

To Be Argued By:
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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.

BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

The verdict for plaintiff in this personal injury case is marred by two clear and highly prejudicial errors of law. First, in violation of numerous rulings by this Court on identical facts, the trial court allowed a plaintiff's expert to recite the contents of an MRI report to the jury, even though neither the MRI report nor the MRI films were in evidence. As this Court has held again and again, such a procedure violates the hearsay and best-evidence rules and automatically requires a new trial. Second, the trial court barred the defense from presenting evidence on injury causation. The chronology of plaintiff's symptoms and diagnoses raises serious doubts as to whether certain of his injuries were caused by the accident in question, and causation was to be a central element of the defense. In the middle of trial, however, after plaintiff had introduced his own causation evidence, the trial court ruled that the issue had been decided in plaintiff's favor on summary judgment. The summary judgment Order said nothing about causation; in fact, the Justice who signed the Order *crossed out* plaintiff's proposed language concerning causation. Summary judgment *could* not properly have been granted on that issue, moreover, because the only causation evidence at the summary judgment stage was presented by the defense. These errors are ample reason to reverse the judgment below and order a new trial.

STATEMENT OF FACTS

I. The Plaintiff's Alleged Injuries

This case arises out of an accident on July 8, 2004, in which a U-Haul rental truck collided with the car of the plaintiff, Sherif Elshaarawy. According to plaintiff's description of the accident, the passenger side rear tire of his own car ran over his foot. A95. Plaintiff was taken by ambulance to Lutheran Hospital, where an X-ray of his right foot was performed. *Id.* According to the Ambulance Call Report, plaintiff's "Chief Complaint" was "my right big toe hurts." *Id.* The hospital records indicate that plaintiff complained of a headache and pain in his feet. A96. None of the records indicate any complaint of pain or injury to his right knee.

The next day, the plaintiff visited his personal doctor (A220), who referred him to a rehabilitation specialist, Dr. Boris Tsatskis. *Id.*; A292. Dr. Tsatskis ordered three magnetic resonance imagery (MRI) scans of plaintiff's brain, back, and knee, which were performed in late July 2004. The MRI of the brain was essentially normal. A141 (noting that the plaintiff had inflamed sinuses). An MRI of the cervical spine showed two "popped" discs in the plaintiff's back. A142. And the MRI of plaintiff's right knee showed that "[t]he anterior and posterior cruciate ligaments, medial and lateral and collateral ligaments, quadriceps and patella tendons are intact." A97. In October, Dr. Tsatskis referred the plaintiff to

an orthopedic surgeon, Dr. Sanford Wert. A293-94. Dr. Wert examined plaintiff's right knee and diagnosed a torn meniscus in the right knee. A221. During surgery to repair the torn meniscus in November, Dr. Wert also discovered a torn anterior cruciate ligament (ACL), an injury that the post-accident MRI had ruled out. A222. This discovery, more than four months after the accident, was the first time that the plaintiff was diagnosed with a torn ACL.

II. The Litigation

Plaintiff filed separate suits against five defendants, which were consolidated before trial. All claims against one defendant, U-Haul International, Inc. were dismissed before trial. On June 15, 2006, plaintiff won summary judgment on the issue of liability, and the case proceeded to trial on damages. The case was tried before the Honorable Justice Francois A. Rivera. The jury returned a verdict for plaintiff and awarded damages of \$815,000. A300-01. The court denied defendants' post-trial motion seeking a new trial on, *inter alia*, the grounds addressed below. A10-11.

Two aspects of the proceedings are relevant to the issues on appeal: (1) the summary judgment ruling on the 90/180 test under Insurance Law Sections 5104 and 5102(d) and its later interpretation, and (2) the testimony of one of plaintiff's expert witnesses concerning the MRI report.

