

# 2014 Serious Injury Threshold Decisions by the Four New York State Appellate Divisions



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A key word search on the “decisions” page at [www.nycourts.gov](http://www.nycourts.gov) finds that in 2014 a collective total of 138 decisions were issued by the four New York State Appellate Divisions on appeals taken from lower court “serious injury” threshold motion decisions under Insurance Law § 5102(d), which states:

“Serious injury” means a personal injury which results in 1) death; 2) dismemberment; 3) significant disfigurement; 4) a fracture; 5) loss of a fetus; 6) permanent loss of use of a body organ, member, function or system; 7) permanent consequential limitation of use of a body organ or member; 8) significant limitation of use of a body function or system; or 9) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety [90] days during the one hundred eighty [180] days immediately following the occurrence of the injury or impairment.

Soft tissue injuries, such as cervical or lumbar disc bulges or herniations, or torn ligaments in the shoulder or knee typically need to meet one of the last three of the above nine categories in order to survive a motion to dismiss and get the case to a jury.

Once the note of issue is filed on a “soft tissue injury” case the defendants must consider if the evidence collected during pre-trial discovery gives them a basis to make an initial *prima facie* showing that the injury or injuries alleged do not meet the threshold to qualify for any of these nine serious injury categories. If the injuries don’t meet the threshold then a motion to dismiss is warranted.

If the court hearing the motion decides that the movant has met the initial burden of showing that plaintiff has not sustained a “serious injury” then

the burden shifts to the plaintiff to come forward with admissible non-conclusory evidence raising a jury question of fact about whether he or she has sustained a serious injury.

A large majority of the 2014 “serious injury” decisions issued by the four New York State Appellate Divisions (86) were handed down by the Second Department. Most of those rulings (67) are in favor of the plaintiffs and consist of either: 1) decisions *reversed* after a defendant’s motion was granted; or 2) decisions *affirmed* after the motion was denied.

Of the decisions *reversed* by the Second Department, the majority of those (18) were overturned for the sole reason that defendant failed to meet the initial burden under the “90/180” category. The case law most often cited in support of these reversals is *Che Hong Kim v Kossoff*, 90 AD3d 969 (2d Dept 2011).

In the First Department, more than one half of the total 2014 decisions (19) either *reversed* or *modified* the lower court’s decision to grant the motion.

Modifying the lower court decision has the same effect as a reversal in that it revives a plaintiff’s action by finding a question about some particular injury claimed. This then allows the plaintiff, as the First Department likes to point out citing *Rubin v SMS Taxi Corp.*, 71 AD3d 548 (1<sup>st</sup> Dept 2010), to plead and prove at trial all injuries allegedly sustained whether the injuries are “serious” or not.

Generally, how these cases were decided and whether the motions were ultimately granted or denied turned on an analysis of each party’s argument under the guidelines established in the recent Court of Appeals cases: *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002); *Perl v Meher*, 18 NY3d 208 (2011); and *Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 (2013).

The First Department does not cite to the Court

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of Appeals cases as much as the other departments but rather looks to its own body of case law as the basis for its decisions.

Only one case from 2014 is going up to the Court of Appeals: *Alvarez v NYLL Management Ltd.*, 120 AD3d 1043, (1<sup>st</sup> Dept 2014) where by a 3-2 vote the First Department affirmed the decision of Judge Betty O. Stinson in Bronx County to grant the defendant's motion.

There was only one case where the plaintiff was the movant: *Hill v. Cash* 117 AD3d 1423 (4<sup>th</sup> Dept 2014).

Here is a table breaking down by department how the 136 appellate court "serious injury" threshold motion appeals for 2014 were decided:

Appellate Department	Total Appeals Decided	Reversed After Granted	Reversed After Denied	Affirmed After Granted	Affirmed After Denied	Modified After Granted	Modified After Denied
First	36	6	2	12	2	13	1
Second	86	42	5	14	24	1	0
Third	5	1	0	1	0	2	1
Fourth	11	1	5	2	2*	1	0
<b>TOTAL</b>	<b>138</b>	<b>50</b>	<b>12</b>	<b>29</b>	<b>28</b>	<b>17</b>	<b>2</b>

\*Plaintiff was the movant in one case

The tables on the following pages break down the cases further into categories which include the counties each case came from, the identity of the lower court judge, and the basic grounds for each appellate decision.

