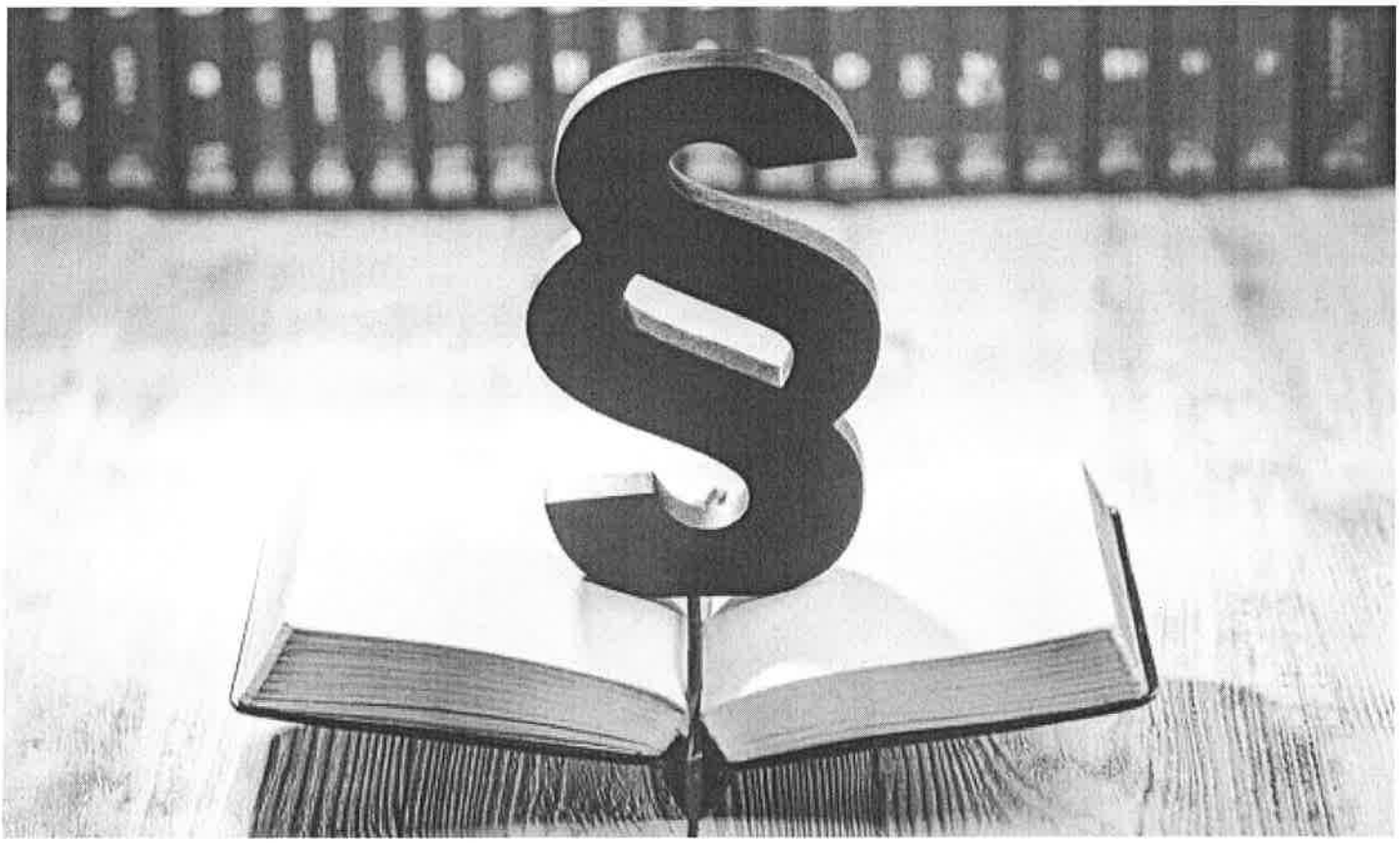
New York Law Journal

Appeals From In Limine Orders: Part I

The nonappealability of evidentiary rulings and orders from in limine motions, even when made on notice, are exceptions to the general rule regarding appeals as of right as set forth in CPLR 5701(a)(2).

By **Elliott Scheinberg** | April 22, 2021



The nonappealability of evidentiary rulings and orders from in limine motions, even when made on notice, are exceptions to the general rule regarding appeals as of right as set forth in CPLR 5701(a)(2). Notably, this exception has its own exceptions.

