DEFENSE PRACTICE UPDATE

MARTIN CLEARWATER & BELL LLP

SUMMER 2021

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Recent Developments Regarding the New York Medical Indemnity Fund:

The Supreme Court finds that an infant whose neurological injury allegedly was caused by malpractice during the delivery admission, but which did not fully manifest itself until after the discharge, still suffered a "birth-related neurological injury"

By: Barbara D. Goldberg and Gregory A. Cascino

Recently, in a case handled by this Firm, the New York County Supreme Court held that an infant whose injury fully manifested itself after his discharge from his delivery admission, but which allegedly was traceable to malpractice occurring during the delivery admission, qualified for enrollment into the New York Medical Indemnity Fund ("MIF") See PHL § 2999-h.

The infant was born at 41 weeks at our client's hospital, and after a brief intubation he was transferred to the newborn nursery. During the approximately 3-day delivery admission, the infant was both breastfed repeatedly and received supplemental formula, and also voided and passed stools. The infant's ability to latch was repeatedly evaluated, and the mother was referred to a lactation consultant where she was educated regarding signs of adequate feeding, as well as the frequency and amounts of formula feeds. On the morning of discharge the parents were instructed to follow up with a pediatrician in 2-3 days. They also received instructions to contact their pediatrician if the infant had fewer than 6 wet diapers within a 24-hour period, was feeding less than 8 times a day, and had fewer than 3 bowel movements a day.

The mother did not breastfeed the infant until 4 hours after discharge, and this only lasted 15 minutes. The mother also claimed that she repeatedly tried to breastfeed throughout the first night home, however he would not latch. The next morning the parents offered the infant formula and took him to the pediatrician, who diagnosed him with severe dehydration and sent him to the emergency room at a different hospital. The infant remained in the hospital for 7 days where he had seizures and brain swelling, and allegedly suffered cytotoxic brain damage as a result of the dehydration.

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RECENT DEVELOPMENTS REGARDING THE NEW YORK MEDICAL INDEMNITY FUND

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Following discovery, this Firm moved for summary judgment and dismissal of plaintiffs' malpractice claims against the hospital. In opposition, plaintiffs submitted affidavits from a physician and a nurse who opined, among other things, that the hospital staff violated accepted guidelines by grossly underfeeding the infant during his admission, and should have addressed his reduced voids and stools. Plaintiffs' expert physician also opined that hospital staff failed to appreciate or react to the infant's dry lips, which she claimed were visible in the parent's discharge photograph, and which she opined were indicative of a "fluid issue." The Supreme Court found that the opinions of plaintiffs' experts were sufficient to raise an issue of fact as to whether the hospital departed from the applicable standards of nursing and lactation care.

This Firm subsequently moved to have the Supreme Court hold, as a matter of law, that the infant is a "qualified plaintiff" who sustained a "birth related neurological injury" pursuant to New York Public Health Law § 2999-h(1) and (4). Therefore, we contended, the infant must be enrolled in the MIF in the event of a settlement or jury determination of liability.

In support, we pointed to plaintiffs' experts' claims in opposition to the summary judgement motion that the infant suffered an injury during the birth admission because hospital employees failed to properly feed, hydrate and evaluate him, and that his dehydration progressed to severe hypoglycemia and cytotoxic brain damage less than 24 hours after discharge. We also highlighted plaintiffs' physician's opinion regarding the infant's dry lips allegedly visible in the discharge photographs. Therefore, since plaintiffs allege that the infant was dehydrated and suffering from intake insufficiency prior to discharge, he allegedly suffered from a "birth related neurological injury" and must enrolled in the MIF. Plaintiffs vigorously opposed the motion, arguing that the infant was not a "qualified plaintiff" because the injury did not occur during the "delivery admission," but rather occurred after discharge.

This case clearly demonstrates that enrollment in the MIF is not limited just to infants who suffer neurological injuries as the result of obstetrical mishaps, which is what the MIF is most often associated with.