## **First Department Decisions Reversed (8):**

Six (6) were *reversed* after the lower court *granted* defendant's motion:

A) Four (4) of these were reversed because the plaintiff raised a question of fact after the defendant met the initial burden of showing that plaintiff did not have a serious injury:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Ferrara	116 AD3d 408	Bronx	Barbato
Pantojas	117 AD3d 577	Bronx	Thompson
Vargas	117 AD3d 560	Bronx	Barbato
Sanchez	2014 NY Slip Op 08584	Bronx	Barbato

B) Two (2) of these were reversed because the defendant failed to meet the initial burden:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Boateng	119 AD3d 424	Bronx	Thompson
Prince	115 AD3d 424	Bronx	Barbato

Two (2) were *reversed* after the lower court *denied* defendant's motion:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Christopher*	115 AD3d 462	Bronx	Briganti-Hughes
Jones**	2014 NY Slip Op 08915	Bronx	Suarez

\*Supplemental Bill of Particulars served too late

\*\* Plaintiff failed to causally connect injury to accident

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### **First Department Decisions Affirmed (14):**

Two (2) were *affirmed* after the lower court *denied* defendant's motion. (Defendant met the initial burden but plaintiff raised a question of fact):

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
McSweeney	115 AD3d 572	New York	Silver
Vargas	2014 NY Slip Op 08561	Bronx	Guzman

Twelve (12) were *affirmed* after the lower court *granted* the defendant's motion. (Defendant met the initial burden and plaintiff failed to raise a question of fact):

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Acosta	119 AD3d 408	Bronx	Stinson
Alvarez*	120 AD3d 1043	Bronx	Stinson
Boone	120 AD3d 1143	New York	Bluth
Camillo	118 AD3d 586	Bronx	Walker
Corporan	117 AD3d 601	Bronx	Gonzalez
Farmer	117 AD3d 562	Bronx	Walker
Galarza	117 AD3d 488	Bronx	Friedlander
Henchy	115 AD3d 478	Bronx	Barbato
<u>Kendig</u>	115 AD3d 438	Bronx	Ruiz
Mena	117 AD3d 441	Bronx	Suarez
Nicholas	116 AD3d 567	Bronx	Barbato
Kester	2014 NY Slip Op 08379	New York	Bluth

\*3-2 decision being appealed to the Court of Appeals

### **First Department Decisions Modified (14):**

Thirteen (13) were *modified* after the lower court *granted* defendant's motion:

- A) Seven (7) of these were modified because the appellate court found a question of fact with respect to plaintiff's claimed injury to the lumbar spine and/or cervical spine:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Diaz	115 AD3d 448	Bronx	Suarez
Long	117 AD3d 624	New York	Bluth
Harper	115 AD3d 597	Bronx	Thompson
R. Windham	115 AD3d 597	Bronx	Thompson
Fludd	122 AD3d 436	Bronx	Barbato
Anderson	122 AD3d 484	Bronx	Barbato
Mulligan	120 AD3d 1155	Bronx	Stinson

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B) Three (3) of these were modified because the appellate court found a question of fact with respect to plaintiff's claimed knee injury:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Gomez	115 AD3d 448	Bronx	Suarez
Johnson	115 AD3d 425	Bronx	Barbato
Swift*	115 AD3d 507	Bronx	Thompson

\* Court also found question of fact regarding 90/180 claim

C) Two (2) of these were modified because the appellate court found a question of fact with respect to plaintiff's claimed shoulder injury:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Kang	116 AD3d 540	Bronx	Suarez
Sutliff	122 AD3d 452	Bronx	Barbato

D) One (1) of these was modified because the appellate court found a question of fact with respect to plaintiff's claimed 90/180 disability:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Windham II	115 AD3d 597	Bronx	Thompson

-One (1) decision was *modified* after the lower court *denied* defendant's motion:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Holmes*	2014 NY Slip Op 09035	Bronx	Suarez

\*Modified to grant dismissal of any claims under the permanent consequential serious injury category

### Second Department Decisions Reversed (47):

Forty-two (42) were *reversed* after the lower court *granted* defendant's motion:

A) Eighteen (18) of these were reversed because the defendant failed to meet the initial burden on the "90/180" category:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Cruz	121 AD3d 637	Kings	Vaughan
Doulos	116 AD3d 656	Kings	Ruchelsman
Fernandez	114 AD3d 637	Kings	Silber

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Hernandez	120 AD3d 628	Suffolk	Jones, Jr.
Johnson	115 AD3d 648	Kings	Bayne
Kacperski	121 AD3d 948	Queens	Strauss
Mamani	117 AD3d 804	Queens	Greco, Jr.
Preston	120 AD3d 647	Queens	Dufficy
Sencion	116 AD3d 1028	Queens	Weiss
Singh	117 AD3d 818	Queens	Dufficy
Smith	120 AD3d 658	Nassau	McCormack
Waxman	121 AD3d 972	Nassau	Galasso
Flowers	122 AD3d 673	Nassau	Mahon
Huang	2014 NY Slip Op 08402	Queens	Butler
Fort	2014 NY Slip Op 08628	Kings	Partnow
Carter	2014 NY Slip Op 08953	Queens	Dufficy
Luna	2014 NY Slip Op 08964	Nassau	Galasso
Rodriquez	2014 NY Slip Op 08973	Kings	Partnow