A. Justice Johnson's Summary Judgment Ruling

On October 13, 2006, plaintiff moved for summary judgment on the issue of whether "Plaintiff has sustained serious injuries within the meaning of Insurance Law Sections 5104 and 5102(d)." A66-67. The only medical evidence offered by the plaintiff at the summary judgment stage was an affirmation from Dr. Wert. Dr. Wert's affidavit included a conclusory statement that all of the plaintiff's injuries were caused by the July 8 accident. A70-73.

In response, the defense submitted an affidavit from Dr. Maurice Carter, stating his "opinion within a reasonable degree of medical certainty that plaintiff's torn [ACL] and meniscus and subsequent two surgeries were not causally related to the subject accident." A68-69. Dr. Carter's opinion was based on the ambulance and hospital reports, also submitted with defendants' opposition, indicating that at the time of the accident the plaintiff made no mention of knee pain, which would have been excruciating had he just torn his ACL. *Id.*

On January 4, 2007, the Honorable Justice Diana A. Johnson issued an order on the plaintiff's motion. The intent and effect of that order are in dispute. The order, drafted by plaintiff's counsel, stated that:

Plaintiff is granted summary judgment on the issue of "serious injury" threshold under the 90/180 Test.

Plaintiff made a prima facie case under 90/180, and the defendant failed to offer satisfactory evidence to rebut.

A98. An additional paragraph stated that “Plaintiff proved causation of the right knee injury to the satisfaction of the Court.” *Id.* Justice Johnson crossed out that paragraph before signing the order. *Id.*

At trial, the court’s opening charge to the jury noted that “liability has already been determined against the defendants” but did not mention causation, either in general or as to any particular injury. A106. In the defendants’ opening, defense counsel argued that “the evidence will show that that ACL tear had nothing to do with the incident that happened on July 8th, nothing to do with it.” A110. Plaintiff’s counsel did not object. Defense counsel also argued that anyone suffering an ACL tear would, unlike plaintiff, be “writhing in pain.” A107-08. Plaintiff’s objection to that statement was overruled. A108. During plaintiff’s case, plaintiff presented evidence relevant to causation (*see, e.g.*, A113-14; A232-36), and defense counsel cross-examined those witnesses on causation, without objection.

Plaintiff also introduced the testimony of Dr. Wert, whose affidavit had been the sole piece of medical evidence offered by plaintiff at the summary judgment stage. Remarkably, of the eight substantive paragraphs of that affidavit,¹ Dr. Wert admitted on cross-examination that four contained false statements. Specifically,

¹ Paragraph 1 stated that Dr. Wert is Elshaarawy’s “treating Orthopedic Surgeon,” Paragraph 2 stated that he made the affirmation at the request of plaintiff’s counsel, and Paragraph 3 stated that Dr. Wert was “thoroughly

- In Paragraph 4 of his affidavit, Dr. Wert stated that he performed “several physical tests of [Elshaarawy’s] right knee. He demonstrated a positive McMurray Test.” A70. At trial, however, Dr. Wert testified that he did not find a positive McMurray Test. He explained that Paragraph 4 “was an omission on my part.” A227.
- In Paragraph 5, Dr. Wert stated that “[t]he surgeries were performed because Mr. Elshaarawy demonstrated positive objective signs of internal derangement to his right knee, swelling, restricted movement and pain.” A71. At trial, after reviewing his records, which indicate no redness, no swelling, no instability, no patella grinding, and a full range of motion, Dr. Wert recanted that paragraph as well. A228.
- In Paragraph 7, Dr. Wert stated that “[m]y pre-operative diagnosis was a right knee lateral meniscal tear, synovitis and chondroplasty patella.” A71. At trial, Dr. Wert testified that there was no lateral meniscal tear and agreed that this paragraph, too, was “incorrect.” A228.
- In Paragraph 9, Dr. Wert stated that he first saw Elshaarawy “within 90 days of his accident.” A72. At trial, he conceded that the first visit

conversant with the facts and circumstances herein” (A70) (an assertion that is itself doubtful given his subsequent testimony).

was 110 days after the accident, and conceded that Paragraph 9 was also “incorrect.” A229.²

When confronted with these wide gaps between his affidavit and the truth, Dr. Wert replied that he “[d]idn’t draw this up” himself and “must have read it quickly.” A228.

