Defense Practice
UPDATE

MARTIN CLEARWATER & BELL LLP

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Update On Covid-19 Immunity:

Fourth Department Holds that Repeal of the EDTPA was Not Retroactive

BY: GREGORY A. CASCINO, ESQ. AND EVAN R. SCHNITTMAN, ESQ.

In the recently decided case of *Ruth v. Elderwood At Amherst*, the Fourth Department held that the New York State Legislature's repeal of the Emergency or Disaster Treatment Protection Act ("EDTPA") did not apply retroactively.[1] On April 3, 2020, the Legislature enacted the EDTPA, which granted statutory immunity from any civil liability for any harm or damages arising out of the negligent provision of medical services if the facility's or provider's treatment of the individual was impacted by COVID-19 from March 7, 2020 to August 3, 2020.[2] On August 3, 2020, the Legislature narrowed the scope of the EDTPA to eliminate the civil immunity conferred to health care providers and facilities for the treatment of non COVID-19 patients.[3] On April 6, 2021, the EDTPA was repealed, ending the immunity for health care providers and facilities for treatment of COVID-19 patients.[4] The repeal legislation contained no express indication of any retroactive intent. Rather, the statute provided that the repeal "shall take effect immediately." [5]

THE REPEAL LEGISLATION CONTAINED NO EXPRESS INDICATION OF ANY RETROACTIVE INTENT. RATHER, THE STATUTE PROVIDED THAT THE REPEAL "SHALL TAKE EFFECT IMMEDIATELY."

In *Ruth*, the plaintiff alleged that the staff at the defendant nursing home Elderwood At Amherst failed to timely diagnose and treat a patient's COVID-19 infection, which developed on or about March 26, 2020. Plaintiff further alleged that the staff at a different defendant nursing home, Elderwood At Williamsville, failed to timely diagnose and treat said patient's stroke on April 13, 2020. As a result, the patient died on April 15, 2020. Plaintiff asserted causes of actions for negligence, violations of New York Public Health Law §§ 2801-d and

1. 2022 NY Slip OP 05637 (4th Dep't 2022).
2. New York Public Health Law former §§ 3080-3082.
3. L 2020, Ch 134, §§ 1-2.
4. L 2021, Ch 96, §§ 1-2.
5. L 2021, Ch 96, §§ 1-2.

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2803-c, deprivation of dignity, medical malpractice, and wrongful death.

On May 6, 2021, after the repeal of the EDTPA, defendants moved to dismiss the complaint on the grounds that plaintiff's claims were barred by the EDTPA's statutory immunity for civil liability. In opposition, plaintiff argued that the repeal of the EDTPA should be given retroactive effect because it was a remedial legislative act passed shortly after the EDTPA was enacted and the repeal was done to hold health care facilities and providers accountable for damages incurred during the COVID-19 pandemic. By Order dated June 29, 2021, Justice Mark Grisanti of the Supreme Court, Erie County granted defendants' motion to dismiss.[6]

Plaintiff appealed, and on October 7, 2022, the Fourth Department unanimously affirmed, holding that the repeal of the EDTPA did not apply retroactively.[7] In reaching its decision, the Fourth Department conducted a retroactivity analysis reasoning that a presumption against retroactivity is triggered when legislation applied to past conduct would impact substantive rights by increasing a party's liability for past conduct or imposing new duties on transactions already completed.[8] According to the Fourth Department, basic considerations of fairness militate against a finding that legislation is retroactive once the presumption against retroactivity is triggered.[9] Thus, a statute should only be applied retroactively in face of clear legislative intent. [10]

THE FOURTH DEPARTMENT EXAMINED THE TEXT OF THE REPEAL LEGISLATION AND DETERMINED THAT IT DID NOT CONTAIN ANY STATED INTENT FOR RETROACTIVE APPLICATION. THE FOURTH DEPARTMENT CONTRASTED THE REPEAL LEGISLATION WITH THE LEGISLATION ENACTING THE EDTPA, WHICH EXPRESSLY REQUIRED RETROACTIVE APPLICATION.

In *Ruth*, the Fourth Department held that applying the repeal of the EDTPA retroactively would expand the scope of the defendants' liability based on conduct that was immune prior to its repeal and would impact defendants' substantive rights by imposing new duties on transactions already completed. The Fourth Department examined the text of the repeal legislation and determined that it did not contain any stated intent for retroactive application. The Fourth Department contrasted the repeal legislation with the legislation enacting the EDTPA, which expressly required retroactive application.