B) Seventeen (17) of these were reversed because the plaintiff raised a question of fact after defendant met the burden of showing that plaintiff did not sustain a serious injury:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Bedoya	120 AD3d 1374	Queens	Agate
Datikashvili	121 AD3d 637	Queens	Golia
Frelow	118 AD3d 745	Kings	Bayne
Giampino	118 AD3d 746	Queens	Weiss
Jean	113 AD3d 597	Kings	Schmidt
King	118 AD3d 956	Queens	Dufficy
Macchio	114 AD3d 647	Queens	Agate
Pirayatamwong	116 AD3d 686	Nassau	Phelan
Tomao	121 AD3d 882	Queens	Agate
Will	116 AD3d 696	Queens	Dufficy
Wysocka	117 AD3d 823	Queens	Siegal
Yeong Sun Koo	120 AD3d 1408	Queens	Strauss
Chae Hong Chung	120 AD3d 1408	Queens	Strauss
Ogle	122 AD3d 696	Kings	Silber
Trunzo	122 AD3d 722	Queens	McDonald
Belmont	2014 NY Slip Op 08798	Queens	Weiss
Che Hong Kim	2014 NY Slip Op 08953	Queens	Dufficy

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C) Seven (7) of these were reversed because the defendant failed to meet the initial burden:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Chang	113 AD3d 582	Queens	Weiss
Ciuffo	118 AD3d 737	Nassau	Diamond
Miller	118 AD3d 761	Richmond	Maltese
Sanclemente	116 AD3d 688	Queens	Taylor
Werthner	120 AD3d 490	Suffolk	Lasalle
Clarke	122 AD3d 662	Nassau	Palmieri
Silan	122 AD3d 713	Queens	Siegal

Five (5) were *reversed* after the lower court *denied* defendant's motion:

A) Three (3) of these were reversed because the appellate court found that the plaintiff did not raise a question of fact after the defendant met the initial burden:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Cotto	117 AD3d 769	Queens	Kitzes
Liriano	113 AD3d 599	Nassau	Bruno
Marshall	117 AD3d 805	Nassau	Brown

B) Two (2) of these were reversed because the appellate court found that the plaintiff failed to raise a question of fact in a non-conclusory manner after defendant met the initial burden:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Henry	119 AD3d 528	Kings	Schmidt
Inzalaco	115 AD3d 807	Putnam	Lubell

### **Second Department Decisions Affirmed (38):**

Fourteen (14) were *affirmed* after the lower court *granted* defendant's motion:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Alamin	113 AD3d 708	Kings	Lewis
Chang Min Li	121 AD3d 1032	Queens	Siegal
Hogue	117 AD3d 802	Queens	Strauss
Jackson	114 AD3d 728	Queens	Greco, Jr.
Livson	121 AD3d 952	Kings	Vaughan
Mohamed	116 AD3d 678	Nassau	Feinman

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Moon	121 AD3d 678	Nassau	Brown
Persaud	117 AD3d 927	Queens	Grays
Persaud (II)	“	“	“
Narain	“	“	“
Reyes	121 AD3d 664	Orange	Bartlett
Flores	122 AD3d 671	Queens	Taylor
Syllas	2014 NY Slip Op 08419	Kings	Partnow
Hernandez	2014 NY Slip Op 08810	Queens	Siegal

Twenty-four (24) were *affirmed* after the lower court *denied* defendant’s motion:

- A) Twelve (12) of these were affirmed wherein plaintiff raised a question of fact after defendant met the initial burden:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Abreu	117 AD3d 972	Kings	Ash
Perez	“	“	“
Burgett	114 AD3d 822	Suffolk	Jones, Jr.
Felix	117 AD3d 780	Nassau	Reilly
Himmelberger	117 AD3d 801	Kings	Partnow
Master	122 AD3d 589	Kings	Solomon
Culpepper	118 AD3d 738	Kings	Partnow
Romero	113 AD3d 746	Kings	Lewis
Bracco	2014 NY Slip Op 08594	Kings	Partnow
Ford	2014 NY Slip Op 08600	Kings	Graham
Berger	2014 NY Slip Op 09093	Suffolk	Garguilo
Wilcoxon*	122 AD3d 727	Westchester	Giacomo

\*Conflicting experts raised question of fact

- B) Seven (7) of these were affirmed wherein the defendant failed to meet the initial burden:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Assemi	120 AD3d 1365	Nassau	Cozzens, Jr.
Berisha	116 AD3d 891	Queens	Butler
Felicciardi	122 AD3d 668	Suffolk	Baisley, Jr.
Meskovic	116 AD3d 1012	Richmond	Minardo
Natal	118 AD3d 762	Kings	Ruchelsman
Villa	119 AD3d 552	Orange	Slobod
Yunayeva	113 AD3d 607	Kings	Martin