In the middle of trial, just as the defense was about to introduce expert testimony that the plaintiff’s symptoms at the time of the accident were inconsistent with a torn ACL, plaintiff moved to exclude that evidence, arguing that Justice Johnson’s Order covered not only the 90/180 threshold but also encompassed causation. *See* A237. The trial court granted that motion. Defense counsel was forced to explain in his closing that he could not produce the causation evidence he had promised (A296), and plaintiff’s counsel highlighted that concession in his own closing. A297.

B. Dr. Friedman’s Testimony

During direct examination of plaintiff’s neurology expert, Dr. Irving Friedman, the witness attempted to summarize an MRI report prepared by another physician, Dr. Robert Shepp. A134. The trial court sustained an objection to that attempt (A138), noting that the MRI reports are inadmissible hearsay. *Id.* After

² Each of these statements was repeated in the Affirmation of plaintiff’s counsel, Harlan Wittenstein, in support of the motion (A81-82; 84-85), and the last incorrect statement, concerning the timing of the first exam, was also included in the plaintiff’s own affidavit. A75.

that ruling, plaintiffs’ counsel elicited testimony that Dr. Friedman had relied upon plaintiff’s MRI reports to confirm his diagnosis. A141. Dr. Friedman then began again to summarize the MRI results. A141 *et seq.* Defendants’ second objection was overruled (A141), with the court relying on the “professional reliability” exception established in *Hambusch v. NYCTA*, 63 N.Y.2d 723, 726, 469 N.E.2d 516, 518 (1984), which is discussed below at pages 14-19. *See* A137.

ARGUMENT

I. The Admission of Dr. Friedman’s Testimony Regarding the MRI Report Warrants a New Trial.

A. This Court Has Held Repeatedly That Testimony About the Contents of an MRI Report Is Inadmissible.

The admission of Dr. Friedman’s summary of the contents of plaintiff’s MRI report was erroneous. As this Court has held many times, in cases indistinguishable from this one, testimonial evidence is not admissible to prove the contents of an MRI report, and the admission of such evidence is reversible error. This is so for two reasons: First, proving the contents of the report through testimony, rather than by introducing the report itself, violates the best evidence rule. Second, even if the report had been offered (which it was not), its contents were inadmissible hearsay.

This Court’s holding in *Wagman v. Bradshaw* is directly on point. In *Wagman*,

the plaintiff's counsel, on direct examination of [plaintiff's expert], asked: "Can you share with us the results of the MRI?" The defendant's counsel immediately objected to the question. After the Supreme Court elicited that [the expert] had relied upon the written MRI report to form his diagnosis, the objection of the defendant was overruled. [The expert] was then permitted to testify as to the 'results of the MRI,' as set forth in the report, which was not in evidence.

292 A.D.2d 84, 86 (2d Dep't 2002).

This case followed exactly the same sequence: Dr. Friedman began to testify to the MRI results. A134. Defense counsel objected. A134-35. Plaintiff's counsel elicited testimony that Dr. Friedman had relied on the MRI report to form his diagnosis. A141. The defendants' second objection was overruled. *Id.* Dr. Friedman discussed the MRI results at length. A141-46. Dr. Friedman admitted that this testimony was based entirely on the MRI *report*, because he had never even seen the MRI films. *See* A197 ("Q. Okay. And you never saw the MRI's yourself? A. Correct."). The MRI report was not in evidence. A138.

In *Wagman*, this Court ordered a new trial, holding that "[p]lainly, it is reversible error to permit an expert witness to offer testimony interpreting diagnostic films such as . . . MRIs, without the production and receipt in evidence of the original films thereof or properly authenticated counterparts." 292 A.D.2d at 87; *see also id.* at 91 ("the trial court committed reversible error in permitting 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").