The General Rule

CPLR 5701(a)(2) states, in pertinent part, that an appeal may be taken as of right from an order provided two conditions are met: that the motion "was made upon notice *and*" also satisfies one of eight enumerated categories. Categories (iv) ("involves some part of the merits" and (v) ("affects a substantial right") are most common. The Practice Commentaries, Richard C. Reilly, state: "Item [v] especially, which makes an order appealable if it merely 'affects a substantial right,' can probably absorb most of the other entries on the list, and do the job alone."

Evidentiary and In Limine Rulings

"Generally, the function of a motion in limine is to permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use. Its purpose is to prevent the introduction of such evidence to the trier of fact, most[ly] a jury." *State v. Metz*, 241 A.D.2d 192, 198 (1st Dep't 1998). "There is no requirement that an in limine motion be made in writing and be in accordance with CPLR 2214." *Wilkinson v. British Airways*, 292 A.D.2d 263 (1st Dep't 2002).

"An order which merely limits the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission." *O'Buckley v. County of Chemung*, 149 A.D.3d 1232 (3d Dep't 2017); *Thome v. Benchmark Main Transit Assocs.*, 125 A.D.3d 1283 (4th Dep't 2015). "Appellate review of [such] ruling[s] 'must await the conclusion of a trial so that the relevance of the proffered evidence, and the effect of [the court's] ruling with respect thereto, can be assessed in the context of the record as a whole.'" *C.H. v. Dolkart*, 174 A.D.3d 1098 (3d Dep't 2019); *Santos v. Nicolas*, 65 A.D.3d 941 (1st Dep't 2009) ("A [pretrial] evidentiary ruling is generally reviewable only in connection with the appeal from the judgment rendered after trial."); *Mayes v. Zawolik*, 55 A.D.3d 1386 (4th Dep't 2008).

"The notion that no appeal as of right lies from an evidentiary ruling, whether made before or during trial, is certainly sound to the extent that the ruling has not been embodied in a formal order (CPLR 5512; also 5511, 5701)," noting, however, that "nothing in the foregoing [statutory] provisions circumscribes the right to appeal from an order merely because it is concerned with the admissibility of evidence." *Scalp & Blade v. Advest*, 309 A.D.2d 219, 223 (4th Dep't 2003). However, in *Kopstein v. City of New York*, 87 A.D.2d 547 (1st Dep't 1982), the Appellate Division, First Department elucidated: "The provisions of CPLR 5701(c) for obtaining permission to appeal from an order which is not appealable as of right were not intended to permit intermediate appeals from evidentiary rulings during trial. Entertaining appeals from such orders, which consist only of procedural and evidentiary rulings during trial, would interfere with and impede the trial process."

Instances of Appealable In Limine Orders

An evidentiary ruling limiting the issues to be tried. An evidentiary ruling that does not merely determine the admissibility of evidence but also limits the issues to be tried is appealable. *United States Fid. & Guar. Co. v. Am. Re-Ins. Co.*, 132 A.D.3d 604 (1st Dep't 2015).

An order dismissing a claim. In *Hogan v. Zibro*, 190 A.D.3d 1124 (3d Dep't 2021), plaintiff sought to partition three parcels of jointly owned land with defendant. Following a hearing, the referee's report granted each party a 50% interest for each parcel. Supreme Court confirmed the report. Thereafter, the court granted plaintiff's motion to preclude defendant from offering proof at trial in support of her first counterclaim and dismissed that counterclaim, which is appealable as of right. Such order was appealable.

An order limiting the scope of the issues. In *Dischiavi v. Calli*, 125 A.D.3d 1435 (4th Dep't 2015), a legal malpractice action involving the continuous representation doctrine, plaintiffs appealed from an order determining an in limine motion, which precluded them from introducing evidence that any of defendants represented plaintiffs with respect to any issue other than an issue in the context of a medical malpractice action. The effect of the order limited plaintiffs to introducing evidence that one of the defendants stated to plaintiff that the malpractice action was not viable thereby precluding plaintiff from introducing the vast majority of evidence on the issue whether defendants continued to represent plaintiffs so as to toll the statute of limitations. The order was appealable as it limited the scope of the issues at trial.

