engineer's inspection of plaintiffs' property and its physical characteristics, and information that he gained through interviews with plaintiffs, their contractors, and individual who was present in house at time of blasting, as detailed in engineer's report, provided sufficient factual exposition to support his opinion. Menard v Carl Thomas Constr. Corp., 246 A.D.2d 890, 666 N.Y.S.2d 966, 1998 N.Y. App. Div. LEXIS 562 (N.Y. App. Div. 3d Dep't 1998).

In products liability action against distributor of "dormant oil" pesticide that damaged trees and shrubs, summary judgment was properly denied on cross claims against distributor by pesticide manufacturer and provider of reconditioned drums in which pesticide was sold where plaintiffs' expert concluded that damage was caused by either insufficient amount of emulsifier added by manufacturer or contaminant in oil, each cross claimant submitted expert's affidavit stating that

oil was not contaminated as result of its actions, and thus conflicting experts' opinions raised triable issues of fact. Laidlaw Transp., Inc. v Helena Chem. Co., 255 A.D.2d 869, 680 N.Y.S.2d 365, 1998 N.Y. App. Div. LEXIS 12057 (N.Y. App. Div. 4th Dep't 1998).

In action by tenant who fell from ladder borrowed from defendant landlord, court properly precluded tenant from having expert testify concerning standards for care and maintenance of ladder where there was sufficient testimony from other witnesses to resolve issues, and offered testimony concerned matters within ordinary knowledge and experience of jury. Ciancio v Cirincione, 273 A.D.2d 431, 711 N.Y.S.2d 736, 2000 N.Y. App. Div. LEXIS 7397 (N.Y. App. Div. 2d Dep't 2000).

Company whose predecessor manufactured playground equipment on which second grade student was injured was entitled to summary judgment dismissing products liability action against it where (1) while student was crossing chain-walk section of piece of playground equipment, her foot caught in one of 4 low-lying chains strung parallel between 2 platforms, causing her to fall, (2) affidavit of plaintiffs' expert, which relied on guidelines promulgated by Consumer Product Safety Commission, was insufficient to raise triable issue of fact as to whether playground equipment was improperly designed, because those guidelines were neither mandatory nor intended to be exclusive standards for playground safety, and (3) plaintiffs did not raise triable issue of fact as to whether alleged departures from those guidelines were proximate cause of accident. Merson v Syosset Cent. Sch. Dist., 286 A.D.2d 668, 730 N.Y.S.2d 132, 2001 N.Y. App. Div. LEXIS 8415 (N.Y. App. Div. 2d Dep't 2001).

In products liability action, expert who had never taken courses in mechanical engineering was nevertheless qualified to testify that negligent design of 3-wheeled recreational vehicle rendered it unstable and difficult to steer, given his knowledge of mathematics and physical engineering principles, his teaching and practical engineering background, peer review of his presented papers, small opportunity for potential rate of error, availability of mathematic and engineering principles to test his theory, and testimony that his theory was grounded on long-standing

uncontradicted mathematic and engineering principles. Wahl v American Honda Motor Co., 181 Misc. 2d 396, 693 N.Y.S.2d 875, 1999 N.Y. Misc. LEXIS 317 (N.Y. Sup. Ct. 1999).

Trial court erred in entering summary judgment for the cigarette manufacturers in a widower's suit for damages, alleging a pre-1969 failure to warn claim, arising out of his wife's death from lung cancer as the trial court disregarded the affidavit of the widower's expert witness, who had a basis for his opinion as to the lack of public awareness of the dangers of smoking; a reasonable juror could find that there was confusion as to the hazardous effects of smoking when the wife began smoking, particularly considering the manufacturers' dissemination of information disputing the validity of scientific evidence linking cigarette smoking to cancer and other diseases. Miele v Am. Tobacco Co., 2 A.D.3d 799, 770 N.Y.S.2d 386, 2003 N.Y. App. Div. LEXIS 14098 (N.Y. App. Div. 2d Dep't 2003).

36. —Machinery, including power tools

In action under CLS Labor § 240(1), proper foundation was laid for opinion of plaintiff's expert that hoisting device should have been used in removing 200-pound hot water circulating pump from rooftop engine room of ship, where there was proof that expert took measurements of ship's ladder, opening to which it led, and pump. Skow v Jones, Lang & Wooton Corp., 240 A.D.2d 194, 657 N.Y.S.2d 709, 1997 N.Y. App. Div. LEXIS 5978 (N.Y. App. Div. 1st Dep't 1997), app. denied, 94 N.Y.2d 758, 704 N.Y.S.2d 532, 725 N.E.2d 1094, 1999 N.Y. LEXIS 4043 (N.Y. 1999).

In action against manufacturer of radial arm saw, plaintiff's account of accident, angle of cuts to plaintiff's fingers, and location of blood and severed fingertips found after accident provided sufficient foundation for presenting expert's opinions to jury, including how plaintiff's hand could have made contact with rotating blade. McKeon v Sears Roebuck & Co., 242 A.D.2d 503, 662 N.Y.S.2d 496, 1997 N.Y. App. Div. LEXIS 9139 (N.Y. App. Div. 1st Dep't 1997), aff'd, McKeon v Sears, Roebuck & Co., 262 A.D.2d 7, 690 N.Y.S.2d 566, 1999 N.Y. App. Div. LEXIS 6147 (N.Y. App. Div. 1st Dep't 1999).

In action for injury when load of lumber fell on plaintiff’s hand as he operated forklift, plaintiff’s expert witness was properly precluded from testifying as to proximate cause where that connection did not require expert testimony but required understanding of facts surrounding accident. Klein v Hyster Co., 255 A.D.2d 425, 680 N.Y.S.2d 583, 1998 N.Y. App. Div. LEXIS 12377 (N.Y. App. Div. 2d Dep't 1998).

Evidence supported both prima facie case of negligence and jury verdict finding point-of-departure warehouse owner 45 percent liable for truck driver’s injuries in manually moving tightly packed 300-pound boxes in preparation for unloading where both plaintiff and another driver had complained to owner’s warehouse manager about manner in which boxes were packed by use of forklift with basiloid attachment not possessed by receiving warehouse, expert testified that owner’s practices fell below industry standard for loading once it had learned that receiving warehouse was using clamp truck without basiloid attachment, and driver claimed that owner should have rearranged boxes inside trailer to provide room for clamp truck to maneuver and unload boxes without need for manual help from drivers. Evidence also supported both prima facie case of negligence and jury verdict finding receiving warehouse owner 55 percent liable for truck driver’s injuries in manually moving tightly packed 300-pound boxes in preparation for unloading where owner’s employees had received, and transmitted to supervisors, complaints by plaintiff and other drivers about its failure to use proper equipment to unload such boxes, owner’s employee testified that his superiors responded that owner was not going to buy basiloid attachment used in loading boxes at point-of-departure warehouse, expert testified that owner’s practices fell below industry standards in allowing driver to participate in unloading process and in failing to supply proper unloading equipment, and another expert testified that driver would not have been injured if owner had used basiloid equipment. Further, it was not reversible error to allow driver’s expert to answer hypothetical question about loading and unloading where expert had requisite knowledge and experience, and basis for question was fairly inferable from record. Gleason v Holman Contract Warehousing Inc., 263 A.D.2d 913, 694 N.Y.S.2d 230, 1999 N.Y. App. Div. LEXIS 8454 (N.Y. App. Div. 3d Dep't 1999).

Manufacturer of excavation trencher in which plaintiff's hand was caught was not strictly liable, even though plaintiff's expert mechanical engineer testified that trencher should have been designed safer by adding dead-man switch, absent evidence that it was possible in 1990 to design and manufacture particular subject trencher with such switch, that manufacturer could have spread cost of such design change, or that trencher's lock-out lever or tension control device was defective. In products liability action by mechanical engineer whose hand was caught in excavation trencher that he rented for research comparison purposes, court properly excluded testimony of plaintiff's expert, who also was mechanical engineer, that accident occurred because plaintiff did not fully stop chain with lock-out lever because tension on lever was too tight where plaintiff consistently testified that lock-out lever was fully engaged each time that he stopped to clear obstruction, no testimony was offered that plaintiff found lever too difficult to engage, expert's opinion was thus based on facts contradictory to evidence, and expert's inspection of trencher occurred 4 years after accident and after its rental to others. Schriber v Melroe Co., 273 A.D.2d 650, 710 N.Y.S.2d 416, 2000 N.Y. App. Div. LEXIS 7230 (N.Y. App. Div. 3d Dep't 2000).

In products liability action by buyer's employee who was hit by forklift truck as it was backing up, employee failed to raise triable issue of fact as to liability of manufacturer and seller of truck where employee's expert lacked experience in or personal knowledge of design, manufacture, or use of forklift trucks, and expert's conclusion that subject truck was unsafe because of presence and size of rearview mirrors was unsupported by foundational facts, such as deviation from industry standards or statistics showing frequency of injuries caused by using trucks so equipped. Geddes v Crown Equip. Corp., 273 A.D.2d 904, 709 N.Y.S.2d 770, 2000 N.Y. App. Div. LEXIS 6969 (N.Y. App. Div. 4th Dep't 2000).

In action for wrongful death of skydiver ride company's electrocuted employee, court properly excluded testimony of plaintiff's expert where expert did not inspect ride and its related components until at least 3 years after decedent's death, and expert's opinion was based on review of ride manual containing configuration of electrical connection. Nichols v Cummins

Engine Co., 273 A.D.2d 909, 709 N.Y.S.2d 319, 2000 N.Y. App. Div. LEXIS 6740 (N.Y. App. Div. 4th Dep't 2000), app. denied, 715 N.Y.S.2d 206, 2000 N.Y. App. Div. LEXIS 9528 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 703, 722 N.Y.S.2d 795, 745 N.E.2d 1017, 2001 N.Y. LEXIS 100 (N.Y. 2001).

In action for personal injuries sustained while plaintiff was unloading bundles of pipes from truck, no facts were adduced tending to show that plaintiff's injuries were proximately caused by manner in which truck was loaded, so as to support negligence claim against carrier or shipper, where (1) opinion of plaintiff's expert that there was such causal relationship was pure speculation, (2) there was no competent expert evidence to contradict defendants' evidence that 21-foot pipes were beyond safe working capacity of kangaroo crane used, and (3) plaintiff could not prove otherwise by relying on alleged prior use of crane, because prior misuse cannot negate dangerous reuse of equipment. Torres v Allied Tube & Conduit, 281 A.D.2d 243, 721 N.Y.S.2d 655, 2001 N.Y. App. Div. LEXIS 2464 (N.Y. App. Div. 1st Dep't 2001).

Manufacturer of table saw was not entitled to summary judgment dismissing plaintiff's strict liability and negligence claims based on alleged design defects where (1) plaintiff was injured when, while making non-through angle cuts, 2 fingers were caught in saw's unguarded blade, (2) although saw was equipped with guard, it was not deployed over blade at time of accident, and (3) plaintiff's expert stated that saw should have been equipped with "over the arm or Brett Guard," which would have allowed non-through cuts without its removal. Sanchez v Otto Martin Maschinenbau GmbH & Co., 281 A.D.2d 284, 722 N.Y.S.2d 140, 2001 N.Y. App. Div. LEXIS 2980 (N.Y. App. Div. 1st Dep't 2001).

Owner of power plant under construction and general contractor were entitled to summary judgment dismissing cause of action for violation of CLS Labor § 240(1) asserted by worker who, while on top of 12-foot-high condenser tank looking for vacuum leak, was injured when rupture disc on tank imploded, causing him to be drawn partially inside tank, even though worker's expert attributed implosion to difference in air pressure and indicated that force of gravity causes air pressure, where extraordinary protections of § 240(1) do no encompass any

and all perils that may be connected in some tangential way with effects of gravity, and core objective of § 240(1) in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Luckern v Lyonsdale Energy Ltd. P'ship, 281 A.D.2d 884, 722 N.Y.S.2d 632, 2001 N.Y. App. Div. LEXIS 2761 (N.Y. App. Div. 4th Dep't 2001).

37. Real estate matters, generally

Finding by Deputy Commissioner for Natural Resources that proposed debris landfill, as controlled by draft Department of Environmental Conservation permit, was designed not to produce significant amounts of hydrogen sulfide was neither arbitrary, abuse of discretion, nor based on error of law where (1) permit prohibited disposal of pulverized construction and demolition debris, which contributes to hydrogen sulfide production, and prohibited construction of new cell until previously constructed cell was properly closed and capped, (2) proposed landfill was designed with leachate collection system, which collects and removes excess moisture and prevents groundwater from seeping into waste mass, (3) expert recognized that operating leachate collection system would limit potential for hydrogen sulfide production, and (4) design was amended to facilitate conversion of its passive vent system into active gas collection system if conditions made it necessary. City of Rennselaer v Duncan, 266 A.D.2d 657, 698 N.Y.S.2d 113, 1999 N.Y. App. Div. LEXIS 11412 (N.Y. App. Div. 3d Dep't 1999).

38. —Appraisers and evaluators

In proceeding by purchaser of house from state to recover from state for negligent destruction of house by state’s agents, state had burden of eliciting on cross-examination the technical basis of opinion of purchaser’s real estate appraiser regarding value of property destroyed. Horn v State, 45 A.D.2d 799, 357 N.Y.S.2d 178, 1974 N.Y. App. Div. LEXIS 4575 (N.Y. App. Div. 3d Dep't 1974), aff'd, 36 N.Y.2d 993, 374 N.Y.S.2d 604, 337 N.E.2d 121, 1975 N.Y. LEXIS 2074 (N.Y. 1975).

Highest and best use of condemned property at time of taking was residential strip development where 11.29-acre parcel was currently used as “farmette” (defined as property improved by single-family residence that has excess land available for small agricultural or recreational purposes), condemnee’s appraiser testified that residential strip development of 10 lots was property’s highest and best use, and condemnee met his burden of showing reasonable probability that, but for taking, residential strip development could or would have been made within reasonably near future. Condemnee offered sufficient evidence on which to base award of consequential damages where his appraiser testified that value of condemned property was $219,000 before and $104,000 after taking, and appraiser’s testimony was not seriously challenged on cross-examination. County of Onondaga v Thorpe, 245 A.D.2d 1093, 667 N.Y.S.2d 541, 1997 N.Y. App. Div. LEXIS 13883 (N.Y. App. Div. 4th Dep't 1997), app. denied, 91 N.Y.2d 811, 671 N.Y.S.2d 715, 694 N.E.2d 884, 1998 N.Y. LEXIS 972 (N.Y. 1998).

Homeowner was entitled to frontage variance where (1) sole opposition consisted of generalized grievances of group of neighboring property owners, which was based on weight of numbers rather than facts, (2) homeowner submitted study by licensed real estate appraiser, with 21 years of experience, who examined property and surrounding community and concluded that minor frontage variance sought would be in character with community and would not impact physical or environmental character of neighborhood or affect property values, and (3) homeowner also submitted area maps indicating numerous similar and substantial variances issued by zoning board in immediate area. Pottick v Duncan, 251 A.D.2d 333, 673 N.Y.S.2d 740, 1998 N.Y. App. Div. LEXIS 6329 (N.Y. App. Div. 2d Dep't 1998).

County industrial development agency was not entitled to have stricken, as defective, condemnation claimant’s appraisal reports, even though those reports were inadequate in some respects, where, taken as whole, they satisfied requirements of CLS Unif Tr Ct Rls § 202.61(c) (22 NYCRR § 202.61(c)), their deficiencies did not hamper referee’s ability to determine value of claimant’s property, it was not improper for claimant’s appraisers to evaluate separately residential and industrial portions of his property, and appraisers’ failure to list before-taking and

after-taking valuations of residential portion did not render appraisals defective, because taking of industrial portion concededly had no adverse impact on residential portion. Highest and best use of remaining residential portion of property, after other portion was taken by condemnation for industrial use, was its present use as single residence, rather than as residential subdivision, where minimum lot width allowed under zoning law was 65 feet, and thus subdividing 257-foot-wide parcel into 4 lots was not physically possible, and appraiser admitted on cross-examination that such subdivision would result in lot line running through existing dwelling. Thompson v Erie County Indus. Dev. Agency, 251 A.D.2d 1026, 674 N.Y.S.2d 193, 1998 N.Y. App. Div. LEXIS 7066 (N.Y. App. Div. 4th Dep't 1998).

In action against town for de facto taking of land, court properly accepted valuation rendered by plaintiff's expert where expert took into account existence of sand and gravel deposits insofar as they influenced land's market value, and expert was able to accurately measure such enhanced value because plaintiff's assignor had leased right to remove those deposits in arm's-length transaction that reflected business value of deposits. Central Dover Dev. Corp. v Town of Dover, 255 A.D.2d 542, 680 N.Y.S.2d 668, 1998 N.Y. App. Div. LEXIS 12845 (N.Y. App. Div. 2d Dep't 1998), app. denied, 94 N.Y.2d 756, 703 N.Y.S.2d 73, 724 N.E.2d 769, 1999 N.Y. LEXIS 3976 (N.Y. 1999).

In landowner's consolidated proceedings under CLS RPTL Art 7 to reduce tax assessments on its cement plant properties, opinions of parties' experts that market value approach had been eschewed in favor of "reproduction cost new less depreciation" method of valuation were not determinative, and owner's appraisal reports were deficient in failing to use market value method, where courts had used and recommended market value approach for cement plant assessments, and Court of Appeals recently had reaffirmed principle that "[d]espite the difficulties of computing the market value of large industrial complexes, the market value method of valuation is preferred as the most reliable measure of a property's full value for assessment purposes." Lehigh Portland Cement Co. v Assessor of the Town of Catskill, 263 A.D.2d 558, 693 N.Y.S.2d 671, 1999 N.Y. App. Div. LEXIS 7684 (N.Y. App. Div. 3d Dep't 1999).

Expert testimony proved over-assessment of taxpayers' motel, restaurant, and parking lot properties where member of Appraisal Institute with extensive background in appraising properties in area testified that he relied primarily on income capitalization approach with support from market data approach by analyzing appraisals of comparable properties close to subject properties, and he provided extensive detail about his methodology, including his reliance on documents prepared by certified public accountant, who also testified as to accuracy of appraiser's findings. Court properly refused to strike taxpayers' appraisal reports on ground that they did not separately analyze and set forth fair market value of land component of disputed parcels where both expert appraiser and certified public accountant testified that calculations supporting their income capitalization approach to valuation reflected income from both land and improvements thereon, thus precluding need for separate valuation when using that methodology, which is preferred method when reviewing income-producing properties. Valuation was not rendered legally deficient by its inclusion of income and expenses in "base year" that allegedly were abnormally low due to financial distress where that claim was supported only by expert's bald conclusory statements, there were conflicting expert opinions, and there was no confirmation from other area motel owners that contested year was aberration rather than part of ebb and flow of motel business. Also, valuation was not rendered legally deficient by alleged "double dipping" in deduction of management fee in addition to annual salary where expert appraiser testified regarding relationship between good will and management and how those efforts impact calculation of value. Schachenmayr v Board of Assessors, 263 A.D.2d 731, 693 N.Y.S.2d 701, 1999 N.Y. App. Div. LEXIS 8023 (N.Y. App. Div. 3d Dep't 1999).

In proceedings under CLS RPTL Art 7 to review property tax assessments of 27,139 acres of land within Adirondack Park, court correctly decided that parcel's "highest best use" was as single integrated "wilderness estate" subject to conservation easement where court's consideration of effect of easement on property's value properly focused on present use of property, rather than its speculative potential uses, and court reasonably accepted view of taxing towns' appraiser, which was consistent with Adirondack Park Agency guidelines. Also, taxing

towns' appraisal of tract was not deficient with regard to comparability of sales or increased value of tract from 1990 to 1996 where appraisers for both landowner and towns used same tract as one of their comparable sales, rise in market value was shown by fact that some parcels used as comparable sales were later resold for substantially higher amounts, and towns' appraiser based comparable sale evaluation primarily on 4 large parcels that were sufficiently similar to subject tract in size and characteristics to serve as guide to market value. Ross v Town of Santa Clara, 266 A.D.2d 678, 698 N.Y.S.2d 90, 1999 N.Y. App. Div. LEXIS 11395 (N.Y. App. Div. 3d Dep't 1999).

In proceeding under CLS EDPL Art 5, court was not required to credit testimony and appraisal of expert for natural gas transmission company that acquired easement over claimant's property where court has broad discretion to accept or reject expert testimony in determining value of condemned property, and court was faced with divergent appraisals by parties' experts and varying comparable sales within each appraiser's report; however, court was required to address in its decision its basis for deviating from figures used in appraisals and basis for its ultimate valuation. In re Acquisition of Real Prop. by CNG Transmission Corp., 273 A.D.2d 726, 710 N.Y.S.2d 670, 2000 N.Y. App. Div. LEXIS 7461 (N.Y. App. Div. 3d Dep't 2000).

In proceeding by state under CLS RPTL Art 7 challenging town's assessments of state park land within town for various tax years, valuation methodology used by state's appraiser was not rendered infirm as matter of law by alleged violations of 9 NYCRR § 199-4.1 et seq., which mandates that local assessors appraise parcel-by-parcel, that Office of Real Property Services mail list of all parcels of state-owned land to assessor or county director before taxable status date, and that assessor enter full value and assessed value for each parcel on state's list, where town's argument did not address real issue of value of parcels, ignored fact that end product of state's appraisal was valuation of each parcel, and failed to acknowledge that town's assessor also failed to do parcel-by-parcel appraisal to extent that he also relied on comparison of average size of state's parcels with sales of comparably sized parcels. State's appraisal rebutted presumption of validity of town's assessments and raised triable issue of fact as to

market value of that land where state's appraiser reached fair and objective conclusion based on sound theory and objective data, and issues of fact concerning overvaluation and inequality remained for trial. State v Town of Hardenburgh, 273 A.D.2d 769, 710 N.Y.S.2d 435, 2000 N.Y. App. Div. LEXIS 7462 (N.Y. App. Div. 3d Dep't 2000).

Court of Claims properly declined to adopt state's proposed cost-to-cure measure of claimant's consequential damages for taking of parking area, despite evidence that such loss could be cured by relocating existing curb cut about 10 feet and reconfiguring remaining parking area, where (1) proposed curb cut required city permit, (2) state did not present any evidence showing criteria used to decide permit application, that curb cut proposed would meet such criteria, or that work involved would be wholly within claimant's property, (3) state merely tried to prove, through cross-examination of claimant's expert, that if all relevant (but undisclosed) criteria were met, permit would issue as matter of right, which conclusion claimant's expert challenged, (4) claimant's expert noted that permission for curb cut entailed scrutiny of area surrounding proposed cut and that grant of permit could be conditioned, for example, on applicant's agreement to repair adjacent right-of-way, and (5) state's proposed measure did not appear to account for expenses of applying for and securing permit. Fodera Enters. v State, 275 A.D.2d 85, 714 N.Y.S.2d 113, 2000 N.Y. App. Div. LEXIS 10120 (N.Y. App. Div. 2d Dep't 2000).

Award of $335,441.09 for state's appropriation of church property was adequate where court's determination of value of condemned parcel was within range of expert testimony, and court properly rejected valuation of church's expert based on site allocation adjustment. Redeeming Love Christian Ctr. v State, 275 A.D.2d 739, 713 N.Y.S.2d 483, 2000 N.Y. App. Div. LEXIS 9257 (N.Y. App. Div. 2d Dep't 2000).

In Article 78 proceeding to review decision of State Board of Real Property Services establishing town's state equalization rate for 1997, there was rational basis for board's rejection of computations of town's experts where board set forth its reasons for each proposed assessment that it rejected. Town of Greenburgh v New York State Bd. of Real Prop. Servs., 275 A.D.2d 787, 713 N.Y.S.2d 539, 2000 N.Y. App. Div. LEXIS 9396 (N.Y. App. Div. 2d Dep't 2000).

Despite strong community opposition to expansion of shopping mall to include department store, town zoning board's denial of special exception was arbitrary where (1) its findings that such expansion would be detrimental to area due to increased noise and traffic and diminution of air quality were not supported by substantial evidence, and (2) residents' general complaints as to, inter alia, increased traffic, and their summary criticisms of experts' testimony, were uncorroborated by any empirical data and were insufficient to counter various expert opinions based on traffic and air quality analyses. Retail Prop. Trust v Bd. of Zoning Appeals, 281 A.D.2d 549, 722 N.Y.S.2d 244, 2001 N.Y. App. Div. LEXIS 2605 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 607, 738 N.Y.S.2d 290, 764 N.E.2d 394, 2001 N.Y. LEXIS 3794 (N.Y. 2001), rev'd, 98 N.Y.2d 190, 746 N.Y.S.2d 662, 774 N.E.2d 727, 2002 N.Y. LEXIS 1882 (N.Y. 2002).

New trial would be ordered in proceeding for condemnation of property containing mineral deposit where (1) court rejected appraisals of both parties and arrived at value using "hybrid-type" approach but failed to explain basis for its determination, (2) petitioners' appraiser concluded that highest and best use of property was as gravel mine but erred in multiplying amount of gravel appropriated or rendered unmineable by unit price per cubic yard, (3) respondent's appraiser failed to make necessary adjustments to account for differences between comparable sales of property on which he relied and subject property, and he failed to include necessary facts, figures, and calculations to account for those adjustments that he did make, and (4) thus, there was no competent proof from which Appellate Division could determine property's value. Bell v Vill. of Poland, 281 A.D.2d 878, 722 N.Y.S.2d 194, 2001 N.Y. App. Div. LEXIS 2659 (N.Y. App. Div. 4th Dep't 2001).

39. —Road and sidewalk construction

In action against city and its contractor for fall on crosswalk allegedly caused by defective expansion joint installed by contractor, affidavit of plaintiff's expert engineer identifying specific provisions of contract that contractor violated raised triable issue of fact as to contractor's compliance where asserted defects included use of nonconforming tar filler and absence of any

sealer at accident area, and contractor's representative testified that tar filler used would last "indefinitely." Wasser v City of New York, 251 A.D.2d 173, 673 N.Y.S.2d 1001, 1998 N.Y. App. Div. LEXIS 7295 (N.Y. App. Div. 1st Dep't 1998).

In action for slip and fall on allegedly defective public sidewalk abutting property leased for supermarket, lessee was entitled to summary judgment where plaintiff failed to prove that lessee negligently maintained or repaired sidewalk or otherwise affirmatively created alleged defect; although plaintiff's expert concluded, after examining photographs of sidewalk, that it had been improperly repaired, plaintiff did not show when or by whom repair was made. Ribacoff v City of Mount Vernon, 251 A.D.2d 482, 674 N.Y.S.2d 431, 1998 N.Y. App. Div. LEXIS 6834 (N.Y. App. Div. 2d Dep't 1998).

In action for slip and fall on broken public sidewalk abutting landowner's property, plaintiff raised triable issue of fact as to whether landowner negligently repaired sidewalk, even though landowner denied having repaired section of sidewalk on which plaintiff fell, where landowner admitted repairing 2 other sections of broken sidewalk abutting his property, village unequivocally stated that it had never repaired subject area, and plaintiff submitted affidavit of expert in field of concrete inspection who concluded that someone had attempted to repair subject area. Fraser v Fertig, 251 A.D.2d 621, 676 N.Y.S.2d 201, 1998 N.Y. App. Div. LEXIS 7889 (N.Y. App. Div. 2d Dep't 1998).

County was not entitled to summary dismissal of action for slip and fall at juncture of street, curb, and sidewalk in front of county courthouse, even though no written notice of defect was filed, where expert opined that area in question was patched in unworkmanlike manner, that patching was not done smoothly and was gorged, that elevation was not uniform, and that area was left in dangerous condition; thus, there was triable issue of fact as to whether county's negligence created condition that negated need for written notice to county. O'Toole v County of Sullivan, 255 A.D.2d 799, 680 N.Y.S.2d 315, 1998 N.Y. App. Div. LEXIS 12497 (N.Y. App. Div. 3d Dep't 1998).

Town was entitled to dismissal of motorist's action based on allegedly negligent design, construction, and maintenance of road, even though motorist's consultant averred that "[t]he roadway is...sloped at an excessive rate," "[t]he pavement is in very poor condition," and "[t]he road is only 16 feet wide," where consultant was not licensed professional engineer, and his affidavit did not provide any specific facts or observations supporting those conclusions and did not reference industry standards or practices that, if implemented, would have remedied claimed defects. Mosher v Town of Oppenheim, 263 A.D.2d 605, 692 N.Y.S.2d 784, 1999 N.Y. App. Div. LEXIS 7703 (N.Y. App. Div. 3d Dep't 1999).

Owner of building abutting city sidewalk on which plaintiff slipped and fell was not entitled to summary judgment dismissing complaint against it where (1) deposition testimony, affidavits of licensed experts, and photographs tended to show that city knew of defects in sidewalk abutting owner's building before accident, that plaintiff tripped on "cut" in sidewalk that extended breadth thereof from curb to building, and that cut indicated opening made for installation of service line to building at owner's request, and thus owner's special use of sidewalk, (2) owner's attacks on plaintiff's experts' qualifications were conclusory and unsupported, and (3) owner's deposition witness was unresponsive to questions regarding building's management and maintenance, leaving plaintiff in need of information within owner's exclusive knowledge. Perez v City of New York, 266 A.D.2d 44, 698 N.Y.S.2d 14, 1999 N.Y. App. Div. LEXIS 11388 (N.Y. App. Div. 1st Dep't 1999).

Village was not entitled to summary judgment dismissing action for slip and fall on uneven condition of street located directly over village's underground pipe where (1) affidavit of plaintiff's expert, which was based on deposition testimony, photographs, and maps, raised triable issue of fact as to whether village created defect or had actual or constructive notice of it, (2) adjacent curb and sidewalk were undisturbed, indicating that no work had been performed with regard to house in vicinity of defect, and (3) although utility company also had underground pipes near uneven condition, it was required to obtain permit to cut open street to fix its pipes, and village could not produce evidence that company had done so. Roberts v Consolidated Edison, Inc.,

273 A.D.2d 369, 709 N.Y.S.2d 204, 2000 N.Y. App. Div. LEXIS 7137 (N.Y. App. Div. 2d Dep't 2000).

In action against city for trip and fall in crosswalk, allegedly caused be depression remaining after negligent repair of pothole, plaintiff was deprived of critical evidence and entitled to new trial where (1) trial court had refused to allow plaintiff to present expert testimony of city's in-house highway repairer, who had been involved in repairing pothole in question, (2) that expert's pretrial examination provided city with type of pretrial disclosure that CLS CPLR § 3101(d)(1)(i) was intended to afford as to other party's expert, and (3) scope of disclosure for employees of party, whether noticed or not, is defined by CLS CPLR § 3101(a) rather than CLS CPLR § 3101(d). Lippel v City of New York, 281 A.D.2d 327, 722 N.Y.S.2d 511, 2001 N.Y. App. Div. LEXIS 3135 (N.Y. App. Div. 1st Dep't 2001).

Jury verdict assessing accident responsibility at 70 percent for defendant and 30 percent for plaintiff would be reinstated where (1) plaintiff was injured when her shoe heel caught in sidewalk expansion joint, (2) defendant building owner was responsible for placement of joint so that it could not be seen by pedestrian approaching it from other side of roadway overpass column, and (3) plaintiff's engineer and safety expert testified, inter alia, that such placement operated as "trap." Coakley v City of New York, 286 A.D.2d 576, 730 N.Y.S.2d 72, 2001 N.Y. App. Div. LEXIS 8336 (N.Y. App. Div. 1st Dep't 2001).

40. —Surveyors

In an action brought by a property owner seeking to enjoin another owner from using and obstructing an easement, an injunction was properly granted where the testimony of the property owner's surveyor was properly admitted inasmuch as the surveyor was an intern land surveyor and a licensed engineer, despite the fact that he was not a licensed surveyor. Cutro v Duffy, 88 A.D.2d 1007, 451 N.Y.S.2d 937, 1982 N.Y. App. Div. LEXIS 17418 (N.Y. App. Div. 3d Dep't 1982).