This Court reached the same conclusion in *DeLuca v. Ju Liu*, also factually indistinguishable from this case:

The respondent's chiropractic expert did not perform the MRI tests or the EMG test, and did not review the actual MRI films or the EMG test results, but merely reiterated conclusions reached by the person who wrote the MRI reports and the EMG report. Moreover, the respondent failed to submit the actual MRI films or the EMG test results in evidence. Accordingly, the respondent failed to proffer sufficient evidence to establish the reliability of the out-of-court MRI and EMG reports, and the respondent erroneously elicited the chiropractic expert's testimony regarding the contents of the MRI and EMG reports. Under the circumstances, a new trial is warranted on the issue of damages.

297 A.D.2d 307, 307 (2d Dep't 2002) (citations omitted); *see also Jemmott v. Lazofsky*, 5 A.D.3d 558, 560 (2d Dep't 2004) ("Further, the testimony offered by Dr. Verde regarding the plaintiff's alleged back injuries was improper as it was partly based upon a magnetic resonance imaging . . . film which was not admitted into evidence and was prepared by another health care professional who did not testify at trial."); *Flamio v. State*, 132 A.D.2d 594, 594 (2d Dep't 1987) (affirming exclusion of testimony "with respect to a written report prepared by a [non-testifying] second physician").

Other courts have come to the same conclusion. The First Department concluded, in *Murphy v. Columbia Univ.*, that "we find it necessary to simply order a new trial on the issue of such damages because the court improperly permitted plaintiff's treating physician to testify as to the contents of the MRI report." 4

A.D.3d 200, 203 (1st Dep’t 2004). Again, in *Kovacev v. Ferreira Bros. Contracting, Inc.*, the First Department held that “[t]he trial court properly precluded plaintiff’s treating physician from referring to hearsay MRI reports in testifying about plaintiff’s back and neck injuries. A treating physician’s opinion at trial cannot be based on an out-of-court interpretation of MRI films prepared by another health care professional. . . .” 9 A.D.3d 253, 253 (1st Dep’t 2004); *see also Portela v. City of New York*, No. 0101805/2003, 2007 WL 2815100, at *7 (Sup. Ct. N.Y. Cty. Aug. 7, 2007) (“Dr. Goldenberg should not have been able to communicate to the jury the results of the inadmissible MRI reports without first having admitted the films into evidence. . . . [I]t was unfair to communicate the results of the hearsay reports without giving the jury the primary documents, the films, which the defense would have been able to use to cross-examine the witness regarding her reliance on their content and her diagnosis.”).

B. MRI Reports Are Inadmissible Hearsay.

In its repeated holdings that testimony detailing the contents of MRI reports is inadmissible, this Court has identified two independent bases for that result: the hearsay rule and the best-evidence rule. As to the former, this Court held in *Wagman* that an MRI report “is patently inadmissible hearsay as the declarant, the preparer of the report, is unavailable for cross-examination.” 292 A.D.2d at 88; *Schwartz v. Gerson*, 246 A.D.2d 589, 589 (2d Dep’t 1998) (“the court committed

reversible error during the damages trial when it admitted into evidence a report prepared by a doctor who examined the plaintiff in Action No. 2 for his insurance carrier”). Thus, an MRI report itself is inadmissible.

Since *Wagman*, this Court has reiterated that rule at least twice. In *Jemmott*, this Court held that “the trial court erred in admitting two MRI reports . . . , since the reports were prepared by other health care professionals who did not testify at the trial and the MRI film was not admitted into evidence.” 5 A.D.3d at 560; *see also Clevenger v. Mitnick*, 38 A.D.3d 586, 587 (2d Dep’t 2007) (“The defendant correctly contends that admission of the MRI reports violated the principles set forth in [*Wagman*]. This Court held that the admission of a hearsay MRI report deprived the party against whom the MRI report was offered of the opportunity to cross-examine the declarant.”).

In this case, the trial court acknowledged the hearsay problem and recognized that the reports were inadmissible. *See* A138 (“the MRI reports are not in evidence for a number of reasons, hearsay exception”); A139 (“The foundation that’s before me does render it to be hearsay.”). As discussed below, however, the court allowed the evidence in under a misinterpretation of the “professional reliability exception” to the rule on opinion evidence.

