

To Be Argued By:  
Christopher J. Houpt  
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# New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT



SHERIF ELSHAARAWY,

*Plaintiff-Respondent,*

*against*

**Case Nos.**  
**2008-08276**  
**2008-10113**

U-HAUL CO. OF MISSISSIPPI, JEFFREY CRANFORD,  
U-HAUL COMPANY OF ARIZONA and AMANDA CRANFORD,

*Defendants-Appellants,*

*and*

U-HAUL INTERNATIONAL INC.,

*Defendant.*

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## REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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## ARGUMENT

### **I. The Admission of Hearsay Testimony Concerning the Contents of an Unadmitted Document Was Prejudicial Error.**

The first issue on appeal concerns the erroneous admission of testimony by Plaintiff's expert Dr. Friedman summarizing the opinion, contained in an MRI report, of a non-testifying radiologist, Dr. Schepp. As this Court has held many times, such testimony is inadmissible, and its admission is prejudicial error. Plaintiff's Response Brief ("Resp. Br.") fails to distinguish this mountain of directly-relevant caselaw and instead offers nothing but irrelevant argument.

#### **A. Whether the MRI Films Were Available Is Not Relevant.**

Plaintiff first argues that the MRI films were unavailable. Resp. Br. 17. Neither *Wagman v. Bradshaw* nor any of the other cases holding that witnesses may not summarize MRI reports depends on the availability of the films. Dr. Friedman's testimony was inadmissible for several independently sufficient reasons:

- The best evidence rule required that the contents of the MRI film be proved by introducing the film;
- The best evidence rule required that the contents of the MRI report be proved by introducing the report; and

- The hearsay rule barred Dr. Friedman from repeating out-of-court statements of Dr. Schepp, whether written or oral, to prove the truth of the matter asserted.

At most, the unavailability of the MRI film might implicate the first best-evidence problem and permit the introduction of testimony from a witness, such as the radiologist, who had actually seen the film. *See Schozer v. William Penn Life Ins. Co. of New York*, 84 N.Y.2d 639, 645-46 (1994) (“when oral testimony is received to establish the contents of an unavailable writing, the proponent of that proof must establish that the witness is able to recount or recite, *from personal knowledge*, ‘substantially and with reasonable accuracy’ all of its contents”) (emphasis added). It did not permit Dr. Friedman to repeat a hearsay opinion contained in yet another out-of-court document, the MRI report, which was available, but which the Plaintiff never offered. *See* A138.

**B. Plaintiff Misinterprets the Rules Concerning Expert Opinions.**

Plaintiff also offers a mishmash of assertions concerning Dr. Friedman’s testimony that, though irrelevant, are potentially confusing. First, he argues that Dr. Friedman had an independent basis, beyond the MRI report, for his testimony concerning the Plaintiff’s alleged spinal injuries. Resp. Br. 8, 20-23. That assertion not only is legally irrelevant, it is also factually incorrect. What Dr. Friedman concluded from his own clinical tests was merely that the plaintiff had

some sort of “nerve root disease.” *E.g.*, A132 (“that can be a manifestation of both shoulder disease or cervical spine disease.”); A134 (“The straight leg raise test is generally a sign of nerve root irritation in the lumbar spine.”); A145-46 (same); Resp. Br. 20 (“As a result of his neurological examination, Dr. Friedman determined that the plaintiff was suffering from cervical nerve root disease.”). By contrast, Dr. Friedman’s lengthy discussion of specific injuries that produced that disease—the “two discs on MRI that were out of place” (A144) and the “straightening of the cervical curvature” (A145)—was based exclusively on the MRI reports, not on any test that Dr. Friedman himself performed. It was that latter testimony to which Defendants objected.