The Supreme Court agreed with our position, and held that in light of the opinions of plaintiffs' experts that the hospital failed to properly care for the infant and recognize and treat him for signs of dehydration prior to discharge, the infant allegedly was in some state of dehydration while still at the hospital. It also found that plaintiffs' argument that the infant suffered his brain injury after discharge was unavailing, since the brain injury as alleged by plaintiff was caused by and cannot be separated from the dehydration he allegedly suffered while admitted to the hospital. Accordingly, since the infant was allegedly somewhat dehydrated while he was admitted to the hospital for the purposes of delivery, he suffered a "birth-related neurological injury" and is therefore a qualified plaintiff" under Public Health Law § 2999-h and should be enrolled in the MIF.

This case clearly demonstrates that enrollment in the MIF is not limited just to infants who suffer neurological injuries as the result of obstetrical mishaps, which is what the MIF is most often associated with. Moreover, enrollment does not require that the alleged neurological injury be apparent, fully or even partially, prior to discharge. Thus, whenever a plaintiff is alleging that any malpractice occurred during the birth admission, and seeks to causally connect the infant's neurological injury to this alleged malpractice, health care providers should consider seeking to enroll the infant in the MIF, either voluntarily or involuntarily, as a way to limit their exposure. ■

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Discussing Fertility When Formulating Treatment Plans for Pediatric Cancer Patients

By: Aryeh S. Klonsky and Alexandra M. Lopes

A multitude of thoughts race through a parent's mind when their child receives a cancer diagnosis. Obviously, the greatest focus on parents and medical providers alike is to find the best suitable treatment plan for each pediatric patient. However, one topic that may not initially come to mind when formulating the best treatment plan for pediatric patients is the effects that certain cancer treatments may have on the child's fertility.

As expected, surgical removal of reproductive organs such as oophorectomy and orchiectomy can negatively affect a pediatric patient's future fertility options. In more recent years, physicians have preferred using minimal surgical techniques to spare fertility and reproductive organs. Accordingly, medical professionals have increasingly turned to using an increased combination of targeted surgical options with chemotherapy and radiation treatment to treat cancers while preserving reproductive organs. However, this increasingly favored technique continues to pose risks to the fertility of pediatric patients. For example, some chemotherapy medications, particularly those with alkylating agents can cause long term damage to male and female reproductive organs in pediatric patients. Such medications include cyclophosphamide (Cytoxan), lomustine (Gleostine), ifosfamide (Ifex), procarbazine (Matulane), busulfan (Busulfex, Myleran), and melphalan (Alkeran)[1]. In addition, other chemotherapy medications such as methotrexate and vincristine may affect a female pediatric patient's menstruation. Moreover, radiation therapy to any part of the body, but particularly to the pelvis, spine, and abdomen in females and the pelvis and gonads in males, increases the likelihood of damage to the patient's reproductive organs.[2]

Other factors such as the patient's age, the type of cancer, gender, and genetic factors also affect the patient's fertility. While it is difficult to predict whether a cancer treatment plan will affect a patient's long-term fertility, it is important for physicians to consider fertility preservation measures whenever a significant risk to irreversible infertility is suspected.

Oocyte (egg) freezing and sperm banking have become increasingly common in both cancer patients and noncancerous patients in recent years. These continue to remain options for pediatric cancer patients who have started puberty. However, egg freezing and sperm banking are not available to those pediatric cancer patients who have not yet gone through puberty. Additionally, the process of freezing an unfertilized egg requires two weeks of fertility drug treatment prior to harvesting. Unfortunately, some patients cannot afford to wait two to three weeks to begin cancer treatment. Accordingly, other fertility preservation measures beyond egg freezing and sperm banking should be considered in situations of aggressive cancers and pre-pubescent cancer patients.

However, one topic that may not initially come to mind when formulating the best treatment plan for pediatric patients is the effects that certain cancer treatments may have on the child's fertility.

Although the options for fertility preservation are extremely limited for pre-pubescent cancer patients and those with aggressive cancers, ovarian tissue freezing and testicular tissue freezing are possible options. In female patients, ovarian tissue is extracted during an outpatient procedure. The patient is then able to have the frozen and stored tissue thawed and re-implanted in the future. As for male patients, testicular tissue is extracted. The sperm stem cells contained within the extracted specimen are then used to grow mature sperm in the future. It is important to note that while ovarian tissue and testicular tissue freezing may be instrumental in preserving fertility in pre-pubescent cancer patients, clinical trials are ongoing. As such ovarian and testicular tissue freezing is considered experimental at this time.[3]

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1. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4729296/.
2. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4729296/.
3. https://clinicaltrials.gov/ct2/show/NCT03674164; https://clinicaltrials.gov/ct2/show/NCT02972801.