C. Testimony About the MRI Report Also Violates the Best-Evidence Rule.

In addition, the trial court, despite agreeing that that the *report* would not be admissible, nonetheless admitted testimony *about* that document. That is precisely what the best-evidence rule prohibits. *See Wagman*, 292 A.D.2d at 87 (“Admission into evidence of a written report prepared by a nontestifying healthcare provider would violate the rule against hearsay and the best evidence rule.”); *Chiu v. Garcia*, 75 A.D.2d 594, 594 (2d Dep’t 1980) (ordering new trial where expert was allowed “to testify as to matters shown on X rays which were not in evidence and whose absence was not explained”). These two independent grounds—hearsay and best evidence—underlie this Court’s rulings in *Wagman* and other cases that an expert witness may not inform the jury of the contents of an MRI report.

D. The Trial Court Misapplied the “Professional Reliability Exception.”

1. *Hambusch v. NYCTA* Does Not Create an Exception to the Best Evidence and Hearsay Rules.

The trial court permitted the introduction of Dr. Friedman’s testimony under the “professional reliability exception” established in *Hambusch v. NYCTA*, 63 N.Y.2d 723, 726 (1984). A139; A40. The court believed that Dr. Friedman’s testimony “falls within the exception to the *Wagman* rule.” A40. That ruling

reflects a fundamental misunderstanding of *Hambusch*, which established an exception only to the opinion rule, not to the hearsay or best-evidence rules.

In *Hambusch*, the Court of Appeals clarified the circumstances in which expert opinions are admissible. Noting the prior rule “that opinion evidence must be based on facts in the record or personally known to the witness” (*id.* at 725 (quoting *Cassano v. Hagstrom*, 5 N.Y.2d 643, 646 (1959))), the Court held “that an expert may rely on out-of-court material” under certain conditions. *Id.* at 726 (material must be “of a kind accepted in the profession as reliable in forming a professional opinion” and proponent must “establish[] the reliability of the out-of-court material”) (internal quotation marks omitted).

Importantly, *Hambusch* did not hold that an expert’s reliance on an out-of-court statement renders the out-of-court statement admissible. *Hambusch* held only that in-court *opinions* are admissible if they are *based on* qualifying out-of-court material. The “professional reliability exception,” therefore, is an “exception” to the rule that opinions must be based either on personal knowledge or record evidence; it is not an exception to the best-evidence or hearsay rules.

This Court has since consistently recognized the distinction between (1) testimony that an expert *has relied* upon an out-of-court document, which is admissible, and (2) testimony summarizing the *contents* of such a document, which is not admissible. In *Wagman*, this Court “reiterate[d] that, 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." 292 A.D.2d at 85-86 (emphasis added).

This Court made the same distinction again in *Adkins v. Queens Van-Plan, Inc.*:

The Supreme Court properly permitted the plaintiffs' expert to state his opinion based on his examination of Adkins and his review of the MRI films which were in evidence [citing *Wagman*]. However, the court erred in allowing the plaintiffs' expert . . . to *summarize* and read statements and findings contained in the reports and records of Adkins' treating physicians, as those reports and records were not in evidence and the physicians did not testify at trial.

293 A.D.2d 503, 504 (2d Dep't 2002) (emphasis added); *see also Schwartz*, 246 A.D.2d at 589 (even assuming "that it was not improper to permit the plaintiff's surgeon to testify that he *reviewed* and, in part *relied on* the report, in the instant case the testimony regarding the report went substantially beyond this limited usage") (emphasis added); *Borden v. Brady*, 92 A.D.2d 983, 984 (3d Dep't 1983) (reversing where "plaintiff's expert not only was permitted to identify the report upon which he relied and to explain its significance in forming his opinion; the report itself was admitted into evidence and read to the jury") (citations omitted).