The Court also rejected the plaintiff's arguments that the legislative sponsor's memoranda and floor debates supported finding that the repeal of the EDTPA should be given retroactive effect. According to the sponsoring memoranda the purpose of repealing the EDTPA was to hold health care facilities and providers responsible for harm and damages "incurred" during the COVID-19 pandemic and to stop future preventable deaths. The Fourth Department held that the past-tense language "incurred" was ambiguous because the legislation repealing the EDTPA was not associated with a time period. The Fourth Department was more persuaded by the language indicating that the purpose of the Bill was to prevent future deaths, indicating a prospective application of the legislation repealing the EDTPA.

Regarding the Senate floor debates, the Court noted that the first senator to speak in support of the Bill understood that the repeal was prospective and would only apply after its passage. No other senator addressed the issue of retroactivity during the debates. In the Assembly, the Bill sponsor deferred to the interpretation of the courts as to whether the repeal of the EDTPA would apply retroactively due to the lack of express language in the legislation. Other members of the Assembly expressed concern that a retroactive repeal could expose frontline health care workers to liability for their treatment of patients during a novel virus that was not well understood. As such, the Fourth Department held that the legislative history of the EDTPA repeal did not express any clear legislative intent that the repeal should apply retroactively.

The holding in Ruth is unequivocally favorable to defendant healthcare facilities and providers who meet the

6. *Ruth v. Elderwood At Amherst*, et al, Index No. 804780/2021 (Sup. Ct. Erie Co.); NYSCEF Doc. No. 30.
7. *Ruth v. Elderwood At Amherst*, 2022 NY Slip OP 05637 (4th Dep't 2022).
8. *Citing Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 NY.3d 332 (2020), rearg denied 35 N.Y.3d 1079, 1081 (2020).
9. *Citing Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 NY.3d 332 (2020), rearg denied 35 N.Y.3d 1079, 1081 (2020).
10. *Citing Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 NY.3d 332 (2020), rearg denied 35 N.Y.3d 1079, 1081 (2020).

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standards for civil immunity from liability between March 7, 2020 and April 6, 2021. While Ruth was issued by the Fourth Department, it is binding on all trial courts in the State unless it is reversed by the Court of Appeals, or another Appellate Division in a different Department reaches a different result.[11]

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How Losing a Summary Judgment Motion Can Increase Your Likelihood of a Successful Defense at Trial

BY: DANIEL L. FREIDLIN, ESQ. AND CONRAD A. CHAYES, JR., ESQ.

In select cases, motions for summary judgment can result in a dismissal of the case. To prevail, the defense must demonstrate to the court that there is no issue of fact for a jury to decide. However, obtaining a complete dismissal in a medical malpractice case is difficult as the plaintiff's lawyer can often defeat the motion by submitting the sworn affirmation of an expert witness that disputes the opinion of the defense expert. While these motions are costly, time-consuming, and can be difficult to win, they are a valuable litigation tool even if they do not result in a complete dismissal. This article highlights examples of how summary judgment motions improve the likelihood of prevailing at trial even when the motion fails.

There is no question that preparing a motion for summary judgment is time consuming and costly. We must address every allegation raised by plaintiff in the Bill of Particulars with the opinions of medical expert(s), and in the process, scrutinize all deposition testimony and the plaintiff's medical records. As such, preparing such a motion is an appreciable investment. Statistically, in most cases, the judge identifies an issue of fact and denies the motion. As such, clients and attorneys alike often hesitate to proceed with the preparation of a summary judgment motion. This hesitance, however, fails to consider that summary judgment motions can increase the likelihood of a favorable result in the underlying case even where the judge denies the motion. Clients and attorneys should recognize the misperception that in order to be successful, a motion for summary judgment must be granted by the court in its entirety.

THIS HESITANCE, HOWEVER, FAILS TO CONSIDER THAT SUMMARY JUDGMENT MOTIONS CAN INCREASE THE LIKELIHOOD OF A FAVORABLE RESULT IN THE UNDERLYING CASE EVEN WHERE THE JUDGE DENIES THE MOTION. CLIENTS AND ATTORNEYS SHOULD RECOGNIZE THE MISPERCEPTION THAT IN ORDER TO BE SUCCESSFUL, A MOTION FOR SUMMARY JUDGMENT MUST BE GRANTED BY THE COURT IN ITS ENTIRETY.