In *Rochester Genesee Regional Transportation Auth. v. Stensrud*, 173 A.D.3d 1699 (4th Dep't 2019), a condemnation proceeding, respondents appealed from an order: (1) granting petitioner's motion in limine to strike that part of respondents' appraisal report with respect to "investment value"; (2) precluding respondents' expert from testifying at trial; and (3) denying respondents' cross motion in limine to strike petitioner's appraisal report. The order was appealable because it limited the scope of the issues at trial by precluding the introduction of evidence regarding respondents' primary method of property valuation.

Plaintiffs, in *Innovative Transmission & Engine Company [ITEC] v. Massaro*, 63 A.D.3d 1506 (4th Dep't 2009), sought to recover damages for conversion of corporate assets of ITEC. The in limine order precluding plaintiffs from offering evidence that ITEC owned the assets was appealable because it limited the scope of issues to be tried.

In *Rott v. Negev*, 102 A.D.3d 522 (1st Dep't 2013), an order dismissing plaintiff's claim for lost rental income was appealable because it did not "merely determine the admissibility of evidence, it 'limit[ed] the scope of issues to be tried.' "

In *O'Buckley v. County of Chemung*, 149 A.D.3d 1232 (3d Dep't 2017), plaintiff's 17-year-old son died from injuries when he lost control of his car as it rounded a downhill curve. In the action for wrongful death, plaintiff alleged that defendants were aware of the hazardous roadway based upon prior accidents in the same approximate location. Plaintiff filed a motion in limine to deny any motion by defendants to preclude evidence of prior accidents. Defendants, in turn, moved to preclude plaintiff from offering evidence of prior accidents, as well as proof pertaining to his son's lost future earnings. Supreme Court determined that, before evidence of prior accidents could be admitted at trial, plaintiff would have to make an offer of proof demonstrating that such evidence would reveal similar accidents. Supreme

Court found that proof of lost future earnings was speculative and would likely be precluded, absent a strong offer of proof. The in limine order was appealable because its effect significantly narrowed the scope of the issues to be tried at a second trial.

'Misuse of a Motion In Limine'

In *Scalp & Blade v. Advest*, 309 A.D.2d 219 (4th Dep't 2003), plaintiffs commenced an action against defendants, an investment advisor/securities broker and his firm, seeking damages for mismanagement of plaintiffs' trust fund or account, including alleged "churning" of the fund and investment of it in a manner unsuited to plaintiffs' needs and purposes. An in limine order that "precluded plaintiffs from offering proof of additional profits that they claimed their account would have earned had it been invested in alternative securities, the performance of which they claimed would have tracked the S&P 500 or other market indices" was appealable as of right. The order had "a concretely restrictive effect on plaintiffs' efforts to prove their case and recover damages, just as our reversal of the order would have 'the very tangible effect of permitting plaintiff[s] to seek full recovery of [their] actual damages'":

> Defendants' motion, although labeled in limine, "was the functional equivalent of a motion for partial summary judgment [on the critical substantive issue of what constitutes the proper measure of damages] dismissing the complaint insofar as it sought damages * * * in excess of the damages" that defendants believe are appropriate ... That is not to say that a motion in limine is an appropriate substitute for a motion for partial summary judgment; it is not ... where a party misuses a motion in limine as the procedural equivalent of a motion for partial summary judgment, and the court decides that motion, resulting in an order that limits the issues to be tried, that order is appealable. An order deciding such a motion clearly involves the merits of the controversy (CPLR 5701(a)(2)(iv)) and affects a substantial right (CPLR 5701(a)(2)(v)) and thus is appealable.

Similarly focusing on the "misuse of a motion in limine as the procedural equivalent of a motion for partial summary judgment," *Rondout Elec. v. Dover Union Free School Dist.*, 304 A.D.2d 808 (2d Dep't 2003), held that an order "resulting from the motion that limits the issues to be tried is appealable," and "an order deciding such a motion clearly involves the merits of the controversy (CPLR 5701(a)(2)(iv)) and affects a substantial right (CPLR 5701(a)(2)(v)) and thus is appealable." Although Dover's motion was styled as in limine, it sought to limit the amount of the plaintiff's recovery, thereby limiting the scope of issues to be tried—the motion was the functional equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought damages in an amount in excess of the damages pleaded in the plaintiff's initial notice of claim: "An order deciding such a motion clearly involves the merits of the controversy (CPLR 5701(a)(2)(iv)) and affects a substantial right (CPLR 5701(a)(2)(v)) and thus is appealable."