2. The Trial Court’s Purported Application of the Professional Reliability Exception Violates Well-Established Law of This Court.

In this case, the trial court interpreted *Hambusch* as blowing a hole through the hearsay and best-evidence rules to permit the introduction of otherwise inadmissible evidence merely because an expert relied on it. In fact, the trial court allowed Dr. Friedman to summarize the MRI report even after acknowledging that the report itself would be inadmissible. A138-39. This Court addressed exactly that mistaken approach in *Wagman* and held that “[t]he inherent inconsistency of that holding is obvious. *If admission into evidence of the report, in violation of the best evidence rule and the rule against hearsay, is erroneous, then permitting an expert to testify as to the substantive contents of the inadmissible report is likewise erroneous.*” 292 A.D.2d at 90 (emphasis added).

In this case, Dr. Friedman’s testimony summarizing the conclusions of the report was relevant only to prove the extent of plaintiff’s injuries, *i.e.*, for the truth of the matter asserted in the report. That testimony, therefore, was inadmissible. *See Wagman*, 292 A.D.2d at 90-91 (“To the extent that *Pegg [v. Shahin]*, 237 A.D.2d 271 (2d Dep’t 1997) applied the ‘professional reliability exception’ to allow testimony as to the results of the written reports, for the truth of the matters asserted in the written reports, . . . it should no longer be followed.”).

3. The Trial Court's Reliance on a Single Third Department Case Was Erroneous.

Ignoring *Wagman*, *Clevenger*, *Schwartz*, *Chiu*, *Adkins*, *Murphy*, and every other case on point, the trial court relied exclusively on a lone Third Department case, *O'Brien v. Mbugua*, which allowed the admission of testimony concerning an MRI report. A41 (citing 49 A.D.3d 937 (3d Dep't 2008)). That reliance was erroneous for several reasons. Most importantly, the Third Department acknowledged that its ruling in *O'Brien* was flatly at odds with governing Second Department precedent. See *O'Brien*, 49 A.D.3d at 939 (citing *Wagman* with a "but see"). As described above, this Court's case law on this exact topic is both abundant and uniform. *O'Brien* is also at odds with the Third Department's own ruling in *Borden*, which held that, while an expert may "identify the report upon which he relied," he cannot read it to the jury. *Borden*, 92 A.D.2d at 984 (cited in *Wagman*, 292 A.D.2d at 89).

In addition, the Third Department addressed only the hearsay objection. It expressly refused to consider the best-evidence issue, despite noting that "[o]rdinarily, under best evidence and foundation rules, an expert witness is not permitted to offer testimony interpreting diagnostic films where, as here, the film at issue has not been offered into evidence." *O'Brien*, 49 A.D.3d at 938 n.2. Thus, even *O'Brien* confirms this Court's holding in *Wagman* concerning the best evidence rule.

Finally, to the extent that *O'Brien* differed with *Wagman*, it was simply incorrect. In *O'Brien*, the Third Department held that the challenged testimony was admissible because it was “merely a link in the chain of data.” *Id.* at 939 (quoting *Ciocca v. Park*, 21 A.D.3d 671, 672-73 (3d Dep’t 2005)) (ellipsis omitted). In *Ciocca*, the Third Department had held that “the testimony about the MRI was properly *excluded* because [the witness] exclusively relied upon the radiologist’s report.” 21 A.D.3d at 672-73 (emphasis added). The “link in the chain” rule addresses only to whether the expert’s *opinion* is admissible—an expert may not offer an opinion that is based solely on one document prepared by someone else—and it has nothing to do with whether the witness may summarize inadmissible documents. *See Borden*, 92 A.D.2d at 984; *Anderson v. Dainack*, 39 A.D.3d 1065, 1067 (3d Dep’t 2007) (“it has been held that [an] expert may be permitted to rely upon otherwise inadmissible hearsay evidence Yet, such evidence may not be the ‘principal basis’ for an opinion on the ultimate issue in the case, and may only form a link in the chain of data which led the expert to his or her opinion.”) (internal quotation marks and citations omitted) (cited in *O'Brien*, 49 A.D.3d at 939).