We previously highlighted instances where we used summary judgment motions for leverage in anticipated settlement discussions and to limit the claims against our clients. This article

11. *Mountain View Coach v. Storms*, 102 A.D.2d 663 (2d Dep't 1984).

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will focus on the benefit of an "unsuccessful" summary judgment motion in a case that proceeds to trial.

To understand this, it is important to understand what a plaintiff's lawyer must do to create an issue of fact to defeat the motion. Typically, a plaintiff's attorney attacks a summary judgment motion by submitting a sworn expert opinion refuting the defense expert's position. Successfully opposing the motion requires the plaintiff to articulate specific theories of liability and causation, as well as disclosure of the expert credentials. The plaintiff's expert affirmation provides the defense with a roadmap of the expert's trial theory (if the motion loses) and a head start in trial preparation. Understand that unlike defendants, a plaintiff's attorneys will often use the same expert to oppose the motion, as they will at trial. This is generally because a plaintiff's attorney is responsible for all costs and disbursements until a settlement or judgment is received, and thus far more reticent to retain new experts to testify for trial. When the case proceeds to trial, the defendant now has the benefit of a sworn affidavit to cross-examine the expert and a preview of the plaintiff's theory at trial. Additionally, the inclusion of an expert's credentials provides the defense with an advanced start on obtaining testimonial history, background information regarding the experts' testimonial history, malpractice history or disciplinary claims, professional memberships, appointments, and collateral testimony that may serve to undermine a particular expert's credibility. This all helps to streamline the trial preparation process. As will be seen by the below two case examples, a relatively small investment in a summary judgment motion resulted in less time spent preparing for trial and a greater likelihood of a defense verdict.

WHEN THE CASE PROCEEDS TO TRIAL, THE DEFENDANT NOW HAS THE BENEFIT OF A SWORN AFFIDAVIT TO CROSS-EXAMINE THE EXPERT AND A PREVIEW OF THE PLAINTIFF'S THEORY AT TRIAL.

CASE EXAMPLE # 1

We recently defended an obstetrician/gynecologist in an action brought by a then-50 year old woman, who alleged that, our client negligently performed a laparoscopic hysterectomy insomuch as he allegedly failed to identify and protect the ureter, resulting in a ureteral transection with the need for subsequent repair. At the close of discovery, we filed a motion for summary judgment on behalf of our client arguing that the injury was an unavoidable thermal spread injury from the Harmonic scalpel and that an anatomic survey at the conclusion of the surgery demonstrated that the left ureter remained intact. As such, the injury was not due to negligence but rather due to unavoidable thermal spread from the instrumentation used during the surgery.

The plaintiff opposed our motion with the sworn expert opinion of an obstetrician gynecologist who opined that our client did not identify the ureter prior to cauterizing and thus increased the likelihood of a ureteral injury. The plaintiff's expert argued that "brisk bleeding" noted in the operative report at the beginning of the surgery resulted in a "pool of blood" in the operative field and thereby obscured the visualization of the ureter. Unfortunately, for the plaintiff and her expert, they failed to recognize that this "brisk bleeding" occurred in the location of the right ureter (which was not the side that was injured). While we pointed out this misstatement of fact in our Reply Affirmation, and argued the plaintiff's expert opinion was improperly based on incorrect facts, the court still denied the motion. The case proceed to trial in Supreme Court, Suffolk County. Rather than spend the money to retain a new expert, plaintiff used the same expert who was locked into this "brisk bleeding" theory. The expert testified at trial that the Operative Report was confusing to her and insisted that the bleeding was on the injured side. It was the expert's position that the defendant's testimony that he always starts his operation on the right side and clearly documented that he then "turned his attention to the left side" was self-serving and in dispute. We used the Affirmation to cross-examine the expert at trial with painstaking questioning on the fact that she issued a sworn opinion despite not carefully reading the Operative Report and then came to court to give sworn testimony to a jury without clarifying facts that she remained confused by. The expert became combative and came across as an advocate, as opposed to an objective witness. The expert conceded that the anatomy was such that if the brisk bleeding occurred near the right ureter, it could not possibly obscure the visual field near the left ureter. The expert had no choice but to give us significant concessions at trial and due to her carelessness in execut-

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ing the Affirmation, lost all credibility with the jury. The jury rendered a verdict for the defense.