In any event, whether the MRI report was the sole basis of Dr. Friedman’s diagnosis is irrelevant—the hearsay and best-evidence errors in allowing him to repeat what the report said would be present even if the report merely confirmed his clinical tests. None of the numerous cases holding that it is “reversible error [to] permit[] the plaintiff’s expert . . . to testify as to the interpretation of MRI films, as set forth in a written report of a nontestifying healthcare professional” (*Wagman v. Bradshaw*, 292 A.D.2d 84, 91 (2d Dep’t 2002)) depends on a finding that the witness’s diagnosis lacked an independent basis. Indeed, in *Wagman*, the testifying doctor had used the MRI report merely to confirm his diagnosis. *Id.* at 86 (“As a result of the initial examination in 1993, he formed a diagnosis that the

plaintiff had injuries to his neck and lower back, and sent the plaintiff for MRI scans of his back.”).

Second, Plaintiff muddies the waters by citing two inapposite principles: the “link in the chain” or “conduit” rule (Resp. Br. 25, 28-29) and the “professional reliability exception.” *Id.* at 24-26. Both principles go to the admissibility of the expert’s *opinion*, which is not at issue here: an opinion is admissible if it is based on professionally reliable, though inadmissible, material, but an opinion is not admissible if the expert is a mere “conduit” for the opinion of a third-party (*i.e.*, the outside material must be no more than a “link in the chain” of the expert’s reasoning). *See Hambsch v. NYCTA*, 63 N.Y.2d 723, 469 N.E.2d 516 (1984); *People v. Wlasiuk*, 32 A.D.3d 674, 681 (3d Dep’t 2006). Neither principle supports the conclusion that merely because a witness has an independent, professionally reliable basis for his opinion, the hearsay and best-evidence rules cease to operate, allowing the expert to repeat the opinions of third-party declarants summarizing unadmitted documents.

Thus, as this Court has repeatedly held, “while the expert witness’s testimony of *reliance upon* out-of-court material to form an opinion may be received in evidence, provided there is proof of reliability, testimony as to the express *contents* of the out-of-court material is inadmissible.” *Wagman*, 292 A.D.2d at 85-86 (emphasis added); *see also Adkins v. Queens Van-Plan, Inc.*, 293

A.D.2d 503, 504 (2d Dep't 2002) (expert may “state his *opinion based on . . .* his review of the MRI films” but may not “summarize and read statements and findings contained in the [MRI] reports”) (emphasis added). Similarly, this Court held in *Schwartz v. Gerson* that

[e]ven assuming that the report was subject to the ‘professional reliability’ exception to the rule that opinion evidence must be based on facts in the record or personally known to the witness, and that it was not improper to permit the plaintiff’s surgeon to testify *that he reviewed* and, in part, *relied on* the report, in determining that the plaintiff required surgery, in the instant case the testimony regarding the report went substantially beyond this limited usage.

246 A.D.2d 589, 589 (2d Dep't 1998) (emphasis added and citation omitted).

All of the cases Plaintiff cites (Resp. Br. 31-33) are consistent with the distinction between an expert opinion partly *based on* a report and testimony about the report’s *contents*. See *Pommells v. Perez*, 4 N.Y.3d 566, 577 n.5 (2005) (holding that “the various medical opinions relying on those MRI reports” are admissible). Similarly, *PLP Acupuncture, PC v. Progressive Casualty Insurance Co.* held only that “the fact that defendant’s peer reviewer *relied upon* medical reports from other medical providers in forming his opinion . . . does not render the peer review report insufficient.” No. 2008-166 K.C., 2009 WL 754763, at \*1 (Sup. Ct. App. T. 2d, 11th & 13th Dists. Mar. 17, 2009 ) (emphasis added); see also *A Khodadadi Radiology, P.C. v. N.Y. Cent. Mut. Fire Ins. Co.*, 16 Misc. 3d 131, at \*2 (Sup. Ct. App. T., 2d & 11th Dists. 2007) (same). And *LaForte v.*

*Tiedmann* allowed a physician “to testify that he had relied on the reports,” not to repeat the reports’ contents. 41 A.D.3d 1191, 1192 (4th Dep’t 2007). All of these cases hold either that experts may give opinions based on out-of-court material or that they may testify *that* their opinions are based on such material; none hold that they may read from or summarize the material in front of the jury.