E. The Trial Court’s Error Was Prejudicial and Warrants a New Trial.

In every one of the cases cited in the preceding sections, the Appellate Division held that the improper admission of testimony concerning MRI reports

was reversible error. *See Wagman*, 292 A.D.2d at 87 (“Plainly, it is reversible error”); *DeLuca*, 297 A.D.2d at 307 (“Under the circumstances, a new trial is warranted on the issue of damages.”); *Adkins*, 293 A.D.2d at 504 (“there must be a new trial”); *Clevenger*, 38 A.D.3d at 587 (“We reverse and remit for a new trial”); *Murphy*, 4 A.D.3d at 203 (“we find it necessary to simply order a new trial”); *Portela*, 2007 WL 2815100, at *10 (ordering new trial).

This Court has described the sources of prejudice resulting from this error:

Without receipt in evidence of the original films, a party against whom expert opinion testimony is offered is deprived of the opportunity to cross-examine the expert witness concerning the basis for the opinion, offer opposing evidence to clear misimpressions, or offer a contrary opinion controverting the interpretation of the films, through his or her own expert witness.

Wagman, 292 A.D.2d at 84.

As this Court eloquently explained in *Wagman*, procedural shortcuts like the one condoned by the court below undermine the adversary system:

Rules of evidence are the palladium of the judicial process. To suffer intrusions into time-tested concepts limiting the use of secondary evidence destroys the vitality of that judicial process. The danger and unfairness of permitting an expert to testify as to the contents of inadmissible out-of-court material is that the testimony is immune to contradiction. It offends fair play to disregard evidentiary rules guaranteed by the force of common sense derived from human experience. Venerable rules of evidence should not be casually discarded to accommodate convenience and speed in the gathering and presentation of facts or evidence.

Wagman, 292 A.D.2d at 91.

II. The Exclusion of Defendants' Causation Evidence Warrants a New Trial.

A new trial is also warranted because Justice Rivera misinterpreted the summary judgment Order issued by Justice Johnson. The Order granted summary judgment to the plaintiff only on the issue of whether his injuries were "serious" under Insurance Law Sections 5102(d) and 5104. The Order left open the question of whether particular injuries were caused by the accident. Indeed, that was the only permissible result, because, as described above, the only evidence on causation at the summary judgment stage came from the defense. When Justice Rivera announced, mid-trial, that causation of the plaintiff's right knee injury was no longer an issue for the jury, he incorrectly took away a critical element of the defense.

That unexpected ruling was incorrect for several reasons. First, the plain text of the summary judgment Order said nothing about causation; in fact, Justice Johnson crossed out the only mention of causation in the proposed order. Second, if the Order had decided causation in plaintiff's favor, it was clearly erroneous, because the only evidence introduced at summary judgment on that issue came from the defense and showed a *lack* of causation. Third, the only medical evidence plaintiff offered at summary judgment was an affidavit from Dr. Wert, who testified at trial that he had not read the affidavit before signing it and that most of the affidavit was false. The exclusion of the defense evidence on causation was

obviously prejudicial, particularly in light of the court’s previous assurances that causation remained in the case and its mid-trial reversal, which came after plaintiff had offered his own causation evidence.

A. Justice Johnson Did Not Order Summary Judgment on Causation.

The decision to exclude evidence on causation was erroneous because Justice Johnson simply did not decide that issue. As the Order states, she decided that “Plaintiff is granted summary judgment on the issue of ‘serious injury’ threshold under the 90/180 Test.” A98. The only logical interpretation of that language is that the plaintiff had proved that his knee injury was *serious* under the 90/180 test (which requires that the plaintiff have been incapacitated for at least 90 of the 180 days following the accident), but had not necessarily proved that the alleged injuries were *caused* by the accident. Indeed, plaintiff’s counsel made that same distinction in the proposed order—“serious injury” in the first sentence and “causation” in the second. *Id.*