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C) Five (5) of these were affirmed wherein the defendant failed to meet the initial burden on only the 90/180 category:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Christie	113 AD3d 585	Nassau	Bruno
Ponce	115 AD3d 729	Queens	Nelson
Sablo	115 AD3d 731	Queens	Taylor
Sicca	121 AD3d 666	Kings	Schmidt
Williams	115 AD2d 740	Rockland	Walsh

### **Second Department Decisions Modified (1):**

One (1) was *modified* after the lower court *granted* defendant's motion. (Appellate court found that defendant did not meet the burden to dismiss plaintiff's 90/180 claim):

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Dowling	119 AD3d 834	Suffolk	Whelan

### **Third Department Decisions Reversed (1):**

One (1) was *reversed* after the lower court *granted* defendant's motion. Appellate court found that defendant did not meet the burden to dismiss plaintiff's 90/180 claim:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Poole	121 AD3d 1224	Court of Claims-Albany	McCarthy

### **Third Department Decisions Affirmed (1):**

One (1) was *affirmed* after the lower court *granted* defendant's motion. (Appellate court found that plaintiff did not raise a question fact):

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Dudley	121 AD3d 1461	Schenectady	Reilly, Jr.

### **Third Department Decisions Modified (3):**

Two (2) were *modified* after the lower court *granted* defendant's motion:

A) One (1) of these was modified because the appellate court found a question of fact with respect to plaintiff's claimed shoulder injury:



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<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Vandetta	121 AD3d 1328	Saratoga	Ferrandino

B) The other one (1) was modified because the appellate court found that defendant failed to meet the initial burden on the 90/180 claim:

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Shelly	121 AD3d 1243	Ulster	Zwack

One (1) was *modified* after the lower court *denied* defendant's motion. (Appellate court found that defendant was entitled to dismissal of two serious injury categories: 90/180 and permanent loss of use):

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Raucci	119 AD3d 1044	Schenectady	Kramer

### **Fourth Department Decisions Reversed (6):**

One (1) of these was *reversed* after the lower court *granted* defendant's motion. (Appellate court found that defendant failed to meet the initial burden):

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Clark	113 AD3d 1076	Erie	Walker

Five (5) of these were *reversed* after the lower court *denied* defendant's motion. (Appellate court found that the plaintiff failed to raise a question of fact after defendant met the initial burden):

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Applebee	118 AD3d 1279	Onondaga	Karalunas
Downie*	117 AD3d 1401	Niagara	Panepinto
Fanti**	115 AD3d 1341	Erie	Glownia
Fisher*	114 AD3d 1193	Wyoming	Dadd
Heather	115 AD3d 1325	Erie	Drury

\*4-1 decision-dissent by Judge Whelan

\*\*Case involved two accidents occurring within 5 months

### **Fourth Department Decisions Affirmed (4):**

One (1) of these was *affirmed* after the lower court *denied plaintiff's* motion for a finding that he met the 90/180 serious injury category:

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<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Hill	117 AD3d 1423	Cattaraugus	Nenno

One (1) of these was *affirmed* after the lower court *denied* defendant's motion. (Appellate court found that defendant failed to meet the initial burden):

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Thomas	115 AD3d 1225	Erie	Curran

Two (2) of these were *affirmed* after the lower court *granted* defendant's motion. (Appellate court found that plaintiff failed to raise a question fact):

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
French*	118 AD3d 1251	Onondaga	DeJoseph
Griffo	118 AD3d 1421	Erie	Drury

\*4-1 decision-dissent by Judge Whelan

### **Fourth Department Decisions Modified (1):**

One (1) decision was *modified* after the lower court *granted* defendant's motion. (Appellate court dismissed plaintiff's claim that he sustained a "permanent consequential limitation" of use injury, otherwise plaintiff raised a question of fact):

<u>Case Name</u>	<u>Citation</u>	<u>Supreme Court County</u>	<u>Supreme Court Judge</u>
Gates	120 AD3d 980	Onondaga	DeJoseph

### **SUMMARY**

Statewide in 2014 the plaintiff was successful on 68% of the appeals filed (94 of 138) seeking review of lower court decisions on serious injury threshold motions.

In the First Department plaintiffs prevailed 58% of the time (21 of 36). In the Second Department plaintiffs won 78% of the appeals filed (67 of 86). In the very few Third Department appeals that were heard plaintiff was successful 80% of the time (4 of 5) while in the Fourth Department (also a relatively

small number) the plaintiff was only successful on 27% of the appeals filed (3 of 11).

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