In *City of New York v. Mobil Oil*, 12 A.D.3d 77 (2d Dep't 2004), Mobil moved to preclude evidence regarding diminution in value of compensation for which the City would be liable in the condemnation proceeding. Since compensation is the only issue in a condemnation

valuation proceeding, Mobil's in limine motion was the functional equivalent of a motion for summary judgment: "An order deciding such a motion clearly involves the merits of the controversy (CPLR 5701(a)(2)(iv)) and affects a substantial right (CPLR 5701(a)(2)(v)) and thus is appealable." The appeal was dismissed.

In *Vaughan v. Saint Francis Hosp.*, 29 A.D.3d 1133 (3d Dep't 2006), plaintiff brought her 26-month-old son to the emergency room at Saint Francis Hospital. Contrary to the hospital's guidelines regarding patients in the child's condition, the child was discharged without being evaluated by a physician. The discharge directions included, inter alia, that the child be seen by his pediatrician the next morning, which the plaintiff did not do. The child was brought back to the hospital with various symptoms about three days later. The child was transferred to another hospital where he was diagnosed with bacterial meningitis, causing him severe injuries, including brain damage, spastic quadriparesis and cortical blindness.

Plaintiff sued St. Francis, among others. Plaintiff moved to preclude any evidence regarding "parental negligence and to redact any references to parental negligence from any documents," including not allowing St. Francis' emergency room discharge instructions into evidence. The hospital argued that the discharge instructions were vital to its defense, premised, in part, upon the assertion that the appropriate standard of care included discharging the child with such instructions as were provided.

Supreme Court granted plaintiff's motion to renew and precluded defendants and third-party defendants from offering the discharge instructions into evidence or in any way referring to such instructions at trial. The hospital and third-party defendants appealed. The Appellate Division described the order as significantly undercutting the primary theory of the hospital, i.e., that discharging the child with specific instructions to the parent fell within the acceptable standard of care. Such a ruling had a clear potential of impacting the merits *and* it affects a substantial right of the hospital. In light of the opinions of plaintiff's experts, such a ruling was essentially tantamount to summary judgment for plaintiff on the issue of liability, for which reasons the order was appealable: "An order that limits the scope of issues to be tried, affecting the merits of the controversy *or* the substantial rights of a party, is appealable."

Part II continues with in limine motions to preclude or permit expert witnesses, including preclusion applications grounded on inadequate disclosure.

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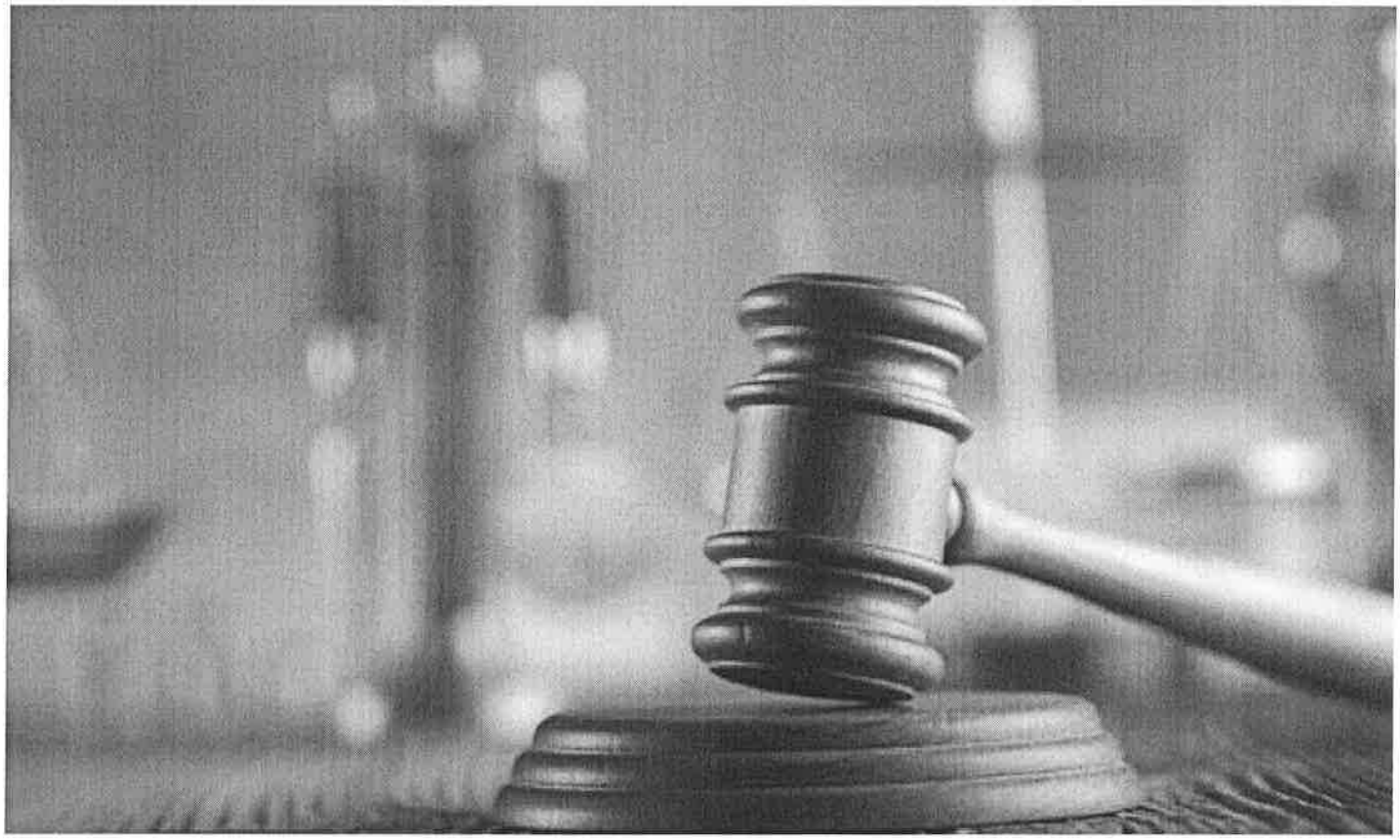
Appeals From In Limine Orders: Part II