41. —Title insurance

Water power rights resulting from river dam were appurtenant to parcel south of river, rather than to condemned parcel located north of river and formerly owned by claimant seeking just compensation under CLS EDPL § 503, where (1) in late 1800s, water power rights associated with north parcel were severed from land and conveyed to owner of south parcel, who operated dam, (2) title examiner, after searching all relevant conveyances, concluded that 1930 deed relied on by claimant did not reveal any grant of water rights to claimant or its predecessor, (3) affidavit of title insurance firm and certified abstract of title under CLS CPLR §§ 4520 and 4523 declared that claimant did not obtain any water power rights by 1950 conveyance of transmission corridor on north side of river, and (4) absence of reference in deed to grantor's "successors and assigns" did not preclude finding in title abstract that easement was conveyed to south shore owner for continued presence of dam and its flooding needs. In re Acquisition of Real Prop. by Warrensburg Hydro Power Ltd. Pshp., 263 A.D.2d 822, 694 N.Y.S.2d 506, 1999 N.Y. App. Div. LEXIS 8309 (N.Y. App. Div. 3d Dep't 1999).

42. Other and miscellaneous non-medical matters and experts

In action by supermarket customer who slipped and fell on crushed grapes, court properly precluded customer's expert witness from testifying where (1) proposed expert admitted that he had not worked in supermarket industry for last 8 years, was not familiar with owner's safety procedures, and never visited site of accident, and (2) any conclusion based on condition of grapes did not require professional or scientific knowledge or skill outside range of jurors' ordinary experience. Rojas v Supermarkets Gen. Corp., 238 A.D.2d 393, 656 N.Y.S.2d 346, 1997 N.Y. App. Div. LEXIS 3825 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 814, 676 N.Y.S.2d 127, 698 N.E.2d 956, 1998 N.Y. LEXIS 1384 (N.Y. 1998).

In action against transit authority for injuries allegedly resulting from plaintiff's being hit by train, testimony of plaintiff's expert as to speed of train was based on speculation, lacked competent factual support, and was beyond proper scope of expert testimony where plaintiff never testified

as to speed of train, there was no other evidence as to speed of train, and expert must have reached his conclusion by assuming material facts not in evidence. Gathers v New York City Transit Auth., 242 A.D.2d 506, 662 N.Y.S.2d 493, 1997 N.Y. App. Div. LEXIS 9172 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 810, 671 N.Y.S.2d 714, 694 N.E.2d 883, 1998 N.Y. LEXIS 937 (N.Y. 1998).

Substantial evidence supported findings that used car dealer falsely certified car's condition in violation of CLS Veh & Tr § 417, failed to properly inspect car in violation of 15 NYCRR § 78.13(c), and failed to provide required information on bill of sale in violation of 15 NYCRR § 78.13(a)(1) and (3) where (1) at time of sale, car's seatbelts did not retract properly, its air conditioning compressor was missing, and its rear frame was severely rotted, (2) DMV inspector, who examined car 6 months after sale, testified that although car had been driven about 2,000 miles since sale, severity of rotted frame showed that condition had existed at time of sale, (3) service invoice found in glove box described work performed on car before sale and indicated that parts of rear frame were beginning to near "structural failure," (4) DMV inspector concluded that dealer did not conduct proper presale inspection of car and that bill of sale omitted certain required information. Nazarian v Jackson, 245 A.D.2d 688, 664 N.Y.S.2d 857, 1997 N.Y. App. Div. LEXIS 12569 (N.Y. App. Div. 3d Dep't 1997).

Proper measure of professional photographer's quantum meruit recovery from decedent's estate for her work on canceled project of preparing decedent's photographic work for exhibition was hourly rate of $17.45 per hour, which was calculated from amount that she was to be paid for completed project and her own notes estimating hours needed for entire project and hours that she actually spent before cancellation, even though she presented expert testimony that her time on project was worth $50 per hour. Rolleston-Daines v Estate of Hopiak, 263 A.D.2d 883, 694 N.Y.S.2d 225, 1999 N.Y. App. Div. LEXIS 8458 (N.Y. App. Div. 3d Dep't 1999).

Cooperative corporation that operated dual-purpose residence and hotel was entitled to summary judgment dismissing minority shareholders' causes of action for breach of contract and breach of fiduciary duty where (1) plaintiffs did not rebut strong presumption that

corporation, which was owned by its resident shareholders, acted in good faith and in exercise of honest judgment and did not discriminate against plaintiffs, who owned transient units for investment purposes, (2) classification of claim as one for "breach of contract" did not defeat operation of business judgment rule, (3) testimony of plaintiffs' experts did now show discrimination or breach of any specific duty but only that hotel could have been operated more profitably, and (4) parties' past dealings indicated that corporation fully protected and advanced plaintiffs' interests. Sherry Assocs. v Sherry-Netherland, Inc., 273 A.D.2d 14, 708 N.Y.S.2d 105, 2000 N.Y. App. Div. LEXIS 6105 (N.Y. App. Div. 1st Dep't 2000).

School district was not entitled to summary judgment dismissing action by third-year track team member who slipped and fell when runner behind her stepped on her heel during noncompetitive "easy run" practice in high school hallway, even though plaintiff assumed usual risks inherent in such practices, where there was evidence that teammates were running only one foot behind plaintiff and that her group "had been running in this close fashion for almost all of the twenty minutes" preceding her fall, and her expert opined that "[p]ermitting one runner to run approximately one foot behind another runner in a school hallway creates an unreasonable and dangerous risk of contact and physical injury between runners which is simply unnecessary in the context of an 'easy run', noncompetitive track practice." Kane v North Colonie Cent. Sch. Dist., 273 A.D.2d 526, 708 N.Y.S.2d 203, 2000 N.Y. App. Div. LEXIS 6445 (N.Y. App. Div. 3d Dep't 2000).

Town board arbitrarily denied rate increase to sewer company, even though company lost records of its actual construction costs for 4 of 7 sections of sewer system, where town did not deny that company built system, company submitted consulting civil engineer's expert testimony estimating construction costs, that testimony and numerous documents proved that current sewer rates were inadequate, and testimony of town's civil engineer that company could not recover costs of construction because it lost documents proving actual costs was irrational—as was board's reliance on it. Bennett Rd. Sewer Co. v Town Bd., 273 A.D.2d 902, 709 N.Y.S.2d 768, 2000 N.Y. App. Div. LEXIS 6944 (N.Y. App. Div. 4th Dep't 2000).

In personal injury action, court properly limited plaintiffs' cross-examination of physical therapist who evaluated injured plaintiff where plaintiffs tried to cross-examine her without first laying proper foundation concerning her knowledge of medical reports that injured plaintiff's spine was fused. Lopez v Kenmore-Tonawanda Sch. Dist., 275 A.D.2d 894, 713 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 4th Dep't 2000).

Convenience store franchisor and property owner were entitled to summary judgment dismissing personal injury action based on negligent failure to provide adequate security where (1) plaintiff was approached in store's parking lot by about 15 persons, one of whom hit him in head and repeatedly kicked him until he blacked out, (2) defendants presented evidence that harm to plaintiff was not foreseeable, (3) prior criminal incidents relied on by plaintiff were not similar to subject assault, and (4) affidavit of plaintiff's expert was conclusory and insufficient. Scheir v Lauenborg, 281 A.D.2d 530, 722 N.Y.S.2d 63, 2001 N.Y. App. Div. LEXIS 2580 (N.Y. App. Div. 2d Dep't 2001).

State trooper did not act recklessly in pursuing dirt bike that accelerated after driver ignored his gesture to pull over (for failure of driver and passenger to wear helmets), trooper's conduct was not proximate cause of accident in which driver lost control of bike, even though trooper's car came to rest on top of injured passenger, and thus state was not liable for passenger's injuries, where (1) passenger's own expert acknowledged that operation of bike was threat to public safety and that trooper, having perceived Vehicle and Traffic Law violation, had authority and duty to follow bike and remove it from highway, (2) although trooper exceeded 35 miles-per-hour speed limit during part of brief pursuit, he never exceeded 50 and was traveling only 17 to 20 miles per hour when he left road, (3) trooper's exceeding of speed limit did not warrant liability, given that weather was clear and dry, it was light outside, and there was no traffic in rural area of pursuit, and (4) although trooper's car ultimately came into contact with bike and passenger's ejected body on side of road, that unintentional contact resulted from trooper's reasonable efforts to avoid what he thought was going to be collision on road. Schieren v State, 281 A.D.2d 828, 722 N.Y.S.2d 128, 2001 N.Y. App. Div. LEXIS 3011 (N.Y. App. Div. 3d Dep't 2001).

In action under CLS Labor §§ 200(1), 240(1), and 241(6) for injury sustained by worker during unloading of particle board panels from trailer at construction site when panels tipped over onto his legs in trailer, affidavit of plaintiff's engineer and safety expert that company whose employees had loaded panels into trailer for delivery to site departed from "good accepted safety practices" lacked probative value and was inadequate to raise triable issue of fact as to whether trailer was negligently loaded where (1) engineer had no training or experience in trucking industry, (2) engineer did not state that loading and stacking of panels departed from industry standards, (3) both regulations relied on by engineer were inapplicable to facts of case, and (4) defendants' trucking and distribution expert, whose area of expertise covered standard practice and procedures in loading and unloading of trucks, opined that company properly loaded and secured panels as per industry standards; for same reasons there was no merit in plaintiff's claim against company that transported panels for allowing them to be loaded in trailer in dangerous manner. Kocurek v Home Depot, U.S.A.P., Inc., 286 A.D.2d 577, 730 N.Y.S.2d 74, 2001 N.Y. App. Div. LEXIS 8334 (N.Y. App. Div. 1st Dep't 2001).

State's public school financing system violates CLS NY Const Art XI § 1 where, inter alia, (1) state abdicated its constitutional responsibility by relying largely on uncertainties of, and disparities in, local tax revenues, (2) state failed to provide New York City students with opportunity for sound basic education by failing to provide minimally adequate teaching of reasonably current basic curricula by sufficient number of adequately trained teachers and by failing to provide minimally adequate physical facilities, classrooms, and instrumentalities of learning, and (3) causal link between current funding system and students' poor performance was proved by graduation/dropout rates, standardized test scores, expert testimony, and various statistical evidence. Campaign for Fiscal Equity v State, 187 Misc. 2d 1, 719 N.Y.S.2d 475, 2001 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 2001), rev'd, 295 A.D.2d 1, 744 N.Y.S.2d 130, 2002 N.Y. App. Div. LEXIS 7252 (N.Y. App. Div. 1st Dep't 2002).

ii. Medical Experts

43. Generally

There was no error in admitting testimony of the state's psychiatrists as expert witnesses without specifying the various tests and examinations to which defendant was subjected in arriving at an opinion as to his sanity. People v Di Piazza, 24 N.Y.2d 342, 300 N.Y.S.2d 545, 248 N.E.2d 412, 1969 N.Y. LEXIS 1390 (N.Y. 1969).

Generally, a predicate for the admission of expert testimony is that its subject matter involve information or questions beyond the ordinary knowledge and experience of the trier of the facts, and that the expert is possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable; however, the requirement that the expert exhibit a degree of confidence in his conclusions sufficient to satisfy accepted standards of reliability is not satisfied by a single verbal straightjacket alone, but, rather, by any formulation from which it can be said that the witness' whole opinion reflects an acceptable level of certainty. Matott v Ward, 48 N.Y.2d 455, 423 N.Y.S.2d 645, 399 N.E.2d 532, 1979 N.Y. LEXIS 2413 (N.Y. 1979).

Doctor's report which does not give basis of his opinion is admissible, and such report in affirmation form may constitute substantial evidence even though doctor is not called as witness. National Basketball Ass'n v New York State Div. of Human Rights, 68 N.Y.2d 644, 505 N.Y.S.2d 63, 496 N.E.2d 222, 1986 N.Y. LEXIS 19039 (N.Y. 1986).

CLS CPLR § 3101(d)(1) applies only to experts retained to give testimony at trial, and not to treating physicians. Casey v Tan, 255 A.D.2d 900, 680 N.Y.S.2d 391, 1998 N.Y. App. Div. LEXIS 12097 (N.Y. App. Div. 4th Dep't 1998), app. denied, 685 N.Y.S.2d 386, 1999 N.Y. App. Div. LEXIS 1721 (N.Y. App. Div. 4th Dep't 1999).

Defendants in personal injury action were not entitled to have one of plaintiff's treating physicians precluded from testifying regarding her interpretation of plaintiff's MRI on ground that plaintiffs failed to comply with CLS CPLR § 3101(d)(1) and CLS Unif Tr Ct Rls § 202.17 (22 NYCRR § 202.17) where (1) because witness was treating physician, § 3101(d)(1) did not apply,

(2) § 202.17 argument, raised for first time on appeal, was not properly preserved for appellate review, and (3) § 202.17 relates to exchange of medical reports and thus did not apply. Bonner v Lee, 255 A.D.2d 1005, 679 N.Y.S.2d 775, 1998 N.Y. App. Div. LEXIS 12311 (N.Y. App. Div. 4th Dep't 1998).

Defendants were entitled to summary judgment dismissing medical malpractice action where their medical expert evidence proved prima facie case of non-liability, and affidavit of plaintiffs' medical expert failed to connect factual assertions made therein to plaintiffs' claim other than in conclusory manner. Heshin v Levitt, 273 A.D.2d 442, 711 N.Y.S.2d 749, 2000 N.Y. App. Div. LEXIS 7388 (N.Y. App. Div. 2d Dep't 2000).

The testimony of an expert witness should be totally unaffected by the question of which party to the litigation retains that expert. With respect to his or her observations, that expert should be subject to call or subpoena by any party and with respect to the opinion of the expert, that opinion should be equally available to all parties willing to pay an appropriate fee for time consumed by travel and testimony, and for whom the expert is willing to testify as to that opinion. Carrasquillo v Rothschild, 110 Misc. 2d 758, 443 N.Y.S.2d 113, 1981 N.Y. Misc. LEXIS 3156 (N.Y. Sup. Ct. 1981).

44. Administrative loss of license to practice medicine

In physician's Article 78 proceeding under CLS Pub Health § 230-c(5) to review revocation of his license to practice medicine, administrative findings of misconduct were not arbitrary where expert testimony proved that (1) on many occasions physician failed to perform adequate physical examinations, to inquire as to relevant aspects of patient's history or symptoms, or to order indicated tests before arriving at diagnosis, (2) physician's diagnoses were often unjustified by information obtained, (3) drugs prescribed were inappropriate, (4) he failed to provide necessary follow-up care, and (5) his records of patient care were insufficient. Carloni v DeBuono, 245 A.D.2d 970, 667 N.Y.S.2d 109, 1997 N.Y. App. Div. LEXIS 13630 (N.Y. App. Div. 3d Dep't 1997).

Administrative Review Board for Professional Medical Conduct had rational basis for its findings that emergency room physician committed acts of gross incompetence and gross negligence, even though expert who testified on behalf of State Department of Health did not use words “egregious” or “conspicuously bad” when referring to physician’s deviations from acceptable medical standards, where expert explained potentially grave consequences of physician’s errors in treating patients and characterized those errors as “significant” or “serious.” Post v State Dep't of Health, 245 A.D.2d 985, 667 N.Y.S.2d 94, 1997 N.Y. App. Div. LEXIS 13572 (N.Y. App. Div. 3d Dep't 1997).

Gynecologist whose license to practice medicine was revoked for professional misconduct was not unduly restricted by administrative law judge in defending charges where (1) he was given sufficient leeway in questioning patients and exploring relevant matters bearing on each’s credibility, (2) he was allowed to present expert opinion of psychiatrist, who reviewed patients’ testimony and speculated as to possible memory distortions and motives to fabricate, and (3) gynecologist was allowed to question particular patient about any psychiatric treatment that she received before or after alleged misconduct, although as mere witness she did not place her mental condition in controversy and thus did not waive physician-patient privilege. Giffone v DeBuono, 263 A.D.2d 713, 693 N.Y.S.2d 691, 1999 N.Y. App. Div. LEXIS 8030 (N.Y. App. Div. 3d Dep't 1999).

45. Automobile accidents

Where, considering the totality of a doctor’s testimony, rather than focusing narrowly on single answers, the doctor’s opinion that a plaintiff’s condition at the time of trial was caused by injuries sustained in a collision between the car he was driving and defendants’ vehicle, though not solicited or expressed in terms of the particular combination of words represented by the phrase “reasonable degree of medical certainty”, conveyed equivalent assurance that it was not based on either supposition or speculation, the issue of causation was properly submitted to the jury.

Matott v Ward, 48 N.Y.2d 455, 423 N.Y.S.2d 645, 399 N.E.2d 532, 1979 N.Y. LEXIS 2413 (N.Y. 1979).

In action by pedestrian struck by taxi, pedestrian was not entitled to offer evidence of nature, extent, and effect of his injuries, matters clearly beyond his competence, without testimonial support from expert medical witness. Razzaque v Krakow Taxi, 238 A.D.2d 161, 656 N.Y.S.2d 208, 1997 N.Y. App. Div. LEXIS 3192 (N.Y. App. Div. 1st Dep't 1997).

Considering that plaintiff had burden of proving that she sustained “serious injury” under CLS Ins § 5102(d), and that jury was entitled to reject expert opinion as to permanency of her injuries in motor vehicle accident, plaintiff was not entitled to directed verdict on issue of serious injury, even though defendants produced no expert evidence, where testimony of plaintiff’s physicians concerning her limitations and permanence of her symptoms was sufficiently equivocal to allow varying inferences. Cooper-Fry v Kolket, 245 A.D.2d 846, 666 N.Y.S.2d 775, 1997 N.Y. App. Div. LEXIS 13195 (N.Y. App. Div. 3d Dep't 1997).

In state’s action for damage to road sign and guardrails against owner of truck that veered off road when driver, who was owner’s employee, suffered fatal heart attack, owner was not chargeable with negligence in failing to foresee driver’s medical emergency where (1) both owner and driver’s fellow employee testified that they were unaware that driver had heart trouble and that he had never mentioned it to them, (2) fellow employee also testified that, despite driver’s shortness of breath and apparent fatigue on morning of accident, he did not believe that driver’s condition was indicative of heart attack, and (3) deputy sheriff’s affidavit stating that, based on his experience and training in cardiopulmonary resuscitation, driver’s shortness of breath was initial sign of heart attack and that driver should not have driven thereafter was insufficient to prove that owner had notice of driver’s medical condition. State v Susco, 245 A.D.2d 854, 666 N.Y.S.2d 321, 1997 N.Y. App. Div. LEXIS 13185 (N.Y. App. Div. 3d Dep't 1997).

Jury’s finding that taxi cab passenger sustained “serious injury” under CLS Ins § 5102(d) was supported by evidence, including testimony of passenger, her dentist, and defendants’

examining oral surgeon, that (1) collision caused passenger's face to strike plexiglass partition separating front and rear seats, causing lacerations to her face and to inside of her mouth, minor paresthesia affecting part of her chin and lower lip, trauma to 7 lower teeth, and internal derangement to her temporomandibular joint (TMJ), (2) passenger required 60 stitches and was left with minor scarring, and (3) she suffered episodes of open lockjaw, with pain in her TMJ, audible clicking, and limited ability to open her mouth and chew tough foods. Taxi cab passenger's "serious injury" threshold under CLS Ins § 5102(d) was met by her permanent nerve loss in 7 teeth, which required series of root canal treatments and significant restorative dental work. In action in which plaintiff was found to have sustained "serious injury" under CLS Ins § 5102(d), jury was entitled to credit expert opinion of plaintiff's treating dentist that plaintiff's temporomandibular joint condition was permanent, even though dentist was not specialist is oral surgery. Mancusi v Miller Brewing Co., 251 A.D.2d 265, 675 N.Y.S.2d 56, 1998 N.Y. App. Div. LEXIS 7799 (N.Y. App. Div. 1st Dep't 1998), app. denied, 1998 N.Y. App. Div. LEXIS 10933 (N.Y. App. Div. 1st Dep't Oct. 1, 1998).

There was sufficient evidence for jury to conclude that derangement of plaintiff's temporomandibular joint was not caused by traffic accident, and thus plaintiff's motion to set aside verdict for defendant motorist was properly denied, where plaintiff's oral surgeon acknowledged that plaintiff had not seen dentist for 22 years before accident and had not worn her lower dentures for 18 to 20 years before accident, that his diagnosis and findings relied on veracity of plaintiff's subjective accounts of degree and locations of her pain, and that plaintiff's pain could be attributed to factors other than accident, such as delay in treatment and stress in her life. Betit v Weeden, 251 A.D.2d 930, 674 N.Y.S.2d 822, 1998 N.Y. App. Div. LEXIS 7741 (N.Y. App. Div. 3d Dep't 1998).

In action arising from motor vehicle collision, plaintiff proved prima facie case of "serious injury" under CLS Ins § 5102(d), and he was entitled to have that issue submitted to jury for special finding, where (1) experts testified that he suffered from herniated discs between fourth and fifth, and fifth and sixth, cervical vertebrae, that one disc was surgically excised, and that he

sustained bilateral carpal tunnel syndrome, which also required surgery, (2) doctor who examined plaintiff testified that plaintiff was extremely depressed, and (3) plaintiff testified that he suffered from pain in both arms and hands and in his lower back, shoulders, and neck. Porcano v Lehman, 255 A.D.2d 430, 680 N.Y.S.2d 590, 1998 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 2d Dep't 1998).

Defendants were entitled to summary judgment dismissing action for “serious injury” under CLS Ins § 5102(d), even though disc bulge might be such injury, where plaintiff failed to show by expert medical evidence that subject motor vehicle accident was proximate cause of disc bulge. Bocci v Turkowitz, 255 A.D.2d 476, 680 N.Y.S.2d 637, 1998 N.Y. App. Div. LEXIS 12655 (N.Y. App. Div. 2d Dep't 1998).

Jury’s award of $8,000 for future pain and suffering of motorcylist whose thumb was injured in collision with car was reasonable, and his additur motion was properly denied, where he had sustained prior hand injury in serious chain-saw accident, defendant’s expert opined that motorcylist’s limitations in flexibility of his thumb emanated from prior injury and that there was no permanent disability resulting solely from motorcycle accident, and motorcyclist’s physician acknowledged that prior accident nearly necessitated amputation of his arm and required several surgeries, including tendon transfer to allow greater use of thumb, and that motorcyclist developed “ulnar claw deformity” and had difficulty with normal functioning of his hand. Teller v Anzano, 263 A.D.2d 647, 694 N.Y.S.2d 780, 1999 N.Y. App. Div. LEXIS 7833 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff who injured her neck in motor vehicle accident did not sustain “serious injury” under CLS Ins § 5102(d) where defendants submitted affidavit of orthopedic surgeon who examined plaintiff and opined that she merely sustained cervical sprain/strain and that there was no objective medical evidence of serious or permanent injury, and although affidavits of plaintiff’s physician and chiropractor stated that she was unable to engage in substantially all of her customary daily activities for 90 of 180 days after accident, those affidavits were clearly tailored to meet statutory threshold and were dependent solely on information supplied by plaintiff,

including her subjective complaints of pain and discomfort. Bennett v Reed, 263 A.D.2d 800, 693 N.Y.S.2d 738, 1999 N.Y. App. Div. LEXIS 8307 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where she testified that, as result of injury in motor vehicle accident, she continued to experience pain and tingling in her right arm and shoulder, that she was unable to lift or hold things with her right arm, and that cortisone shots, pain medication, and physical therapy were insufficient to totally alleviate her symptoms, (2) her doctor testified that he and 2 other physicians diagnosed her as having impingement syndrome and cervical myosascitis, that MRI revealed, inter alia, inflammation of bicep tendon and synovium, that plaintiff’s complaints correlated with his clinical findings and MRI, and that plaintiff’s injuries were permanent and causally related to accident, and (3) although orthopedic surgeon testified that there was nothing wrong with plaintiff and that she was faking pain, he admitted that it was not possible to fake inflammation. Rivera v Majuk, 263 A.D.2d 841, 695 N.Y.S.2d 158, 1999 N.Y. App. Div. LEXIS 8259 (N.Y. App. Div. 3d Dep't 1999).

In personal injury action arising from car accident, although court erred in precluding psychiatrist from rendering expert medical opinion on behalf of defendants regarding plaintiff’s need for surgery, error was harmless in light of jury’s failure to award future damages. Pares v La Prade, 266 A.D.2d 852, 697 N.Y.S.2d 413, 1999 N.Y. App. Div. LEXIS 11704 (N.Y. App. Div. 4th Dep't 1999).

Respondents were not entitled to summary judgment dismissing claim of “serious injury” under CLS Ins § 5102(d) where their medical expert concluded that plaintiff’s injuries were caused by subject automobile accident, and same expert’s conclusory assertion that limitation of motion in plaintiff’s shoulder was “near normal” lacked any trace of factual support. Acevedo v Pena, 273 A.D.2d 260, 710 N.Y.S.2d 900, 2000 N.Y. App. Div. LEXIS 8214 (N.Y. App. Div. 2d Dep't 2000).

Police investigator injured in car accident was not entitled to accidental and state police disability retirement benefits where orthopedic surgeon who examined him on behalf of State and Local Police and Fire Retirement System testified that her examination revealed only some degenerative changes in his spine and knee but no disabling impairment that prevented him

from physically engaging in strenuous activities of his position, and Comptroller was entitled to accept that opinion over conflicting opinion of investigator's treating physician. Di Pofi v New York State & Local Police & Fire Retirement Sys., 273 A.D.2d 734, 709 N.Y.S.2d 712, 2000 N.Y. App. Div. LEXIS 7436 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 765, 716 N.Y.S.2d 39, 739 N.E.2d 295, 2000 N.Y. LEXIS 2897 (N.Y. 2000).

Jury's award of $10,000 for past pain and suffering was sufficient where plaintiff sustained cervical sprain in traffic accident, and expert medical testimony indicated that preexisting bone spur in plaintiff's shoulder might have contributed to her pain and restricted motion. Jury's award of $12,000 for future lost wages was sufficient where (1) plaintiff sustained cervical sprain in traffic accident, (2) although $12,000 represented only 3 years of income at her pre-accident rate as part-time home health aide, there was expert medical testimony from which jury could have concluded that she would be able to obtain more limited or sedentary part-time work and could return to her previous level of part-time work within 5 years, and (3) although preponderance of evidence indicated that she would not be able to return to her employment as home health aide, jury could have concluded that she would be able to perform equivalent work or that any further disability was unrelated to accident. Jury's award of $27,500 for future pain and suffering was sufficient where plaintiff sustained cervical sprain in traffic accident, expert medical testimony as to prognosis was in conflict, there was paucity of objective confirmation of plaintiff's subjective reports of pain, and jury could have concluded that her accident-related injuries would be resolved within 5 years and that any further continuing pain or disability would be result of unrelated and preexisting bone spur in her shoulder. Molter v Gaffney, 273 A.D.2d 773, 710 N.Y.S.2d 654, 2000 N.Y. App. Div. LEXIS 7466 (N.Y. App. Div. 3d Dep't 2000).

Plaintiff raised triable issue of fact as to whether she sustained "serious injury" under CLS Ins § 5102(d) where orthopedic surgeon who treated her for 2 ½ years after traffic accident opined that, to reasonable degree of medical certainty, plaintiff had suffered permanent limitations including, inter alia, 20 to 30 percent loss of flexion, rotation, and extension in her neck, 20-degree loss of full elevation of right shoulder, permanent winging of right scapula with

permanent nerve damage and palsy to long thoracic nerve, and 20 percent loss of use of right shoulder. Mangano v Sherman, 273 A.D.2d 836, 709 N.Y.S.2d 293, 2000 N.Y. App. Div. LEXIS 6713 (N.Y. App. Div. 4th Dep't 2000).

Verdict for defendant on ground that plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) would not be set aside where, inter alia, (1) there was conflicting medical testimony as to cause of plaintiff’s shoulder injury, (2) orthopedic surgeon who examined plaintiff on behalf of defendant opined that shoulder injury was not causally related to traffic accident but, rather, to preexisting degenerative condition, and (3) defendant testified that he was traveling at about 5 miles per hour at time of impact, not 30 to 35 miles per hour as reported by plaintiff’s husband to her physician. Howe v Wilkinson, 275 A.D.2d 876, 713 N.Y.S.2d 573, 2000 N.Y. App. Div. LEXIS 9483 (N.Y. App. Div. 3d Dep't 2000).

Defendant failed to prove extent ofplaintiff’s injuries. where defendant submitted contradictory medical proof as to whether plaintiff’s cervical spine condition was caused by accident involving defendant’s vehicle, prior accident, or degenerative disease. Julemis v Gates, 281 A.D.2d 396, 721 N.Y.S.2d 665, 2001 N.Y. App. Div. LEXIS 2104 (N.Y. App. Div. 2d Dep't 2001).

In personal injury action arising from motor vehicle collision, in which plaintiff’s state of intoxication was at issue, defendants’ medical expert was properly allowed to testify within specific limits on that issue, despite lack of full compliance with CLS CPLR § 3101(d)(1)(i). Karoon v N.Y. City Transit Auth., 286 A.D.2d 648, 730 N.Y.S.2d 331, 2001 N.Y. App. Div. LEXIS 8836 (N.Y. App. Div. 1st Dep't 2001).

46. Causation at issue generally

Testimony by medical experts as to whether, with a reasonable degree of medical certainty, it could be said that accident in question was a competent producing cause of the physiological or neurological condition suffered by a particular plaintiff involves area of medical expertise as to which jury has little if any competence and is admissible. Kulak v Nationwide Mut. Ins. Co., 40 N.Y.2d 140, 386 N.Y.S.2d 87, 351 N.E.2d 735, 1976 N.Y. LEXIS 2791 (N.Y. 1976).

Where, considering the totality of a doctor's testimony, rather than focusing narrowly on single answers, the doctor's opinion that a plaintiff's condition at the time of trial was caused by injuries sustained in a collision between the car he was driving and defendants' vehicle, though not solicited or expressed in terms of the particular combination of words represented by the phrase "reasonable degree of medical certainty", conveyed equivalent assurance that it was not based on either supposition or speculation, the issue of causation was properly submitted to the jury. Matott v Ward, 48 N.Y.2d 455, 423 N.Y.S.2d 645, 399 N.E.2d 532, 1979 N.Y. LEXIS 2413 (N.Y. 1979).

In firefighter's Article 78 proceeding to annul administrative decision that his myocardial infarction and underlying arteriosclerosis were not caused by performance of his duties as firefighter, and thus that he was not eligible for supplemental wage benefits under CLS Gen Mun § 207-a, city respondents were bound by workers' compensation decision—that firefighter's myocardial infarction was causally related to his employment—to extent that expert medical testimony could prove discrete period of disability arising solely from firefighter's myocardial infarction and not from arteriosclerosis, where city respondents had full and fair opportunity to litigate causation issue in workers' compensation proceeding. Substantial evidence supported hearing officer's finding that firefighter's arteriosclerosis was not causally related to performance of his duties as firefighter, for purposes of his eligibility for supplemental wage benefits under CLS Gen Mun § 207-a, where, even accepting that testimony by firefighter's expert was sufficient to support claim that firefighter's arteriosclerosis was caused by job-related stress, there was conflicting medical proof on that issue, and it was exclusive province of hearing officer to evaluate such evidence. Furch v Bucci, 245 A.D.2d 749, 666 N.Y.S.2d 300, 1997 N.Y. App. Div. LEXIS 12950 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 953, 671 N.Y.S.2d 711, 694 N.E.2d 880, 1998 N.Y. LEXIS 998 (N.Y. 1998).

Firefighter was entitled to supplementary benefits under CLS Gen Mun § 207-a where unrebutted medical evidence, including opinions of 2 examining physicians, proved that firefighter was suffering from post-traumatic stress disorder directly related to or aggravated by

his work as firefighter. Dembowski v Hanna, 245 A.D.2d 1039, 678 N.Y.S.2d 174, 1997 N.Y. App. Div. LEXIS 13783 (N.Y. App. Div. 4th Dep't 1997), app. denied, 91 N.Y.2d 813, 674 N.Y.S.2d 278, 697 N.E.2d 179, 1998 N.Y. LEXIS 1261 (N.Y. 1998).

Proximate cause element of CLS Pub Health § 2805-d(3) was satisfied by expert opinion adduced by malpractice plaintiff tending to substantiate causal relationship between treatment that she received and her injuries. Hardt v LaTrenta, 251 A.D.2d 174, 674 N.Y.S.2d 335, 1998 N.Y. App. Div. LEXIS 7292 (N.Y. App. Div. 1st Dep't 1998).