Third, Plaintiff cites a series of cases considering MRI reports offered in opposition to summary judgment. Resp. Br. 32-33. That result cannot be extrapolated to trial, however, because evidence is considered at summary judgment to decide only whether a disputed issue exists. Thus, evidence in a form that would be inadmissible at trial, such as an affidavit, may be considered. *See Gallo Painting, Inc. v. Aetna Ins. Co.*, 49 A.D.2d 746, 747 (2d Dep’t 1975) (“Rules of evidence should be guardedly and cautiously applied on an application for summary judgment, particularly where there are many exceptions to the general rules and where the application of a rule of evidence or the exceptions thereto can best be determined upon evidence offered at a trial.”) (quoting *Exchange Leasing Corp. v Bundy*, 29 A.D.2d 828 (4th Dep’t 1968); *see also* James J. Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1534 (1995) (hearsay admissible on summary judgment if offered as indication of trial testimony). As described above, this Court has held many times that testimony concerning the contents of MRI reports is inadmissible at trial.

### **C. This Issue Was Preserved.**

Plaintiff also suggests that this issue was not properly preserved. That is not correct: the defense objected twice to the relevant portion of Dr. Friedman's testimony. *See* A134-35 ("Objection to him reading what the MRI's were."); A141. The first objection was sustained, and the second was overruled, after a sidebar that takes up six transcript pages. A135-40. Having informed the court of his objection and obtained a clear ruling, defense counsel preserved the issue for appeal.

Plaintiff first observes that the defense did not object later in the trial, when defense witness Dr. Head was asked what the MRI showed. To preserve an issue for appeal, however, a party is not required to offer repeated, futile objections when, as here, the court has made a clear ruling after a lengthy sidebar. *See People v. Ford*, 11 N.Y.3d 875, 878-79 (2008). Dr. Head's answer, moreover, was nowhere near as prejudicial as Dr. Friedman's. Whereas Dr. Friedman recounted the MRI results as if they were established fact, Dr. Head made clear that he could not vouch for the opinion of a non-testifying doctor: "According to the radiologist, there was a herniation there. I couldn't tell whether it was from this accident or preceded this accident because I couldn't review the films." RA22.

Plaintiff also argues that the defense "expressly waived" its objection to Dr. Friedman's use of a model to demonstrate the Plaintiff's alleged injuries. Resp.

Br. 27; A142 (“I have no objection to the model”). But it is not the use of the model that is at issue; it is the discussion of the contents of the MRI report.

**D. The Error Was Prejudicial.**

Finally, Plaintiff halfheartedly argues that the admission of Dr. Friedman’s testimony “was harmless error because the testimony did not substantially influence the outcome of the trial.” Resp. Br. 34-35. That assertion flies in the face of *Wagman*, which held, concerning the admission of identical testimony, “[p]lainly, it is reversible error.” 292 A.D.2d at 87. At least five other cases, cited in Defendants’ opening brief at page 19, have held the same, also on identical facts. Plaintiff offers no authority holding this error to be harmless.

This case offers no reason to depart from that well-established rule. The trial court permitted Dr. Friedman to bolster his opinion by repeating the opinion of a non-testifying witness, who was unavailable for cross-examination. The hearsay nature of that testimony was especially prejudicial because the declarant was a doctor, whose opinion likely carried extra weight with the jury. Moreover, the MRI report enabled Dr. Friedman to testify about the Plaintiff’s alleged injuries in greater detail and at greater length than he could have based on his own examination. That prejudice goes well beyond harmless error. *See, e.g., Clevenger v. Mitnick*, 38 A.D.3d 586, 587 (2d Dep’t 2007) (“The defendant was deprived of the opportunity to cross-examine the authors of the six MRI reports

and the EMG report, and we cannot conclude that the cumulative effect of the jury's access to these reports was harmless"); *Cheul Soo Kang v. Violante*, 60 A.D.3d 991, 992 (2d Dep't 2009) (admission of hearsay report "cannot be considered harmless").