This second part of a two-part article on the appealability of evidentiary rulings and orders from in limine motions continues with in limine motions to preclude or permit expert witnesses, including preclusion applications grounded on inadequate disclosure.

By **Elliott Scheinberg** | April 23, 2021



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Part II continues the examination of orders deciding in limine motions.

Orders for a 'Frye' Hearing

Generally, "no appeal lies from an order that denies a motion seeking a *Frye* hearing concerning proposed expert testimony." *Piorkowski v. Hosp. for Special Surgery*, 116 A.D.3d 560, 560-61 (1st Dep't 2014); *Thornhill v. Degen*, 185 A.D.3d 982 (2d Dep't 2020). Such a ruling is, at best, an advisory opinion. *Gonzalez v. Arya*, 140 A.D.3d 925 (2d Dep't 2016). Similarly, an order denying a motion to direct a witness to submit to a *Frye* hearing is, "at best, an advisory opinion which is neither appealable as of right nor by permission." See also *Fontana v. Larosa*, 74 A.D.3d 1016 (2d Dep't 2010).

Order From a Motion To Permit or Preclude Expert Testimony

The pretrial evidentiary ruling in *Knafo v. Mount Sinai Hosp.*, 184 A.D.3d 478 (1st Dep't 2020), which granted the doctor's motion to preclude plaintiffs' experts' testimony that plaintiff's hyponatremia, which was subsequently corrected, caused permanent fasciculations, was reviewable because it limited the scope of issues to be tried as the evidence was "so central to the proponent's case that its exclusion was the functional equivalent of summary judgment": "Without the proposed evidence to establish a causal link between defendant's alleged departure from accepted practice and plaintiff's permanent condition, her malpractice claim was certain to fail."

In *C.H. v. Dolkart*, 174 A.D.3d 1098 (3d Dep't 2019), the infant was diagnosed with a brain injury after birth, which resulted in cerebral palsy. After unsuccessfully moving for summary judgment to dismiss the complaint alleging malpractice, defendant moved to preclude the opinions of the infant's expert witnesses as inadmissible under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). Supreme Court denied the motion:

> [S]upreme Court merely permit[ted] the infant to offer various testimony of his expert and does not limit the scope of issues to be tried ... Therefore, appellate review of the court's ruling "must await the conclusion of a trial so that the relevance of the proffered evidence, and the effect of [the court's] ruling with respect thereto, can be assessed in the context of the record as a whole."

The second component, in *Burdick v. Tonoga*, 2021 NY Slip Op 01175 (3d Dep't 2021), is stimulating. Plaintiffs alleged that defendant, a manufacturer, dumped chemical compounds that contaminated the water of surrounding private wells. Defendant made five motions, each seeking to preclude plaintiffs' experts' testimony as speculative and conclusory and/or as failing to meet the standard articulated in *Frye*. In November 2019, Supreme Court granted one motion to the limited extent of precluding one expert from testifying and denied the remaining motions: "These orders addressed only the admissibility of the experts' testimonies, they did not limit the scope of the issues or the theories of liability to be tried for which reason the appeals were dismissed."