There was sufficient evidence for jury to conclude that derangement of plaintiff's temporomandibular joint was not caused by traffic accident, and thus plaintiff's motion to set aside verdict for defendant motorist was properly denied, where plaintiff's oral surgeon acknowledged that plaintiff had not seen dentist for 22 years before accident and had not worn her lower dentures for 18 to 20 years before accident, that his diagnosis and findings relied on veracity of plaintiff's subjective accounts of degree and locations of her pain, and that plaintiff's pain could be attributed to factors other than accident, such as delay in treatment and stress in her life. Betit v Weeden, 251 A.D.2d 930, 674 N.Y.S.2d 822, 1998 N.Y. App. Div. LEXIS 7741 (N.Y. App. Div. 3d Dep't 1998).

Doctor who assisted in medical malpractice plaintiff's bilateral breast reduction was not entitled to summary judgment where he professed complete lack of any specific recollection of that surgery, and his expert's affidavit contained conclusory statements that although doctor "may have performed deepithelization," "may have made some incisions," and possibly sutured plaintiff's breasts, he did not deviate from accepted standards of surgical practice in his role of assisting in surgery and did not proximately cause any of plaintiff's injuries. Modzelewski v Herman, 255 A.D.2d 299, 679 N.Y.S.2d 421, 1998 N.Y. App. Div. LEXIS 11557 (N.Y. App. Div. 2d Dep't 1998).

Death of claimant's husband from heart attack was due to serious preexisting heart condition and was unrelated to his employment, and thus claimant was not entitled to workers' compensation benefits, where decedent had been previously diagnosed as suffering from

congestive heart failure, his consulting cardiologist reported that he had short life expectancy and could die suddenly within next 2 months, his personal physician agreed and added that death could have occurred regardless of stress encountered by decedent during his employment, and another cardiologist opined that death resulted from advanced cardiomyopathy and ischemic heart disease, “most likely” sudden arrhythmia due to cardiomyopathy due to ischemia, and that, short of mental stress so severe as to have rendered decedent unable to perform his job (which was not shown), there was no causal connection between decedent’s job stress and heart attack suffered at home on Saturday morning. Daniels v Wallach's Mens Store, 263 A.D.2d 909, 694 N.Y.S.2d 800, 1999 N.Y. App. Div. LEXIS 8459 (N.Y. App. Div. 3d Dep't 1999).

Defendants were entitled to summary judgment dismissing personal injury action for negligent maintenance of premises where (1) plaintiff’s medical expert witness was properly precluded, without hearing, from testifying regarding Multiple Chemical Sensitivity Syndrome on ground that plaintiff failed to raise triable issue of fact as to whether such diagnosis has gained general acceptance in scientific community, and (2) there was no proof of other injuries caused by defendants’ alleged negligence. Oppenheim v United Charities, 266 A.D.2d 116, 698 N.Y.S.2d 144, 1999 N.Y. App. Div. LEXIS 12082 (N.Y. App. Div. 1st Dep't 1999).

Preexisting condition exclusion in group long-term disability insurance policy barred coverage of insured’s depression where 2 doctors who examined him in connection with his depression concluded that he had preexisting mental condition that was greatly exacerbated by, inter alia, his physical pain and suffering and loss of physical functions directly attributable to his preexisting herniated discs and surgery to remove them and fuse his vertebrae. Sloman v First Fortis Life Ins. Co., 266 A.D.2d 370, 698 N.Y.S.2d 295, 1999 N.Y. App. Div. LEXIS 11504 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff was not entitled to have jury’s verdict set aside as against weight of evidence where jury properly evaluated conflicting expert testimony and credibility of other witnesses, and defendant’s medical expert testified that plaintiff’s injuries were not caused by his fall. Accurso v

Forest City Enters., 273 A.D.2d 820, 710 N.Y.S.2d 261, 2000 N.Y. App. Div. LEXIS 6861 (N.Y. App. Div. 4th Dep't 2000).

In medical malpractice action based on claim that plaintiff suffered substantial reduction of vision as result of negligent placement of his head during back surgery, plaintiff was not entitled to have set aside jury verdict for defendant physicians, even though ophthalmologist was allowed to testify for plaintiff on issue of causation despite noncompliance with notice requirements of CLS CPLR § 3101(d), where (1) jury found physicians not negligent and did not reach issue of causation, and thus any error in admitting expert's testimony was harmless, and (2) noncompliance with § 3101(d) did not require preclusion of expert's testimony, because noncompliance was neither willful nor prejudicial. Gilbert v Luvin, 286 A.D.2d 600, 730 N.Y.S.2d 85, 2001 N.Y. App. Div. LEXIS 8389 (N.Y. App. Div. 1st Dep't 2001).

Personal injury plaintiff was not entitled to have set aside jury verdict for defendant on issue of damages, even though defendant did not strictly comply with CLS CPLR § 3101(d)(1)(i), where (1) defendant's examining physician was properly allowed to testify that injuries to plaintiff's shoulder and elbow, and resulting surgeries, were not proximately caused by subject accident, and (2) plaintiff could not claim surprise or prejudice as result of that testimony, because issue of causation was implicit in question of damages. Fishkin v Massre, 286 A.D.2d 749, 730 N.Y.S.2d 724, 2001 N.Y. App. Div. LEXIS 8652 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 700, 739 N.Y.S.2d 99, 765 N.E.2d 302, 2002 N.Y. LEXIS 38 (N.Y. 2002).

Defendants were not entitled to partial summary judgment on issue of their liability under CLS Labor § 240(1) where (1) plaintiff submitted proof in admissible form that his fall from scaffold was proximate cause of his injuries, and (2) although affidavit of defendants' examining physician raised triable issue of fact as to whether plaintiff's "present condition" was related to accident, it did not raise triable issue of fact as to whether plaintiff sustained any causally related injury. Brown v BKV Realty Co., LLC, 286 A.D.2d 984, 730 N.Y.S.2d 915, 2001 N.Y. App. Div. LEXIS 8891 (N.Y. App. Div. 4th Dep't 2001).

47. Criminal law matters, generally

Court properly permitted prosecution's rebuttal psychiatric witness to offer expert opinion on manslaughter defendant's mental state since expert opinion can be based on material not in evidence if such material is "accepted in the profession" as reliable, and prosecution's witness had delineated psychiatric reports, physical and mental examinations, medical records and testimony on which she relied in forming her opinion, so that her testimony was entitled to whatever weight jury conferred on it. People v Fitzgibbon, 166 A.D.2d 745, 563 N.Y.S.2d 518, 1990 N.Y. App. Div. LEXIS 12025 (N.Y. App. Div. 3d Dep't 1990), app. denied, 77 N.Y.2d 838, 567 N.Y.S.2d 206, 568 N.E.2d 655, 1991 N.Y. LEXIS 3707 (N.Y. 1991).

In action for injuries allegedly sustained as result of excessive force used during arrest, non-treating physician, who testified as expert witness, was improperly permitted to testify about history of plaintiff's injuries and to speculate about plaintiff's current physical condition where his opinion was based solely on conversation with plaintiff's attorney on morning of his scheduled appearance and concededly incomplete medical records. Easley v City of New York, 189 A.D.2d 599, 592 N.Y.S.2d 690, 1993 N.Y. App. Div. LEXIS 179 (N.Y. App. Div. 1st Dep't 1993).

Evidence in juvenile delinquency proceeding supported presence of elements of first degree sodomy where 8-year-old victim testified that 14-year-old juvenile pulled down victim's pants and placed his penis in victim's "butt," and physician's assistant who examined victim about 36 hours after incident testified that victim's perineal region was slightly red and tender on palpation. In re Jeremy "R", 266 A.D.2d 745, 698 N.Y.S.2d 749, 1999 N.Y. App. Div. LEXIS 12167 (N.Y. App. Div. 3d Dep't 1999).

48. —Rape and other sex crimes

Defendants were entitled to summary judgment dismissing legal malpractice action, because she did not show that she would have succeeded in obtaining leave of court to assert late notice of underlying claim against New York City Housing Authority involving her rape on its property, where (1) her trial testimony suggested that she was not, as she claimed, suffering from

debilitating depression after incident that prevented her from seeking prompt legal advice, and (2) her psychiatrist's prior statements regarding plaintiff's recovery from incident, including her lack of need for further counseling, were inconsistent with his present opinion that she was suffering from "Silent Rape Reaction," which was variant of rape trauma syndrome. F.P. v Herstic, 263 A.D.2d 393, 693 N.Y.S.2d 123, 1999 N.Y. App. Div. LEXIS 7990 (N.Y. App. Div. 1st Dep't 1999).

Even if duly authenticated reports of county crime laboratory concerning examination of vaginal smears taken from alleged rape victim had not been admitted in evidence, defendant's expert medical witness could have relied on them as basis for his expert opinion, notwithstanding that he did not personally examine the victim. Although duly authenticated reports of county crime laboratory concerning examination of vaginal smears taken from alleged rape victim could have been relied on by defendant's expert medical witness even if they had not been admitted into evidence and even though reports were heavily on ultimate issue of guilt or innocence, the People had the right to inquire into the sources of the expert's information on cross-examination. People v Mack, 86 Misc. 2d 364, 382 N.Y.S.2d 424, 1976 N.Y. Misc. LEXIS 2448 (N.Y. Sup. Ct. 1976).

49. Damages at issue, generally

In action for personal injuries, testimony of plaintiff's medical expert as to unhealed fracture of bone was improperly received in evidence in absence of X-rays on which expert relied and upon inability of plaintiff to produce them, and thus defendant's motion to strike this testimony should have been granted, such that matter is remanded for new trial limited solely to issue of damages. Ebanks v New York City Transit Authority, 118 A.D.2d 363, 504 N.Y.S.2d 640, 1986 N.Y. App. Div. LEXIS 55162 (N.Y. App. Div. 1st Dep't 1986), rev'd, 70 N.Y.2d 621, 518 N.Y.S.2d 776, 512 N.E.2d 297, 1987 N.Y. LEXIS 17294 (N.Y. 1987).

Uncontroverted medical testimony of plaintiff's medical expert that plaintiff would require future knee replacement was not speculative and was properly admitted, even though expert did not

state such opinion through use of phrase “reasonable degree of medical certainty.” Rodriguez v New York City Hous. Auth., 238 A.D.2d 125, 655 N.Y.S.2d 501, 1997 N.Y. App. Div. LEXIS 2961 (N.Y. App. Div. 1st Dep't), modified, aff'd, 91 N.Y.2d 76, 666 N.Y.S.2d 1009, 689 N.E.2d 903, 1997 N.Y. LEXIS 3708 (N.Y. 1997).

New trial as to damages would be ordered where, on issue of mitigation, third-party defendant attempted to present testimony of expert in neurology and rehabilitative medicine as to surgical procedures that might have benefited plaintiff, but court refused to permit that testimony, or allow any inquiry into expert’s qualifications to offer such testimony, based on expert’s admission that he was not neurosurgeon; fact that expert was not competent to perform surgery did not mean that he was not qualified to render expert opinion as to potential benefits of surgery. Gordon v Tishman Constr. Corp., 264 A.D.2d 499, 694 N.Y.S.2d 719, 1999 N.Y. App. Div. LEXIS 8917 (N.Y. App. Div. 2d Dep't 1999).

In personal injury action arising from car accident, although court erred in precluding psychiatrist from rendering expert medical opinion on behalf of defendants regarding plaintiff’s need for surgery, error was harmless in light of jury’s failure to award future damages. Pares v La Prade, 266 A.D.2d 852, 697 N.Y.S.2d 413, 1999 N.Y. App. Div. LEXIS 11704 (N.Y. App. Div. 4th Dep't 1999).

Court properly declined to charge jury on aggravation of preexisting condition, and thus plaintiff was not entitled to new trial on issue of damages, where (1) neither party’s theory of case was that plaintiff had preexisting condition that was aggravated by subject accident, (2) plaintiff tried unsuccessfully to elicit such information during cross-examination of defendant’s medical expert, (3) during direct examination, that expert testified that he had changed his initial conclusion and was no longer of opinion that accident had aggravated preexisting condition, and (4) thus, there was failure of proof on that issue. Ogunti v Hellman, 281 A.D.2d 404, 721 N.Y.S.2d 549, 2001 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 2d Dep't 2001).

50. —Pain and suffering

Damage award of $15,000 for past pain and suffering, $10,800 for lost earnings, and nothing for future pain and suffering did not deviate materially from reasonable compensation where plaintiff injured his ankle in accident on July 5, 1992, he was out of work until the following November, he then worked until December 1993 when he reinjured same ankle and was out of work until July 1995, he claimed that award of damages was inadequate because original injury caused continuing instability in his ankle, jury heard conflicting medical testimony as to whether there was any legitimate medical explanation for alleged instability, and jury was entitled to accept opinion of defendant's expert and reject that of plaintiff's expert. Fernandez v Continental Airlines, Inc., 251 A.D.2d 369, 674 N.Y.S.2d 76, 1998 N.Y. App. Div. LEXIS 6600 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 812, 680 N.Y.S.2d 905, 703 N.E.2d 763, 1998 N.Y. LEXIS 3713 (N.Y. 1998).

After jury awarded plaintiffs $25,000 for past pain and suffering but nothing for either future pain and suffering or loss of consortium, new trial would be granted on latter issues, unless defendants should stipulate to $10,000 for future pain and suffering and $2,500 for loss of consortium, where injured plaintiff sustained avulsion fracture of greater tuberosity of humerus, her shoulder bones healed in deviated way known as malunion, she had reduced range of motion and was unable to move her arm completely around her head, medical experts testified that she had mild or moderate permanent partial disability in her right shoulder, and since accident her husband had to do most housework and accompany her when shopping. Albrecht v Bedard, 255 A.D.2d 918, 680 N.Y.S.2d 788, 1998 N.Y. App. Div. LEXIS 12132 (N.Y. App. Div. 4th Dep't 1998).

Jury's award of $8,000 for future pain and suffering of motorcylist whose thumb was injured in collision with car was reasonable, and his additur motion was properly denied, where he had sustained prior hand injury in serious chain-saw accident, defendant's expert opined that motorcylist's limitations in flexibility of his thumb emanated from prior injury and that there was no permanent disability resulting solely from motorcycle accident, and motorcyclist's physician acknowledged that prior accident nearly necessitated amputation of his arm and required

several surgeries, including tendon transfer to allow greater use of thumb, and that motorcyclist developed “ulnar claw deformity” and had difficulty with normal functioning of his hand. Teller v Anzano, 263 A.D.2d 647, 694 N.Y.S.2d 780, 1999 N.Y. App. Div. LEXIS 7833 (N.Y. App. Div. 3d Dep't 1999).

Personal injury defendants were entitled to new trial on issue of future damages for plaintiff, who was infected with Human Immune Deficiency Virus (HIV), where court improvidently precluded testimony of defendants’ infectious disease expert as to plaintiff’s life expectancy, defendants did not intentionally or willfully fail to disclose identity of witness, they disclosed his name and expected testimony before opening statements of liability phase of trial, jury was charged that future damages were to be based on plaintiff’s life expectancy, and thus jury should have had benefit of expert’s testimony on effect of plaintiff’s HIV on his life expectancy. Davis v City of New York, 273 A.D.2d 342, 709 N.Y.S.2d 587, 2000 N.Y. App. Div. LEXIS 7056 (N.Y. App. Div. 2d Dep't 2000).

Court properly set aside jury’s award of no damages for past pain and suffering, and court properly ordered additur of $48,500, where plaintiff suffered bimalleolar fracture dislocation of ankle requiring 2 surgical procedures within 17 months and hospitalizations attendant to both surgeries, medical testimony as to seriousness of injury was uncontroverted, and plaintiff’s other witnesses testified to pain that she experienced after her fall and before her second surgery. Plaintiff who suffered bimalleolar fracture dislocation of ankle requiring 2 surgical procedures within 17 months was not entitled to have set aside jury’s award of no damages for future pain and suffering where (1) she last saw her attending physician 10 months before trial for follow-up visit one week after second surgery, which resulted in removal of hardware from ankle, (2) at that appointment, she informed physician that she was feeling much better, (3) physician discharged her from further medical care and told her to return only if further treatment were needed, and (4) physician testified that “I was thinking I was going to see her again but it didn’t seem to be that I had to. So I have to only presume that she’s—that she was doing well.”

Ordway v Columbia County Agric. Soc'y, 273 A.D.2d 635, 709 N.Y.S.2d 691, 2000 N.Y. App. Div. LEXIS 7201 (N.Y. App. Div. 3d Dep't 2000).

In action under CLS Labor § 240(1), injured worker sufficiently substantiated his aggravated injuries so as to be entitled to increase claimed damages from $1,000,000 to $10,000,000 where (1) voluminous medical documentation proved that complications from his initial injuries during extended course of treatment, including 6 surgical operations, resulted in permanent and severely disabling medical condition, (2) those operations included repeated spinal fusion and bone grafts, reconstruction of thoracic and lumbar spine, removal of part of rib, and irrigation and debridement of wound site, (3) he later contracted staph infection and had life-threatening allergic reaction to antibiotic, and (4) his physician stated that worker continued to experience pain that would continue “on a permanent basis” because he still had nonunion of spine. Parsons v Borden, Inc., 273 A.D.2d 749, 710 N.Y.S.2d 446, 2000 N.Y. App. Div. LEXIS 7445 (N.Y. App. Div. 3d Dep't 2000).

Jury’s award of $10,000 for past pain and suffering was sufficient where plaintiff sustained cervical sprain in traffic accident, and expert medical testimony indicated that preexisting bone spur in plaintiff’s shoulder might have contributed to her pain and restricted motion. Jury’s award of $12,000 for future lost wages was sufficient where (1) plaintiff sustained cervical sprain in traffic accident, (2) although $12,000 represented only 3 years of income at her pre-accident rate as part-time home health aide, there was expert medical testimony from which jury could have concluded that she would be able to obtain more limited or sedentary part-time work and could return to her previous level of part-time work within 5 years, and (3) although preponderance of evidence indicated that she would not be able to return to her employment as home health aide, jury could have concluded that she would be able to perform equivalent work or that any further disability was unrelated to accident. Jury’s award of $27,500 for future pain and suffering was sufficient where plaintiff sustained cervical sprain in traffic accident, expert medical testimony as to prognosis was in conflict, there was paucity of objective confirmation of plaintiff’s subjective reports of pain, and jury could have concluded that her accident-related

injuries would be resolved within 5 years and that any further continuing pain or disability would be result of unrelated and preexisting bone spur in her shoulder. Molter v Gaffney, 273 A.D.2d 773, 710 N.Y.S.2d 654, 2000 N.Y. App. Div. LEXIS 7466 (N.Y. App. Div. 3d Dep't 2000).

Jury's award of damages to roofer who broke his back in fall from roof was neither excessive nor inadequate where (1) fracture required one surgery to fuse vertebrae and install metal rods along spine and another to remove rods, which had shifted and were protruding, (2) as result of accident, roofer suffered from chronic major depression and posttraumatic stress disorder, requiring psychiatric treatment, (3) he was determined by his physician to be totally disabled from work, and he had not worked during 6 years since accident, (4) he was prescribed several medications, including narcotic pain reliever and antidepressant, and (5) jury awarded $50,644 for past medical expenses (as stipulated by parties), $200,000 for future medical expenses for 25 years, $114,389 for past lost earnings, $150,000 for future lost earnings for 5 years, $240,000 for past pain and suffering, and $650,000 for future pain and suffering for 37 years. Lopez v Kenmore-Tonawanda Sch. Dist., 275 A.D.2d 894, 713 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 4th Dep't 2000).

Court properly set aside jury's findings that plaintiff did not suffer any pain and suffering as result of accident, and court properly granted new trial unless defendant stipulated to $300,000 for past, and $120,000 for future, pain and suffering, where (1) jury, by awarding past and future medical expenses and earnings, necessarily rejected view of defendant's medical expert that plaintiff's knee injury was preexisting, (2) plaintiff suffered tear in posterior cruciate ligament and underwent arthroscopic surgery and several months of physical therapy, (3) his knee progressively worsened and was subject to further buckling, (4) he was 33 years old at time of accident, and (5) he was no longer able to participate in strenuous sports without pain. Myers v S. Schaffer Grocery Corp., 281 A.D.2d 156, 721 N.Y.S.2d 347, 2001 N.Y. App. Div. LEXIS 1908 (N.Y. App. Div. 1st Dep't 2001).

51. Employment matters, generally

Although seasonal auditor's exposure to paint fumes in course of her employment was accidental injury, she did not suffer any continuing disability attributable to that accident for purposes of workers' compensation where (1) 2 medical experts who examined her on behalf of State Insurance Fund testified that her symptoms were physical manifestations of anxiety disorder rather than result of her exposure to environmental contaminants at work, (2) auditor's treating physician confirmed that auditor suffered from history of delusional and anxiety disorder with psychotic features, including conversion of mental stress into physical complaints, and (3) several of auditor's experts acknowledged possibility that liver dysfunction, which was one of her symptoms, was caused by known side effects of anti-psychotic medication administered to her during stay at psychotic hospital. Gannon v New York State Dep't of Taxation & Fin., 275 A.D.2d 869, 713 N.Y.S.2d 576, 2000 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2000).

State Division of Human Rights' finding of sex discrimination in termination of female employee was not supported by substantial evidence where (1) employee's claim of reduced work hours was inconsistent with her claim that she was given more work than her coworkers were, (2) although she did not have locker for changing clothes, she was provided small room to change in, because of unavailability of separate lockers for female employees, (3) every fact finder who had heard employee's testimony had found it incredible, (4) court-appointed psychiatrist who examined employee described her belief of sexual harassment in terms of paranoid personality disorder, delusional psychosis, and distorted view of reality, and (5) employee's prior complaints against 2 former employers were never substantiated, one of them prompting federal judge to condemn her strongly. Jamco Bldg. Maint. Corp. v N.Y. State Div. of Human Rights, 281 A.D.2d 364, 724 N.Y.S.2d 20, 2001 N.Y. App. Div. LEXIS 3139 (N.Y. App. Div. 1st Dep't 2001), app. denied, 98 N.Y.2d 613, 749 N.Y.S.2d 475, 779 N.E.2d 186, 2002 N.Y. LEXIS 2699 (N.Y. 2002).

In action against employer for exposure of employees to dangerous substances, employer was entitled to new trial on issue of liability where (1) X-ray of one plaintiff's lungs was placed in evidence without proper foundation required by CLS CPLR § 4532-a, (2) during testimony of plaintiffs' expert physician, X-ray was displayed to jury, (3) physician used X-ray to show jury

alleged abnormalities of asbestosis, (4) only one plaintiff alleged that he was suffering from asbestosis, (5) employer's expert radiologist testified that although X-ray was of poor quality, plaintiff's lungs appeared normal, and (6) thus, admission of X-ray into evidence was not harmless error. Aguirre v Long Island R.R. Co., 286 A.D.2d 658, 730 N.Y.S.2d 122, 2001 N.Y. App. Div. LEXIS 8549 (N.Y. App. Div. 2d Dep't 2001).

52. —Disability retirement benefits

Substantial evidence supported sheriff's decision that correction sergeant was capable of performing light duty where 4 of 5 physicians who examined her found that she could either return to her normal duties or perform at least light sedentary work. Kelly v County of Nassau, 245 A.D.2d 514, 666 N.Y.S.2d 489, 1997 N.Y. App. Div. LEXIS 13260 (N.Y. App. Div. 2d Dep't 1997).

Correction officer injured while restraining inmate was not permanently incapacitated from performing his duties, and thus was not entitled to disability retirement benefits, where state retirement system's expert neurologist testified that (1) based on his examination of officer and his examination of MRI and CAT scan films, he concurred with observations recorded by physician who initially reviewed firms, finding no evidence of herniated disc, (2) officer's subjective complaints of pain were inconsistent with injury allegedly sustained, and (3) although officer had slight bulging disc, it did not impinge on any nerves or prohibit officer from performing his duties. Dixon v McCall, 245 A.D.2d 686, 664 N.Y.S.2d 856, 1997 N.Y. App. Div. LEXIS 12586 (N.Y. App. Div. 3d Dep't 1997).

Substantial evidence supported finding that police officer was not permanently disabled from performing his employment duties, and thus was not entitled to accidental disability retirement benefits, where testimony of 2 examining neurologists proved that officer's neck and back pain resulted from degenerative disc disease of cervical spine rather than accidents. In Article 78 proceeding to review state comptroller's denial of accidental disability retirement benefits to police officer, officer was not deprived of full and fair hearing by denial of his request to call

particular neurologist as expert rebuttal witness where, presumably for tactical reasons, officer chose not to take advantage of opportunity to call that witness on his direct case. In Article 78 proceeding to review state comptroller's denial of accidental disability retirement benefits to police officer, comptroller had discretion to limit weight given to expert opinions of orthopedic surgeon and occupational physician, and to credit testimony of 2 neurologists, where orthopedist and occupational physician appeared to rely on officer's subjective complaints of pain, and those complaints were not credible. City of Schenectady ex rel. Coker v McCall, 245 A.D.2d 708, 666 N.Y.S.2d 754, 1997 N.Y. App. Div. LEXIS 12946 (N.Y. App. Div. 3d Dep't 1997).

Substantial evidence supported denial of former police officer's application for ordinary disability retirement benefits, because he was not permanently incapacitated from performing his duties, where 1980 medical report concluding that officer suffered from personality disorder that rendered him mentally impaired to perform duties of police officer was outweighed by 1993 medical report of psychiatrist who examined officer on behalf of state retirement system, was unable to establish diagnosis, and concluded that officer was not permanently physically or mentally incapacitated from performing his duties. Hughes v New York State Police & Firemen's Retirement Sys., 245 A.D.2d 946, 666 N.Y.S.2d 794, 1997 N.Y. App. Div. LEXIS 13597 (N.Y. App. Div. 3d Dep't 1997).

Court reporter was properly denied disability retirement benefits, for both claimed nerve damage to her left arm allegedly sustained in course of her employment and injuries from trip and fall on courtroom platform, even though she presented testimony of orthopedic surgeon and 2 neurologists in support of her claim that she was permanently incapacitated from performing her employment duties, where retirement system's neurologist examined her and diagnosed cervical sprain but found no evidence of ulnar neuropathy and opined that reporter was able to perform her work duties, and although he acknowledged that MRI revealed minimal subligamentus disc herniations, he testified that those results were normal degenerative changes for woman of reporter's age. Kavakos v McCall, 251 A.D.2d 857, 674 N.Y.S.2d 482, 1998 N.Y. App. Div.

LEXIS 7335 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 812, 680 N.Y.S.2d 905, 703 N.E.2d 763, 1998 N.Y. LEXIS 3228 (N.Y. 1998).

City fireman was not entitled to line-of-duty accident disability retirement benefits where report of Article 1-B Pension Fund Medical Board was expert medical opinion based on evidentiary proof reasonably tending to support conclusion of lack of causation between fireman's line-of-duty accidents and his condition. Rickert v Board of Trustees of N.Y. City Fire Dep't, Article 1-B Pension Fund, 255 A.D.2d 328, 679 N.Y.S.2d 329, 1998 N.Y. App. Div. LEXIS 11570 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 801, 687 N.Y.S.2d 625, 710 N.E.2d 272, 1999 N.Y. LEXIS 59 (N.Y. 1999).

Comptroller properly denied highway general foreman's application for accidental disability retirement benefits, even though foreman sustained injuries to his neck, back, and arms in attack by coworker, where orthopedic surgeon who examined foreman testified that foreman's subjective complaints of pain were inconsistent with medical findings and that foreman was not permanently incapacitated from performing his employment duties. Nugent v New York State & Local Emples. Retirement Sys., 255 A.D.2d 682, 679 N.Y.S.2d 208, 1998 N.Y. App. Div. LEXIS 11669 (N.Y. App. Div. 3d Dep't 1998).

Keyboard specialist who tripped on telephone wires, fell, and injured her arm, neck, and shoulders was not entitled to disability retirement benefits where board-certified orthopedic surgeon testified that, based on his examination of specialist, her X-rays, and her inconsistent subjective complaints of pain, she was not permanently incapacitated from her job and that he disagreed with neurologist's conclusion that specialist suffered from right ulnar neuropathy. Guerra v McCall, 255 A.D.2d 684, 679 N.Y.S.2d 207, 1998 N.Y. App. Div. LEXIS 11700 (N.Y. App. Div. 3d Dep't 1998).

Arbitrator's denial to police officer of benefits under CLS Gen Mun § 207-c would not be vacated, even though it might have been at odds with some decisional authority, where 3 physicians and clinical psychologist who examined officer agreed that his depression (which resulted in work absences) was caused by interpersonal conflict with his superior rather than by

his police duties, and arbitrator's decision was neither totally irrational nor violative of any strong public policy. Cohoes Police Officers Union, Local 756 ex rel. Westfall v City of Cohoes, 263 A.D.2d 652, 692 N.Y.S.2d 796, 1999 N.Y. App. Div. LEXIS 7858 (N.Y. App. Div. 3d Dep't 1999).

Preexisting condition exclusion in group long-term disability insurance policy barred coverage of insured's herniated C3-C4 disc where (1) exclusion expressly applied to injury or related injury for which insured consulted with or received advice from licensed medical practitioner during 6 months before effective date of policy, (2) during that period, insured had surgery to remove herniated discs at C4-C5 and C5-C6 levels and to fuse his vertebrae, (3) after effective date of policy, he was diagnosed with herniated C3-C4 disc, (4) before litigation began, his doctor unequivocally stated that C3-C4 herniation was caused by spinal fusion surgery and removal of C4-C5 and C5-C6 discs, (5) after litigation began, same doctor opined that surgery was more than 50 percent responsible for C3-C4 herniation, and (6) term "related" in exclusion would be given its ordinary and accepted meaning. Sloman v First Fortis Life Ins. Co., 266 A.D.2d 370, 698 N.Y.S.2d 295, 1999 N.Y. App. Div. LEXIS 11504 (N.Y. App. Div. 2d Dep't 1999).

Arbitrator's decision to discontinue insured employee's lost wage benefits on ground that she was capable of returning to work was not arbitrary and would not be vacated, even though several of employee's physicians noted her complaints of abdominal pain, where those physicians rendered no diagnosis regarding that aspect of her condition, and insurer presented medical evidence that employee required no further medical treatment and that no medical reason prevented her return to work. Kolesnik v State Farm Mut. Auto. Ins. Co., 266 A.D.2d 630, 697 N.Y.S.2d 778, 1999 N.Y. App. Div. LEXIS 11204 (N.Y. App. Div. 3d Dep't 1999).

Correctional officer who wrenched her neck in slip and fall was not entitled to accidental disability retirement benefits where her chiropractor's testimony that she sustained herniated disc in fall and was permanently disabled by it was contradicted by (1) MRI report stating that "no definite disc herniation [was] identified" and (2) examining neurologist's testimony that officer had degenerative spur formation that appeared in X-rays taken on day of fall and thus had to be preexisting because spurring would not immediately result from trauma sustained on same day.

State and Local Employees' Retirement System's expert neurologist was properly allowed to testify in Article 78 proceeding challenging its denial of accidental disability retirement benefits to correction officer, even though officer was not given neurologist's medical reports before hearing, where requirement of 2 NYCRR § 317.8 that applicant be furnished with reports of examining physicians before hearing date is conditioned on applicant's having provided reciprocal disclosure, which was not done. Knight v New York State & Local Retirement Sys., 266 A.D.2d 774, 699 N.Y.S.2d 170, 1999 N.Y. App. Div. LEXIS 12127 (N.Y. App. Div. 3d Dep't 1999).

Police investigator injured in car accident was not entitled to accidental and state police disability retirement benefits where orthopedic surgeon who examined him on behalf of State and Local Police and Fire Retirement System testified that her examination revealed only some degenerative changes in his spine and knee but no disabling impairment that prevented him from physically engaging in strenuous activities of his position, and Comptroller was entitled to accept that opinion over conflicting opinion of investigator's treating physician. Di Pofi v New York State & Local Police & Fire Retirement Sys., 273 A.D.2d 734, 709 N.Y.S.2d 712, 2000 N.Y. App. Div. LEXIS 7436 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 765, 716 N.Y.S.2d 39, 739 N.E.2d 295, 2000 N.Y. LEXIS 2897 (N.Y. 2000).