## **II. Exclusion of the Defense Evidence on Causation of the Torn ACL Was Prejudicial Error.**

The second error that warrants a new trial was the ruling excluding the defense's evidence that Plaintiff's torn ACL was not caused by the accident.<sup>1</sup> Defense expert Dr. Carter testified in opposition to the summary judgment motion (A68) and was prepared to testify at trial, that, as Plaintiff's counsel stated, "the ACL tear and meniscal tear are not causally related to this accident." A237. The trial court excluded that evidence on the ground that causation of both injuries had been decided in a summary judgment Order, which ruled that the Plaintiff had satisfied the "serious injury threshold" (the "90/180 test") under Sections 5102(d) and 5104 of the Insurance Law. A251.

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<sup>1</sup> Plaintiff seems to argue that the Defendants waived their right to appeal the summary judgment order by failing to appeal it immediately. Resp. Br. 17. That is incorrect. C.P.L.R. 5501(a)(1) provides that "[a]n appeal from a final judgment brings up for review: 1. any non-final judgment or order which necessarily affects the final judgment . . . ." See also *Mid-Valley Oil Co. v. Hughes Network Sys., Inc.*, 54 A.D.3d 394, 395 (2d Dep't 2008) ("The issues raised on the appeal from the [summary judgment] order are brought up for review and have been considered on the appeals from the judgment"). Furthermore, Justice Rivera's erroneous interpretation of the summary judgment Order did not occur until mid-trial, and so could not have been appealed until after trial.

As argued in the Defendants’ Opening Brief, however, not only did the summary judgment Order (A98) not mention causation, but the only evidence concerning causation that was presented at the summary judgment stage was from the defense. Thus, either Justice Rivera erred in interpreting Justice Johnson’s Order to encompass causation, or Justice Johnson erred in ruling on causation when there clearly was a disputed issue of material fact. In addition, the summary judgment Order must be reversed for the further and independent reason—not even disputed by Plaintiff—that it depended on a false affidavit from Plaintiff’s expert Dr. Wert, which the witness recanted at trial. Plaintiff offers several points in response, none persuasive.

Plaintiff first argues that the Pattern Jury Instruction on the 90/180 test requires a finding of causation. Resp. Br. 11. While that is correct, it is irrelevant. The summary judgment Order did not answer the Pattern Jury Instruction; it ruled that “Plaintiff is granted summary judgment on the issue of ‘serious injury’ threshold under the 90/180 test.” A98. Particularly in light of the evidence that was presented at summary judgment, and the judge’s decision to cross out the only express language addressing causation, the remaining language must be interpreted as a ruling that Plaintiff had satisfied the “serious injury” or “90/180” element of Insurance Law Section 5102(d), not the causation element. It is, of course, well-established that a court may grant partial summary judgment on specific issues,

while leaving other issues for the jury. *See* C.P.L.R. 3212(e) (“summary judgment may be granted as to one or more causes of action, or part thereof”).

Plaintiff’s next response is a shell game. He now argues that there was sufficient evidence of causation at the summary judgment stage, because the defense submitted a report of an MRI of the plaintiff’s knee, which stated that “[a] partial meniscal tear is identified.” A97.<sup>2</sup> (The same report also states that 13 days after the accident, “[t]he anterior and posterior cruciate ligaments . . . are intact.” *Id.*) Plaintiff thereby attempts to argue that the summary judgment Order could have included causation if it had been based on the torn meniscus, rather than the torn ACL.<sup>3</sup>

What Plaintiff fails to mention is that the trial court relied on the Order to exclude Defendants’ causation evidence not only as to the meniscus but also as to the ACL. *See* A247 (“Counsel represents that it’s the *torn ACL* that was represented in his motion papers. If that’s so, isn’t that issue gone?”) (emphasis

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<sup>2</sup> To avoid any confusion, the report that the defense submitted at summary judgment was of a different MRI than the report whose contents Dr. Friedman discussed at trial and which is the basis of the first issue on appeal. *Compare* A97 (summary judgment exhibit: “MRI EXAMINATION OF THE RIGHT KNEE,” dated “7/31/04”) *with* A141 (Dr. Friedman: “MRI of the cervical spine which was performed 7/21/04”).