The following added bounce to the determination:

> [A]fter defendant sought preclusion, it moved for summary judgment dismissing the second amended complaint in an entirely separate motion. Supreme Court partially denied the summary judgment motion in a January 2020 order. Even though the court relied, in part, on plaintiffs' expert opinions in reaching its conclusion in th[at] order, defendant's appeal therefrom and our decision in that appeal ... do not alter the determination that the November 2019 orders are not appealable. *Defendant did not seek preclusion and summary judgment in the same motion* (compare *Robinson v. Bartlett*, 95 A.D.3d 1531 [2012]; *Jackson v. Nutmeg Tech., Inc.*, 43 A.D.3d 599, 600 [2007]), nor did the court consolidate the preclusion motions and the summary judgment motion for disposition in a single order. Furthermore, the November 2019 orders did not resolve the summary judgment motion.

See also *Lynch v. Carlozzi*, 121 A.D.3d 1308 (3d Dep't 2014).

Bozzetti v. Pohlmann, 94 A.D.3d 1201 (3d Dep't 2012), involved a RPAPL article 15 boundary line dispute. Defendants moved in limine to preclude the testimony of plaintiffs' surveyor regarding the location of one of the boundary lines contending that his opinion lacked factual foundation. Plaintiffs cross-moved to preclude defendants' surveyor's testimony on that same basis. Supreme Court granted defendants' motion and denied plaintiffs' cross motion. Plaintiff appealed:

> [T]he order addresse[d] only the admissibility of evidence in advance of trial ... Accordingly, appellate review must be deferred until after trial so that "'the relevance of the proffered evidence, and the effect of Supreme Court's ruling with respect thereto, can be assessed in the context of the record as a whole.'"

However, in *Rodriguez v. Ford Motor Co.*, 17 A.D.3d 159 (1st Dep't 2005), the defendant, Nyiri, while intoxicated, put his car into reverse, pinned the plaintiff to a building causing severe injuries. Making Ford Motor Company "the principal defendant" [one can only imagine the reason], plaintiff alleged accelerator malfunction. Ford moved to exclude the testimony of plaintiff's expert, contending that his transient signal theory had no basis in scientific fact. Following a *Frye* hearing, the court excluded the expert's testimony. Ford also successfully moved to: (1) bar plaintiff from introducing proof of allegedly similar incidents of sudden acceleration; and (2) admit various reports by governmental agencies, domestic and foreign. Plaintiff aborted the trial and appealed. Both orders were nonappealable because they were deemed evidentiary rulings.

Inadequate Expert Disclosure as Basis of Preclusion

In *Frankel v. Vernon & Ginsburg*, 118 A.D.3d 479 (1st Dep't 2014), "Supreme Court incorrectly precluded plaintiff's legal malpractice expert from testifying on the ground that the initial disclosure was insufficiently detailed," which argument "defendants only first raised in their omnibus in limine motion on the day trial was to begin." The Appellate Division ruled that any deficiency had been cured by plaintiff's service of a more detailed supplemental disclosure four days later. Furthermore, defendants had been aware of the substance of the expert's

proposed testimony because plaintiff had previously submitted the expert's affidavit in opposition to defendants' motion for summary judgment. Moreover, defendants did not establish prejudice by receipt of the expert disclosures four days after the 30-day minimum set by local rule, or that the delay was willful. The order was appealable, since it did not merely determine the admissibility of evidence, but it also limited the scope of issues to be tried, citing both CPLR 5701(a)(2)(iv) ("involved some part of the merits") and (v) ("affected a substantial right")).

The issue in *Franklin v. Prahler*, 91 A.D.3d 49 (4th Dep't 2011) was whether plaintiff, whose personal property had appreciated in value from the time of its purchase, was limited to recovering the cost of repairs to the property after it had been damaged or whether plaintiff could seek to recover the diminution in the value of the property.