Motor vehicle representative injured when belligerent customer slammed door on her right hand was not permanently incapacitated from performing her duties, and thus she was not entitled to ordinary disability retirement benefits, even though her treating orthopedic surgeon diagnosed her with reflex sympathetic dystrophy and opined that her condition permanently disabled her from working, where (1) retirement system's neurologist who examined her found no functional limitation or objective evidence to support surgeon's diagnosis or any other disabling condition, (2) he stated that representative's complaints of severe pain were inconsistent with her failure to display any discernible pain reaction in response to physical examination and that claimed ailments were either volitional or attributable to psychiatric problem, and (3) psychiatrist who evaluated representative found no evidence of disabling psychiatric condition. Pellino v McCall,

275 A.D.2d 880, 713 N.Y.S.2d 567, 2000 N.Y. App. Div. LEXIS 9479 (N.Y. App. Div. 3d Dep't 2000).

Although court erred in precluding personal injury plaintiff's treating psychiatrist from testifying on issue of plaintiff's inability to work in future, error was harmless where that psychiatrist otherwise testified that plaintiff was chronically disabled, would remain totally disabled, and was incapable of functioning in job. Dudek v Call, 275 A.D.2d 992, 714 N.Y.S.2d 251, 2000 N.Y. App. Div. LEXIS 9529 (N.Y. App. Div. 4th Dep't 2000).

In Article 78 proceeding to review denial of nurse's application for state disability retirement benefits, absence of objective medical evidence did not automatically prove that she failed to meet her burden of showing her permanent incapacity where (1) she submitted detailed reports from several physicians who, on reviewing medical records and examining her, opined that she was permanently disabled from performing duties of her job, (2) such opinions are generally credible evidence on which Comptroller may rely, (3) another physician who examined nurse and reviewed her medical records reached contrary conclusion, and (4) thus, Comptroller was required to exercise his authority to resolve conflicts in medical opinion and credit opinion of one expert over another. Comptroller's denial of application would be annulled, and case would be remitted for specific findings, where Comptroller's decision lacked sufficient detail to allow Appellate Division to discern whether Comptroller properly weighed conflicting medical testimony, and Comptroller apparently applied incorrect legal standard, essentially obligating nurse to submit objective evidence of disability in addition to expert medical evidence of disability. Johnson v McCall, 281 A.D.2d 730, 721 N.Y.S.2d 294, 2001 N.Y. App. Div. LEXIS 2301 (N.Y. App. Div. 3d Dep't 2001).

Substantial evidence supported Comptroller's denial of accidental disability retirement benefits based on applicant's cervical and lumbar injuries sustained as result of incidents at work as city budget coordinator, even though applicant's treating physician testified that applicant was permanently disabled, where (1) orthopedic expert testified that his review of relevant medical records and reports, including MRI results, and his examination of applicant revealed no

objective evidence of any orthopedic or neurological condition that would explain her subjective complaints, that absence of any muscle atrophy was inconsistent with weakness exhibited by applicant during examination, and that although applicant had osteoarthritis and small herniated disc, she was not permanently incapacitated for performance of her duties as budget coordinator, and (2) applicant's criticisms of orthopedic expert's opinion were based on type of alleged deficiencies that presented credibility issue for Comptroller to resolve. In Article 78 proceeding to review Comptroller's determination of application for accidental disability retirement benefits, where expert provides articulated, rational, and fact-based opinion, founded on physical examination and review of relevant medical reports, expert's opinion generally will not be considered so lacking in foundation or rationality as to preclude Comptroller from exercising authority to evaluate conflicting medical opinion. Glynn v N.Y. State & Local Employees' Ret. Sys., 286 A.D.2d 820, 730 N.Y.S.2d 369, 2001 N.Y. App. Div. LEXIS 8637 (N.Y. App. Div. 3d Dep't 2001).

In Article 78 proceeding to review Comptroller's determination of application for accidental disability retirement benefits, where expert provides articulated, rational, and fact-based opinion, founded on physical examination and review of relevant medical reports, expert's opinion generally will not be considered so lacking in foundation or rationality as to preclude Comptroller from exercising authority to evaluate conflicting medical opinion. Substantial evidence supported Comptroller's denial of accidental disability retirement benefits where (1) expert, although acknowledging that accident might have aggravated applicant's preexisting and apparently asymptomatic degenerative cervical condition and that relevant medical reports documented disc herniation and radiculopathy, explained that extent to which those conditions impaired applicant could not be determined without considering results of physical or neurological examination, which were essentially negative other than revealing some minor limitation of motion in applicant's neck, (2) expert thus found no neurological disturbance or disorder and concluded that applicant was not incapacitated from performing duties of correction officer, and (3) criticisms of expert's opinion were based on type of alleged deficiencies that presented

credibility issue for Comptroller to resolve. Fullone v N.Y. State & Local Emples. Ret. Sys., 286 A.D.2d 831, 731 N.Y.S.2d 89, 2001 N.Y. App. Div. LEXIS 8863 (N.Y. App. Div. 3d Dep't 2001).

Dismissal of a N.Y. C.P.L.R. art 78 proceeding was affirmed as the hearing officer did not abuse his discretion in crediting the testimony of the State's expert, an internist, in a decision denying disability retirement benefits to a disability retirement claimant; the claimant's contention that only a psychiatrist or a psychologist could render an opinion as to a cognitive disability was rejected, as an internist could render such an opinion if an appropriate foundation was demonstrated. Even if the testimony of the internist was excluded, the hearing officer specifically found that the claimant's expert psychologist was not credible, and the claimant failed to establish a permanent disability. Marx v McCall, 306 A.D.2d 797, 762 N.Y.S.2d 441, 2003 N.Y. App. Div. LEXIS 7481 (N.Y. App. Div. 3d Dep't 2003).

53. —Worker's compensation law

Accountant's mental injury did not result from any employment-related "accident," and thus he was not entitled to workers' compensation benefits, where (1) testimony of insurer's psychiatric expert supported finding that stress precipitating accountant's mental disorders was not product of harassment but of ordinary workplace irritations, (2) that conclusion was corroborated by accountant's medical expert, who diagnosed him as having paranoid personality, which is condition characterized by baseless belief that one is being persecuted or harassed, and (3) accountant's personnel file disclosed that he repeatedly had made unsubstantiated accusations of discrimination and unfair treatment when in fact his own disruptive behavior or documented shortcomings had led to actions complained of. Hernandez v Domino Sugar Corp., 245 A.D.2d 680, 664 N.Y.S.2d 892, 1997 N.Y. App. Div. LEXIS 12572 (N.Y. App. Div. 3d Dep't 1997).

Claim for workers' compensation benefits was properly denied where testimony by 2 physicians who examined claimant was sufficient to support finding that there was no nexus between his 1990 work-related back injury and his 1993 back injury incurred while shoveling snow at his

residence. Baskerville v J.J. Keenan Constr. Corp., 245 A.D.2d 906, 666 N.Y.S.2d 848, 1997 N.Y. App. Div. LEXIS 13582 (N.Y. App. Div. 3d Dep't 1997).

Miner's claim for workers' compensation benefits for partial disability based on occupational lung disease allegedly due to exposure to dust, fumes, and oil did not suffer from "dust disease," for which partial disability was excluded from coverage under CLS Work Comp former § 39, where medical experts who testified for both parties essentially agreed that miner suffered from chronic bronchitis, and expert for employer specifically found no evidence of pneumoconiosis. Matott v St. Joe's Lead, 245 A.D.2d 907, 666 N.Y.S.2d 849, 1997 N.Y. App. Div. LEXIS 13622 (N.Y. App. Div. 3d Dep't 1997).

Company vice-president's death from bacterial endocarditis, which is rare and deadly heart infection, was not proved to have been work related, for purposes of his widow's workers' compensation claim, even though he became ill while on business trip to England, lost consciousness during return flight, and died in hospital to which he was taken from airport, where (1) medical experts agreed that decedent's infection was caused by staphylococci bacteria, which are common both in United States and England, and (2) expert testimony was in conflict as to whether decedent contracted infection before or during his trip or on flight home from England. Spoerl v Armstrong Pumps, Inc., 251 A.D.2d 915, 674 N.Y.S.2d 833, 1998 N.Y. App. Div. LEXIS 7753 (N.Y. App. Div. 3d Dep't 1998), app. denied, 92 N.Y.2d 820, 685 N.Y.S.2d 421, 708 N.E.2d 178, 1999 N.Y. LEXIS 2099 (N.Y. 1999).

Evidence supported denial of workers' compensation benefits on ground that claimant's lack of work was due to economic conditions rather than his continuing disability from 1987 work-related back injury where (1) he was discharged for insubordination in 1994, (2) he testified that he applied for engineering-related employment, such as design and drafting, but was unable to procure job, and that some prospective employers simply were not hiring, (3) there was no evidence that his disability was related to his inability to obtain employment, and (4) his orthopedic surgeon opined that claimant was capable of returning to sedentary work. Benesch v

Utilities Mut. Ins. Co., 263 A.D.2d 585, 693 N.Y.S.2d 676, 1999 N.Y. App. Div. LEXIS 7713 (N.Y. App. Div. 3d Dep't 1999).

Evidence supported Workers' Compensation Board's finding that psychiatric problems of assistant to executive director of not-for-profit service agency providing educational services to developmentally disabled persons was compensable injury due to abnormal work-related stress where assistant's involvement in agency's expansion caused extremely tense situation as its financial difficulties mounted, assistant also had acrimonious relationship with his superiors regarding agency's operations, which caused him to be depressed and anxious, he was very troubled by deaths of 2 children in agency's care, and his 2 treating psychiatrists testified that he suffered from extreme anxiety, panic attacks, morbid thoughts, and preoccupation with death and that his psychiatric condition was causally related to his employment. Marillo v Cantalician Ctr. for Learning, 263 A.D.2d 719, 693 N.Y.S.2d 687, 1999 N.Y. App. Div. LEXIS 8031 (N.Y. App. Div. 3d Dep't 1999).

Death of claimant's husband from heart attack was due to serious preexisting heart condition and was unrelated to his employment, and thus claimant was not entitled to workers' compensation benefits, where decedent had been previously diagnosed as suffering from congestive heart failure, his consulting cardiologist reported that he had short life expectancy and could die suddenly within next 2 months, his personal physician agreed and added that death could have occurred regardless of stress encountered by decedent during his employment, and another cardiologist opined that death resulted from advanced cardiomyopathy and ischemic heart disease, "most likely" sudden arrhythmia due to cardiomyopathy due to ischemia, and that, short of mental stress so severe as to have rendered decedent unable to perform his job (which was not shown), there was no causal connection between decedent's job stress and heart attack suffered at home on Saturday morning. Daniels v Wallach's Mens Store, 263 A.D.2d 909, 694 N.Y.S.2d 800, 1999 N.Y. App. Div. LEXIS 8459 (N.Y. App. Div. 3d Dep't 1999).

Workers' compensation claimant's exposure to noxious substances as bridge painter for employer acted on his preexisting but dormant pulmonary condition to cause disability that did not previously exist where (1) claimant's work included sandblasting, paint stripping, and spraying red lead paint, (2) expert attributed claimant's poor pulmonary reserve to chronic inhalation of noxious substances at work, and (3) although expert acknowledged that chronic pulmonary obstructive disease is often result of "the composite of many things," including smoking, he testified that exposure to noxious substances in course of claimant's work was causative factor. Cocco v New York City DOT, 266 A.D.2d 634, 697 N.Y.S.2d 751, 1999 N.Y. App. Div. LEXIS 11217 (N.Y. App. Div. 3d Dep't 1999).

Claimant sustained continuing disability causally related to altercation at work and thus was entitled to workers' compensation benefits where (1) his treating physician, based on examination of claimant and MRI results indicating cervical herniation, disc bulges, and muscle spasms, diagnosed claimant with lumbar radiculopathy, (2) physician noticed no improvement in claimant's condition during nearly 11-month period of treatment, (3) physician concluded that claimant was totally disabled as result of altercation at work and that there was possibility that injuries were permanent, and (4) claimant testified that he was unable to work and that he was receiving continued medical treatment. In workers' compensation proceeding, board properly precluded testimony of physician who examined claimant on behalf of employer where physician twice failed to appear to testify; thus, physician's written report could not be considered by board in making its decision. Escala v Cecilware Corp., 275 A.D.2d 868, 713 N.Y.S.2d 779, 2000 N.Y. App. Div. LEXIS 9481 (N.Y. App. Div. 3d Dep't 2000).

Custodian who sustained lower back injury while picking up garbage can did not sustain causally related permanent disability under Workers' Compensation Law where (1) employer's physician opined that small herniated disc revealed on MRI of custodian's lumbosacral spine was degenerative change that was normal variant of aging unrelated to her accident, that there was no objective indication that herniated disc was impinging on any nerves, and that custodian's back strain had "resolved," and (2) although custodian's treating physician

expressed contrary view, he acknowledged that nerve conduction studies performed on custodian were within normal limits. Reversal of Workers' Compensation Board's ruling that custodian lower back injury from lifting garbage can was not causally related permanent disability was not required merely because custodian's attorney was denied access to notes taken by employer's physician during physical examination of custodian where (1) attorney asked to review notes in order to cross-examine physician about his awareness of custodian's continuing complaints of pain and nature of her duties as custodian, (2) attorney was given ample opportunity to challenge physician's credibility and cross-examined him at length, (3) physician's medical report revealed information sought from notes and showed that physician was aware of custodian's duties and continuing complaints, and (4) fact that only custodian's subjective complaints of pain contradicted objective medical evidence of no permanent disability further supported conclusion that denial of access to notes did not harm custodian in any appreciable way. Ceselka v Kingsborough Cmty. College, 281 A.D.2d 842, 722 N.Y.S.2d 314, 2001 N.Y. App. Div. LEXIS 3001 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 719, 733 N.Y.S.2d 371, 759 N.E.2d 370, 2001 N.Y. LEXIS 3001 (N.Y. 2001).

Workers' compensation claimant employed as carpentry supervisor proved that he sustained consequential injury to his back as result of his limping gait after log fell on his foot where (1) his treating orthopedic surgeon attributed claimant's back pain to "gait abnormality" adopted to compensate for injured foot, (2) neurosurgeon considered claimant's back pain to be "secondary" to his foot injury, and (3) physician specializing in physical and rehabilitation medicine found "direct relationship" between claimant's back pain and his limping gait. Traver v Rickkard Constr. Co., 286 A.D.2d 808, 730 N.Y.S.2d 361, 2001 N.Y. App. Div. LEXIS 8632 (N.Y. App. Div. 3d Dep't 2001).

Workers' Compensation Law Judge properly denied employer's request for adjournment for purpose of having experts testify as to causal relationship between claimant's psoriasis and his employment where (1) claimant's expert filed numerous reports establishing such relationship, (2) CLS Work Comp § 21(5), which creates presumption that medical reports are prima facie

evidence of their contents, was intended to reduce need for expert testimony, (3) report by employer's medical expert was reasonably construed as conceding causal relationship, and (4) employer's reliance on CLS Work Comp Bd Rules § 300.10(c), 12 NYCRR § 300.10(c), was misplaced, absent timely request to cross-examine expert. Claimant proved that his psoriasis was causally related to his employment as heavy construction worker where (1) during such work, he sustained small burn to his hand that did not heal and was diagnosed as psoriasis, which ultimately affected his feet, knees, and elbows as well as his hands, (2) his treating dermatologist reported that pressure on claimant's extremities created by use of heavy tools and by other heavy work aggravated psoriasis and that condition was causally related to employment, (3) although employer's expert noted that psoriasis was genetic, that claimant was predisposed to that condition, and that it was difficult to determine causal relationship to claimant's work, same expert also noted that burn to claimant's hand might have started process, that working conditions might have aggravated it and caused it to persist, and that claimant never had psoriasis before he sustained burn while on job, and (4) thus, claimant's use of heavy tools was required distinctive feature of his employment that acted on his predisposition for psoriasis to cause disability that did not previously exist. McDonald v Danforth, 286 A.D.2d 845, 730 N.Y.S.2d 571, 2001 N.Y. App. Div. LEXIS 8853 (N.Y. App. Div. 3d Dep't 2001).

Forklift operator's death did not arise out of and in course of his employment, and thus claimant was not entitled to workers' compensation death benefits, where (1) decedent died of cardiac arrest as result of myocardial infarction about 3 hours after 35-minute surgery on 2 fingers to relieve work-related condition, (2) no problems arose during surgery, (3) decedent had history of diabetes, hypertension, vascular occlusive disease, and coronary artery disease that resulted in myocardial infarction 5 years before surgery, (4) decedent sought medical attention for chest pain less than 2 weeks before surgery and experienced shortness of breath on night before surgery, and (5) report and testimony of impartial medical specialist showed that although compensable hand injury and resulting surgery furnished occasion for inadequate recovery room treatment of decedent's deteriorating preexisting cardiac condition, neither hand injury nor

surgery caused his death. Wallace v Nestles Chocolate Co., 286 A.D.2d 851, 730 N.Y.S.2d 378, 2001 N.Y. App. Div. LEXIS 8859 (N.Y. App. Div. 3d Dep't 2001).

54. — —Diabetes; diabetics

Workers' compensation claimant's diabetes, diagnosed in 1994, was attributable to preexisting obesity and not to 1986 back injury where (1) insurer's physician indicated that, within 3 months after back injury, claimant was 100 pounds over normal weight and thus was morbidly obese at that time, and (2) claimant's treating physician testified that form of diabetes suffered by claimant is attributable to genetic predisposition compounded by obesity and sedentary lifestyle. A'Gard v Major Builders Corp., 273 A.D.2d 519, 708 N.Y.S.2d 736, 2000 N.Y. App. Div. LEXIS 6438 (N.Y. App. Div. 3d Dep't 2000).

Claimant sustained accidental injury arising out of and in course of his employment and thus was entitled to workers' compensation benefits where (1) he presented evidence that he was insulin-dependent diabetic who had worked as machine operator for more than 15 years without similar incident and that he developed phlebitis in his leg in April 1994 caused by prolonged standing on concrete floor in performance of his job duties, (2) his physician testified that claimant's work environment contributed to aggravation of his medical condition to extent that by September 1994 he was totally disabled and unable to continue his employment, and (3) employer's internist agreed that claimant was "permanently and markedly" disabled and acknowledged that persistent standing had worsened claimant's condition, particularly cellulitis, although he attributed only 10 percent of disability to "the aggravation of long periods of standing." Ochsner v New Venture Gear, 273 A.D.2d 715, 710 N.Y.S.2d 443, 2000 N.Y. App. Div. LEXIS 7446 (N.Y. App. Div. 3d Dep't 2000), app. dismissed, 96 N.Y.2d 731, 722 N.Y.S.2d 797, 745 N.E.2d 1019, 2001 N.Y. LEXIS 144 (N.Y. 2001).

55. Family law matters, generally

Wife was entitled to divorce on ground of cruel and inhuman treatment where husband had been engaged in extramarital affair since 1991 and refused her request to return to marriage; expert medical proof of effect of that conduct on wife's physical or mental well-being was not necessary. Rauchway v Kotyuk, 255 A.D.2d 885, 680 N.Y.S.2d 361, 1998 N.Y. App. Div. LEXIS 12071 (N.Y. App. Div. 4th Dep't 1998).

Adjudicated juvenile delinquent was properly placed on probation for 2 years with counseling and community service where his acts, if committed by adult, would be first degree sexual abuse, he lacked insight into his multiple criminal acts and their impact on victim, Family Court properly relied on evaluations by psychiatrist and probation officer as to need for probation and treatment, and such disposition was least restrictive alternative consistent with needs of juvenile and community. In re Sherrod B., 275 A.D.2d 665, 713 N.Y.S.2d 352, 2000 N.Y. App. Div. LEXIS 10018 (N.Y. App. Div. 1st Dep't 2000).

In divorce action based on cruel and inhuman treatment, chiropractor's testimony that husband's conduct caused wife's mental and physical ailments lacked probative value. Ridley v Ridley, 275 A.D.2d 941, 714 N.Y.S.2d 396, 2000 N.Y. App. Div. LEXIS 9622 (N.Y. App. Div. 4th Dep't 2000).

56. —Child custody; termination of parental rights

In proceeding to terminate mother's parental rights to child, expert testimony that mother was presently and for foreseeable future unable, by reason of mental illness, to provide proper and adequate care for child concerned matter requiring professional or skilled knowledge and thus was not impermissibly allowed opinion testimony by expert on ultimate issue of fact. In re Guardianship of Sanovia G., 245 A.D.2d 207, 666 N.Y.S.2d 596, 1997 N.Y. App. Div. LEXIS 13323 (N.Y. App. Div. 1st Dep't 1997).

Mother's parental rights were properly terminated under CLS Soc Serv § 384-b where she had suffered from mental illness for many years and was currently and for foreseeable future unable, by virtue of her illness, to care for her child, who had been removed from her care and custody soon after birth, and court-appointed psychiatrist testified at length regarding her examination of

mother, her review of mother's medical and other records, and basis for her conclusion that mother suffered from "schizophrenia, undifferentiated type, chronic." In re Patrick H., 245 A.D.2d 510, 666 N.Y.S.2d 492, 1997 N.Y. App. Div. LEXIS 13223 (N.Y. App. Div. 2d Dep't 1997).

Family Court's award to father of sole custody of parties' son born out of wedlock was in son's best interest where (1) mother failed to recognize and deal with son's diagnosed speech and developmental delays, provide adequate personal hygiene for him, take adequate steps to keep him safe, and provide sufficient parental guidance, (2) father, who was fully employed and married with 2 children from that union, took affirmative steps to address son's speech and developmental difficulties and provided him with stable home, necessary daily routines, proper hygiene, and age-appropriate activities, and (3) both law guardian and court-appointed psychologist recommended that father be given full legal custody, psychologist having concluded that child was "transformed," calm, and no longer disorganized when in father's custody. Brewer v Whitney, 245 A.D.2d 842, 666 N.Y.S.2d 354, 1997 N.Y. App. Div. LEXIS 13199 (N.Y. App. Div. 3d Dep't 1997).

Custody of child was properly awarded to father where doctor testified that child had cigarette burns and that child told him that mother caused those burns. James A.F. v Jennifer T., 251 A.D.2d 983, 674 N.Y.S.2d 534, 1998 N.Y. App. Div. LEXIS 6994 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 809, 680 N.Y.S.2d 54, 702 N.E.2d 839, 1998 N.Y. LEXIS 3168 (N.Y. 1998).

Father, by reason of mental illness, was presently and for foreseeable future unable to provide proper and adequate care for his child where court-appointed psychiatrist testified that (1) father had history of drug and alcohol abuse, was suffering from paranoid schizophrenia, and had been hospitalized for mental illness on several occasions over past 13 or 14 years, (2) there was strong possibility that father would resume using illegal drugs and stop taking his prescribed anti-psychotic medication, and (3) child would be in danger of becoming neglected if placed in father's custody. In re Casey J., 251 A.D.2d 1002, 674 N.Y.S.2d 239, 1998 N.Y. App. Div. LEXIS 7017 (N.Y. App. Div. 4th Dep't 1998).

Mother’s parental rights were properly terminated for mental illness where she had long history of psychiatric treatment, she had not responded to medication, she believed that she could talk to television and to angels and that sun followed her around, social worker testified that mother exhibited inappropriate behavior when caring for child, and psychiatrist testified that mother was schizophrenic, that her psychological problems would continue, and that she would not be able to care for child in times of stress. In re Christine K., 255 A.D.2d 513, 680 N.Y.S.2d 615, 1998 N.Y. App. Div. LEXIS 12619 (N.Y. App. Div. 2d Dep't 1998).

Finding of father’s mental illness warranting termination of his parental rights was supported by court-appointed psychiatrist’s uncontroverted testimony that (1) father suffered from debilitating mental illness known as antisocial personality disorder, (2) there was no known medication for it, (3) prognosis for father was poor, (4) as result, father presently and for foreseeable future lacked basic insight and skills necessary to provide proper parenting, and (5) child would be at risk of both physical and emotional harm if returned to father’s custody. In re Commitment of Raymond W., 263 A.D.2d 366, 693 N.Y.S.2d 27, 1999 N.Y. App. Div. LEXIS 7798 (N.Y. App. Div. 1st Dep't 1999).

Mother’s neglect of her child was not proved, even though mother refused to consent to child’s placement in residential treatment center, where child had received outpatient care, Family Court also ordered agency to provide preventive services for child at home, including referral for appropriate counseling and therapy, and agency’s psychiatrist acknowledged that child’s emotional distress was partly attributable to her being away from her mother and sisters, with whom she had strong emotional bond. In re Felicia D., 263 A.D.2d 399, 693 N.Y.S.2d 41, 1999 N.Y. App. Div. LEXIS 7993 (N.Y. App. Div. 1st Dep't 1999).

Family Court, in awarding sole custody of parties’ children to father, did not disregard expert psychologist’s recommendation—that mother be given custody because children viewed her as their primary attachment figure and she had more time to spend with them—where court also noted absence of “a strong, ringing endorsement of one parent over the other,” psychologist’s expressed safety concerns arising from mother’s past psychiatric difficulties and failure to

supervise children, and psychologist's consequent recommendation that mother be closely monitored to ensure children's physical safety, and court concluded that support system was insufficient to monitor mother's activities to extent necessary to allow award of custody to her. Aldrich v Aldrich, 263 A.D.2d 579, 693 N.Y.S.2d 282, 1999 N.Y. App. Div. LEXIS 7710 (N.Y. App. Div. 3d Dep't 1999).

County social services department proved prima facie case of parents' neglect of their baby, and of derivative neglect of their 2 older children, where baby was twice within one month diagnosed with non-organic failure to thrive, physician ascribed major cause of baby's failure to gain weight to "not getting enough to eat," baby showed remarkable improvement while hospitalized and deterioration when at home, parents were hostile toward and resistant to help from hospital staff and home health professionals, their home was dirty and unkempt, and father was untreated for alcohol abuse. In re Camara "R", 263 A.D.2d 710, 693 N.Y.S.2d 681, 1999 N.Y. App. Div. LEXIS 8020 (N.Y. App. Div. 3d Dep't 1999).

Evidence supported finding of mother's neglect of her older child where (1) after taking child to hospital for help for his "moderate to severe" attention deficit hyperactivity disorder, she did not participate in his treatment plan, respond to repeated phone calls from hospital staff, or try to visit him for about 3 weeks, (2) she was frequent marijuana user who suffered from severe depressive disorder that caused her to be unfocused, unable to keep appointments, and incapable of adhering to regular schedule, (3) mental health professionals testified that boy's condition would improve only in carefully structured home environment wherein he would be given his medications regularly, be carefully monitored for adverse drug reactions and behavioral problems, and taken for weekly therapy sessions, and (4) expert testimony was not necessary to prove that mother's condition posed imminent danger to boy's physical, mental, and emotional health. In re Krewsean S., 273 A.D.2d 393, 709 N.Y.S.2d 616, 2000 N.Y. App. Div. LEXIS 7019 (N.Y. App. Div. 2d Dep't 2000).

Law guardian properly advocated that custody of parties' 11-year-old boy be given to his father, despite boy's strong preference to live with his mother, where (1) guardian repeatedly

communicated boy's preference to Family Court, (2) boy suffered from several neurological disorders, including Tourettes Syndrome, Obsessive-Compulsive Disorder, and Attention Deficit Hyperactivity Disorder, (3) psychologist appointed by Family Court opined that boy was intelligent but somewhat less mature than average and could easily be manipulated by adults, (4) boy might have been blinded by his love for his mother, who exerted influence on his thoughts about custody, and (5) boy did not articulate objective reasons for his preference other than his dislike for discipline at his father's home and lack of rules and discipline at his mother's home. Law guardian was not biased against boy's mother, even though he stated on 9th day of custody hearing, "And yes, I am biased in this thing. And I think it's no secret, here, that as the case has progressed, I have become biased in favor of one of the parents, because I believe my client's best interests are best served there," where (1) his use of inflammatory term "biased" was inopportune because he intended to communicate that after being exposed to evidence, he had formed professional opinion concerning proper disposition of custody and thus had preference for father, (2) there was no evidence that he held any personal prejudice against mother, (3) he had not met father before trial, (4) he formed his opinion of both parties only in course of hearing, and (5) considered opinion as to best interest of boy was natural result by late stage of proceeding. Law guardian did not improperly disclose his ward's confidence in connection with custody dispute between ward's parents where 11-year-old ward consented to guardian's telling ward's father about ward's suicide attempt. Law guardian breached no professional responsibility in failing to call father's new wife as witness at child custody hearing, even though mother characterized wife as absolutely essential witness because wife would likely be child's primary care-giver if father were awarded sole custody, where mother could have called wife as witness and could have requested to treat her as hostile witness. Carballeira v Shumway, 273 A.D.2d 753, 710 N.Y.S.2d 149, 2000 N.Y. App. Div. LEXIS 7504 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 764, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2846 (N.Y. 2000).

Psychologist's recommendation that change from primary custody of twin daughters in mother to split custody in which father would have primary custody of handicapped daughter would not be

followed, even though psychologist opined that father would be better advocate for handicapped daughter and that other daughter harbored negative feelings toward her family due to attention given to her sister, where (1) psychologist did not say that mother, who had been daughters' primary caretaker since their birth, was inappropriate caretaker, (2) mother was able to care for handicapped daughter without excluding her sister, (3) sisters shared close bond, (4) neither parent wanted to separate sisters, and (5) by continuing existing custodial arrangement, under which mother was primary residential parent and each parent spent time alone with each sister, court addressed psychologist's concerns about nonhandicapped sister. Salerno v Salerno, 273 A.D.2d 818, 708 N.Y.S.2d 539, 2000 N.Y. App. Div. LEXIS 6883 (N.Y. App. Div. 4th Dep't 2000).

Foster parent was entitled to foster care benefits at special rate where (1) finding of State Department of Social Services that child placed in foster parent's care had not been certified by qualified psychiatrist or psychologist as having behavioral disorder requiring high degree of supervision improperly discounted fact that psychiatrist twice recommended special rate based on examinations, conducted over one year apart, that showed multiple behavioral problems, (2) fact that psychiatrist's report did not explicitly state why extra supervision was necessary as result of those problems was not reason to conclude that extra supervision was unnecessary, and (3) testimony of foster parent and his recently deceased wife amply showed additional and significant burdens that proper supervision of child required. Timmons v New York State Dep't of Soc. Servs., 275 A.D.2d 623, 713 N.Y.S.2d 55, 2000 N.Y. App. Div. LEXIS 9159 (N.Y. App. Div. 1st Dep't 2000).

Mother neglected her daughter where, on learning that daughter had been sexually abused by mother's fiance, mother refused to believe daughter and declined fiance's offer to vacate home, and there was expert medical proof that daughter's emotional condition was impaired as result of mother's actions. In re Brittany B., 275 A.D.2d 986, 715 N.Y.S.2d 197, 2000 N.Y. App. Div. LEXIS 9762 (N.Y. App. Div. 4th Dep't 2000).

Mother's parental rights were properly terminated on ground that she was presently, and for foreseeable future would be, unable to care for her children by reason of mental retardation

where (1) court-appointed psychologist testified that, based on her examinations of mother and review of mother's medical records, mother was suffering from mental retardation, and (2) mother's condition was long-standing and included history of poor judgment. In re Tysheeka J., 281 A.D.2d 626, 722 N.Y.S.2d 258, 2001 N.Y. App. Div. LEXIS 3125 (N.Y. App. Div. 2d Dep't 2001).

Evidence supported change of custody of divorced parties' 17-year-old daughter from father to mother, even though father had adequately provided for all 4 of their children's needs for many years while mother was unable to do so due to alcoholism and drug dependency, where (1) there was evidence that mother had reformed, (2) daughter, in what psychiatrist described as attempt to manipulate situation to remove herself from father's discipline, made superficial cuts to her wrists, and (3) after that incident, daughter went to live with her maternal grandparents and then with her mother; parties and children were properly required to participate in counseling to improve communication among family members, and visitation between father and daughter would be held in abeyance pending their participation in counseling. Gary D. B. v Elizabeth C. B., 281 A.D.2d 969, 722 N.Y.S.2d 323, 2001 N.Y. App. Div. LEXIS 2721 (N.Y. App. Div. 4th Dep't 2001).