<sup>3</sup> Plaintiff also suggests that the omission of his summary judgment Reply from the Appendix was based on “strategic reasons.” Resp. Br. 12. In fact, the Reply contains only legal argument by counsel and therefore is not relevant to the appeal.

added); A251 (“there is absolutely no issue for this jury that the *torn ACL* is causally linked by this car accident”) (emphasis added); A249 (“If the motion papers, the motion papers that were submitted only ask the Court to address a 90 out of 180 injury *pertaining to this particular injury*, the judge is taking that from your hands.”) (emphasis added). If, as Plaintiff now suggests, summary judgment was based on evidence of a torn meniscus, there is no question that the exclusion of evidence at trial concerning causation of the torn ACL was error.

The remainder of Plaintiff’s argument on this issue merely disputes the facts. Resp. Br. 14-16. He argues that Dr. Carter should have read the MRI report (*id.* 14-15) (though the report confirmed Dr. Carter’s opinion that there was no ACL injury), and that Dr. Carter “failed to identify any objective testing used in support of his opinion.” *Id.* 16. In doing so, however, Plaintiff ignores the procedural posture: Defendants needed only to demonstrate a disputed issue of material fact. Every case cited in the Response Brief on this point addresses the proof necessary for the *defendant* to win summary judgment. For example, *Dixon v. Pena*, reversed a grant of summary judgment to the defendant, because plaintiff had raised issues “that are not dispositively addressed in the affirmations of defendants’ experts.” 5 A.D.3d 283 (1st Dep’t 2004).<sup>4</sup> None of those cases hold that a defense

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<sup>4</sup> See also *Jones v. Jacob*, 1 A.D.3d 485, 485 (2d Dep’t 2003) (“Defendant failed to establish her prima facie entitlement to summary judgment on ground that plaintiff did not sustain serious injury”); *Browdame v. Candura*, 25 A.D.3d 747

affidavit that does not “dispositively address[]” every medical test fails even to raise a disputed issue of fact, such that the *plaintiff* is entitled to summary judgment.

Finally, Plaintiff completely ignores his most serious problem: the *only medical evidence* Plaintiff offered at summary judgment was Dr. Wert’s false affidavit. That affidavit states that the Plaintiff exhibited symptoms that he did not exhibit and asserts that medical tests found the opposite of what they actually found. It also states that Dr. Wert’s examination was closer in time to the accident than it actually was. This is no mere dispute of fact—Dr. Wert admitted at trial that all of these sworn statements were false. *See* A227-29. It is preposterous for Plaintiff to argue that Dr. Carter’s analysis was insufficient to raise a triable issue, when Plaintiff’s own evidence was manifestly untrue. Without the Wert affidavit, Plaintiff never could have met either element of the serious injury test. Accordingly, the trial court should have reversed the summary judgment Order on the basis of the new evidence—the recantation of the affidavit—adduced at trial.

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(2d Dep’t 2006) (same); *McNair v. Lee*, 24 A.D.3d 159 (1st Dep’t 2005) (same); *Gamberg v. Romeo*, 289 A.D.2d 525 (2d Dep’t 2001) (same).

## **CONCLUSION**

For all of the foregoing reasons, Defendants-Appellants respectfully request that this Court vacate the verdict and order a new trial.

May 14, 2009

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

**Pursuant to 22 NYCRR § 670.10.3(f)**

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