CASE EXAMPLE #2

In another case, pending in Supreme Court, Richmond County, plaintiff alleged negligent performance of a neurosurgical procedure resulting in aortic dissection with neurologic sequelae. We employed a similar strategy in moving for summary judgment, despite recognizing that the likelihood of a complete dismissal was low. In this case, our summary judgment motion successfully disposed of all claims except for one allegation, whether "defendants' alleged failure to create a differential diagnosis of aortic dissection caused a nine-hour delay in diagnosing plaintiff that allegedly resulted in greater injury than plaintiff would have otherwise suffered." As such, this was the sole issue to be determined at trial.

Knowing exactly what the plaintiff's expert was going to argue and only having to defend a single issue streamlined the trial preparation process. This not only made trial preparation more efficient, but also increased the likelihood of success at trial.

Realizing his diminished chances for success at trial given the extremely limited theory of liability following the Court's motion decision, plaintiff's counsel served an expert witness disclosure in cardiothoracic surgery on the literal eve of trial, which attempted to assert an additional theory of liability not previously asserted. We filed a successful motion in limine arguing that not only was the expert disclosure late, but it impermissibly expanded the allegations beyond the singular issue not resolved by the summary judgment motion. The trial judge agreed with our position and limited the plaintiff's expert to the sole issue of fact identified in the court's decision on our summary judgment motion. We tried this issue to verdict and the jury returned their defense verdict in under six minutes.

DISCUSSION

These summary judgment motions are not a zero sum game, where success is contingent upon the court granting the motion in its entirety. As in the case of the expert who did not know left from right in the operative report, sometimes you have to give the plaintiff's lawyer the opportunity to lose an otherwise winnable case. These cases provide yet additional examples that demonstrate that summary judgment motions have many other benefits than simply having a case dismissed. While we lost the motions, we limited the plaintiff's theory at trial and locked their respective experts into a specific opinion. This saved countless hours in preparing for trial and increased the likelihood of success.

Attorneys and clients alike often avoid summary judgment motions when the likelihood of receiving a complete dismissal is low. However, these cases demonstrate how investing in a summary judgment motion can pay major long-term dividends. Even when a summary judgment motion is unlikely to result in a full dismissal, the cost of the motion pales in comparison to the cost savings of a better settlement, a discontinuance, or in the above cases a defense verdict. The above case examples are just two of many within our experience of a "losing" summary judgment motion resulting in a "winning" long-term result.

Considering the overall benefit of a summary judgment motion, even a "losing" motion, leads many attorneys and clients to conclude that they should file a summary judgment motion on most, if not all, cases. ■

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It's Just Nut Right:

Allergy Bullying and Practice Recommendations for Children with Life-Threatening Allergies

BY: LAURIE A. ANNUNZIATO, ESQ. AND NICOLE S. BARRESI, ESQ.

Food allergies can be a frightening issue for pediatricians, guardians and children. The Food Allergy Research & Education (FARE) group estimates that every 3 minutes a food allergy reaction sends someone to the emergency room and there has been a 377% increase in treatment of anaphylactic reactions to food allergies between 2007 and 2016.[1] However, not only do guardians and providers have to worry about the physical safety of the child, but they should also consider the emotional impacts of serious allergies caused by allergy bullying.

A 2010 study at Mount Sinai Medical Center found that 35% of children[2] with food allergies have experienced bullying. Of those who reported bullying,[3] 86% reported it happened more than once, 79% reported that it was due to allergies alone and 43% reported having an allergen physically waved in their face.[4] This is also not just an issue with children bullying other children, as more than 20% of children reported bullying by a staff member at school.[5] This bullying was associated with higher risk activity, related to the allergy, as the child became 13 to 21 years old with an increased propensity to purposely ingest potentially unsafe foods and a refusal to carry an epi-pen in an attempt to "fit in."

A 2010 STUDY AT MOUNT SINAI MEDICAL CENTER FOUND THAT 35% OF CHILDREN WITH FOOD ALLERGIES HAVE EXPERIENCED BULLYING. OF THOSE WHO REPORTED BULLYING, 86% REPORTED IT HAPPENED MORE THAN ONCE, 79% REPORTED THAT IT WAS DUE TO ALLERGIES ALONE AND 43% REPORTED HAVING AN ALLERGEN PHYSICALLY WAVED IN THEIR FACE.