57. Medical malpractice, generally

Physician was entitled to summary judgment in medical malpractice action alleging that he negligently read and interpreted X-rays of plaintiff's decedent where physician submitted affidavit of medical expert stating that physician's examination of X-rays was in accordance with good and accepted radiology practice, and sole medical proof submitted by plaintiff was unsworn report from medical expert, which was not proof in admissible form. Doyle v Health Care Plan, 245 A.D.2d 1018, 666 N.Y.S.2d 60, 1997 N.Y. App. Div. LEXIS 13757 (N.Y. App. Div. 4th Dep't 1997).

Plaintiff in medical malpractice action was not required to adduce expert medical testimony on "reasonably prudent person" element of CLS Pub Health § 2805-d(3). Hardt v LaTrenta, 251 A.D.2d 174, 674 N.Y.S.2d 335, 1998 N.Y. App. Div. LEXIS 7292 (N.Y. App. Div. 1st Dep't 1998).

Medical malpractice action was properly dismissed, despite plaintiff's request that case be restored to calendar, because neurosurgeon's letter submitted by plaintiff did not satisfy court's order requiring expert's "affidavit of merit," where letter was not sworn to, was not in admissible evidentiary form, and did not include author's expert opinion either that defendants deviated from accepted medical practice in their treatment of plaintiff or that their actions proximately caused plaintiff's injuries. Papineau v Powell, 251 A.D.2d 924, 675 N.Y.S.2d 169, 1998 N.Y. App. Div. LEXIS 7747 (N.Y. App. Div. 3d Dep't 1998).

Judgment for plaintiff executor would be reversed, and new trial would be ordered, in wrongful death action based on physician's alleged failure to timely diagnose decedent's ovarian cancer where (1) defendant was precluded from presenting defense of lack of proximate cause by exclusion of testimony of decedent's subsequent treating physician that, given virulent form of decedent's cancer, defendant's failure to diagnose it was not proximate cause of death, (2) CLS CPLR § 3101(d)(1) did not apply to testimony of treating physician, (3) CLS Unif Tr Ct Rls § 202.17 (22 NYCRR § 202.17) did not require defendant to supply plaintiff with copies of records of decedent's treating physician that already were in plaintiff's possession, and (4) excluded virulence testimony on would not have been cumulative. Casey v Tan, 255 A.D.2d 900, 680 N.Y.S.2d 391, 1998 N.Y. App. Div. LEXIS 12097 (N.Y. App. Div. 4th Dep't 1998), app. denied, 685 N.Y.S.2d 386, 1999 N.Y. App. Div. LEXIS 1721 (N.Y. App. Div. 4th Dep't 1999).

In medical malpractice action based on failure to diagnose, in 1990 and 1992, rare gastric tumor (leiomyosarcoma) diagnosed in 1994, jury verdict for defendants was not against weight of evidence, even though plaintiffs' expert theorized that decedent had benign tumor in 1990 that was undetected and allowed to grow, where defendants' expert testified that tumor was not present in 1990 or 1992, and such conflicting evidence created question of fact for jury. McKnight v LaGuardia Hosp., 263 A.D.2d 500, 693 N.Y.S.2d 620, 1999 N.Y. App. Div. LEXIS

8096 (N.Y. App. Div. 2d Dep't), app. denied, 94 N.Y.2d 756, 703 N.Y.S.2d 73, 724 N.E.2d 769, 1999 N.Y. LEXIS 3962 (N.Y. 1999).

Substantial evidence supported psychiatrist's improper sexual conduct toward both female patient and female resident physician for whom he was faculty advisor where (1) patient testified that psychiatrist regularly hugged and kissed her and gave her massages and that, on her last visit, he pulled her slacks and underpants down to her ankles and told her that if she exposed herself to him physically, it would help her to expose herself emotionally, (2) resident testified that psychiatrist hugged her, kissed her on neck, and sought information that exceeded appropriate boundaries, (3) testimony of patient and resident was corroborated by testimony of persons whom they had told of psychiatrist's conduct, and (4) 2 other psychiatrists called as experts by parties agreed that accused's behavior was gross deviation from acceptable standards of proper medical and psychiatric practice. Substantial evidence also supported psychiatrist's failure to maintain adequate records in violation of 8 NYCRR § 29.2(a)(3), which requires recordation of meaningful information in event that patient might seek treatment from another physician, where another psychiatrist testified that accused's records of particular patient's treatment were inadequate in their lack of diagnosis or treatment plan. Revocation of psychiatrist's license to practice medicine was proper penalty for his sexual misconduct where he hugged, kissed, massaged, and removed clothing of female patient and hugged, kissed, and asked inappropriately intrusive questions of female resident physician for whom he was faculty advisor, and 2 other psychiatrists called as experts by parties agreed that accused's behavior was gross deviation from acceptable standards of proper medical and psychiatric practice; sexual misconduct with patient is fundamental violation and exploitation of trust so as to warrant penalty of license revocation. Slakter v DeBuono, 263 A.D.2d 695, 694 N.Y.S.2d 496, 1999 N.Y. App. Div. LEXIS 8039 (N.Y. App. Div. 3d Dep't 1999).

Plaintiffs were entitled to have their action restored to trial calendar, even though they took no action during 13 months immediately preceding motion to restore, where (1) their medical expert clearly articulated facts and opinions which, if believed, proved actionable medical malpractice

by defendant in failing to obtain X-ray, which failure led to later hip surgeries and complete replacement, (2) their counsel provided reasonable excuse based on misconception about relationship between present action and related negligence action, (3) plaintiffs served discovery and opposed consolidation motion within year before CLS CPLR § 3404 dismissal, and (4) no meaningful prejudice to defendant resulted from brief interruption in disclosure, because Appellate Division would provide for additional pretrial discovery in granting new physical examination and deposition of injured plaintiff. Campbell v Yanoff, 273 A.D.2d 166, 710 N.Y.S.2d 65, 2000 N.Y. App. Div. LEXIS 7514 (N.Y. App. Div. 1st Dep't 2000).

Medical malpractice plaintiffs were entitled to vacatur of default judgment where their attorney failed to appear at compliance conference because he had mistakenly calendared it under wrong date in his diary, and physician specified defendants' departures from accepted standards of care and opined that such departures contributed to plaintiffs' injuries. Rosenberg v Maggio, 281 A.D.2d 183, 721 N.Y.S.2d 521, 2001 N.Y. App. Div. LEXIS 2240 (N.Y. App. Div. 1st Dep't 2001).

Medical malpractice defendants were not entitled to have plaintiffs' medical expert witness precluded from testifying at trial where (1) on retaining that medical expert 6 weeks before scheduled commencement of trial, plaintiffs immediately served defendant with notice under CLS CPLR § 3101(d), (2) plaintiffs later served defendant with supplemental response further detailing expected testimony of their medical expert, and (3) thus, plaintiffs did not willfully fail to comply with § 3101(d), and defendant was not prejudiced. Medical malpractice plaintiffs were entitled to call defendant doctor as expert witness and have their attorney fully examine him regarding alleged departures from accepted medical practice and issue of informed consent. Vega v LaPalorcia, 281 A.D.2d 623, 722 N.Y.S.2d 563, 2001 N.Y. App. Div. LEXIS 3091 (N.Y. App. Div. 2d Dep't 2001).

In medical malpractice action based on claim that plaintiff suffered substantial reduction of vision as result of negligent placement of his head during back surgery, plaintiff was not entitled to have set aside jury verdict for defendant physicians, even though ophthalmologist was allowed

to testify for plaintiff on issue of causation despite noncompliance with notice requirements of CLS CPLR § 3101(d), where (1) jury found physicians not negligent and did not reach issue of causation, and thus any error in admitting expert's testimony was harmless, and (2) noncompliance with § 3101(d) did not require preclusion of expert's testimony, because noncompliance was neither willful nor prejudicial. Gilbert v Luvin, 286 A.D.2d 600, 730 N.Y.S.2d 85, 2001 N.Y. App. Div. LEXIS 8389 (N.Y. App. Div. 1st Dep't 2001).

Court properly allowed 2 expert demonstrations in medical malpractice action where (1) there is no requirement of strict or absolute identity between circumstances of case and those of demonstration, (2) conditions of demonstration need only be substantially same as those that existed at time of occurrence of event, (3) testimony concerning demonstrations at issue was subject to cross-examination and subsequent expert rebuttal testimony, both of which criticized demonstrations and minimized their significance, and (4) thus, there was no prejudice to plaintiff. Blanchard v Whitlark, 286 A.D.2d 925, 731 N.Y.S.2d 410, 2001 N.Y. App. Div. LEXIS 9152 (N.Y. App. Div. 4th Dep't 2001).

58. —Dental malpractice

Defendant dentist in malpractice action was deprived of fair trial, and new trial would be required, where preclusion of testimony of his expert oral surgeon forced him to serve as his own expert on very short notice, his testimony as interested party carried less weight with jury than that of even hired expert, jury might have received impression that no other doctor was willing to defend dentist, some of dentist's statements as expert were impatiently curtailed as repetitive of his earlier testimony as factual witness, and unfairness was compounded by court's curtailment of his attack on Harvard Guidelines—subject that he was particularly qualified to address—while plaintiff's expert was allowed to discuss them at length as one source of his opinion. Plaintiff was not entitled to preclusion of defense testimony on possible role of plaintiff's alleged culpable conduct in contributing to her injuries, even though CLS CPLR § 3101(d) notice referred to culpable conduct somewhat vaguely as "factors outside of the control" of dentist,

where bill of particulars gave plaintiff full warning of details to which that phrase referred. Gallo v Linkow, 255 A.D.2d 113, 679 N.Y.S.2d 377, 1998 N.Y. App. Div. LEXIS 11650 (N.Y. App. Div. 1st Dep't 1998).

Plaintiffs raised triable issue of fact as to dental malpractice where (1) dental expert with over 20 years of experience concluded that dentist departed from good and accepted dental practice by inserting post into wrong root canal of patient's tooth and that, based on patient's complaint of more pain and throbbing after procedure and radiographic irregularities in tooth after procedure, such procedure might have caused fracture of tooth and contributed to her injuries, and (2) dentist did not deny that he inserted post into wrong canal and that radiograph taken 3 months after procedure indicated possible infection in same canal. Ballatore v Verini, 255 A.D.2d 472, 680 N.Y.S.2d 633, 1998 N.Y. App. Div. LEXIS 12641 (N.Y. App. Div. 2d Dep't 1998).

Court properly refused to submit to jury plaintiff's claim, in dental malpractice action, that he needed root canal due to defendant's faulty treatment where testimony of plaintiff's dental expert in that connection was too speculative. In dental malpractice action, court properly refused to preclude defendant's dental expert's testimony, despite late service of notice under CLS CPLR § 3101, where belated disclosure was neither willful nor intentional, and plaintiff was not prejudiced thereby. McCluskey v Shapiro, 273 A.D.2d 284, 709 N.Y.S.2d 854, 2000 N.Y. App. Div. LEXIS 6487 (N.Y. App. Div. 2d Dep't 2000).

Dentist was not entitled to summary judgment dismissing malpractice action where (1) there was triable issue of fact as to whether treatment rendered more than 2 ½ years before commencement of action was continuous course of treatment tolling limitations period, and (2) conflicting opinions of parties' experts raised triable issue of fact as to whether dentist committed malpractice by treatment rendered during 2 ½ years before action was commenced. Heller v Lublin, 281 A.D.2d 393, 721 N.Y.S.2d 275, 2001 N.Y. App. Div. LEXIS 2109 (N.Y. App. Div. 2d Dep't 2001).

59. —Hospital as defendant

In a medical malpractice action against both the hospital in which the infant plaintiff was born and the doctor who delivered the child, the trial court improperly limited plaintiff's cross-examination of the physician member of a medical malpractice panel regarding his trial testimony that his recommendation that defendant hospital was not liable for the infant's brain damage was based on a specialist's written evaluation indicating that the infant's condition was congenital, which information he believed was contained in a report from a nonparty hospital to which the infant plaintiff had been transferred on the night of her birth, where the report the witness mentioned was written by defendant hospital's expert witness and was not a conclusion arrived at by the transferee hospital. Further, although the panel recommendation of no liability related solely to defendant hospital, the erroneous rulings also tainted the case against defendant doctor, and the judgment in favor of defendants would therefore be reversed and a new trial granted. Ellenberger v Pena, 88 A.D.2d 373, 453 N.Y.S.2d 436, 1982 N.Y. App. Div. LEXIS 17084 (N.Y. App. Div. 2d Dep't 1982).

In medical malpractice action on behalf of deceased patient, status of plaintiff's expert as pathologist did not vitiate validity of expert's affidavit for purposes of defeating hospital's motion for summary judgment; rather, such status presented issue for eventual consideration by jury in evaluating weight to be accorded expert's opinion. Lambos v Weintraub, 246 A.D.2d 356, 667 N.Y.S.2d 711, 1998 N.Y. App. Div. LEXIS 229 (N.Y. App. Div. 1st Dep't 1998).

Patient was entitled to release from psychiatric center on proper conditions where hearing court found, on basis of testimony of patient's treating psychiatrist and another psychiatrist, that patient was neither mentally ill nor suffering from dangerous mental condition, patient exhibited no symptoms of mental illness during 9 years between his transfer to center and rehearing, and he did not suffer any relapse during 16-month period when his treatment protocol did not include medication. Leon R. v Palmer, 266 A.D.2d 218, 697 N.Y.S.2d 693, 1999 N.Y. App. Div. LEXIS 11100 (N.Y. App. Div. 2d Dep't 1999).

One defendant was entitled to summary judgment dismissing medical malpractice action against him where (1) he proved prima facie case that he was not responsible for care of plaintiff's

decedent while decedent was in hospital's intensive care unit, in which alleged acts of malpractice occurred, and (2) affidavit of plaintiff's expert physician was insufficient to raise triable issue of fact as to that defendant's alleged malpractice. Hospital and 2 individual defendants were not entitled to summary judgment dismissing medical malpractice against them where affidavits of their medical experts were conclusory and did not attempt to refute, by specific factual reference, allegations of negligence in bills of particulars. Kenny v Parkway Hosp., 281 A.D.2d 596, 722 N.Y.S.2d 167, 2001 N.Y. App. Div. LEXIS 3111 (N.Y. App. Div. 2d Dep't 2001).

Anesthesiologist was entitled to summary judgment dismissing action against him by hospital patient who fell from operating table while under general anesthetic where anesthesiologist and his expert averred, and patient did not controvert, that (1) anesthesiologist's role was limited to administering anesthesia, monitoring patient's vital signs, and managing her airway, (2) anesthesiologist had no responsibility to secure patient to operating table and did not participate in placing restraints on her, and (3) surgeon and nurses had sole responsibility for properly positioning and securing patient. Schallert v Mercy Hosp. of Buffalo, 281 A.D.2d 983, 722 N.Y.S.2d 668, 2001 N.Y. App. Div. LEXIS 2821 (N.Y. App. Div. 4th Dep't 2001).

Hospital defendants were not entitled to summary judgment dismissing medical malpractice action against them where (1) patient, who was admitted to emergency room for alcohol detoxification and then to special pulmonary care unit for pneumonia, died of cardiac arrest, (2) hospital defendants failed to show prima facie that did not depart from good and accepted nursing practices by failing to record results of their monitoring or to report patient's deteriorating vital signs to his private physician or another physician, and (3) because hospital defendants did not meet their prima facie burden, any deficiencies in affidavit of plaintiff's expert were immaterial. Quinn v Nyack Hosp., 286 A.D.2d 675, 730 N.Y.S.2d 142, 2001 N.Y. App. Div. LEXIS 8453 (N.Y. App. Div. 2d Dep't 2001).

60. —Obstetric and gynecologic malpractice

In a medical malpractice action against both the hospital in which the infant plaintiff was born and the doctor who delivered the child, the trial court improperly limited plaintiff's cross-examination of the physician member of a medical malpractice panel regarding his trial testimony that his recommendation that defendant hospital was not liable for the infant's brain damage was based on a specialist's written evaluation indicating that the infant's condition was congenital, which information he believed was contained in a report from a nonparty hospital to which the infant plaintiff had been transferred on the night of her birth, where the report the witness mentioned was written by defendant hospital's expert witness and was not a conclusion arrived at by the transferee hospital. Further, although the panel recommendation of no liability related solely to defendant hospital, the erroneous rulings also tainted the case against defendant doctor, and the judgment in favor of defendants would therefore be reversed and a new trial granted. Ellenberger v Pena, 88 A.D.2d 373, 453 N.Y.S.2d 436, 1982 N.Y. App. Div. LEXIS 17084 (N.Y. App. Div. 2d Dep't 1982).

Trial court, as trier of fact, is entitled to accept plaintiff's expert's opinion that tubal ligation failed because it was improperly performed rather than defendant's version that he performed operation correctly and had no idea why it failed. Hill v Bresnick, 112 A.D.2d 919, 492 N.Y.S.2d 435, 1985 N.Y. App. Div. LEXIS 52132 (N.Y. App. Div. 2d Dep't 1985).

In medical malpractice action, court properly granted defendant obstetrician's motion to dismiss part of complaint alleging that his negligence on date of patient's postpartum visit caused need for her later mastectomy, because patient failed to prove that if physical examination had been performed on that date, her need for modified radical mastectomy would have been obviated, where her medical expert was unable to express opinion as to whether lumpectomy on that date would have obviated need for modified radical mastectomy, and he testified on cross-examination that if, on that date, lump was as large as patient alleged, accepted medical practice would have been to perform modified radical mastectomy. Court properly declined to set aside verdict for obstetrician as contrary to weight of evidence where (1) testimony was in conflict as to whether obstetrician conducted breast examination during patient's initial prenatal

visit, whether patient complained of lump in her breast during any later visit to obstetrician's office or at delivery hospital, and whether breast examination was conducted at hospital, and (2) experts agreed that if breast examination was performed during initial visit and no lump was found, and if patient did not complain of existence of lump during later visits, failure to conduct breast examination during later prenatal visits would not have been deviation from accepted medical practice. Holmes v Weissman, 251 A.D.2d 1078, 674 N.Y.S.2d 215, 1998 N.Y. App. Div. LEXIS 7189 (N.Y. App. Div. 4th Dep't 1998).

In medical malpractice action, plaintiff would be permitted to read into evidence entire examination before trial of nonparty physician who was one of physicians who delivered brain-damaged child, including portions containing expert opinion; as participant in occurrence, physician was more likely than others to have critical factual information, and because he was one of physicians charged with malpractice and was therefore one of those who would have created any liability on part of defendant New York City Health and Hospitals Corporation, he should have same obligations to answer questions calling for expert opinion as defendant physician. Cruz v New York, 135 Misc. 2d 393, 515 N.Y.S.2d 398, 1987 N.Y. Misc. LEXIS 2233 (N.Y. Sup. Ct. 1987).

61. —Podiatric malpractice

Affidavit of plaintiff's expert, based on review of plaintiff's medical records, was sufficient to prove that plaintiff had meritorious cause of action for medical malpractice and negligence of podiatrist where expert averred that podiatrist should have ordered CAT scan or MRI to locate foreign material in plaintiff's foot, rather than doing 3 separate surgeries, and should have ordered "culture and sensitivity" test to determine cause of infection that persisted for 2 ½ years and resulted in prescription of "311 various antibiotics and 95 pain killers," that podiatrist's treatment of plaintiff fell below prevailing standard of care required of podiatrists, and that such failure was proximate cause of plaintiff's injury. Schneider v Meltzer, 266 A.D.2d 801, 700 N.Y.S.2d 237, 1999 N.Y. App. Div. LEXIS 12114 (N.Y. App. Div. 3d Dep't 1999).

62. —Surgical malpractice

In a medical malpractice action in which plaintiff alleged defendant severed or damaged her spinal accessory nerve when he performed surgery, the trial court erred in admitting testimony of defendant's expert witness where the testimony was grounded upon erroneous assumptions in hypothetical questions propounded by defense counsel that examinations by three other physicians had revealed that plaintiff was able to use the affected neck muscle approximately 11 months after the operation; furthermore, the court erred in refusing to allow plaintiff's counsel to recall one of the three other physicians as a rebuttal witness to correct defense counsel's misrepresentation of his findings concerning plaintiff's ability to perform exercises involving use of the affected muscle. O'Shea v Sarro, 106 A.D.2d 435, 482 N.Y.S.2d 529, 1984 N.Y. App. Div. LEXIS 21475 (N.Y. App. Div. 2d Dep't 1984).

Defendants met their initial burden of proving that continuous treatment doctrine did not apply to save from applicable 2 ½ -year statute of limitations plaintiff's first of 3 causes of action for medical malpractice where defendants' medical expert averred that 3 surgeries performed on plaintiff were separate and unrelated medical events, each of which arose from entirely different condition. However, plaintiff raised triable issue of fact as to whether continuous treatment doctrine applied to save from applicable 2 ½ -year statute of limitations her first of 3 causes of action for medical malpractice where, inter alia, her medical expert averred that 3 surgeries performed on plaintiff were not separate and unrelated events, but rather resulted from continuous treatment arising from defendants' performance of unnecessary hysterectomy in May 1991, and that, as direct result, plaintiff developed post-hysterectomy ovarian syndrome, which necessitated her October 1991 and April 1993 surgeries. Scribner v Harvey, 245 A.D.2d 1120, 667 N.Y.S.2d 526, 1997 N.Y. App. Div. LEXIS 13938 (N.Y. App. Div. 4th Dep't 1997).

Medical malpractice plaintiff raised triable issue of fact as to lack of informed consent where she testified that she had no understanding of what proposed surgery would entail, her medical expert testified that defendant plastic surgeon should have informed plaintiff that, among other risks, she might suffer from mal-positioning of eye and that there were some drawbacks to

undergoing surgical repair by general plastic surgeon rather than oculoplastic surgeon. Hardt v LaTrenta, 251 A.D.2d 174, 674 N.Y.S.2d 335, 1998 N.Y. App. Div. LEXIS 7292 (N.Y. App. Div. 1st Dep't 1998).

Doctor who assisted in medical malpractice plaintiff's bilateral breast reduction was not entitled to summary judgment where he professed complete lack of any specific recollection of that surgery, and his expert's affidavit contained conclusory statements that although doctor "may have performed deepithelization," "may have made some incisions," and possibly sutured plaintiff's breasts, he did not deviate from accepted standards of surgical practice in his role of assisting in surgery and did not proximately cause any of plaintiff's injuries. Modzelewski v Herman, 255 A.D.2d 299, 679 N.Y.S.2d 421, 1998 N.Y. App. Div. LEXIS 11557 (N.Y. App. Div. 2d Dep't 1998).

Medical malpractice defendant was not entitled to have set aside verdict for plaintiff where testimony of medical experts and plaintiff's friend, who witnessed plaintiff's condition during crucial period immediately after her surgery, was sufficient for jury to fairly conclude that plaintiff had been bleeding continuously from time she left operating room and that defendant's failure to stop her bleeding sooner was departure from accepted standards of surgical practice that proximately caused plaintiff's injuries. English v Fischman, 266 A.D.2d 6, 697 N.Y.S.2d 613, 1999 N.Y. App. Div. LEXIS 11151 (N.Y. App. Div. 1st Dep't 1999), app. denied, 94 N.Y.2d 760, 706 N.Y.S.2d 81, 727 N.E.2d 578, 2000 N.Y. LEXIS 142 (N.Y. 2000).

Surgeon and urologist were not entitled to summary judgment dismissing medical malpractice action against them where affidavit of plaintiff's medical expert raised triable issues of fact as to whether surgery was medically indicated for her diverticulitis, whether plaintiff's bladder was perforated during unsuccessful attempt to insert catheter, and whether other departures from good medical practice contributed to development of stricture or stenosis that, in turn, caused or contributed to symptoms necessitating second surgery. Gastroenterologist, professional corporation, and medical center were entitled to summary judgment dismissing medical malpractice action against them where (1) gastroenterologist recommended that plaintiff consult

surgeon regarding her diverticulitis, (2) during surgery performed by surgeon, plaintiff's bladder was perforated during unsuccessful attempt by urologist to insert catheter, (3) affidavit of plaintiff's medical expert was insufficient to raise triable issue of fact as to whether gastroenterologist committed any malpractice during post-operative phase of treatment, and (4) alleged negligence of gastroenterologist was sole theory of liability pleaded against professional corporation and medical center. Golub v Sutton, 281 A.D.2d 589, 723 N.Y.S.2d 59, 2001 N.Y. App. Div. LEXIS 3098 (N.Y. App. Div. 2d Dep't 2001).

In action for pecuniary loss, conscious pain and suffering, and wrongful death of plaintiff's wife as result of medical malpractice of wife's primary health care provider and surgeon who performed emergency appendectomy, plaintiff was not entitled to have verdict for defendants set aside as against weight of evidence where (1) opinion of plaintiff's medical expert that defendants had misdiagnosed wife's condition and otherwise deviated from accepted medical practice was countered by defendants' medical experts, who testified, inter alia, that wife did in fact have appendicitis requiring immediate surgery, and (2) defendants presented compelling evidence that wife expressed no complaint of shortness of breath, thus eliminating basis of opinion of plaintiff's medical expert that wife should have been seen by physician earlier than she was. Veeder v Cmty. Health Plan, 281 A.D.2d 756, 722 N.Y.S.2d 106, 2001 N.Y. App. Div. LEXIS 2495 (N.Y. App. Div. 3d Dep't 2001).

Medical malpractice defendant was not entitled to have court give "error in judgment" charge to jury regarding proper surgical procedure where (1) plaintiffs' medical expert testified that standard of care required that stitch be placed at fascia at base of cylindrical incision wound in order to prevent bowel from being drawn into wound, (2) defendant's medical expert testified that standard of care simply required stitch at skin, (3) defendant chose neither alternative but, instead, placed stitch at skin level and additional stitch $^1/_3$ of way into wound, (4) neither defendant nor medical expert testified that it would have been medically acceptable to stitch fascia or skin, and (5) defendant did not testify that he considered either of those alternatives or any other medically acceptable treatment options before choosing manner in which to stitch

incision. Also, medical malpractice defendant was not entitled to have court give “error in judgment” charge to jury regarding proper diagnosis and treatment of post-operative bowel obstruction where (1) plaintiffs’ medical expert testified that defendant deviated from standard of care by failing to obtain x-ray after plaintiff patient exhibited classic symptoms of bowel obstruction, (2) defendant testified that he would have ordered x-ray if he had suspected bowel obstruction, (3) defendant’s medical expert testified that defendant’s assessment that patient did not have bowel obstruction was reasonable, and (4) thus, no reasonable view of evidence would support finding that defendant considered and chose among medically acceptable alternative courses of treatment. Martin v Lattimore Rd. Surgicenter, Inc., 281 A.D.2d 866, 727 N.Y.S.2d 836, 2001 N.Y. App. Div. LEXIS 2855 (N.Y. App. Div. 4th Dep't 2001).

In medical malpractice action, court did not err in giving “error in judgment” charge to jury where (1) defendant and his expert testified that it was medically necessary to ligate decedent’s blood vessels during surgery, that risk associated with that procedure is ligation of renal artery, which can become caught in tissue surrounding one of ties used to ligate blood vessels, and that as result of defendant’s decision to ligate blood vessels, renal artery was ligated, (2) plaintiff’s expert disagreed that ligation of renal artery is risk associated with ligation of blood vessels and testified that defendant could have controlled bleeding with methods other than ligation, (3) defendant’s decision to ligate blood vessels was one of 2 or more medically acceptable alternative to control bleeding during adrenalectomy. Nestorowich v Ricotta, 281 A.D.2d 870, 727 N.Y.S.2d 833, 2001 N.Y. App. Div. LEXIS 2671 (N.Y. App. Div. 4th Dep't 2001), aff'd, 97 N.Y.2d 393, 740 N.Y.S.2d 668, 767 N.E.2d 125, 2002 N.Y. LEXIS 182 (N.Y. 2002).

63. —Veterinarian medicine malpractice

In veterinary malpractice action for over-anesthetizing and improperly monitoring race horse during arthroscopic surgery for removal of bone chip from fetlock, with result that horse died of cardiac and respiratory arrest in recovery stall, plaintiff horse owner’s expert was qualified to give opinion on standard of care applicable to veterinarians administering anesthesia during

surgery, even though he practiced in university rather than clinical setting, where he had impressive credentials in specific area of veterinary anesthesiology and was familiar with applicable standard of care. Clinic co-owner who assisted surgeon, and anesthetist for overanesthetizing and improperly monitoring race horse during arthroscopic surgery for removal of bone chip from fetlock, with result that horse died of cardiac and respiratory arrest in recovery stall, jury verdict for plaintiff was not against weight of evidence, even though 3 individual defendants and one other veterinarian testified that defendants' conduct was consistent with standard practice in local clinical settings, where, inter alia, plaintiff's expert, who had impressive credentials in specific area of veterinary anesthesiology, testified that defendants' administration of large doses of drugs Rompum and Ketamine, together with inordinately high level of gaseous volatile anesthetic Halothane, was departure from accepted standards of veterinary care and that monitoring procedures employed during surgery—taking peripheral pulse and making visual observations of horse—were substandard in light of various devices available to monitor horse's vital signs. Kenny v Lesser, 281 A.D.2d 853, 722 N.Y.S.2d 302, 2001 N.Y. App. Div. LEXIS 3003 (N.Y. App. Div. 3d Dep't 2001).

64. Prisons; prisoner's rights

Even though inmate proceeded pro se in negligence claim against state for ankle injury allegedly sustained in prison recreation yard, judgment for inmate would be reversed, and his claim dismissed, where his theory of liability was that delay by prison personnel in providing him with his prescribed medication caused him to become dizzy and fall, prison medical director's testimony that such delay "may or may not" have caused inmate's dizziness was too speculative to be competent expert proof of causation, effect of medication was not matter of common knowledge, and thus inmate failed to present necessary expert testimony showing proximate causation. Duffen v State, 245 A.D.2d 653, 665 N.Y.S.2d 978, 1997 N.Y. App. Div. LEXIS 12598 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 810, 670 N.Y.S.2d 404, 693 N.E.2d 751, 1998 N.Y. LEXIS 885 (N.Y. 1998).

Prison inmate claiming damages against state failed to prove that he was victim of sodomy or assault by fellow inmates, even though physician testified that inmate's head injury resulted from attack, and internal report by 2 correction officers stated "On information gained from reliable source. Above staff were informed that [two] inmate[s] . . . made assault on "claimant and another inmate]," where (1) state presented evidence that inmate's injuries and amnesia were result of seizure, not attack, (2) kitchen supervisor testified that when he discovered inmate, it appeared that he was having seizure because he was on floor shaking and bleeding from his mouth, and (3) state's medical expert indicated that evaluations of inmate revealed that he had history of seizures. Prison inmate claiming damages against state failed to prove that state's physicians committed malpractice, even though his medical expert testified that some of treatment that inmate received after alleged assault by fellow inmates was departure from accepted medical practices, where that expert was often unresponsive to questions at trial and appeared unfamiliar with inmate's medical records, and state's medical expert disagreed and opined that all diagnoses and treatments received by inmate were consistent with accepted medical practices. Zi Guang v State, 263 A.D.2d 745, 695 N.Y.S.2d 142, 1999 N.Y. App. Div. LEXIS 8033 (N.Y. App. Div. 3d Dep't 1999).

Claimant assaulted by fellow prison inmate did not prove medical malpractice by state in its treatment of his injured leg, even though claimant's expert stated that x-rays mandated surgical repair of fracture rather than casting and that failure to operate was major deviation from accepted medical practice that proximately caused claimant's injuries, where physician employed by state testified that although surgery was considered and even scheduled at one point, she referred claimant to outside orthopedic specialists who ultimately decided against surgery after continuous review of successive x-rays, that she continued to monitor claimant's progress though those outside orthopedic surgeons, and that no further recommendation or request that she arrange for surgery was communicated. Auger v State, 263 A.D.2d 929, 693 N.Y.S.2d 343, 1999 N.Y. App. Div. LEXIS 8453 (N.Y. App. Div. 3d Dep't 1999).