DISCUSSING FERTILITY WHEN FORMULATING TREATMENT PLANS...

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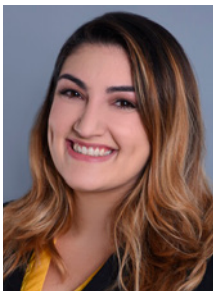
Medical providers should consider communicating with the parents and guardians of minor cancer patients about the risks of the various cancer treatment options to the patient's fertility, and the risks of each of the fertility preservation options. For example, egg freezing, ovarian tissue freezing and testicular tissue freezing requires surgical intervention. Also, depending on the type of cancer at issue, it is important to consider whether ovarian tissue, which will later be replanted into the patient, will potentially result in the placement of cancerous cells back into the patient's body. Accordingly, the risks of each respective surgery should be discussed with the patient's parent(s) or guardian(s). In addition, while these measures will help to increase the likelihood of preserving a pediatric cancer patient's fertility, it is important to explain to the patient and his or her family that these potentially invasive measures will not guarantee the patient's fertility. In that regard, it may be beneficial to refer a patient to a fertility specialist to further assist the patient and his or her family decide if and which fertility preservation method would be most appropriate given the patient's particular set of circumstances. Moreover, the financial implications should be considered by the patient and his or her family.

As part of the consent conversation, medical providers should assess the age and understanding of the pediatric patient of his or her own fertility. If a patient is under 18, but understands the potential fertility implications from the cancer treatment plan and fertility preservation options, it is important that the minor patient, in addition to his or her parents, is agreeable to the treatment and preservation plan.

Medical providers should be reminded that the treatment of cancer patients, especially pediatric cancer patients, is emotional for the families involved. Moreover, fertility tends to be a sensitive topic on its own. Combining the two heightens the potential impassioned responses when a negative outcome results. Furthermore, it is difficult to anticipate how a patient may feel with regard to fertility preservation measures he or she received as a child once he or she reaches adulthood. Accordingly, medical providers should be cognizant of the potential legal concerns when managing patient expectations in this context. This is especially true in New York where the time for a pediatric patient to bring a malpractice lawsuit does not start to run until the patient turns 18 years of age[1], which can be years after the formulation of the treatment plan. Therefore, medical providers should consider including contemporaneous documentation in the medical record that memorializes the informed consent discussions. The documentation should incorporate the patient's (when applicable) and guardian's acknowledgement of the risks, benefits and alternatives of the treatment plan, and the risks, benefits, and alternatives of the applicable fertility preservation measures. Ideally, the documentation should be individualized to the specific treatment options discussed and address the specific risks posed to the patient.

In sum, when treating pediatric cancer patients, in addition to advising patients of the available cancer treatment options, medical providers should also discuss the impact such treatment might have on the patient's fertility. Appropriate documentation of the informed consent discussion addressing the patient's options to preserve fertility, as well as the implications of each preservation option, are paramount in shielding the treating physician in a potential lawsuit in the future. ■

Aryeh S. Klonsky is a Partner at Martin Clearwater & Bell LLP. He has over 10 years of litigation defense experience, and focuses his practice on the defense of medical malpractice and professional liability matters.



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1. But not more than ten years from the date of the malpractice or last date of treatment if there is a continuous course of treatment, whichever occurs first.

Legislative Alert: An Unfortunate Step Backward

By: Thomas A. Mobilia and Barbara D. Goldberg

In April 2020, as COVID-19 infections and deaths were surging exponentially, the New York Legislature enacted the Emergency or Disaster Treatment Protection Act (EDTPA). This was accomplished by adding a new Article 30-D to the New York Public Health Law. That legislation conferred broad immunity on health care facilities and health care workers treating, or arranging for treatment of COVID-19 patients, as well as "the care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration."