In an effort to keep patients with life threatening allergies safe, providers should consider discussing these issues and offering guidance and resources. Providers should consider asking patients, and their guardians, questions focused on assessing whether the child is in contact with the allergen at school and whether they are being bullied to assess the patient's respective risk. Where appropriate, providers should consider notifying guardians of certain rights their child is entitled to when attending school. A food allergy has been considered a disability under Title II of the Americans with Disabilities Act of 1990, Individuals with Disabilities Education Act, and Section 504 of the Rehabilitation Act of 1973. While the law does not define a disability, the protections include "persons with a substantial impairment to a major life activity of bodily function." Further, there is no requirement that the disabled individual show symptoms at all times. Therefore, food allergies have been interpreted to be included because exposure can trigger a severe impairment, including, but not limited to anaphylaxis.

All schools that receive federal funding must comply with these laws. If a child is physically placed in danger by exposure to allergens and/or bullied for having an allergy, the school is required to respond to protect the student's well-being or can face liability for their failure to do so. If an immediate and effective response does not occur, legal action can be taken against the school. A guardian may request a due process hearing before an administrative judge or file a complaint with the Department of Education or court. Prior to engaging in litigation, however, it is recommended that providers advise guardians of their rights to seek a 504 Plan. A 504 Plan, is a written contract between the school and family that states what accommodations must be put in place for the child to access a safe education to which all children are entitled. Issues to be considered in creating a 504 Plan are ensuring a safe

1. https://www.foodallergy.org/.
2. The studied population included children over the age of 5 years old.
3. New Study Finds That Children with Food Allergies are Targeted by Bullies. Published September 28, 2010. Available at https://www.mountsinai.org/about/newsroom/2010/new-study-finds-that-children-with-food-allergies-are-targeted-by-bullies.
4. *Id.*
5. *Id.*

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It's Just Nut Right: Allergy Bullying and Practice Recommendations...

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MEDICAL PROVIDER ADVICE TO GUARDIANS REGARDING THEIR RIGHT TO OBTAIN A SECTION 504 PLAN COULD ENSURE THAT MORE CHILDREN ARE SAFE AT SCHOOL.

classroom/lunch room, access to safe snacks, instructions on who and when medications will be administered in the event of a reaction and directions as to who is responsible for handling the medications.

Medical provider advice to guardians regarding their right to obtain a Section 504 Plan could ensure that more children are safe at school. Further, providers should consider counseling guardians of children with allergies regarding the prevalence of allergy bullying and its potential effects on children, in addition to considering referrals for mental health, if needed. Because allergy bullying affects at least a third of all children with allergies, it is important to discuss with patients and their caregivers their ability to advocate for safety while at school and access to resources aimed at anti-bullying. ■

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Considerations for Treating Patients with Alzheimer's Disease

BY: MICHAEL A. SONKIN, ESQ. AND EVAN R. SCHNITTMAN, ESQ.

Alzheimer's disease is a progressive neurologic disorder that causes brain atrophy and is the most common cause of dementia. According to the Alzheimer's Association, as of 2022, there are approximately 9.5 million Americans with Alzheimer's disease, including 4.5 million Americans over the age of 65 with Alzheimer's dementia and an estimated 5 million Americans over the age of 65 with mild cognitive impairments from Alzheimer's. The prevalence of this disease is expected to increase as the population continues to age and live longer.

Patients with Alzheimer's disease can create challenges for medical professionals who may need to obtain their informed consent for treatment. As a legal matter, obtaining informed consent means the physician has disclosed to the patient the reasonably foreseeable risks of the proposed treatment that a reasonable physician would have disclosed under similar circumstances, as well as the benefits and alternatives of the proposed treatment. See New York Public Health Law § 2805-d. When raised as part of a medical malpractice action, a lack of informed consent claim must demonstrate that a reasonably prudent person would not have undergone the treatment or procedure if fully informed. See id. § 2805-d(3). Lack of informed consent claims are limited to non-emergent treatment, surgeries, and tests, and to diagnostic procedures involving invasion or disruption of the patient's bodily integrity (i.e. a CT scan with IV contrast). See id. § 2805-d(2).