Damage award of $12,500 was adequate in prison inmate's claim against state for contributing to his venous insufficiency where his medical expert acknowledged that insufficiency was natural progression from varicose veins that inmate had when he began prison term, and although expert opined that condition was further exacerbated by inmate's having to wear state-regulation boots, sleep on bed that was too short for him, and work in horticulture program, expert did not quantify either probability of avoiding condition or period in which inmate could have avoided its occurrence if he had received better treatment. Mihileas v State, 266 A.D.2d 866, 697 N.Y.S.2d 891, 1999 N.Y. App. Div. LEXIS 11833 (N.Y. App. Div. 4th Dep't 1999).

Evidence supported Court of Claims' conclusions, after trial, that prison inmate's death was caused by asthma and that state's negligence in failing to comply with inmate's request for refill of his asthma medication contributed to his death, despite expert evidence for state that death was caused by combined effect of numerous drugs ingested by inmate, where court's conclusions were consistent with coroner's report and coroner's testimony adhering to report. Farace v State, 266 A.D.2d 870, 698 N.Y.S.2d 376, 1999 N.Y. App. Div. LEXIS 11783 (N.Y. App. Div. 4th Dep't 1999).

In inmate's Article 78 proceeding to review finding that he violated prison disciplinary rule against assaulting another inmate, hearing officer properly denied inmate's request to call doctor to testify as to whether injuries sustained during altercation were consistent with fist fight where facility nurse administrator already had testified on that issue, rendering doctor's proposed testimony redundant, and doctor was no better qualified than nurse administrator to address issue of whether injuries could have been inflicted by experienced boxer or martial arts expert. Claudio v Selsky, 273 A.D.2d 678, 711 N.Y.S.2d 355, 2000 N.Y. App. Div. LEXIS 7210 (N.Y. App. Div. 3d Dep't 2000).

Inmate violated prison disciplinary rule against using controlled substances where (1) his urine twice tested positive for presence of cannabinoids, (2) although correction officer who conducted urinalysis tests had not yet received his certificate, he had successfully completed training course and was certified in use of urinalysis testing apparatus, (3) that officer's testimony and

urinalysis testing documentation showed that proper testing procedures were followed, and (4) in view of testimony by representative of apparatus manufacturer that medications taken by inmate would not cause false positive test result, conflicting testimony by prison nurse presented credibility issue for hearing officer to resolve. Morales v Selsky, 281 A.D.2d 658, 721 N.Y.S.2d 424, 2001 N.Y. App. Div. LEXIS 2011 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 713, 729 N.Y.S.2d 440, 754 N.E.2d 200, 2001 N.Y. LEXIS 1399 (N.Y. 2001).

Inmate was not denied any regulatory or constitutional rights at prison disciplinary hearing on charge of assaulting staff by biting correction officer's finger, despite hearing officer's refusal to view correction officer's wound, either in person or by photo, where (1) inmate claimed that correction officer injured his finger when he forcefully stuck his hand in inmate's mouth, (2) prison dental assistant testified that cut finger could occur either as result of bite or as described by inmate but did not testify that examination of wound would disclose how it had occurred, (3) hearing officer noted that he would be unable to determine, from viewing wound, how it had occurred, and (4) hearing officer was justified in concluding that viewing of wound was irrelevant to inmate's guilt or innocence. Grant v Selsky, 281 A.D.2d 676, 721 N.Y.S.2d 423, 2001 N.Y. App. Div. LEXIS 2036 (N.Y. App. Div. 3d Dep't 2001).

65. "Serious injury" under Insurance Law § 5102(d), generally

Considering that plaintiff had burden of proving that she sustained "serious injury" under CLS Ins § 5102(d), and that jury was entitled to reject expert opinion as to permanency of her injuries in motor vehicle accident, plaintiff was not entitled to directed verdict on issue of serious injury, even though defendants produced no expert evidence, where testimony of plaintiff's physicians concerning her limitations and permanence of her symptoms was sufficiently equivocal to allow varying inferences. Cooper-Fry v Kolket, 245 A.D.2d 846, 666 N.Y.S.2d 775, 1997 N.Y. App. Div. LEXIS 13195 (N.Y. App. Div. 3d Dep't 1997).

Plaintiff raised triable issue of fact as to whether she sustained "serious injury" under CLS Ins § 5102(d) where one treating physician diagnosed her as suffering from chronic and severe

cervical, dorsal, and lumbosacral sprain with radiating pain, and intermittent paresthesias in her arms and legs, all directly and causally related to motor vehicle accident, treating physicians' medical findings included trigger points and spasms in plaintiff's back, and 2 treating physicians opined that her injuries rendered her permanently disabled from performing her profession as chambermaid and housekeeper. Denner v Mizgala, 245 A.D.2d 1069, 666 N.Y.S.2d 76, 1997 N.Y. App. Div. LEXIS 13839 (N.Y. App. Div. 4th Dep't 1997).

Doctor's affidavits, based on examinations of 2 injured plaintiffs, raised triable issue of fact as to whether they sustained "significant limitation of use of a body function or system" under CLS Ins § 5102(d) where affidavits indicated that first plaintiff experienced restriction of movement to 30-35 degrees in right and left rotation of his cervical spine and that second plaintiff experienced restriction of movement to 40 degrees in her lumbar spine. Yahya v Schwartz, 251 A.D.2d 498, 674 N.Y.S.2d 430, 1998 N.Y. App. Div. LEXIS 6845 (N.Y. App. Div. 2d Dep't 1998).

Medical evidence specifying degree of limitation in range of motion of plaintiff's lumbosacral spine causally related to his accident was sufficient to raise triable issue of fact as to whether plaintiff sustained "a significant limitation of use of a body function or system," and thus "serious injury," under CLS Ins § 5102(d). Dahlman v Lowen, 251 A.D.2d 532, 673 N.Y.S.2d 924, 1998 N.Y. App. Div. LEXIS 7524 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff failed to prove that she sustained "serious injury" under CLS Ins § 5102(d) where her treating physician's affidavits did not specify extent or degree of her alleged "significant limitation of use of a body function or system." Williams v Tillak, 251 A.D.2d 657, 675 N.Y.S.2d 555, 1998 N.Y. App. Div. LEXIS 7956 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not suffer "serious injury" under CLS Ins § 5102(d) where there was no indication that medical diagnoses on which he relied were based on objective tests or merely his subjective complaints, no-fault insurer's doctor found that plaintiff sustained "mild partial disability," and none of plaintiff's reported symptoms was "significant limitation of a use of a body function." Sigona v New York City Transit Auth., 255 A.D.2d 231, 680 N.Y.S.2d 228, 1998 N.Y. App. Div. LEXIS 12471 (N.Y. App. Div. 1st Dep't 1998).

Jury reasonably could have concluded that plaintiff sustained “serious injury” under CLS Ins § 5102(d) where his medical experts testified that he suffered from 4 bulging discs in lumbosacral spine and that those bulges impinged on his thecal sac. Maisonaves v Friedman, 255 A.D.2d 494, 680 N.Y.S.2d 619, 1998 N.Y. App. Div. LEXIS 12654 (N.Y. App. Div. 2d Dep't 1998).

Town was entitled to dismissal of personal injury action where it submitted report from physician who examined plaintiff and found that although she had sustained shoulder contusion, she no longer showed any objective signs of pathology, and plaintiff’s self-serving statements as to her inability to perform household chores for 6 months after accident were insufficient to show that she had sustained medically determined injury or impairment of nonpermanent nature that prevented her from performing substantially all material acts of her usual and customary daily activities for at least 90 days during 180-day period immediately after accident. Turchuk v Town of Wallkill, 255 A.D.2d 576, 681 N.Y.S.2d 72, 1998 N.Y. App. Div. LEXIS 12889 (N.Y. App. Div. 2d Dep't 1998).

Jury verdict for plaintiff, although set aside on issue of damages, would not be set aside on issue of liability for “serious injury” under CLS Ins § 5102(d) where testimony of plaintiff’s expert, who was sole expert to testify, proved basis on which jury reasonably could have concluded that plaintiff suffered “significant limitation of use of a body function or system” and “permanent loss of use of a body organ, member, function or system,” and expert’s objective medical evidence was sufficient to support finding that such injuries resulted from accident involving defendant. Burney v Raba, 266 A.D.2d 174, 697 N.Y.S.2d 329, 1999 N.Y. App. Div. LEXIS 11112 (N.Y. App. Div. 2d Dep't 1999).

Infant plaintiffs did not sustain serious injuries under CLS Ins § 5102(d) where affidavits of their physician (1) merely recited measurements of their alleged limitations of cervical and lumbar motion, which had been obtained 20 months earlier and less than 2 weeks after accident, and (2) failed to articulate any opinion as to permanency. Kim v Kim, 266 A.D.2d 190, 697 N.Y.S.2d 676, 1999 N.Y. App. Div. LEXIS 11102 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where his doctor’s affirmation failed to indicate that opinion expressed therein was based on recent medical examination rather than doctor’s examination and treatment of plaintiff 11 years earlier. Alvarez v Ming Chao Wong, 266 A.D.2d 248, 699 N.Y.S.2d 420, 1999 N.Y. App. Div. LEXIS 11335 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where, in opposition to defendants’ prima facie showing of no such injury, affidavit of plaintiff’s examining physician did not provide any information concerning objective tests that he performed in arriving at his conclusions about alleged restriction of plaintiff’s range of motion. Laincy v Tsou Chienchun, 266 A.D.2d 355, 697 N.Y.S.2d 533, 1999 N.Y. App. Div. LEXIS 11545 (N.Y. App. Div. 2d Dep't 1999).

Plaintiffs raised triable issues of fact as to whether they sustained serious injuries under CLS Ins § 5102(d) where their doctor’s affidavit quantified limitations of motion of cervical spine regions of both plaintiffs and set forth duration of those limitations. Lefkowitz v Salas, 266 A.D.2d 356, 698 N.Y.S.2d 329, 1999 N.Y. App. Div. LEXIS 11540 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff raised triable issue of fact as to whether she sustained “serious” injury under CLS Ins § 5102(d) where competent medical evidence indicated that she suffered significant and permanent injury to her lumbosacral spine and was unable to perform substantially all of her daily activities for at least 90 of 180 days following accident. Shulman v Papell, 273 A.D.2d 111, 710 N.Y.S.2d 527, 2000 N.Y. App. Div. LEXIS 6596 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff raised triable issue of fact as to whether she sustained “serious injury” under CLS Ins § 5102(d) where she submitted doctor’s affirmation, based on recent examination, indicating degree to which plaintiff’s movement was restricted in her cervical spine and lumbar spine, noting that those restrictions had been objectively measured using range-of-motion test, and stating that restrictions were permanent. Vitale v Lev Express Cab Corp., 273 A.D.2d 225, 708 N.Y.S.2d 692, 2000 N.Y. App. Div. LEXIS 6288 (N.Y. App. Div. 2d Dep't 2000).

Respondents were not entitled to summary judgment dismissing claim of “serious injury” under CLS Ins § 5102(d) where their medical expert concluded that plaintiff’s injuries were caused by subject automobile accident, and same expert’s conclusory assertion that limitation of motion in plaintiff’s shoulder was “near normal” lacked any trace of factual support. Acevedo v Pena, 273 A.D.2d 260, 710 N.Y.S.2d 900, 2000 N.Y. App. Div. LEXIS 8214 (N.Y. App. Div. 2d Dep't 2000).

Plaintiffs did not sustain “serious injury” under CLS Ins § 5102(d) where defendants proved prima facie case through affidavits and incorporated reports of physician who examined plaintiffs and concluded that they had not sustained accident-related injury, and plaintiffs’ medical evidence in opposition was insufficient to raise triable issue of fact. Sallusti v Jones, 273 A.D.2d 293, 710 N.Y.S.2d 547, 2000 N.Y. App. Div. LEXIS 6529 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where defendants proved prima facie case to that effect, and affidavit of plaintiff’s physician consisted solely of conclusory assertions tailored to meet statutory requirements. Worley v Griffith, 273 A.D.2d 303, 709 N.Y.S.2d 846, 2000 N.Y. App. Div. LEXIS 6543 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d), even though affirmations of her treating and examining physicians purported to quantify certain alleged restrictions in her range of motion, where those physicians did not support their conclusions with proof of objectively diagnosed injury, provide any information about nature of plaintiff’s medical treatment, or explain over 4-year gap between date of accident and her later visits. Welcome v Diab, 273 A.D.2d 377, 711 N.Y.S.2d 329, 2000 N.Y. App. Div. LEXIS 7071 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where plaintiff’s doctor neither quantified any limitations of motion nor verified any limitation by objective medical findings, either at initial visit or 5 years later at most recent examination, and plaintiff did not show that she was prevented from performing substantially all of her customary and usual activities for at least 90 days during 180 days immediately after accident. Linares v Mompoint, 273 A.D.2d 446, 711 N.Y.S.2d 741, 2000 N.Y. App. Div. LEXIS 7378 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where her sole medical evidence was physician’s affidavit that stated neither (1) objective tests performed in reaching conclusions concerning restrictions in plaintiff’s range of motion nor (2) treatment, if any, that plaintiff received. McKie v Hughes, 273 A.D.2d 448, 712 N.Y.S.2d 365, 2000 N.Y. App. Div. LEXIS 7355 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where (1) no-fault verification form signed by his physician proved that he was disabled and thus unable to return to work or perform his usual and customary daily activities for at least 90 day immediately after accident, and (2) as to other categories of serious injury alleged, medical records indicated that he had permanent loss of use of body organ, member, function, or system, permanent consequential limitation of use of body organ or member, or significant limitation of use of body function or system. Gaeta v Kosek, 273 A.D.2d 801, 710 N.Y.S.2d 269, 2000 N.Y. App. Div. LEXIS 6936 (N.Y. App. Div. 4th Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where her doctor failed to (1) state what objective tests, if any, were used to examine plaintiff, (2) specify degree of plaintiff’s limitation of motion, and (3) explain almost 2 ½ -year gap in treatment between accident and plaintiff’s most recent medical examination. Slasor v Elfaiz, 275 A.D.2d 771, 713 N.Y.S.2d 742, 2000 N.Y. App. Div. LEXIS 9435 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) plaintiff did not submit any medical evidence indicating what treatment he received for his alleged injuries during 4 ½ -year period between accident and examination conducted by his medical expert, and (2) plaintiff’s medical expert neither stated nature of plaintiff’s alleged prior medical treatment nor delineated when that treatment was received. Yaraghi v Zeller, 286 A.D.2d 765, 730 N.Y.S.2d 517, 2001 N.Y. App. Div. LEXIS 8651 (N.Y. App. Div. 2d Dep't 2001).

66. —Causation at issue in “serious injury” case

Defendants were entitled to summary judgment dismissing action for “serious injury” under CLS Ins § 5102(d), even though disc bulge might be such injury, where plaintiff failed to show by expert medical evidence that subject motor vehicle accident was proximate cause of disc bulge. Bocci v Turkowitz, 255 A.D.2d 476, 680 N.Y.S.2d 637, 1998 N.Y. App. Div. LEXIS 12655 (N.Y. App. Div. 2d Dep't 1998).

Defendants made prima facie showing that plaintiff did not suffer “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) probative medical reports of orthopedist and neurologist, prepared after physical examinations of plaintiff, showed that although plaintiff suffered “lumbosacral sprain” and “soft tissue injuries” as result of accident, there was no evidence of “disability or any permanent type of injuries which could be linked causally” to accident, and (2) MRI showed preexistent levels of disc herniation and desiccation that were causally unrelated to accident. Kosto v Bonelli, 255 A.D.2d 557, 681 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 12857 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where he missed only 14 days of work as result of accident, and his doctor’s affirmed report failed to indicate that plaintiff’s injuries were “serious” or causally related to accident. Lalli v Tamasi, 266 A.D.2d 266, 698 N.Y.S.2d 276, 1999 N.Y. App. Div. LEXIS 11334 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 3102(d) where (1) defendants submitted affirmed report of orthopedist, who “found no evidence of any orthopedic disability,” and affirmed MRI report of radiologist, who characterized as “unremarkable” MRI exam of plaintiff’s cervical spine, (2) plaintiff submitted affirmed report of chiropractor, who had not treated him in 3 years and whose opinions were based on examinations at least 3 years old, and (3) although plaintiff also submitted MRI report indicating that he exhibited “slight posterior disc bulge” in cervical spine, there was no evidence causally relating bulge to accident. Bucci v Kempinski, 273 A.D.2d 333, 709 N.Y.S.2d 595, 2000 N.Y. App. Div. LEXIS 7108 (N.Y. App. Div. 2d Dep't 2000).

Although disc herniation may be “serious injury” under CLS Ins § 5102(d), it was sheer speculation to conclude that May 1992 car accident was proximate cause of plaintiff’s herniated

disc diagnosed in October 1996 doctor visits where there was no explanation for 4-year gap in treatment, and medical expert testimony for plaintiff proved only that she suffered herniated disc at some time before October 1996. Ekundayo v GHI Auto Leasing Corp., 273 A.D.2d 346, 709 N.Y.S.2d 603, 2000 N.Y. App. Div. LEXIS 7053 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 765, 716 N.Y.S.2d 640, 739 N.E.2d 1145, 2000 N.Y. LEXIS 3782 (N.Y. 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where defendants submitted affirmation of orthopedist who concluded, from physical examination and objective medical tests, that plaintiff’s disc herniations were result of preexisting degenerative condition rather than accident, and plaintiff’s treating physician improperly relied on unsworn medical report of another physician and failed to set forth any objective medical basis for his conclusion that plaintiff’s disc herniations were caused or exacerbated by accident. Napoli v Cunningham, 273 A.D.2d 366, 710 N.Y.S.2d 919, 2000 N.Y. App. Div. LEXIS 7079 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) there was no objective medical basis for opinions of his experts that injury shown in May 1998 MRI was causally related to March 1992 accident, (2) those opinions were dependent solely on his representations of continuing pain and related problems since terminating treatment in April 1992, (3) as of that date, his attending physician reported that plaintiff “had full range of motion and complained of no pain,” (4) diagnostic tests performed in 1992 and 1993 revealed only preexisting degenerative arthritic condition of cervical spine and “mild C 7 radiculopathy,” and (5) plaintiff did not prove causal relationship between accident and that radiculopathy. Palivoda v Sluberski, 275 A.D.2d 1036, 713 N.Y.S.2d 378, 2000 N.Y. App. Div. LEXIS 9638 (N.Y. App. Div. 4th Dep't 2000).

In action involving issue of whether plaintiff sustained “serious injury” under CLS Ins § 5102(d), absence of specific opinion concerning causation in examining physician’s report did not preclude his trial testimony, offered by defendant, on that issue, and any error in admitting such testimony was harmless, where (1) specific injury claimed by plaintiff—chondral defect in knee—was first diagnosed over 4 years after accident, (2) plaintiff had sustained another knee injury

that could not be ruled out as cause of chondral defect, (3) plaintiff's own medical expert could state only that accident possibly caused that condition, and (4) causation was issue throughout trial. Pola v Nycz, 281 A.D.2d 839, 722 N.Y.S.2d 818, 2001 N.Y. App. Div. LEXIS 3002 (N.Y. App. Div. 3d Dep't 2001).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) medical experts disagreed as to whether his herniated discs were caused by motor vehicle accident or preexisting degenerative condition temporarily aggravated by accident, (2) plaintiff's expert did not specify any resulting loss or limitation of motion, (3) plaintiff continued to play racquetball once or twice per week, although he could not compete with same frequency and intensity as before accident, (4) he continued to participate in Tai Chi, exercising regularly, although with some discomfort, (5) in his employment as teacher, he sat more often while giving lectures after accident, and (6) he was no longer taking prescription medication, although he was using ibuprofen for pain. Rose v Furgerson, 281 A.D.2d 857, 721 N.Y.S.2d 873, 2001 N.Y. App. Div. LEXIS 3047 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287, 2001 N.Y. LEXIS 3301 (N.Y. 2001).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) evidence of disc herniation alone is not sufficient proof, (2) 2 of 3 experts failed to provide objective evidence of extent or degree of the physical limitations resulting from herniation or its duration, (3) third expert, although quantifying limitations, did not draw any causal connection between herniation and car accident, (4) plaintiff's experts also failed to submit quantitative objective findings as to plaintiff's shoulder injury, and (5) experts did not explain 22-month hiatus between cessation of plaintiff's medical treatment after accident and physical examinations that they conducted, possibility that plaintiff's condition might have existed before accident, or possible significance of related injuries sustained by plaintiff in later car accident. Uber v Heffron, 286 A.D.2d 729, 730 N.Y.S.2d 174, 2001 N.Y. App. Div. LEXIS 8558 (N.Y. App. Div. 2d Dep't 2001).

Jury verdict finding that plaintiff had sustained serious injury in motor vehicle accident and that defendant was negligent but that defendant's negligence was not "a substantial factor in causing

the plaintiff's injury" was inherently inconsistent and against weight of evidence and would be set aside where testimony of plaintiff's treating physicians proved that accident was at least substantial factor in causing plaintiff's injury, and preponderance of evidence on proximate cause was so great that verdict could not have been reached on any fair interpretation of evidence. Zecher v Backus, 286 A.D.2d 884, 730 N.Y.S.2d 898, 2001 N.Y. App. Div. LEXIS 8935 (N.Y. App. Div. 4th Dep't 2001).

67. —Chiropractor as witness

Plaintiff did not sustain permanent "serious injury" under CLS Ins § 5102(d) where independent neurologist found "no objective evidence on examination of any permanent limitation of the use of [plaintiff's] extremity or her neck or back," and plaintiff's sole medical proof in opposition to motion for summary judgment was her chiropractor's nonspecific and conclusory affidavit stating, without substantive elaboration, that plaintiff "received a limitation in the use of her lumbar spine and cervical spine as well as her right elbow," and chiropractor failed to identify tests used in diagnosing plaintiff, dates of his findings, locations of "trigger point tenderness" and muscle spasms, degree of motion limitation, or any treatment recommendations; his mere use of word "permanent" was insufficient to raise triable issue of fact. Plaintiff raised triable issue of fact as to whether, under CLS Ins § 5102(d), she suffered from medically determined nonpermanent injury that prevented her from performing substantially all material acts of her usual daily activities for at least 90 of 180 days immediately after her injury in September accident where her chiropractor, after initially treating her on September 23, diagnosed her as having "sustained whiplash syndrome/cervical sprain, cervical subluxation complex, lumbar sprain/strain and multiple contusions" and that she was totally disabled from her employment as nanny until about October 7, he reexamined her on October 10 and extended her disability until January 4, and plaintiff stated that during that period she could not perform any kind of lifting, head movement, or prolonged sitting or standing without pain and that her athletic and social activities were curtailed. Uhl v Sofia, 245 A.D.2d 988, 667 N.Y.S.2d 92, 1997 N.Y. App. Div. LEXIS 13726 (N.Y. App. Div. 3d Dep't 1997).

Triable issues of fact existed as to whether plaintiff sustained “serious injury” under CLS Ins § 5102(d) where report of chiropractor who examined her 5 years after accident stated that she suffered cervical and thoracic strain and sprain causally related to accident, which aggravated symptoms of preexisting cervical and thoracic spondylosis and left her with “mild partial disability,” and that no fundamental change in her condition could be expected, and defendant’s own proof showed that plaintiff suffered from chronic neck, shoulder, and back conditions that restricted her physical activities. Hawkins v Foshee, 245 A.D.2d 1091, 666 N.Y.S.2d 88, 1997 N.Y. App. Div. LEXIS 13878 (N.Y. App. Div. 4th Dep't 1997).

Defendant was not entitled to summary judgment in personal injury action where affidavit of plaintiff’s chiropractor, which incorporated findings contained in chiropractor’s medical report specifying degree of limitation in range of motion of plaintiff’s cervical and lumbar spine, was based on identified objective testing, was in admissible form, and was sufficient to raise triable issue of fact as to whether plaintiff sustained serious injury under CLS Ins § 5102(d). Gonzalez v Niddrie, 251 A.D.2d 450, 673 N.Y.S.2d 330, 1998 N.Y. App. Div. LEXIS 6857 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff failed to rebut defendant’s prima facie case that plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where affidavit of plaintiff’s chiropractor did not indicate any objective basis on which he determined stated degrees of limitation of motion allegedly suffered by plaintiff, and affidavit was clearly tailored to meet statutory requirements. Lebenfeld v Toner, 251 A.D.2d 551, 673 N.Y.S.2d 929, 1998 N.Y. App. Div. LEXIS 7537 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff failed to rebut defendant’s prima facie case that plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where unsworn progress report by plaintiff’s chiropractor was inadmissible, and plaintiff’s affidavit contradicted his deposition and consisted of merely conclusory assertions tailored to meet statutory requirements. Benanti v Bay Ridge Lincoln Mercury, Inc., 255 A.D.2d 475, 680 N.Y.S.2d 636, 1998 N.Y. App. Div. LEXIS 12671 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where her chiropractor’s affidavit was based on examinations of plaintiff performed at least 34 months earlier, and thus there was insufficient proof of duration of alleged impairment. Burnett v Miller, 255 A.D.2d 541, 680 N.Y.S.2d 866, 1998 N.Y. App. Div. LEXIS 12882 (N.Y. App. Div. 2d Dep't 1998).

Jury verdict finding that plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) was not against weight of evidence, even though her treating physician testified that, based on plaintiff’s subjective complaints, she had sustained cervical, shoulder, and chest wall strain and possible posttraumatic carpel tunnel syndrome, where he acknowledged that MRI revealed neither disc herniation nor nerve root compression and that he conducted no tests for carpel tunnel syndrome, (2) plaintiff’s chiropractor testified that although tests showed no neurological or reflex abormalities, plaintiff nevertheless sustained permanent partial disability to her cervical and upper thoracic spine, (3) defendant’s expert testified that X-rays and MRI were normal, that examination revealed no abnormalities, that any strain was not permanent, and that there was no evidence of carpel tunnel syndrome, and (4) plaintiff returned to work 3 weeks after accident. Moxley v Givens, 255 A.D.2d 632, 679 N.Y.S.2d 472, 1998 N.Y. App. Div. LEXIS 11672 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff who injured her neck in motor vehicle accident did not sustain “serious injury” under CLS Ins § 5102(d) where defendants submitted affidavit of orthopedic surgeon who examined plaintiff and opined that she merely sustained cervical sprain/strain and that there was no objective medical evidence of serious or permanent injury, and although affidavits of plaintiff’s physician and chiropractor stated that she was unable to engage in substantially all of her customary daily activities for 90 of 180 days after accident, those affidavits were clearly tailored to meet statutory threshold and were dependent solely on information supplied by plaintiff, including her subjective complaints of pain and discomfort. Bennett v Reed, 263 A.D.2d 800, 693 N.Y.S.2d 738, 1999 N.Y. App. Div. LEXIS 8307 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 3102(d) where (1) defendants submitted affirmed report of orthopedist, who “found no evidence of any orthopedic disability,” and affirmed

MRI report of radiologist, who characterized as “unremarkable” MRI exam of plaintiff’s cervical spine, (2) plaintiff submitted affirmed report of chiropractor, who had not treated him in 3 years and whose opinions were based on examinations at least 3 years old, and (3) although plaintiff also submitted MRI report indicating that he exhibited “slight posterior disc bulge” in cervical spine, there was no evidence causally relating bulge to accident. Bucci v Kempinski, 273 A.D.2d 333, 709 N.Y.S.2d 595, 2000 N.Y. App. Div. LEXIS 7108 (N.Y. App. Div. 2d Dep't 2000).

Plaintiffs did not sustain “serious injury” under CLS Ins § 5102(d) where affidavit of their treating chiropractor did not indicate what objective medical tests he performed to measure plaintiffs’ restrictions of motion, and court correctly refused to consider unsworn medical records attached to that affidavit. Perovich v Liotta, 273 A.D.2d 367, 710 N.Y.S.2d 908, 2000 N.Y. App. Div. LEXIS 7139 (N.Y. App. Div. 2d Dep't 2000).

Findings of limitations in plaintiffs’ cervical movement were insufficient to prove that they sustained either permanent consequential limitation of use of body organ or member or significant limitation of use of body function or system under CLS Ins § 5102(d) where (1) restriction in cervical flexion purportedly diagnosed for first plaintiff, who claimed most extensive limitation of any plaintiff, did not raise triable issue of fact as to whether she suffered “serious injury,” (2) diagnosis that second plaintiff suffered herniated disc was based on MRI report done by another doctor that was not submitted in plaintiffs’ papers and thus was properly disregarded as unsupported by competent admissible evidence, and (3) additional diagnostic statements in treating chiropractor’s reports were conclusory assertions tailored to meet statutory requirements. Collins v Jost, 281 A.D.2d 175, 721 N.Y.S.2d 524, 2001 N.Y. App. Div. LEXIS 2242 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) defendants’ orthopedist found that plaintiff’s cervical and low back sprains had fully resolved, (2) plaintiff’s chiropractor did not specify degree of limitation or restriction caused by alleged spinal injuries, (3) plaintiff’s proof was based on examination performed over 2 years earlier and unsworn MRI report prepared nearly 5 years earlier by physician no longer treating plaintiff, and (4) although

plaintiff's psychiatrist indicated that plaintiff was suffering from depression since accident, psychiatrist did not address issue of whether plaintiff was unable to function in her usual manner. Gjelaj v Ludde, 281 A.D.2d 211, 721 N.Y.S.2d 643, 2001 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 1st Dep't 2001).

Self-employed florist did not sustain "serious injury" under CLS Ins § 5102(d) where (1) he was examined in hospital emergency room immediately after motor vehicle accident and was diagnosed with muscle strain of his neck and back, (2) he missed only 4 or 5 days of work and then worked part-time thereafter, (3) independent medical examination report affirmed lack of objective findings or ongoing disability, and (4) his own medical experts (orthopedist and chiropractor) described his permanent disability as "very mild" and "mild." Florist did not prove that he was unable to perform substantially all of his usual daily activities for not less than 90 out of 180 days following accident where (1) his medical experts' affidavits were deficient because they were clearly tailored to meet statutory threshold and ignored fact that he missed only 4 or 5 full work days, and (2) as activities restricted since accident, florist listed at his deposition only landscaping, which he estimated as 25 to 40 percent of his business, and riding friend's jet ski and snow skiing, which he had done "at the maximum maybe two to three times." Pantalone v Goodman, 281 A.D.2d 790, 722 N.Y.S.2d 291, 2001 N.Y. App. Div. LEXIS 2497 (N.Y. App. Div. 3d Dep't 2001).

68. — —Range of motion limitation at issue

Plaintiff failed to prove that he sustained "serious injury" under CLS Ins § 5102(d) where (1) his chiropractor's affidavit contained conclusory assertions that plaintiff was suffering from significant limitation and permanent consequential limitation, based on recent examination, without quantifying extent or degree to which plaintiff's range of movement was limited, (2) although affidavit contained measurements of limitations of motion in plaintiff's spine, measurements were based on physical examination conducted 4 years earlier, and (3) plaintiff failed to support allegation that his injuries prevented him from performing substantially all of his

usual daily activities during at least 90 out of first 180 days after accident. Marin v Kakivelis, 251 A.D.2d 462, 674 N.Y.S.2d 709, 1998 N.Y. App. Div. LEXIS 6883 (N.Y. App. Div. 2d Dep't 1998).

Affidavit of plaintiff's treating chiropractor raised triable issue of fact as to whether plaintiff sustained "serious injury" under CLS Ins § 5102(d) where affidavit stated, inter alia, that plaintiff suffered from objectively measured, specifically quantified restrictions of motion of her cervical and lumbosacral spine. Pasutto v Hacker, 251 A.D.2d 478, 673 N.Y.S.2d 592, 1998 N.Y. App. Div. LEXIS 6889 (N.Y. App. Div. 2d Dep't 1998).