Harm or damages resulting from "willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm" were excluded; however, health care providers were otherwise shielded from "any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services" in response to the COVID-19 emergency, provided certain specified conditions were met.

Almost from its inception, the legislation came under attack by various interest groups that challenged the protections it afforded to nursing homes and other long term care facilities. In August 2020, the first "unfortunate step backward" was taken when the EDTPA was amended to remove the "prevention" of COVID-19 from the definition of health care services. In addition, care and treatment of patients not suffering from COVID-19 were eliminated from the definition of "health care services" covered by the EDTPA.

On April 6, 2021, Governor Andrew M. Cuomo signed into law Assembly Bill A03397, which repeals the EDTPA in its entirety.

The Sponsor's Memo for the bill that resulted in the amendment described it as an attempt "to move forward from the uncertainty that faced the state from the impact of COVID-19 in late March," and declared that the amendment was "only a first step, however, and we must take further action to hold to account any malfeasance that occurred during the height of the COVID-19 crisis."

Unfortunately, that "further action" – an even more "unfortunate step backward" – has now been taken. On April 6, 2021, Governor Andrew M. Cuomo signed into law Assembly Bill A03397, which repeals the EDTPA in its entirety. The Bill merely states tersely that "Article 30-d of the "public health law is REPEALED," and that "[t]his act shall take effect immediately."

As a result, health care providers who responded to the pandemic emergency, including those who rendered treatment under exigent circumstances or were called upon to treat patients outside their areas of specialization as a result of staffing shortages caused by COVID-19, will now potentially face civil and even criminal liability for treatment decisions during the pandemic. This would appear to be directly at odds with the original intent of the EDTPA to provide a measure of protection to "front line" healthcare workers, who in many instances literally placed their own lives at risk treating patients during the early months of the pandemic.

Given the repeal of the EDTPA, the provisions of the Federal Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C.A. § 247d-6d, will assume added importance to providers named as defendants in COVID-related litigation. The PREP Act been interpreted as affording very broad protections to "covered persons" providing "covered countermeasures" in response to a public health emergency. ■

Legislative Alert is published by the Appellate Practice Group of Martin Clearwater & Bell LLP to inform clients about significant legal developments. This publication is intended for general information only and should not be used for specific action without obtaining legal advice.

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MCB CASE RESULTS

Appellate Division Affirms Grant of Summary Judgment Dismissing Plaintiff's Labor Law Claims

Senior Partner Michael A. Sonkin and Partners Barbara D. Goldberg and Matthew M. Frank obtained an affirmance of a grant of summary judgment from the Appellate Division, Second Department, dismissing plaintiff's Labor Law §240 and §241 claims where the plaintiff, a boiler mechanic, claims to have fallen from a ladder while inspecting a boiler. Both the Appellate Division and the underlying trial court agreed with our argument that the particular activity plaintiff was engaged in at the time of his alleged injury constituted "routine maintenance" and therefore did not fall into one of the enumerated protected categories for liability under the Labor Law.

Dismissal in Case Involving Anoxic Brain Injury

Senior Partner Peter T. Crean and Of Counsel Maureen P. Blazowski obtained a dismissal of a case involving a brain injury as a complication of a cardiology procedure on behalf of our client hospital and cardiothoracic surgeons.

In this matter, the plaintiff, a 78-year-old male, underwent Automatic Implantable Cardioverter Defibrillator (AICD) extraction by defendant doctor at our client hospital. The patient sustained a perforation of the right ventricular apex as a complication of the procedure. The responding surgeon presented to the operating room to assist the operative surgeon in managing the complication. The patient sustained anoxic brain injury and died approximately one month later.

MCB moved for summary judgment at the completion of discovery, arguing that the decedent was fully apprised of the risks, complications and alternatives of the procedure, including the risk of cardiac perforation, and consented to proceed with surgery after being so informed.

Plaintiff's counsel moved to be relieved immediately upon service of the motions, which was granted. The Pro Se plaintiff failed to retain new counsel and/or an expert despite ample time to do so. Judge O'Donoghue correspondingly dismissed the case pursuant to 22 NYCRR 202.27(b).