B. Justice Johnson’s Order Was Erroneous If It Granted Summary Judgment on Causation.

If Justice Johnson actually did grant summary judgment to plaintiff on causation, moreover, that ruling was erroneous. The only evidence that plaintiff submitted at the summary judgment stage showed that he suffered from various injuries between 2004 and 2006: none of that evidence tended to prove that those

injuries were *caused* by the accident in question. On the other hand, the defense disputed causation of the meniscal and ACL tears and submitted ambulance and hospital reports showing that plaintiff's complaints immediately after the accident were inconsistent with those injuries. A95-96. That record clearly showed a disputed material issue of fact: the jury could have reasoned that the right knee injury, which was not diagnosed until four months after the accident, had occurred at a later date.

C. Dr. Wert's Retraction of Nearly Half His Affidavit, on Which Justice Johnson Relied, Warrants Reconsideration.

Any summary judgment decision on causation should be reversed for the additional reason that Justice Johnson's Order was based in large part on the affidavit of Dr. Wert. As described above, Dr. Wert recanted fully half of that affidavit on cross-examination. He stated that the affidavit on which the summary judgment Order rested included false statements concerning when he first examined the plaintiff (a critical issue when the timing of the injury was in dispute), what symptoms the plaintiff manifested, what tests Dr. Wert performed, and what the results of those tests were. This case presents an extreme example of "extraordinary circumstances such as . . . a showing of new evidence" that would warrant overturning a prior summary judgment ruling. *See Brownrigg v. NYCHA*, 29 A.D.3d 721, 722 (2d Dep't 2006).

D. The Court’s Mid-Trial Ruling on Causation Denied Defendants A Fair Trial.

“[A]n error is only deemed harmless when there is no view of the evidence under which appellant could have prevailed.” *Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 43, 405 N.E.2d 205, 211 (1980). In this case, had Dr. Carter been permitted to offer his opinion and the issue of causation gone to the jury, the jury could have inferred from the total absence of any complaint or diagnosis of a knee injury until four months after the accident that the ACL tear in the right knee was not caused by the accident. The jury also could have declined to credit the self-serving testimony of the plaintiff’s wife that the hospital staff ignored the plaintiff’s entreaties to examine his knee and inexplicably failed to note that complaint in either the ambulance or hospital records. A113.

The timing of the order exacerbated the prejudice. New York courts consistently hold that trial rulings that interfere with a party’s ability to develop and follow trial strategy are unfair and warrant retrial. *See In re Eighth Judicial Dist. Asbestos Litig.*, 8 N.Y.3d 717, 722, 872 N.E.2d 232, 235 (2007) (“Garlock was deprived of its right to a fair trial by Supreme Court’s failure to disclose the existence of the high-low agreement. . . . Had the agreement been disclosed, Garlock could have adjusted its trial strategy accordingly”); *People v. Spencer*, 67 A.D.2d 867, 868 (1st Dep’t 1979) (“The trial court’s belated decision to sever the cases could not rescue defense counsel’s trial strategy that had been long

established consistent with the trial court’s previous rulings.”; ordering retrial); *People v. Baum*, 64 A.D.2d 655, 656 (2d Dep’t 1978) (belated ruling “could not obliterate the fact that defense counsel’s trial strategy had long since been established in accordance with the trial court’s prior rulings”; ordering retrial).

Here, defense counsel, without objection, promised the jury that he would present evidence on causation, a promise he was forced to recant in closing. A296.

Plaintiff’s counsel capitalized on that retraction:

Mr. Conboy got up here at the beginning of the trial and said to you, I am going to prove to you that the knee injury suffered by Sheriff had absolutely nothing to do with this accident. He promised you that. But, guess what? He was dead wrong.

A297. Thus, the erroneous decision that plaintiff had won summary judgment on causation—whether that error resulted from Justice Johnson’s review of the evidence or Justice Rivera’s interpretation of the order—was prejudicial and warrants a new trial.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 670.10.3(f)

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