Affidavit of plaintiff's chiropractor indicating only that plaintiff sustained unquantified decrease in cervical and lumbar range of motion was insufficient to raise triable issue of fact as to whether plaintiff sustained "serious injury" under CLS Ins § 5102(d). Hores v Guralnick, 255 A.D.2d 292, 679 N.Y.S.2d 647, 1998 N.Y. App. Div. LEXIS 11589 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff sustained "serious injury" under CLS Ins § 5102(d) where his chiropractor averred that, on examination, he determined that plaintiff sustained partial permanent disability in his cervical spine and some loss of range of motion, and chiropractor quantified those limitations. Ventura v Moritz, 255 A.D.2d 506, 680 N.Y.S.2d 176, 1998 N.Y. App. Div. LEXIS 12661 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff failed to rebut defendants' prima facie showing that she did not suffer "serious injury" under CLS Ins § 5102(d) where her chiropractor's affidavit (1) failed to indicate that opinion expressed was based on recent medical examination rather than one conducted 2 years earlier, and (2) although it noted "loss of the lumbar range of motion," failed to specify extent or degree of that limitation. Kosto v Bonelli, 255 A.D.2d 557, 681 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 12857 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff raised triable issue of fact as to whether he sustained "serious injury" under CLS Ins § 5102(d) where (1) MRI disclosed large herniated disc and bulging disc, (2) EMG confirmed disc problem and indicated ridiculopathy, (3) neurologist opined that plaintiff had severe aggravated exacerbation of his spinal cord injuries, which were permanent, and that if history given by

plaintiff were correct, those permanent and significant injuries were causally related to his automobile accident, and (4) although chiropractor initially reported that plaintiff had fully recovered, he later opined that relief had been temporary and that plaintiff had decreased range of motion in cervical and lumbar spine directly related to his accident. Boehm v Estate of Mack by Pfaff-Adams, 255 A.D.2d 749, 680 N.Y.S.2d 732, 1998 N.Y. App. Div. LEXIS 11914 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff raised triable issue of fact as to whether he sustained “serious injury” under CLS Ins § 5102(d) where his chiropractor stated that plaintiff suffered serious, permanent, and consequential disabling injury to his lumbosacral spine as result of his accident, he based his conclusions on several objective medical tests performed by him, including MRI, which revealed that plaintiff suffered from severe back pain and spasms from bulging disc and degenerative changes in facet joints of spine, and that injury would limit plaintiff’s ability for physical labor and recreation, including restricting him from lifting more than 25 pounds and from bending and working with arms overhead for prolonged period. Evans v Hahn, 255 A.D.2d 751, 680 N.Y.S.2d 734, 1998 N.Y. App. Div. LEXIS 11902 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where her chiropractor averred that he measured significant and permanent restrictions in the flexion, extension, and rotation of her cervical spine 11 months after accident. Rodriguez v Duggan, 266 A.D.2d 859, 697 N.Y.S.2d 803, 1999 N.Y. App. Div. LEXIS 11836 (N.Y. App. Div. 4th Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d), despite her subjective complaints of pain, where chiropractor’s affidavit asserting that plaintiff had decreased range of motion in her spine as result of accident did not specify extent or degree of that decrease and thus did not raise triable issue of fact as to whether limitation of motion was “significant” or “consequential,” and chiropractor’s affidavit contained no objective findings to support his conclusory assertion that injury was permanent. Brehaut v Laveck, 266 A.D.2d 927, 697 N.Y.S.2d 418, 1999 N.Y. App. Div. LEXIS 11877 (N.Y. App. Div. 4th Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102 (d) where his treating chiropractor did not indicate what, if any, objective medical tests were performed to support his conclusion that plaintiff suffered loss of cervical and thoracic motion. Funderburk v Gordon, 273 A.D.2d 196, 709 N.Y.S.2d 437, 2000 N.Y. App. Div. LEXIS 6257 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d), even though his treating chiropractor averred that plaintiff had specifically quantified restrictions of motion in his cervical and lumbar spines, absent any indication that those measurements were based on objective medical tests. Harewood v Aiken, 273 A.D.2d 199, 710 N.Y.S.2d 82, 2000 N.Y. App. Div. LEXIS 6256 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) chiropractor’s report dated about 3 weeks after accident indicated no lumbar or cervical range-of-motion limitations for plaintiff as result of accident, and (2) although new report from same chiropractor after unexplained 21-month gap in treatment indicated significant limitations in plaintiff’s range of motion as result of accident, second report was clearly tailored to meet statutory requirements. The same result was also found where neither of plaintiff’s 2 physicians indicated that he had performed objective tests to verify plaintiff’s subjective complaints of pain and quantify her alleged limitation of motion, and neither physician explained gap of about 6 years between plaintiff’s final medical treatment and their affidavits. Lauretta v County of Suffolk, 273 A.D.2d 204, 708 N.Y.S.2d 468, 2000 N.Y. App. Div. LEXIS 6227 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3873 (N.Y. 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) defendants submitted reports of 2 orthopedic surgeons stating that plaintiff did not sustain any restrictions in range of motion due to accident and could resume her normal activities, (2) reports of plaintiff’s treating chiropractor and orthodontist were not based on recent examination of plaintiff and thus were insufficient, (3) those reports did not explain gap of over 3 ½ years in treatment immediately preceding submission of reports, (4) although plaintiff’s orthopedic surgeon stated that plaintiff suffered from “chronic cervical strain, chronic impingement syndrome, and

myofascial pain syndrome" as result of accident, he did not quantify any restriction in plaintiff's range of motion, and (5) surgeon's report was not based on recent examination of plaintiff. Borino v Little, 273 A.D.2d 262, 709 N.Y.S.2d 575, 2000 N.Y. App. Div. LEXIS 6536 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 131, 746 N.E.2d 186, 2001 N.Y. LEXIS 263 (N.Y. 2001).

Plaintiff raised triable issue of fact as to whether she sustained "serious injury" under CLS Ins § 5102(d) where her treating chiropractor testified that plaintiff suffered from "vertebral subluxation complex" in her cervical spine as result of injuries sustained in accident, and those injuries allegedly resulted in permanent significant range-of-motion limitations, which were objectively measured using arthroidal protractor. Martin v Pietrzak, 273 A.D.2d 361, 709 N.Y.S.2d 591, 2000 N.Y. App. Div. LEXIS 7061 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) affidavit of her chiropractor did not explain how limitation of plaintiff's range of motion, which was described as resolved a few months after accident, was found to exist nearly 4 years later, (2) although chiropractor's most recent examination noted limitation of plaintiff's cervical range of motion, he concluded that she had suffered 10 percent limitation of spinal range of motion, and there was no indication in report or affidavit that any tests for spinal range of motion were performed, and (3) objective findings regarding plaintiff's cervical range of motion showed insignificant limitations of 2, 4, and 2 percent. Duncan v New York City Transit Auth., 273 A.D.2d 437, 710 N.Y.S.2d 255, 2000 N.Y. App. Div. LEXIS 7368 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), despite her subjective complaints of pain and disability, where (1) her chiropractor's affidavit referred to findings from his examination of her over one year earlier, in which only minimal limitations of movement were noted, and affidavit did not indicate that his opinion was based on more recent examination, (2) plaintiff missed only one day of work because of accident, and (3) during summer after accident, she participated in various athletic activities, such as tennis and bicycling. Mohamed v

Dhanasar, 273 A.D.2d 451, 711 N.Y.S.2d 733, 2000 N.Y. App. Div. LEXIS 7395 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) neurologist who examined him concluded that he “does not demonstrate an objective neurological disability,” and (2) plaintiff’s treating chiropractor’s affidavit did not prove duration of alleged “significant limitation of use of a body function or system.” Barbeito v Kesev Taxi, Inc., 281 A.D.2d 379, 721 N.Y.S.2d 279, 2001 N.Y. App. Div. LEXIS 2050 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) although disc bulge was initially diagnosed about one week after 1995 car accident, there was no evidence that it still existed, (2) plaintiff’s chiropractor did not explain expert findings in MRI reports indicating that bulge was degenerative or congenital, and (3) chiropractor’s finding of 2 percent loss of cervical rotation did not show significant limitation or permanent loss of use of body function or system. Monette v Keller, 281 A.D.2d 523, 721 N.Y.S.2d 839, 2001 N.Y. App. Div. LEXIS 2612 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) defendants submitted evidence that plaintiff was suffering from degenerative disc disease and associated degenerative disc bulge, which was not related to any trauma, (2) medical reports by orthopedist and neurologist, both of whom had examined plaintiff over 3 years after accident, indicated that plaintiff had suffered cervical and lumbar sprains, that range of motion in her cervical and lumbar spines was good, and that she was not suffering from orthopedic or neurological disability, and (3) affirmation of plaintiff’s treating chiropractor was not competent evidence. Holmes v Hanson, 286 A.D.2d 750, 730 N.Y.S.2d 528, 2001 N.Y. App. Div. LEXIS 8643 (N.Y. App. Div. 2d Dep't 2001).

There was triable issue of fact as to whether plaintiff sustained “serious injury” under CLS Ins § 5102(d) where chiropractor who had treated plaintiff for over 3 years after car accident stated his objective findings that range of motion in plaintiff’s lumbar spine was extremely limited and that he measured significant restrictions in flexion and extension of plaintiff’s lumbar spine 2 years

after accident, and he opined to reasonable degree of medical certainty that those restrictions were permanent and that accident at issue was cause of plaintiff's injuries. Dixon v La Morticella, 286 A.D.2d 951, 730 N.Y.S.2d 389, 2001 N.Y. App. Div. LEXIS 9137 (N.Y. App. Div. 4th Dep't 2001).

69. —Competency of evidence

Affidavit of plaintiff's treating physician was not competent evidence under CLS CPLR § 2106 where it was neither sworn nor affirmed to be true under penalties of perjury, and thus it was insufficient to raise triable issue of fact as to whether plaintiff sustained "serious injury" under CLS Ins § 5102(d). Parisi v Levine, 246 A.D.2d 583, 667 N.Y.S.2d 283, 1998 N.Y. App. Div. LEXIS 435 (N.Y. App. Div. 2d Dep't 1998).

Reports prepared by 2 doctors, submitted by defendants to prove prima facie case that plaintiff had not sustained "serious injury" under CLS Ins § 5102(d), were competent evidence where they were affirmed to be true under penalty of perjury. Marin v Kakivelis, 251 A.D.2d 462, 674 N.Y.S.2d 709, 1998 N.Y. App. Div. LEXIS 6883 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where his physician's affidavit relied on unsworn reports and failed to provide objective evidence of extent, degree, and duration of "significant limitation of use of a body function or system." Ahmed v Jaekyoo Yoo, 255 A.D.2d 345, 679 N.Y.S.2d 840, 1998 N.Y. App. Div. LEXIS 11816 (N.Y. App. Div. 2d Dep't 1998).

Defendant, in meeting initial burden of proving that plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), was entitled to rely on unsworn reports of plaintiff's treating physician, which failed to indicate that plaintiff suffered any additional injuries, or aggravation of his preexisting condition, in second accident. Cody v Parker, 263 A.D.2d 866, 693 N.Y.S.2d 769, 1999 N.Y. App. Div. LEXIS 8281 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) his admissible evidence consisted solely of his own affidavit and that of neurologist whose care he was under for back and neck injuries sustained in prior accident, (2) neurologist’s affidavit did not allude to any objective medical findings or opine that plaintiff sustained serious injury in second accident, but rather stated only that, after second accident, it “appeared” that plaintiff had increased cervical pain and worsening of his earlier condition, and (3) unsworn letters from neurologist to plaintiff’s general practitioner and attorney lacked probative value. Also, plaintiff failed to raise triable issue of fact as to whether his second accident resulted in “medically determined injury or impairment of a non-permanent nature” that prevented him from performing his usual daily activities for at least 90 of first 180 days after accident, under CLS Ins § 5102(d), where (1) his neurologist’s affidavit did not refer to plaintiff’s inability to perform his customary activities as result of either first or second accident, (2) neurologist’s unsworn letters were inadmissible and indicated only that plaintiff was disabled as result of first accident, (3) plaintiff acknowledged that he lost no time from work as result of second accident and that he continued to work for another year, and (4) both plaintiff and his wife testified that degree to which his daily activities were limited did not change after second accident. Cody v Parker, 263 A.D.2d 866, 693 N.Y.S.2d 769, 1999 N.Y. App. Div. LEXIS 8281 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where much of his evidence was not submitted in admissible form, and his subjective complaints of pain and his physician’s affidavit, which was based on examination conducted almost 6 years earlier, were insufficient to raise triable issue of fact. Calcagno v New York City Transit Auth., 266 A.D.2d 421, 698 N.Y.S.2d 872, 1999 N.Y. App. Div. LEXIS 12019 (N.Y. App. Div. 2d Dep't 1999), recalled, vacated, sub. op., 273 A.D.2d 334, 710 N.Y.S.2d 824, 2000 N.Y. App. Div. LEXIS 7025 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where medical report prepared by defendants’ medical expert was unsworn, and diagnoses of plaintiff’s examining physician were probative, even though they were not supported by objective tests, because they were based on

his own physical examination of plaintiff. Choudhury v Hsien Chen, 273 A.D.2d 142, 710 N.Y.S.2d 895, 2000 N.Y. App. Div. LEXIS 7155 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) he did not submit any medical records, in admissible form, indicating treatment, if any, received for his alleged injuries in over 2 ½ years between accident and examination conducted by his medical expert, and (2) his medical expert did not set forth what objective tests she performed in arriving at her conclusions concerning alleged restrictions of his range of motion. Guevara v Conrad, 273 A.D.2d 198, 708 N.Y.S.2d 698, 2000 N.Y. App. Div. LEXIS 6237 (N.Y. App. Div. 2d Dep't 2000).

In action involving issue of whether plaintiff sustained “serious injury” under CLS Ins § 5102(d), unsworn report of plaintiff’s orthopedic surgeon was properly before Supreme Court where report was submitted by defendants in support of their motion for summary judgment. Borino v Little, 273 A.D.2d 262, 709 N.Y.S.2d 575, 2000 N.Y. App. Div. LEXIS 6536 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 131, 746 N.E.2d 186, 2001 N.Y. LEXIS 263 (N.Y. 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where defendants submitted affirmed reports of neurologist and orthopedic surgeon stating that objective tests performed during their examination of plaintiff revealed that he had “normal range of motion,” plaintiff’s treating chiropractor did not explain objective tests that were performed to support his conclusion that plaintiff suffered restricted range of motion, chiropractor’s conclusions appeared to be based on plaintiff’s subjective complaints of pain, chiropractor never stated that plaintiff’s bulging disc was causally related to accident, and neither plaintiff nor chiropractor sufficiently explained almost 4-year gap between plaintiff’s last treatment and most recent examination. Villalta v Schechter, 273 A.D.2d 299, 710 N.Y.S.2d 87, 2000 N.Y. App. Div. LEXIS 6481 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 3102(d) where much of plaintiff’s evidence was not submitted in admissible form, and remaining evidence consisted of his subjective complaints of pain and affirmation of physician based on examination conducted

almost 6 years earlier. Calcagno v New York City Transit Auth., 273 A.D.2d 334, 710 N.Y.S.2d 824, 2000 N.Y. App. Div. LEXIS 7025 (N.Y. App. Div. 2d Dep't), aff'd, 95 N.Y.2d 875, 715 N.Y.S.2d 211, 738 N.E.2d 358, 2000 N.Y. LEXIS 3941 (N.Y. 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where all but one of medical reports submitted in opposition to defendants’ summary judgment motion were neither sworn nor affirmed to be true under penalty of perjury and thus were not competent evidence, and remaining medical report contained only conclusory allegations tailored to meet statutory requirements. Slavin v Associates Leasing, Inc., 273 A.D.2d 372, 710 N.Y.S.2d 916, 2000 N.Y. App. Div. LEXIS 7109 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where written statements of her treating physician were not competent evidence under CLS CPLR § 2106. Douglas v Zhi Wei He, 275 A.D.2d 690, 713 N.Y.S.2d 287, 2000 N.Y. App. Div. LEXIS 9177 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) affirmation of her physician did not state objective medical tests that he performed to determine that plaintiff suffered specifically quantified restrictions of motion in her back and neck, (2) same physician improperly relied on unsworn medical reports and test results of other physicians in reaching his conclusions, and (3) plaintiff did not show that she was prevented from performing substantially all material acts constituting her usual and customary daily activities for required period. Trent v Niewierowski, 281 A.D.2d 622, 722 N.Y.S.2d 68, 2001 N.Y. App. Div. LEXIS 3100 (N.Y. App. Div. 2d Dep't 2001).

70. — —MRI scans, records and reports

Motorist sustained “serious injury” under CLS Ins § 5102(d) where (1) she complained of headaches, numbness in several fingers of her left hand, loss of grip strength in that hand, and decreased range of neck motion, (2) MRI scan, performed 2 months after accident, revealed that she had suffered herniated disc at C5-C6, causing distortion of her spinal cord and pressure

on her sixth spinal nerve, (3) examining physician concluded that disc herniation and symptoms were caused by accident, and motorist was able to obtain relief from her debilitating symptoms only by undergoing spinal surgery. Hawkey v Jefferson Motors, 245 A.D.2d 785, 665 N.Y.S.2d 766, 1997 N.Y. App. Div. LEXIS 12955 (N.Y. App. Div. 3d Dep't 1997).

Defendants made prima facie showing that plaintiff did not suffer “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) probative medical reports of orthopedist and neurologist, prepared after physical examinations of plaintiff, showed that although plaintiff suffered “lumbosacral sprain” and “soft tissue injuries” as result of accident, there was no evidence of “disability or any permanent type of injuries which could be linked causally” to accident, and (2) MRI showed preexistent levels of disc herniation and desiccation that were causally unrelated to accident. Kosto v Bonelli, 255 A.D.2d 557, 681 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 12857 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff raised triable issue of fact as to whether he sustained “serious injury” under CLS Ins § 5102(d) where his chiropractor stated that plaintiff suffered serious, permanent, and consequential disabling injury to his lumbosacral spine as result of his accident, he based his conclusions on several objective medical tests performed by him, including MRI, which revealed that plaintiff suffered from severe back pain and spasms from bulging disc and degenerative changes in facet joints of spine, and that injury would limit plaintiff’s ability for physical labor and recreation, including restricting him from lifting more than 25 pounds and from bending and working with arms overhead for prolonged period. Evans v Hahn, 255 A.D.2d 751, 680 N.Y.S.2d 734, 1998 N.Y. App. Div. LEXIS 11902 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where (1) he testified that, within a few days after accident, he began experiencing severe pain in his neck that radiated into his arms and hands and that, as result of numbness in his arms and fingers, he frequently dropped things and was unable to perform many daily activities, and (2) his treating neurologist testified that post-accident MRI showed herniated disc, that pre-accident MRI did not, that herniated disc was consistent with plaintiff’s stated symptoms, and that he could conclude with reasonable

degree of medical certainty that plaintiff sustained injury in collision that resulted in significant limitation of use of body function or system. Quinn v Licausi, 263 A.D.2d 820, 693 N.Y.S.2d 762, 1999 N.Y. App. Div. LEXIS 8296 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where report prepared by his radiologist stated that MRI taken of plaintiff’s lumbar spine 4 days after accident revealed “[d]esiccation...at the L5-S1 level” and “[b]ulging to the L5-S1 intervertebral disc,” and reports prepared by his treating orthopedist specified degree of limitation in range of motion of plaintiff’s lumbar and cervical spines and asserted that those injuries were “causally related” to his accident and were permanent. Dillon v Thomas, 266 A.D.2d 183, 697 N.Y.S.2d 336, 1999 N.Y. App. Div. LEXIS 11109 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where (1) plaintiff testified that, 6 months after accident, she experienced severe pain and daily discomfort and could not perform her daily activities, (2) her board-certified neurologist opined that although plaintiff had preexisting back condition, she had suffered lumbosacral radiculopathy, muscle spasms, and cervical sprain in connection with car accident, which rendered her unable to substantially perform her normal activities for at least 90 of 180 days after accident, that plaintiff had sustained permanent injury to her cervical spine, and that preexisting injury to her lumbar spine was aggravated by collision, and (3) neurologist’s views were based on objective findings, including MRI and EMG results, as well as presence of muscle spasms and swelling. Stone v Hidle, 266 A.D.2d 705, 698 N.Y.S.2d 351, 1999 N.Y. App. Div. LEXIS 11843 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain “serious” injury under CLS Ins § 5102(d), despite his self-serving allegation that he was out of work for about 4 months as result of accident, where his doctor’s affidavit did not indicate that doctor reviewed MRI films on which he relied or that he performed any objective tests that would support his conclusions, no sworn MRI report was attached to doctor’s affidavit, and thus doctor’s opinion lacked probative value. Sherlock v Smith, 273 A.D.2d 95, 709 N.Y.S.2d 176, 2000 N.Y. App. Div. LEXIS 6610 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d), even though her treating physician properly relied on unsworn MRI report submitted by defendants, which showed that plaintiff suffered from bulging disc, where (1) physician did not provide any objective evidence of extent or degree of alleged physical limitations resulting from disc injury and its duration, and (2) physician’s affirmation, which was dated over 6 ½ years after accident, did not provide any information concerning nature of plaintiff’s medical treatment or any explanation for gap of over 6 years between plaintiff’s prior and most recent visits to physician. Jackson v New York City Transit Auth., 273 A.D.2d 200, 708 N.Y.S.2d 469, 2000 N.Y. App. Div. LEXIS 6245 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) sworn reports of orthopedic surgeon and neurologist who examined plaintiff about 5 months after accident indicated that he had normal range of motion in his spine and knee and that his neck, back, and knee strains allegedly caused by accident were temporary, (2) although plaintiff’s treating physician stated that plaintiff suffered 30 percent restriction of motion of his knee and 20 percent restriction of his lumbar spine, physician did not describe objective tests that he performed to support those conclusions, and (3) treating physician’s mere recitation of selected parts of 1995 MRI reports, without explanation of their significance, was insufficient to defeat evidence that plaintiff suffered only temporary muscle strains as result of accident. Plaintiff did not prove that he was prevented by his injuries from performing his usual and customary activities for not less than 90 of 180 days after accident, under CLS Ins § 5102(d), where (1) he merely averred that he was unable to work for 9 months after accident, (2) although his treating physician concurred in that statement, there was no objective evidence that injury prevented plaintiff from performing substantially all of his customary activities, and (3) treating physician’s opinion was dependent on plaintiff’s subjective complaints. Watt v Eastern Investigative Bureau, Inc., 273 A.D.2d 226, 708 N.Y.S.2d 472, 2000 N.Y. App. Div. LEXIS 6302 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 3102(d) where (1) defendants submitted affirmed report of orthopedist, who “found no evidence of any orthopedic disability,” and affirmed

MRI report of radiologist, who characterized as “unremarkable” MRI exam of plaintiff’s cervical spine, (2) plaintiff submitted affirmed report of chiropractor, who had not treated him in 3 years and whose opinions were based on examinations at least 3 years old, and (3) although plaintiff also submitted MRI report indicating that he exhibited “slight posterior disc bulge” in cervical spine, there was no evidence causally relating bulge to accident. Bucci v Kempinski, 273 A.D.2d 333, 709 N.Y.S.2d 595, 2000 N.Y. App. Div. LEXIS 7108 (N.Y. App. Div. 2d Dep't 2000).

Defendants were not entitled to summary judgment dismissing personal injury action, on ground that plaintiff did not sustain “serious injury” under CLS Ins § 5102(d), where MRI report on plaintiff’s lumbosacral spine showed disc herniations at L4-5 and L5-S1, and defendants failed to show that those herniations were not causally related to subject accident. Caulfield v Metten, 275 A.D.2d 758, 713 N.Y.S.2d 551, 2000 N.Y. App. Div. LEXIS 9366 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) there was no objective medical basis for opinions of his experts that injury shown in May 1998 MRI was causally related to March 1992 accident, (2) those opinions were dependent solely on his representations of continuing pain and related problems since terminating treatment in April 1992, (3) as of that date, his attending physician reported that plaintiff “had full range of motion and complained of no pain,” (4) diagnostic tests performed in 1992 and 1993 revealed only preexisting degenerative arthritic condition of cervical spine and “mild C 7 radiculopathy,” and (5) plaintiff did not prove causal relationship between accident and that radiculopathy. Palivoda v Sluberski, 275 A.D.2d 1036, 713 N.Y.S.2d 378, 2000 N.Y. App. Div. LEXIS 9638 (N.Y. App. Div. 4th Dep't 2000).

Findings of limitations in plaintiffs’ cervical movement were insufficient to prove that they sustained either permanent consequential limitation of use of body organ or member or significant limitation of use of body function or system under CLS Ins § 5102(d) where (1) restriction in cervical flexion purportedly diagnosed for first plaintiff, who claimed most extensive limitation of any plaintiff, did not raise triable issue of fact as to whether she suffered “serious

injury," (2) diagnosis that second plaintiff suffered herniated disc was based on MRI report done by another doctor that was not submitted in plaintiffs' papers and thus was properly disregarded as unsupported by competent admissible evidence, and (3) additional diagnostic statements in treating chiropractor's reports were conclusory assertions tailored to meet statutory requirements. Collins v Jost, 281 A.D.2d 175, 721 N.Y.S.2d 524, 2001 N.Y. App. Div. LEXIS 2242 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where, inter alia, (1) defendants' orthopedist found that plaintiff's cervical and low back sprains had fully resolved, (2) plaintiff's chiropractor did not specify degree of limitation or restriction caused by alleged spinal injuries, (3) plaintiff's proof was based on examination performed over 2 years earlier and unsworn MRI report prepared nearly 5 years earlier by physician no longer treating plaintiff, and (4) although plaintiff's psychiatrist indicated that plaintiff was suffering from depression since accident, psychiatrist did not address issue of whether plaintiff was unable to function in her usual manner. Gjelaj v Ludde, 281 A.D.2d 211, 721 N.Y.S.2d 643, 2001 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 1st Dep't 2001).

Injury to plaintiff's knee was not "serious injury" under CLS Ins § 5102(d), despite her subjective claims of pain, where (1) her doctor offered no opinion on seriousness or permanency of injury or how it affected plaintiff's daily activities, (2) doctor's affirmed medical report did not explain 3-year gap between it and his last examination of plaintiff and improperly relied on unsworn 3-year-old MRI report, and (3) plaintiff lost only 2 days of work, was not confined to bed, and was no longer receiving medical treatment for her knee. Graham v Shuttle Bay, Inc., 281 A.D.2d 372, 722 N.Y.S.2d 541, 2001 N.Y. App. Div. LEXIS 3218 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) although disc bulge was initially diagnosed about one week after 1995 car accident, there was no evidence that it still existed, (2) plaintiff's chiropractor did not explain expert findings in MRI reports indicating that bulge was degenerative or congenital, and (3) chiropractor's finding of 2 percent loss of cervical rotation did not show significant limitation or permanent loss of use of body function or

system. Monette v Keller, 281 A.D.2d 523, 721 N.Y.S.2d 839, 2001 N.Y. App. Div. LEXIS 2612 (N.Y. App. Div. 2d Dep't 2001).

71. —Depression at issue

In action arising from motor vehicle collision, plaintiff proved prima facie case of "serious injury" under CLS Ins § 5102(d), and he was entitled to have that issue submitted to jury for special finding, where (1) experts testified that he suffered from herniated discs between fourth and fifth, and fifth and sixth, cervical vertebrae, that one disc was surgically excised, and that he sustained bilateral carpal tunnel syndrome, which also required surgery, (2) doctor who examined plaintiff testified that plaintiff was extremely depressed, and (3) plaintiff testified that he suffered from pain in both arms and hands and in his lower back, shoulders, and neck. Porcano v Lehman, 255 A.D.2d 430, 680 N.Y.S.2d 590, 1998 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 2d Dep't 1998).

72. —Disfigurement at issue

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) affidavit of plaintiff's physician, based on examination over 4 years after accident, consisted of conclusory assertions tailored to meet statutory requirements, (2) plaintiff's affidavit consisted of merely subjective complaints of pain, and (3) scar on plaintiff's forehead, allegedly sustained in accident, was not significant disfigurement. Dyagi v Newburgh Auto Auction, Inc., 251 A.D.2d 619, 675 N.Y.S.2d 872, 1998 N.Y. App. Div. LEXIS 7921 (N.Y. App. Div. 2d Dep't 1998).

Jury verdict finding that plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) was not against weight of evidence, even though he testified that his lower lip was numb in area of injury, which made it difficult for him to eat certain foods, prevented him from smiling, and caused him to drool, where (1) his treating physician testified that wound had healed well, that there was no muscular damage to his lip, and that he was able to smile, (2) photograph of him smiling was admitted into evidence, (3) he demonstrated smile to jury, and (4) jury thus properly found that

he did not sustain significant disfigurement or permanent consequential limitation of body organ or member. Moxley v Givens, 255 A.D.2d 632, 679 N.Y.S.2d 472, 1998 N.Y. App. Div. LEXIS 11672 (N.Y. App. Div. 3d Dep't 1998).

73. —Hearing loss at issue

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), despite his otolaryngologist's conclusion that he sustained "permanent loss, to a degree, of the function of his audiological system," where MRI audiologic evaluation results were negative, and diagnosis of tinnitus rested solely on plaintiff's subjective complaints of ringing in ear, which was not accompanied by hearing loss or any other manifestation of injury. Congdon v Preisman, 263 A.D.2d 808, 693 N.Y.S.2d 757, 1999 N.Y. App. Div. LEXIS 8301 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) defendants' medical evidence proved that plaintiff did not sustain serious loss of hearing as result of accident, (2) it could be inferred from plaintiff's deposition that any orthopedic injuries that he sustained in accident had long since been resolved, and (3) plaintiff's medical expert failed to specify objective tests used in arriving at her conclusions regarding alleged restrictions in plaintiff's range of motion. Thaler v Aspen Ready Mix Corp., 286 A.D.2d 763, 730 N.Y.S.2d 717, 2001 N.Y. App. Div. LEXIS 8698 (N.Y. App. Div. 2d Dep't 2001).

74. —Neurologist as witness

Plaintiff did not sustain permanent "serious injury" under CLS Ins § 5102(d) where independent neurologist found "no objective evidence on examination of any permanent limitation of the use of [plaintiff's] extremity or her neck or back," and plaintiff's sole medical proof in opposition to motion for summary judgment was her chiropractor's nonspecific and conclusory affidavit stating, without substantive elaboration, that plaintiff "received a limitation in the use of her lumbar spine and cervical spine as well as her right elbow," and chiropractor failed to identify tests used in diagnosing plaintiff, dates of his findings, locations of "trigger point tenderness" and

muscle spasms, degree of motion limitation, or any treatment recommendations; his mere use of word “permanent” was insufficient to raise triable issue of fact. Plaintiff raised triable issue of fact as to whether, under CLS Ins § 5102(d), she suffered from medically determined nonpermanent injury that prevented her from performing substantially all material acts of her usual daily activities for at least 90 of 180 days immediately after her injury in September accident where her chiropractor, after initially treating her on September 23, diagnosed her as having “sustained whiplash syndrome/cervical sprain, cervical subluxation complex, lumbar sprain/strain and multiple contusions” and that she was totally disabled from her employment as nanny until about October 7, he reexamined her on October 10 and extended her disability until January 4, and plaintiff stated that during that period she could not perform any kind of lifting, head movement, or prolonged sitting or standing without pain and that her athletic and social activities were curtailed. Uhl v Sofia, 245 A.D.2d 988, 667 N.Y.S.2d 92, 1997 N.Y. App. Div. LEXIS 13726 (N.Y. App. Div. 3d Dep't 1997).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d), even though affidavit of her treating neurologist stated that, as result of accident, plaintiff sustained permanent disability and significant limitation of motion in her lumbar region caused by myofascial pain syndrome, where neurologist’s conclusions were based on plaintiff’s subjective complaints of pain and were unsupported by objective medical proof, and unsworn statements of that neurologist contained in unsworn report of defendant’s expert neurologist were not in admissible form. Stowell v Safee, 251 A.D.2d 1026, 674 N.Y.S.2d 228, 1998 N.Y. App. Div. LEXIS 7065 (N.Y. App. Div. 4th Dep't 1998).