Plaintiff owned a 2000 Ford GT, a rare collector's sports car that had rapidly surged in value. Defendant, while intoxicated, struck the GT. Plaintiff sought $52,000 in damages. Plaintiff's disclosure included an estimate, prepared by State Farm, that the cost of repairs was $3,484.35. Plaintiff also disclosed the identity of both expert appraisers. Defendant made a motion in limine pursuant to CPLR 3101 and 3106 to preclude plaintiff's experts and fact witness from testifying at the damages trial, arguing that plaintiff's disclosure of witnesses was: varyingly untimely, provided after the note of issue was filed, noncompliant with specific information required by CPLR 3101(d) and that the experts lacked the requisite skill, training, education, knowledge and experience to provide a reliable market value for the vehicle. The court held:

> "[A]n order that 'limits the scope of the issues at trial' is appealable. Thus, because the court's order had a concretely restrictive effect on the efforts of plaintiff to recover certain damages, defendant's motion ... is 'the functional equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought damages ... in excess of the damages' that defendant believe[d] are appropriate."

In *Lynch v. Carlozzi*, 121 A.D.3d 1308 (3d Dep't 2014), plaintiff, a pedestrian, was struck by defendant. Supreme Court denied defendant's in limine motion for an order precluding the opinion testimony of one of plaintiff's expert witnesses and limiting the testimony of the other expert, on the ground that that plaintiff's disclosures regarding the experts were not in compliance with CPLR 3101(d)(1)(i). Nevertheless, both experts testified at the hearing following which the court kept the record open to allow plaintiff to submit into evidence a properly certified copy of his Social Security Administration records. Defendant's in limine motions sought to limit the proof to be offered at the hearing regarding the nature and extent of plaintiff's disability, and the resulting "orders resolved only those narrow evidentiary issues. As the orders neither limited the scope of the issues or the theories of liability in the action nor resolved defendant's underlying motion for summary judgment dismissing the complaint they were not appealable." See *O'Donnell v. Ferguson*, 100 A.D.3d 1534 (4th Dep't 2012) ("[A]n order that ... 'limits the legal theories of liability to be tried' or the scope of the issues at trial ... is appealable.")

In *Reed v. New York State Electric & Gas (NYSE&G)*, 183 A.D.3d 1207 (3d Dep't 2020), an explosion due to a gas leak in the service line at the great grandfather's house killed plaintiff's 15-month-old son and seriously injured the child's mother and great grandfather. The gas service line was excavated, and it was discovered that there were multiple areas where the line was wrapped in what resembled "electrical tape" and "field wrap." NYSE&G found a fracture covered with tape approximately 35 feet from the home. The line also had "sags" where the gas line crossed the municipal water and sewer lines. The water lines were installed by defendant Town of Horseheads and are maintained by defendant Village of Horseheads. Defendant County of Chemung installed and maintains the sewer lines.

Supreme Court, inter alia, partially granted plaintiff's request to preclude the admission of any evidence of the great grandfather's contributory negligence as a means of reducing plaintiff's damages, but allowed it in as a defense to plaintiff's res ipsa loquitur claim. Plaintiff appealed. The court held:

> An order that limits the scope of issues to be tried, affecting the merits of the controversy *or* the substantial rights of a party, is appealable . ... As to plaintiff's objection to that part of the order as allowed evidence of the great grandfather's negligence as a defense to the claim of res ipsa loquiter does not limit the scope of issues or impact a substantial right, such issue is not appealable.
>
> Plaintiff also contends that Supreme Court erred in partially granting NYSEG's motion to preclude the testimony of, Reiber, plaintiff's economist. Finding that the expert disclosure lacked reasonable detail as to how the value that Reiber assigned to plaintiff's lost services and support would be calculated, Supreme Court precluded his testimony with regard to said damages. However, because this ruling restricted plaintiff's ability to prove and recover damages, this issue is appealable.

In *Calabrese Bakeries v. Rockland Bakery*, 139 A.D.3d 1192 (3d Dep't 2016), Supreme Court denied motions to dismiss the causes of action alleging fraudulent inducement, breach of contract, conversion and breach of fiduciary duty. Plaintiffs served a supplemental response to defendants' combined discovery demands consisting of an index of over 13,000 invoices and, other invoices referenced in an index. The Rockland defendants moved in limine to preclude the index and those of the invoices not previously disclosed. After plaintiffs served a supplemental expert report that relied, in part, on the newly disclosed invoices, defendants moved to preclude plaintiffs from introducing, referencing or relying on the supplemental expert report at trial. Supreme Court granted the motions. The order was appealable:

> An order that limits the scope of issues to be tried, affecting the merits of the controversy or the substantial rights of a party, is appealable. The order, rather than 'merely limit[ing] the production of certain evidence as immaterial to damages,' restricted plaintiffs' ability to prove and recover damages that they allegedly incurred after the judicial dissolution of B.M. Baking and [was], therefore, appealable.