Summary Judgement Win on Behalf of Radiologist Clients in Medical Malpractice Action

Senior Partner Anthony M. Sola and Of Counsel Anthony M. Chionchio obtained a summary judgment dismissal on behalf of our client radiologists and radiology practice group in Supreme Court, Queens County.

In this matter, plaintiff alleged that defendants failed to timely diagnose and treat lower extremity osteomyelitis in the infant-plaintiff resulting in the need for intravenous antibiotics and surgical debridement. MCB submitted the affirmation of an expert, Board Certified in Radiology, who opined that our client radiologist appropriately interpreted the lower extremity x-rays, suspected osteomyelitis and recommended subsequent MRI imaging to confirm the diagnosis. The infant-plaintiff underwent the MRI study at an outside facility shortly thereafter. The infant-plaintiff ultimately returned to the hospital thereafter and underwent a CT scan of the lower extremity which we argued was correctly interpreted by our client defendant-radiologist, as demonstrating evidence of osteomyelitis for which the patient was placed on intravenous antibiotics.

The Court found that we made a prima facie showing of entitlement to summary judgment. Plaintiff's counsel opted against opposing our application. Accordingly, Justice O'Donoghue granted MCB's motion in its entirety and dismissed the action as against our clients.

Summary Judgment Win in Action Involving Allegation of Failure to Diagnose Breast Cancer

Senior Partner William P. Brady and Partner Gregory J. Radomisli obtained a summary judgment dismissal on behalf of our clients, a leading New York Hospital and its staff, in Supreme Court, New York County.

Plaintiff, a then 32-year-old female, alleged that she should have undergone, inter alia, an ultrasound and mammography to diagnose breast cancer when she presented to the emergency department of a leading New York emergency room with the chief complaint of a lump in her left breast for six months. The hospital staff informed the plaintiff that she required an outpatient ultrasound and mammogram and instructed her to follow up with an outside Breast Clinic. The plaintiff delayed seeking outside care, and eventually was diagnosed with breast cancer a year later. However, after having been diagnosed with breast cancer, she further delayed seeking treatment for another 18 months.

MCB submitted the expert affirmations of two experts, one of whom was Board Certified in emergency medicine, who opined that the standard of care for the Hospital and its staff was simply the referral to the Breast Clinic. MCB's other expert, Board Certified in oncology, opined that the plaintiff's treatment at the time it was diagnosed would have been the same if it been diagnosed six months earlier.

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CASE RESULTS

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Immediately following oral argument, Justice Eileen Rakower ruled in favor of all of the defendants in this matter. She granted summary judgment and dismissed the case in regard to all of our own defendants, as well as the two co-defendants, the attending physician and the physicians' assistant who also treated the plaintiff. This was important as due to the nature of this alleged malpractice having occurred in an emergency department, the Hospital could have been held to be vicariously liable for these co-defendants under Mduba.

Summary Judgment Win in Postoperative Stroke Case

Senior Partner Peter T. Crean, Partner Emma B. Glazer and Associate Alexander C. Cooper, successfully obtained dismissal of all claims against our client Hospital and individually named doctor in a Bronx County action.

The case involved a man, who underwent a partial right nephrectomy for a renal mass and on postoperative day two, he sustained mild left-sided weakness. Notably, plaintiff did not report his symptoms to the defendants for approximately eight hours because he "did not want to bother anyone." The stroke team was called, but plaintiff was not eligible for stroke treatment because he was within 48 hours of major surgery. Plaintiff claimed that the defendants failed to timely diagnose stroke.

Defendants moved for summary judgment and annexed Expert Affirmations from a neurologist and urologist. Both experts opined that the standard of care was met and the delay in diagnosis of stroke was due to plaintiff's own failure to report his symptoms. Moreover, even if he did report the symptoms immediately, he was not eligible for treatment because of the temporal proximity to surgery.

After review of opposition and oral argument, the Court held that plaintiff's neurology expert did not have adequate qualifications to opine on our urologist's treatment and had failed to address the fact that the patient was never eligible for stroke treatment. Because plaintiff failed to raise a triable issue of fact, the Court dismissed the case in its entirety.