Consent to treatment may not be valid if the patient lacks sufficient cognitive capacity due to Alzheimer's disease or other cognitive mental illness. In such a situation, the physician must carefully evaluate the patient to determine whether they have the capacity to offer informed consent. The physician should evaluate whether the patient understands their medical condition, appreciates the nature and consequences of the treatment, can make a rational judgment, can communicate a clear choice, and is able to comprehend

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Considerations for Treating Patients with Alzheimer's Disease

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A PHYSICIAN TREATING A PATIENT WITH EARLY ONSET ALZHEIMER'S PATIENT OR MILD COGNITIVE IMPAIRMENTS SHOULD CONSIDER RECOMMENDING THE APPOINTMENT OF A HEALTH CARE PROXY. A HEALTH CARE PROXY WILL BE ABLE TO MAKE MEDICAL DECISIONS ON BEHALF OF THE PATIENT WHEN IT IS DETERMINED THAT THE PATIENT NO LONGER HAS THE CAPACITY TO MAKE SUCH DECISIONS FOR THEMSELVES.

the risks, benefits, and alternatives of the treatment.

Since Alzheimer's is a progressive disease, the capacity of an Alzheimer's patient to consent to treatment will diminish as the neurological impacts from the disease become more pronounced. A physician treating a patient with early onset Alzheimer's disease or mild cognitive impairments should consider recommending the appointment of a Health Care Proxy. A Health Care Proxy will be able to make medical decisions on behalf of the patient when it is determined that the patient no longer has the capacity to make such decisions for themselves. A mentally incapacitated patient without a Health Care Proxy may not be able to consent to a treatment or test that is in their best interest. In this scenario, the physician may have to consult with the patient's family members about having a legal guardian appointed to make necessary medical decisions on behalf of the patient.

For patients without a Health Care Proxy and who are admitted to hospitals, residential care facilities, and hospices, Article 29 of the New York Public Health Law provides a mechanism for a surrogate to make health care decisions for a patient found to be incapacitated. See New York Public Health Law § 2994-C(2). The initial determination of incapacity by an attending physician must be followed by an independent concurring determination. See id. § 2994-C(3). Physicians should consult the policies and procedures of their respective hospitals and facilities for rendering such determinations. Once deemed incapacitated pursuant to Section 2994-C, the following may act as a surrogate in decreasing priority: a guardian appointed pursuant to Article 81 of the New York Mental Health Law, the spouse or domestic partner, an adult child, a parent, an adult sibling, or a close friend. See id. § 2994-D(1). A proactive approach to this sensitive situation will often be in the patient's best interests. ■

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Jacqueline D. Berger

EFFECTIVE NOVEMBER 7, 2022

MCB is pleased to announce

Jacqueline D. Berger

as the Firm's new Interim Managing Partner

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Recent Case Results

Summary Judgment Granted in Decubitus Ulcer Case

Senior Trial Partner **Jeff Lawton** and Associate **Gabrielle Murray** obtained summary judgment in Bronx County. The patient developed a pressure ulcer at our client hospital. Our geriatric expert opined on summary judgment that development of the pressure ulcer, despite multiple proper interventions, was unavoidable due to the patient's co-morbidities. The Court found plaintiff's arguments in opposition regarding lack of documentation and lack of early wound consult unpersuasive and insufficient to raise a triable issue of fact. As such, the Court dismissed the Complaint as to our client hospital and removed them from the caption. The plaintiff's motion to reargue the grant of our Summary Judgment was denied.

Dismissal Obtained in Cardiac Arrest Case

Partners **Aryeh Klonsky** and **Gregory Cascino** obtained a discontinuance in Supreme Court, Kings County on behalf of our client who was then the Director of Rehabilitation Medicine at a NY State run hospital. This case involved the death of a then 69-year-old male at the hospital who had suffered a loss of consciousness and cardiac arrest while admitted to the in-patient rehabilitation medicine service. Plaintiff alleged that our client failed to appreciate early signs of respiratory failure, including a drop in the decedent's oxygen saturation levels with simultaneous complaints of shortness of breath and chest pain in the days prior to the code. It was further alleged that our client should have personally examined the patient, obtained cardiology and pulmonology consults, and should have ordered a blood transfusion to address low HGB and RBC levels.