In *Sisemore v. Leffler*, 125 A.D.3d 1374 (4th Dep't 2015), plaintiffs sought damages for injuries sustained by plaintiff in a car accident:

Defendants appealed from an order denying their motion in limine to strike certain portions of plaintiffs' second supplemental bill of particulars regarding the need for a future surgery and future loss of earnings. According to defendants, the second supplemental bill of particulars amounted to an improper amendment rather than merely a "supplement" and therefore required leave of court. Defendants also sought to preclude plaintiffs' experts from testifying at trial due to insufficient expert disclosure. Alternatively, defendants contended that the second supplemental bill of particulars and expert disclosure were not timely served. The denial of the motion was held appealable because the order "decided a motion that clearly involved the merits of the controversy ... and affected a substantial right."

Orders Precluding Expert Testimony or Denying 'Frye' Hearing

In *Johnson v. Guthrie Med. Group, P.C.*, 125 A.D.3d 1445 (4th Dep't 2015), a medical malpractice action, defendants moved, as relevant here, to: strike the fifth and sixth bills of particulars; preclude expert disclosure; and preclude expert testimony regarding the alleged causal relationship between IFN–a treatment and long term cognitive deficits or, in the alternative, for a *Frye* hearing. Supreme Court denied the motions. On appeal, defendants argued that the court erred in denying the motions to preclude expert testimony or for a *Frye* hearing. The order was appealable inasmuch as it "clearly involved the merits of the controversy" with respect to medical causation of alleged long-term cognitive defects, and "affects a substantial right" of the parties.

In *Parker v. Mobil Oil*, 16 A.D.3d 648 (2d Dep't 2005), aff'd on other grounds, 7 N.Y.3d 434 (2006), plaintiff sued Mobil Oil, et al., alleging that, as a gas station attendant, he contracted acute myelogenous leukemia during his 17-year daily occupational exposure to benzene, a known carcinogen, by way of inhalation and dermal contact. Defendants moved in limine to preclude plaintiff from introducing expert testimony regarding medical causation and for summary judgment on the grounds that plaintiff's expert's theory of causality was inadmissible as unreliable and not generally accepted in the relevant scientific community. They also moved for summary judgment contending that, if the motions in limine were granted, the plaintiff would be unable to prove causation and would not be able to prevail on his claims.

The Appellate Division noted that an order limiting the scope of issues to be tried is appealable and that such a motion goes to the very merits of the controversy, where it, if granted, would render the plaintiff's case meritless. Accordingly, the order affected a substantial right of the parties and were thus appealable.

In *Redmond v. Redmond*, 163 A.D.3d 1475 (4th Dep't 2018), plaintiff sought damages for injuries sustained by striking her head on the bottom of a swimming pool after sliding head first down a water slide. Plaintiff alleged, inter alia, that defendants were negligent with respect to the construction, control of their swimming pool and its component parts. Plaintiff's expert witness disclosure indicated that plaintiff's aquatic safety expert would testify that

defendants' installation of the slide violated 16 CFR part 1207, which provides safety standards for swimming pool slides. Supreme Court granted defendant's motion in limine to, inter alia, preclude the expert from testifying at trial. The order was appealable because it decided a motion that "clearly involved the merits of the controversy and affected a substantial right.'"

In *Robinson ex rel. Chapman v. Bartlett*, 95 A.D.3d 1531 (3d Dep't 2012), plaintiff-child lived in an apartment that was owned and managed by defendants. Lead-based paint was found in the apartment. Tests indicated that the child had elevated levels of lead in his blood. When the child was 15 years old, he sued to recover damages for neurological and neurobehavioral injuries due to exposure to the paint.

Plaintiff moved, inter alia, to preclude defendants' experts from testifying that socioeconomic factors caused plaintiff's developmental and behavioral deficiencies or, in the alternative, that a *Frye* hearing be held regarding the admissibility of the experts' testimony:

> Although an order determining the admissibility of evidence is generally not appealable, Supreme Court concluded that this expert testimony served to create an issue of fact as to what caused plaintiff's injuries and relied upon its admissibility to deny plaintiff's motion for partial summary judgment. Given the crucial role this testimony played in that determination, plaintiff can, at this juncture, argue on appeal that the court erred in finding that it was admissible.

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