Defendants made prima facie showing that plaintiff did not suffer “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) probative medical reports of orthopedist and neurologist, prepared after physical examinations of plaintiff, showed that although plaintiff suffered “lumbosacral sprain” and “soft tissue injuries” as result of accident, there was no evidence of “disability or any permanent type of injuries which could be linked causally” to accident, and (2) MRI showed preexistent levels of disc herniation and desiccation that were causally unrelated to

accident. Kosto v Bonelli, 255 A.D.2d 557, 681 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 12857 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff raised triable issue of fact as to whether he sustained “serious injury” under CLS Ins § 5102(d) where (1) MRI disclosed large herniated disc and bulging disc, (2) EMG confirmed disc problem and indicated ridiculopathy, (3) neurologist opined that plaintiff had severe aggravated exacerbation of his spinal cord injuries, which were permanent, and that if history given by plaintiff were correct, those permanent and significant injuries were causally related to his automobile accident, and (4) although chiropractor initially reported that plaintiff had fully recovered, he later opined that relief had been temporary and that plaintiff had decreased range of motion in cervical and lumbar spine directly related to his accident. Boehm v Estate of Mack by Pfaff-Adams, 255 A.D.2d 749, 680 N.Y.S.2d 732, 1998 N.Y. App. Div. LEXIS 11914 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where (1) he testified that, within a few days after accident, he began experiencing severe pain in his neck that radiated into his arms and hands and that, as result of numbness in his arms and fingers, he frequently dropped things and was unable to perform many daily activities, and (2) his treating neurologist testified that post-accident MRI showed herniated disc, that pre-accident MRI did not, that herniated disc was consistent with plaintiff’s stated symptoms, and that he could conclude with reasonable degree of medical certainty that plaintiff sustained injury in collision that resulted in significant limitation of use of body function or system. Quinn v Licausi, 263 A.D.2d 820, 693 N.Y.S.2d 762, 1999 N.Y. App. Div. LEXIS 8296 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) his admissible evidence consisted solely of his own affidavit and that of neurologist whose care he was under for back and neck injuries sustained in prior accident, (2) neurologist’s affidavit did not allude to any objective medical findings or opine that plaintiff sustained serious injury in second accident, but rather stated only that, after second accident, it “appeared” that plaintiff had increased cervical pain and worsening of his earlier condition, and (3) unsworn letters from neurologist to

plaintiff's general practitioner and attorney lacked probative value. Also, plaintiff failed to raise triable issue of fact as to whether his second accident resulted in "medically determined injury or impairment of a non-permanent nature" that prevented him from performing his usual daily activities for at least 90 of first 180 days after accident, under CLS Ins § 5102(d), where (1) his neurologist's affidavit did not refer to plaintiff's inability to perform his customary activities as result of either first or second accident, (2) neurologist's unsworn letters were inadmissible and indicated only that plaintiff was disabled as result of first accident, (3) plaintiff acknowledged that he lost no time from work as result of second accident and that he continued to work for another year, and (4) both plaintiff and his wife testified that degree to which his daily activities were limited did not change after second accident. Cody v Parker, 263 A.D.2d 866, 693 N.Y.S.2d 769, 1999 N.Y. App. Div. LEXIS 8281 (N.Y. App. Div. 3d Dep't 1999).

New trial as to damages would be ordered where, on issue of mitigation, third-party defendant attempted to present testimony of expert in neurology and rehabilitative medicine as to surgical procedures that might have benefited plaintiff, but court refused to permit that testimony, or allow any inquiry into expert's qualifications to offer such testimony, based on expert's admission that he was not neurosurgeon; fact that expert was not competent to perform surgery did not mean that he was not qualified to render expert opinion as to potential benefits of surgery. Gordon v Tishman Constr. Corp., 264 A.D.2d 499, 694 N.Y.S.2d 719, 1999 N.Y. App. Div. LEXIS 8917 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff sustained "serious injury" under CLS Ins § 5102(d) where (1) plaintiff testified that, 6 months after accident, she experienced severe pain and daily discomfort and could not perform her daily activities, (2) her board-certified neurologist opined that although plaintiff had preexisting back condition, she had suffered lumbosacral radiculopathy, muscle spasms, and cervical sprain in connection with car accident, which rendered her unable to substantially perform her normal activities for at least 90 of 180 days after accident, that plaintiff had sustained permanent injury to her cervical spine, and that preexisting injury to her lumbar spine was aggravated by collision, and (3) neurologist's views were based on objective findings,

including MRI and EMG results, as well as presence of muscle spasms and swelling. Stone v Hidle, 266 A.D.2d 705, 698 N.Y.S.2d 351, 1999 N.Y. App. Div. LEXIS 11843 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff raised triable issue of fact as to whether she sustained “serious injury” under CLS Ins § 5102(d), despite contrary affirmation of defendants’ expert neurologist, where (1) plaintiff’s medical expert asserted in his affirmation that plaintiff suffered from fibromyalgia and chronic pain syndrome as result of accident and that those conditions significantly limited use of her upper torso and might result in permanent consequential limitation of use of her spine and upper torso, (2) sworn report of independent physician who examined plaintiff concluded that she suffered from chronic pain syndrome and that her condition was likely result of accident, and (3) medical records submitted by defendants documented muscle spasms, trigger points, and restricted ranges of motion and muscular weakness in cervical and lumbar regions of spine continuing from date of accident. Pagels v P.V.S. Chems., 266 A.D.2d 819, 698 N.Y.S.2d 368, 1999 N.Y. App. Div. LEXIS 11825 (N.Y. App. Div. 4th Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) sworn reports of orthopedic surgeon and neurologist who examined plaintiff about 5 months after accident indicated that he had normal range of motion in his spine and knee and that his neck, back, and knee strains allegedly caused by accident were temporary, (2) although plaintiff’s treating physician stated that plaintiff suffered 30 percent restriction of motion of his knee and 20 percent restriction of his lumbar spine, physician did not describe objective tests that he performed to support those conclusions, and (3) treating physician’s mere recitation of selected parts of 1995 MRI reports, without explanation of their significance, was insufficient to defeat evidence that plaintiff suffered only temporary muscle strains as result of accident. Plaintiff did not prove that he was prevented by his injuries from performing his usual and customary activities for not less than 90 of 180 days after accident, under CLS Ins § 5102(d), where (1) he merely averred that he was unable to work for 9 months after accident, (2) although his treating physician concurred in that statement, there was no objective evidence that injury prevented plaintiff from performing

substantially all of his customary activities, and (3) treating physician's opinion was dependent on plaintiff's subjective complaints. Watt v Eastern Investigative Bureau, Inc., 273 A.D.2d 226, 708 N.Y.S.2d 472, 2000 N.Y. App. Div. LEXIS 6302 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where defendants proved prima facie case to that effect through affirmation and affirmed report of neurologist who examined plaintiff and concluded that plaintiff sustained no accident-related disability, and competent evidence submitted by plaintiff did not raise triable issue of fact. Gladding v Riccobono, 273 A.D.2d 272, 709 N.Y.S.2d 852, 2000 N.Y. App. Div. LEXIS 6519 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where defendants submitted affirmed reports of neurologist and orthopedic surgeon stating that objective tests performed during their examination of plaintiff revealed that he had "normal range of motion," plaintiff's treating chiropractor did not explain objective tests that were performed to support his conclusion that plaintiff suffered restricted range of motion, chiropractor's conclusions appeared to be based on plaintiff's subjective complaints of pain, chiropractor never stated that plaintiff's bulging disc was causally related to accident, and neither plaintiff nor chiropractor sufficiently explained almost 4-year gap between plaintiff's last treatment and most recent examination. Villalta v Schechter, 273 A.D.2d 299, 710 N.Y.S.2d 87, 2000 N.Y. App. Div. LEXIS 6481 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) neurologist who examined him concluded that he "does not demonstrate an objective neurological disability," and (2) plaintiff's treating chiropractor's affidavit did not prove duration of alleged "significant limitation of use of a body function or system." Barbeito v Kesev Taxi, Inc., 281 A.D.2d 379, 721 N.Y.S.2d 279, 2001 N.Y. App. Div. LEXIS 2050 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where (1) defendants submitted evidence that plaintiff was suffering from degenerative disc disease and associated degenerative disc bulge, which was not related to any trauma, (2) medical reports by orthopedist and neurologist, both of whom had examined plaintiff over 3 years after accident, indicated that

plaintiff had suffered cervical and lumbar sprains, that range of motion in her cervical and lumbar spines was good, and that she was not suffering from orthopedic or neurological disability, and (3) affirmation of plaintiff's treating chiropractor was not competent evidence. Holmes v Hanson, 286 A.D.2d 750, 730 N.Y.S.2d 528, 2001 N.Y. App. Div. LEXIS 8643 (N.Y. App. Div. 2d Dep't 2001).

75. —Oral surgeon, orthodontist, dentist and the like as witness

Jury's finding that taxi cab passenger sustained "serious injury" under CLS Ins § 5102(d) was supported by evidence, including testimony of passenger, her dentist, and defendants' examining oral surgeon, that (1) collision caused passenger's face to strike plexiglass partition separating front and rear seats, causing lacerations to her face and to inside of her mouth, minor paresthesia affecting part of her chin and lower lip, trauma to 7 lower teeth, and internal derangement to her temporomandibular joint (TMJ), (2) passenger required 60 stitches and was left with minor scarring, and (3) she suffered episodes of open lockjaw, with pain in her TMJ, audible clicking, and limited ability to open her mouth and chew tough foods. Taxi cab passenger's "serious injury" threshold under CLS Ins § 5102(d) was met by her permanent nerve loss in 7 teeth, which required series of root canal treatments and significant restorative dental work. In action in which plaintiff was found to have sustained "serious injury" under CLS Ins § 5102(d), jury was entitled to credit expert opinion of plaintiff's treating dentist that plaintiff's temporomandibular joint condition was permanent, even though dentist was not specialist is oral surgery. Mancusi v Miller Brewing Co., 251 A.D.2d 265, 675 N.Y.S.2d 56, 1998 N.Y. App. Div. LEXIS 7799 (N.Y. App. Div. 1st Dep't 1998), app. denied, 1998 N.Y. App. Div. LEXIS 10933 (N.Y. App. Div. 1st Dep't Oct. 1, 1998).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where, inter alia, (1) defendants submitted reports of 2 orthopedic surgeons stating that plaintiff did not sustain any restrictions in range of motion due to accident and could resume her normal activities, (2) reports of plaintiff's treating chiropractor and orthodontist were not based on recent examination of plaintiff and thus

were insufficient, (3) those reports did not explain gap of over 3 ½ years in treatment immediately preceding submission of reports, (4) although plaintiff's orthopedic surgeon stated that plaintiff suffered from "chronic cervical strain, chronic impingement syndrome, and myofascial pain syndrome" as result of accident, he did not quantify any restriction in plaintiff's range of motion, and (5) surgeon's report was not based on recent examination of plaintiff. Borino v Little, 273 A.D.2d 262, 709 N.Y.S.2d 575, 2000 N.Y. App. Div. LEXIS 6536 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 131, 746 N.E.2d 186, 2001 N.Y. LEXIS 263 (N.Y. 2001).

76. —Orthopedist as witness

Defendants made prima facie showing that plaintiff did not suffer "serious injury" under CLS Ins § 5102(d) where, inter alia, (1) probative medical reports of orthopedist and neurologist, prepared after physical examinations of plaintiff, showed that although plaintiff suffered "lumbosacral sprain" and "soft tissue injuries" as result of accident, there was no evidence of "disability or any permanent type of injuries which could be linked causally" to accident, and (2) MRI showed preexistent levels of disc herniation and desiccation that were causally unrelated to accident. Kosto v Bonelli, 255 A.D.2d 557, 681 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 12857 (N.Y. App. Div. 2d Dep't 1998).

Plaintiffs did not sustain serious injuries under CLS Ins § 5102(d) where (1) orthopedist's finding that first plaintiff had sustained permanent loss or use of body organ, member, function, or system was improperly based on subjective complaints of pain, (2) although same orthopedist's conclusion that second plaintiff had sustained serious injury was based on MRI results, he did not indicate that he reviewed MRI films, and he did not attach copy of sworn MRI report to his affidavit, and (3) affidavit of physical therapist was of limited probative value in opposition to affirmed reports prepared by board-certified orthopedic surgeon submitted by defendants. Shay v Jerkins, 263 A.D.2d 475, 692 N.Y.S.2d 730, 1999 N.Y. App. Div. LEXIS 7879 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff who injured her neck in motor vehicle accident did not sustain “serious injury” under CLS Ins § 5102(d) where defendants submitted affidavit of orthopedic surgeon who examined plaintiff and opined that she merely sustained cervical sprain/strain and that there was no objective medical evidence of serious or permanent injury, and although affidavits of plaintiff’s physician and chiropractor stated that she was unable to engage in substantially all of her customary daily activities for 90 of 180 days after accident, those affidavits were clearly tailored to meet statutory threshold and were dependent solely on information supplied by plaintiff, including her subjective complaints of pain and discomfort. Bennett v Reed, 263 A.D.2d 800, 693 N.Y.S.2d 738, 1999 N.Y. App. Div. LEXIS 8307 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff sustained “serious injury” under CLS Ins § 5102(d) where she testified that, as result of injury in motor vehicle accident, she continued to experience pain and tingling in her right arm and shoulder, that she was unable to lift or hold things with her right arm, and that cortisone shots, pain medication, and physical therapy were insufficient to totally alleviate her symptoms, (2) her doctor testified that he and 2 other physicians diagnosed her as having impingement syndrome and cervical myosascitis, that MRI revealed, inter alia, inflammation of bicep tendon and synovium, that plaintiff’s complaints correlated with his clinical findings and MRI, and that plaintiff’s injuries were permanent and causally related to accident, and (3) although orthopedic surgeon testified that there was nothing wrong with plaintiff and that she was faking pain, he admitted that it was not possible to fake inflammation. Rivera v Majuk, 263 A.D.2d 841, 695 N.Y.S.2d 158, 1999 N.Y. App. Div. LEXIS 8259 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff involved in 2 automobile accidents 3 years apart did not sustain “serious injury” under CLS Ins § 5102(d) in first accident where sole basis for orthopedist’s opinion that plaintiff’s disc herniation at C5-6 was causally related to first accident was notation in another orthopedist’s report stating that plaintiff “was experiencing paresthesias along the C6 root in her right hand,” that unsworn report was of questionable evidentiary value, and there was no objective basis for medical conclusion that plaintiff’s herniated disc and other injuries were causally related to first

accident. Zupan v Hart, 266 A.D.2d 795, 699 N.Y.S.2d 155, 1999 N.Y. App. Div. LEXIS 12144 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) sworn reports of orthopedic surgeon and neurologist who examined plaintiff about 5 months after accident indicated that he had normal range of motion in his spine and knee and that his neck, back, and knee strains allegedly caused by accident were temporary, (2) although plaintiff’s treating physician stated that plaintiff suffered 30 percent restriction of motion of his knee and 20 percent restriction of his lumbar spine, physician did not describe objective tests that he performed to support those conclusions, and (3) treating physician’s mere recitation of selected parts of 1995 MRI reports, without explanation of their significance, was insufficient to defeat evidence that plaintiff suffered only temporary muscle strains as result of accident. Plaintiff did not prove that he was prevented by his injuries from performing his usual and customary activities for not less than 90 of 180 days after accident, under CLS Ins § 5102(d), where (1) he merely averred that he was unable to work for 9 months after accident, (2) although his treating physician concurred in that statement, there was no objective evidence that injury prevented plaintiff from performing substantially all of his customary activities, and (3) treating physician’s opinion was dependent on plaintiff’s subjective complaints. Watt v Eastern Investigative Bureau, Inc., 273 A.D.2d 226, 708 N.Y.S.2d 472, 2000 N.Y. App. Div. LEXIS 6302 (N.Y. App. Div. 2d Dep't 2000).

In action involving issue of whether plaintiff sustained “serious injury” under CLS Ins § 5102(d), unsworn report of plaintiff’s orthopedic surgeon was properly before Supreme Court where report was submitted by defendants in support of their motion for summary judgment. Borino v Little, 273 A.D.2d 262, 709 N.Y.S.2d 575, 2000 N.Y. App. Div. LEXIS 6536 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 131, 746 N.E.2d 186, 2001 N.Y. LEXIS 263 (N.Y. 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where defendants submitted affirmed reports of neurologist and orthopedic surgeon stating that objective tests performed during their examination of plaintiff revealed that he had “normal range of motion,” plaintiff’s

treating chiropractor did not explain objective tests that were performed to support his conclusion that plaintiff suffered restricted range of motion, chiropractor's conclusions appeared to be based on plaintiff's subjective complaints of pain, chiropractor never stated that plaintiff's bulging disc was causally related to accident, and neither plaintiff nor chiropractor sufficiently explained almost 4-year gap between plaintiff's last treatment and most recent examination. Villalta v Schechter, 273 A.D.2d 299, 710 N.Y.S.2d 87, 2000 N.Y. App. Div. LEXIS 6481 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 3102(d) where (1) defendants submitted affirmed report of orthopedist, who "found no evidence of any orthopedic disability," and affirmed MRI report of radiologist, who characterized as "unremarkable" MRI exam of plaintiff's cervical spine, (2) plaintiff submitted affirmed report of chiropractor, who had not treated him in 3 years and whose opinions were based on examinations at least 3 years old, and (3) although plaintiff also submitted MRI report indicating that he exhibited "slight posterior disc bulge" in cervical spine, there was no evidence causally relating bulge to accident. Bucci v Kempinski, 273 A.D.2d 333, 709 N.Y.S.2d 595, 2000 N.Y. App. Div. LEXIS 7108 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where defendants submitted affirmation of orthopedist who concluded, from physical examination and objective medical tests, that plaintiff's disc herniations were result of preexisting degenerative condition rather than accident, and plaintiff's treating physician improperly relied on unsworn medical report of another physician and failed to set forth any objective medical basis for his conclusion that plaintiff's disc herniations were caused or exacerbated by accident. Napoli v Cunningham, 273 A.D.2d 366, 710 N.Y.S.2d 919, 2000 N.Y. App. Div. LEXIS 7079 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) where orthopedic surgeon's examination of plaintiff revealed no objective signs to confirm any of plaintiff's subjective complaints, chiropractor failed to provide adequate explanation for 22-month lag between plaintiff's initial medical treatment and later visit and failed to state what objective tests he performed in arriving at his conclusions regarding alleged restrictions in plaintiff's range of

motion, and plaintiff did not show that she suffered from medically determined injury that prevented her from performing substantially all of her customary and usual activities for at least 90 days during 180 days immediately after accident. Graves v Rui Liu, 273 A.D.2d 440, 710 N.Y.S.2d 113, 2000 N.Y. App. Div. LEXIS 7373 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff raised triable issue of fact as to whether she sustained “serious injury” under CLS Ins § 5102(d) where orthopedic surgeon who treated her for 2 ½ years after traffic accident opined that, to reasonable degree of medical certainty, plaintiff had suffered permanent limitations including, inter alia, 20 to 30 percent loss of flexion, rotation, and extension in her neck, 20-degree loss of full elevation of right shoulder, permanent winging of right scapula with permanent nerve damage and palsy to long thoracic nerve, and 20 percent loss of use of right shoulder. Mangano v Sherman, 273 A.D.2d 836, 709 N.Y.S.2d 293, 2000 N.Y. App. Div. LEXIS 6713 (N.Y. App. Div. 4th Dep't 2000).

Verdict for defendant on ground that plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) would not be set aside where, inter alia, (1) there was conflicting medical testimony as to cause of plaintiff’s shoulder injury, (2) orthopedic surgeon who examined plaintiff on behalf of defendant opined that shoulder injury was not causally related to traffic accident but, rather, to preexisting degenerative condition, and (3) defendant testified that he was traveling at about 5 miles per hour at time of impact, not 30 to 35 miles per hour as reported by plaintiff’s husband to her physician. Howe v Wilkinson, 275 A.D.2d 876, 713 N.Y.S.2d 573, 2000 N.Y. App. Div. LEXIS 9483 (N.Y. App. Div. 3d Dep't 2000).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) defendants’ orthopedist found that plaintiff’s cervical and low back sprains had fully resolved, (2) plaintiff’s chiropractor did not specify degree of limitation or restriction caused by alleged spinal injuries, (3) plaintiff’s proof was based on examination performed over 2 years earlier and unsworn MRI report prepared nearly 5 years earlier by physician no longer treating plaintiff, and (4) although plaintiff’s psychiatrist indicated that plaintiff was suffering from depression since accident, psychiatrist did not address issue of whether plaintiff was unable to function in her usual

manner. Gjelaj v Ludde, 281 A.D.2d 211, 721 N.Y.S.2d 643, 2001 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 1st Dep't 2001).

Self-employed florist did not sustain “serious injury” under CLS Ins § 5102(d) where (1) he was examined in hospital emergency room immediately after motor vehicle accident and was diagnosed with muscle strain of his neck and back, (2) he missed only 4 or 5 days of work and then worked part-time thereafter, (3) independent medical examination report affirmed lack of objective findings or ongoing disability, and (4) his own medical experts (orthopedist and chiropractor) described his permanent disability as “very mild” and “mild.” Florist did not prove that he was unable to perform substantially all of his usual daily activities for not less than 90 out of 180 days following accident where (1) his medical experts’ affidavits were deficient because they were clearly tailored to meet statutory threshold and ignored fact that he missed only 4 or 5 full work days, and (2) as activities restricted since accident, florist listed at his deposition only landscaping, which he estimated as 25 to 40 percent of his business, and riding friend’s jet ski and snow skiing, which he had done “at the maximum maybe two to three times.” Pantalone v Goodman, 281 A.D.2d 790, 722 N.Y.S.2d 291, 2001 N.Y. App. Div. LEXIS 2497 (N.Y. App. Div. 3d Dep't 2001).

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where (1) defendants submitted evidence that plaintiff was suffering from degenerative disc disease and associated degenerative disc bulge, which was not related to any trauma, (2) medical reports by orthopedist and neurologist, both of whom had examined plaintiff over 3 years after accident, indicated that plaintiff had suffered cervical and lumbar sprains, that range of motion in her cervical and lumbar spines was good, and that she was not suffering from orthopedic or neurological disability, and (3) affirmation of plaintiff’s treating chiropractor was not competent evidence. Holmes v Hanson, 286 A.D.2d 750, 730 N.Y.S.2d 528, 2001 N.Y. App. Div. LEXIS 8643 (N.Y. App. Div. 2d Dep't 2001).

77. —Psychiatrist as witness

Plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) where, inter alia, (1) defendants’ orthopedist found that plaintiff’s cervical and low back sprains had fully resolved, (2) plaintiff’s chiropractor did not specify degree of limitation or restriction caused by alleged spinal injuries, (3) plaintiff’s proof was based on examination performed over 2 years earlier and unsworn MRI report prepared nearly 5 years earlier by physician no longer treating plaintiff, and (4) although plaintiff’s psychiatrist indicated that plaintiff was suffering from depression since accident, psychiatrist did not address issue of whether plaintiff was unable to function in her usual manner. Gjelaj v Ludde, 281 A.D.2d 211, 721 N.Y.S.2d 643, 2001 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 1st Dep't 2001).

78. Substance abuse at issue

Where the court permitted a doctor to state a general conclusion that the patient was a drug addict, it was certainly proper cross-examination for defense counsel to ask the doctor what his interpretation of addiction was, and what weight he gave to each fact such as physical dependence, tolerance, or emotional dependence in reaching his conclusion. People v Fuller, 24 N.Y.2d 292, 300 N.Y.S.2d 102, 248 N.E.2d 17, 1969 N.Y. LEXIS 1682 (N.Y. 1969).

In a wrongful death action in which the critical issue for the jury’s determination was the effect, if any, upon the decedent’s organs of the decedent’s chronic ingestion of drugs that had been prescribed by defendant physician, the trial court erred in refusing to admit opinion testimony by plaintiff’s expert pharmacologist where, though the expert was not licensed to practice medicine, his training in phramacology rendered him qualified to express an opinion on the question at issue. Karasik v Bird, 98 A.D.2d 359, 470 N.Y.S.2d 605, 1984 N.Y. App. Div. LEXIS 16487 (N.Y. App. Div. 1st Dep't 1984).

Defendants were entitled to summary judgment dismissing personal injury action for negligent maintenance of premises where (1) plaintiff’s medical expert witness was properly precluded, without hearing, from testifying regarding Multiple Chemical Sensitivity Syndrome on ground that plaintiff failed to raise triable issue of fact as to whether such diagnosis has gained general

acceptance in scientific community, and (2) there was no proof of other injuries caused by defendants' alleged negligence. Oppenheim v United Charities, 266 A.D.2d 116, 698 N.Y.S.2d 144, 1999 N.Y. App. Div. LEXIS 12082 (N.Y. App. Div. 1st Dep't 1999).

Evidence supported finding of mother's neglect of her older child where (1) after taking child to hospital for help for his "moderate to severe" attention deficit hyperactivity disorder, she did not participate in his treatment plan, respond to repeated phone calls from hospital staff, or try to visit him for about 3 weeks, (2) she was frequent marijuana user who suffered from severe depressive disorder that caused her to be unfocused, unable to keep appointments, and incapable of adhering to regular schedule, (3) mental health professionals testified that boy's condition would improve only in carefully structured home environment wherein he would be given his medications regularly, be carefully monitored for adverse drug reactions and behavioral problems, and taken for weekly therapy sessions, and (4) expert testimony was not necessary to prove that mother's condition posed imminent danger to boy's physical, mental, and emotional health. In re Krewsean S., 273 A.D.2d 393, 709 N.Y.S.2d 616, 2000 N.Y. App. Div. LEXIS 7019 (N.Y. App. Div. 2d Dep't 2000).

Inmate violated prison disciplinary rule against using controlled substances where (1) his urine twice tested positive for presence of cannabinoids, (2) although correction officer who conducted urinalysis tests had not yet received his certificate, he had successfully completed training course and was certified in use of urinalysis testing apparatus, (3) that officer's testimony and urinalysis testing documentation showed that proper testing procedures were followed, and (4) in view of testimony by representative of apparatus manufacturer that medications taken by inmate would not cause false positive test result, conflicting testimony by prison nurse presented credibility issue for hearing officer to resolve. Morales v Selsky, 281 A.D.2d 658, 721 N.Y.S.2d 424, 2001 N.Y. App. Div. LEXIS 2011 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 713, 729 N.Y.S.2d 440, 754 N.E.2d 200, 2001 N.Y. LEXIS 1399 (N.Y. 2001).

Attorney would be disbarred where (1) he married one woman in 1956 and another in 1997 while still married to first wife, (2) he filed false and misleading marriage application in 1997,

affirming that he had no prior marriages, (3) he was previously admonished in 1998 for handling legal matter that he was not competent to handle, falsely holding himself out as attorney admitted to practice in New Jersey, and engaging in professional misconduct involving fraudulent power of attorney, and (4) although attorney claimed disability involving his use of large doses of drugs, court-appointed medical expert concluded, inter alia, that attorney's mental state and psychiatric/neuropsychiatric condition would not support legal determination of incapacity or unfitness to practice law. In re Masterson, 283 A.D.2d 20, 726 N.Y.S.2d 114, 2001 N.Y. App. Div. LEXIS 5603 (N.Y. App. Div. 2d Dep't), dismissed, 97 N.Y.2d 639, 735 N.Y.S.2d 495, 760 N.E.2d 1291, 2001 N.Y. LEXIS 4157 (N.Y. 2001).

In malpractice action by administratrix on behalf of anesthesiology resident at hospital who died at home from overdose of anesthetic narcotic available only through hospital pharmacies, administratrix was not entitled to summary judgment on liability of physician who conducted chemical dependency evaluation of decedent and recommended that he enter group therapy, physician who participated in group therapy discussions with decedent, or hospital owner that employed physicians where conflicting affidavits of medical experts on issues of causation and alleged deviations from accepted standard of care presented credibility issues for resolution at trial. Gedon v Bry-Lin Hosps., Inc., 286 A.D.2d 892, 730 N.Y.S.2d 641, 2001 N.Y. App. Div. LEXIS 9151 (N.Y. App. Div. 4th Dep't 2001), app. denied, 2001 N.Y. App. Div. LEXIS 12848 (N.Y. App. Div. 4th Dep't Dec. 21, 2001), app. denied, 98 N.Y.2d 601, 744 N.Y.S.2d 761, 771 N.E.2d 834, 2002 N.Y. LEXIS 936 (N.Y. 2002).

Wife was entitled to divorce on ground of cruel and inhuman treatment, despite long duration of marriage, where (1) she testified that husband abused alcohol throughout marriage and that his conduct, including verbal abuse associated with his alcohol abuse, had adverse effect on her mental and physical well-being, and (2) she presented expert medical proof that husband's alcohol abuse adversely affected her health. Szatkowski v Szatkowski, 286 A.D.2d 952, 730 N.Y.S.2d 390, 2001 N.Y. App. Div. LEXIS 8903 (N.Y. App. Div. 4th Dep't 2001).

79. Testamentary capacity at issue

In probate proceeding, Surrogate's Court properly denied motion to set aside jury verdict finding that decedent had testamentary capacity when will was executed, even though she suffered from old age, physical infirmity, and chronic, progressive senile dementia, where executor testified that decedent invited him to her home for purpose of changing her will, that decedent explained her reasons for doing so and corrected drafting error before executing new will in presence of executor, his wife, and his secretary, and that decedent was rational and of sound mind, executor's testimony was corroborated by his wife and secretary, physician who treated decedent for osteoporosis testified that he noted no defect in her mental state until 4 months after execution of will, decedent's ophthalmologist testified similarly, and although there was contrary expert testimony by psychiatrist and neurologist, they never examined decedent but based their opinions almost exclusively on her medical records. In re Estate of Buchanan, 245 A.D.2d 642, 665 N.Y.S.2d 980, 1997 N.Y. App. Div. LEXIS 12542 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 957, 671 N.Y.S.2d 717, 694 N.E.2d 886, 1998 N.Y. LEXIS 926 (N.Y. 1998).

80. Other and miscellaneous medical matters and experts

In action under CLS Labor § 240(1) for worker's injuries in fall from scaffold, court properly redacted 3 references in hospital record indicating that worker fell from ladder where there was no basis for defendant's speculation that worker was source of such information, and redacted references were not relevant to diagnosis of worker's injuries and treatment, as indicated by defendant's own medical expert, who testified that it was only necessary to know that plaintiff "fell and landed on something hard." Court properly precluded defendant's pathologist from testifying as to worker's blood alcohol level at time of accident and its effect on his balance and ability where worker's alleged intoxication was not sole proximate cause of accident. Haulotte v Prudential Ins. Co. of Am., 266 A.D.2d 38, 698 N.Y.S.2d 24, 1999 N.Y. App. Div. LEXIS 11386 (N.Y. App. Div. 1st Dep't 1999).

Swimming pool lift for 15-year-old girl's home pool was "medical assistance" under CLS Soc Serv § 365-a(5) and was medically necessary to slow debilitating progression of her degenerative spinal muscle atrophy where (1) hydrotherapy was prescribed to her for that purpose, (2) there was evidence that medical benefits of hydrotherapy for her included increases in ranges of motion, muscle strength, and bone density, reduction in cardiovascular deterioration, and prevention of venostasis and osteoporosis, (3) her physical therapist testified that those benefits would not be realized through other forms of physical therapy, and (4) therapist and girl's guardian testified that family pool was sole pool adequate to meet girl's needs and that lift was sole safe means for transporting her into pool. Kindron v De Buono, 266 A.D.2d 896, 697 N.Y.S.2d 794, 1999 N.Y. App. Div. LEXIS 11919 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 764, 708 N.Y.S.2d 53, 729 N.E.2d 710, 2000 N.Y. LEXIS 883 (N.Y. 2000).

In action against city and others for personal injuries allegedly sustained when plaintiff was stabbed in hospital stairwell, judgment on jury verdict for plaintiff would be reversed, and new trial would be ordered, where (1) court improperly admitted memorandum on security at hospital when plaintiff was attacked, because memorandum was not business record and included discussion of post-accident remedial measures, (2) court improperly allowed hearsay testimony about content of newspaper articles, (3) court improperly precluded cross-examination of plaintiff as to whether he had improperly kept public document, which act tended to show moral turpitude and thus was relevant to credibility, (4) court improperly excluded evidence that plaintiff was not stabbed in stairwell, including expert testimony that blood should have been found in stairwell if plaintiff were stabbed there, and (5) viewed collectively, errors were not harmless. Platovsky v City of New York, 275 A.D.2d 699, 713 N.Y.S.2d 358, 2000 N.Y. App. Div. LEXIS 9155 (N.Y. App. Div. 2d Dep't 2000).

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3 Am Jur Proof of Facts 161., Causation-Medical Opinion.

6 Am Jur Proof of Facts 159., Hypothetical Questions.

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Hierarchy Notes:

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