Dismissal on Behalf of Client Oncologist: The Little Things Make A Big Difference

Senior Partner Michael A. Sonkin, Partner Gregory J. Radomisli, and Associate Jacob H. Lisogorsky obtained a dismissal in Supreme Court, Kings County. The matter involves allegations that our client negligently failed to diagnose and treat the decedent, resulting in the development of Stevens-Johnson syndrome. On September 3, 2016, the decedent succumbed to her untreatable Stage IV breast cancer.

On July 8, 2019, plaintiff served a Summons with Notice and MCB timely filed a Notice of Appearance and served a Demand for a Complaint. After plaintiff's application for an extension of time to serve a Complaint was granted, plaintiff had until September 23, 2019 to serve a Complaint, but failed to do so. Subsequently, we moved to dismiss this action pursuant to CPLR 3012(b).

Plaintiff opposed our motion, and cross-moved for relief and/or default judgment and, claimed, he had an extension of time to respond to our Demand due to the Governor's Executive Orders related to COVID-19.

The Court granted our motion, and dismissed this case and held that although plaintiff established a reasonable excuse for the delay in serving a Complaint, plaintiff did not submit an affidavit by a medical expert attesting to the potential merit of this action.

Summary Judgment Win on Behalf of a Leading Otolaryngologist in a Medical Malpractice Action

Senior Partner Jeff Lawton and Associate Brian Kim obtained a discontinuance on behalf of an otolaryngologist in New York County Supreme Court after her summary judgment motion went unopposed by the plaintiff. Plaintiff's counsel has continued the action against the co-defendants, an anesthesiologist and a leading New York hospital, where the surgery at issue was performed.

Plaintiff alleged that she was malpositioned during ambulatory nasal surgery which resulted in a torn rotator cuff of her right shoulder. MCB submitted the affirmation of an expert, board certified in otolaryngology, to opine that our defendant who performed nasal surgery was not involved with positioning the plaintiff and thus would not be responsible for any alleged injury to the patient's shoulder. MCB also submitted an affirmation from our own defendant doctor that she herself was not involved in touching any part of the plaintiff other than her head and/or nasal cavity during the nasal surgery.

After not opposing our motion and much back and forth, plaintiff's counsel finally relented and signed a Stipulation of Discontinuance as to our client.

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CASE RESULTS

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Appellate Division Upholds Summary Judgment for Hospital Otolaryngologist and Anesthesiologist

Senior Partner Michael A. Sonkin and Partner Barbara D. Goldberg obtained the affirmance of a summary judgment dismissal on behalf of our clients, a prestigious New York hospital and its attendings, an otolaryngologist and an anesthesiologist. The dismissal, which was ordered by the Supreme Court, Bronx County, was affirmed on appeal by the Appellate Division, First Department.

Plaintiff, then 80 years old, alleged that following the insertion and stabilization of a laryngoscope, in connection with a biopsy of a suspicious mass on her vocal cords, she sustained multiple fractured teeth and a jaw fracture. The plaintiff moved for partial summary judgment under the doctrine of res ipsa loquitur, arguing that her injuries could not have occurred in the absence of negligence, while we moved for summary judgment and opposed plaintiff's motion using affirmations from three experts, who were board certified in otolaryngology, anesthesiology and oral surgery. These experts established that the injury which occurred, while extremely rare, was a recognized and accepted risk of the procedure which could occur in the absence of a departure from accepted practice. Justice George Silver found that the plaintiff's failure to submit an expert affidavit in support of her res ipsa loquitur theory was in and of itself fatal to her position, given the medical complexities of the case. Justice Silver essentially adopted our argument that due to the complex medical procedure used, and the subsequent injuries sustained, the opinion of an expert was required, and not an affidavit from the plaintiff's attorney, to opine that the plaintiff's injury could not have been sustained absent negligence. The Appellate Division, First Department, upheld Justice Silver's ruling, finding that the plaintiff failed to adduce sufficient evidence in opposition, in that submitting an attorney affidavit, and not one from an expert, was insufficient to rebut defendants' experts. As a result, the dismissal of the action as to all of our clients was upheld.

MCB Wins Summary Judgment Motion in High Exposure Cervical Cancer Case

Senior Partner Michael A. Sonkin and Partner Samantha E. Shaw obtained a successful dismissal of a high exposure cervical cancer case on summary judgment. The case, venued in New York County, involved a patient who underwent a radical hysterectomy following a diagnosis of cervical cancer. Clear margins were confirmed post-operatively, but the patient suffered a recurrence and ultimately expired. However, the plaintiff, a pro se physician and husband of the deceased, alleged a failure to excise the entire cancerous tumor due to improper placement of clamps, failure to confirm an adequate amount of tissue was submitted to pathology, failure to properly interpret the pathology and failure to recommend adjuvant therapy.

We moved for summary judgment on behalf of the physician and hospital defendants. Following oral argument, the Judge issued a favorable defense decision holding that defendants met its prima facie burden demonstrating entitlement to summary judgment and that plaintiff failed to put forth expert opinions to combat the opinions of the defendants' experts.

Motion for Summary Judgment Results in Stipulation of Discontinuance Against GYN Oncologist in Action Involving Alleged Failure to Diagnose Recurrence of Ovarian Cancer

Senior Partner Jeff Lawton, Of Counsel Michael Clarke, and Associate Evan Schnittman obtained a successful discontinuance of an ovarian cancer case venued in Supreme Court, Monroe County. Plaintiff alleged that defendants failed to timely and properly diagnose a recurrence of ovarian cancer in a then 40-year-old female patient resulting in her wrongful death. Plaintiff specifically alleged that our gyn oncologist client failed to order periodic CT scans or MRIs, a referral to an oncologist, and repeat follow up appointments after removing a borderline non-invasive mucinous tumor in the right ovary.

In moving for summary judgment, we submitted an expert affidavit of a gyn oncologist who opined that the standard of care did not require periodic CT scans or MRIs because non-invasive mucinous cancers have a 95% survival rate or a referral to an oncologist because mucinous cancers are resistant to chemotherapy. Our expert further opined that repeat follow up appointments with our client were not necessary because our client referred the decedent to the co-defendant ob/gyn for follow up care. Plaintiff's counsel did not oppose our motion and agreed to a stipulation of discontinuance against our clients, which was executed by all parties. The case continues against the co-defendant ob/gyn. ■

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What's New at MCB?

EMMA B. GLAZER

New Partner Announcement!

Martin Clearwater & Bell LLP is very pleased to announce that Emma B. Glazer has joined our team of experienced partners effective April 1, 2021. Emma, a talented attorney, has demonstrated outstanding legal skills and dedication to our clients. We look forward to Emma's contribution to MCB's success going forward and we congratulate her on this well-deserved professional achievement.

MCB Sponsors AHRMNY's 2021 Virtual Educational Conference

MCB proudly sponsored AHRMNY's 2021 Virtual Educational Conference on June 4th 2021, where attendees listened to timely topics from experts in the insurance, risk management, legal, and healthcare fields.

MCB Presents with Medisys Health Network, Jamaica Hospital, and Flushing Hospital Medical Center

On Tuesday, June 22nd, MCB attorneys Ellen Rosenthal, Kenneth Larywon, Thomas A. Mobilia and Gregory Cascino joined panelists from Medisys Health Network, Jamaica Hospital and Flushing Hospital Medical Center for a presentation entitled *Grand Rounds-Information Blocking/Medical Records & Harm Exceptions*.

Fordham Law Scholarship Fund

In Memory of Francis P. Bensel

FRANCIS P. BENSEL

It is with great sadness that Martin Clearwater & Bell LLP (MCB) mourns the passing of Francis (Frank) Bensel on June 8, 2021, at the age of 87. Frank received his law degree from Fordham Law School (1958), and was a very proud alumnus.

The Firm offers its deepest condolences to Frank's wife, Sally, his children, Caitlin Brown, Anne Bensel, Frank Bensel, MaryJo Demetriades, Diane Bensel and Michael Bensel, his 8 grandchildren and all those who knew and loved him. He will be greatly missed.

In Memory of Frank, this fund has been established in his name:

http://law.fordham.edu/francisbensel

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