The Court denied our summary judgment motion. We perfected our appeal of the summary judgment decision, and plaintiff submitted a respondent brief. While waiting for a decision from the Appellate Division, Second Department, we learned that plaintiff had finalized a settlement with the State of New York in a companion action in the Court of Claims. Plaintiff's counsel insisted on continuing his case against our client in New York Supreme Court, Kings County. Prior to trial, we successfully obtained copies of the settlement agreement filed in the Court of Claims, including a copy of the General Release signed by plaintiff and plaintiff's counsel. With an appeal pending, and a trial date looming, we prepared a motion to dismiss arguing that the General Release incidentally also provided for the Release of all employees of the State of New York and the NY State run hospital. We provided documentary evidence that our client was an employee of the hospital at the time he treated the decedent, and therefore, we argued that the Release should apply to him as well. Premised on the strength of the arguments raised in our motion to dismiss, plaintiff's counsel ultimately agreed to voluntarily discontinue all claims against our client prior to oral argument of the motion to dismiss.

Our aggressive approach to motion practice positioned us to obtain a voluntary discontinuance for our client thereby avoiding the costs and risks of taking the case to verdict in Kings County.

Summary Judgment Granted in a Laparoscopic Cholecystectomy Case

Senior Trial Partner **Jeff Lawton** obtained summary judgment in New York County. This case involved a laparoscopic cholecystectomy performed by our co-defendant surgeon. During the surgery, the hepatic duct and artery was inadvertently injured. The patient was transferred to our client hospital where our surgeon, an expert in liver procedures and liver transplants, performed a Roux-En-Y procedure to repair the hepatic duct and artery. She was subsequently discharged from the hospital, but sustained a cardiac arrest 5 days later. An autopsy found a hepaticojejunostomy with intact anastomosis found in place. We argued that the cholecystectomy performed by co-defendant surgeon was indicated and that the named residents acted under the explicit direction and supervision of the attending surgeon. Upon the patient's transfer, the hepaticojejunostomy was timely and properly performed and she was properly discharged. In response to our motion, plaintiff's counsel filed an Affirmation of no opposition. The Court dismissed the case as to our defendants in its entirety.

Summary Judgment in Neurosurgery Case

Senior Trial Partner **Anthony Sola** obtained summary judgment in New York County in a neurosurgery case. This case involved an alleged failure to timely diagnose parotid gland adenocarcinoma in a then 62-year-old man. The patient presented to our neurosurgeons between February and April 2018 for evaluation of possible trigeminal neuralgia. After reviewing the intracranial findings of the patient's MRI's of the brain, our neurosurgeons did not recommend neurosurgical intervention. Plaintiff alleges that our neurosurgeons failed to diagnose plaintiff's extracranial finding of parotid gland adenocarcinoma. We

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Case Results

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argued that the standard of care does not require a neurosurgeon to interpret radiological findings in the region of the parotid gland as this is outside a neurosurgeon's training and expertise. Plaintiff did not oppose our motion and ultimately executed a stipulation of discontinuance.

Summary Judgment in OB/GYN Case

Senior Trial Partner **Yuko Nakahara** and Partner **Gregory Cascino** obtained summary judgment in an OB/GYN case. In this action, plaintiff claimed that defendants' prenatal care was rendered negligently, such that it caused the fetus' demise. While there was an issue of fact as to liability due to a "he said, she said" dispute between the parties, defendants moved for summary judgment on causation - as there was no evidence that the alleged negligence was a proximate cause of, or a substantial contributing factor in, the fetal demise. The Court granted summary judgment and dismissed the case in its entirety, holding that there was no causal connection between the alleged negligence and the claimed injuries. The Court further held that plaintiff's attempts to assert a new theory of liability, for the first time, in opposition to defendants' motion for summary judgment was inappropriate. Further, plaintiff's expert opinions were found to be conclusory and failed to address/refute defendants' expert's findings.

Summary Judgement in Cardiology/ Urgent Care Case

Senior Trial Partner **Laurie Annunziato**, and Partner **Samantha Shaw** obtained Summary Judgment in a cardiology case. The case involves a 73-year-old who claims that from January 28, 2019 to March 18, 2019, our clients failed to appreciate signs and symptoms of bacterial endocarditis. Upon admission to an outside hospital on March 20, 2019, the diagnosis of bacterial endocarditis was made and on March 28th, the plaintiff underwent open-heart surgery, with valve replacement, followed by a three month admission, placement of a loop recorder, pacemaker and a six-week course of intravenous antibiotics.

Plaintiff claimed there were signs of the infection ignored by our clients including tachycardia, heart murmur and fibromyalgia. The plaintiff argued that had the diagnosis be made timely, the infection could have resolved with a course of antibiotics. Our expert opined that our clients properly evaluated and assessed the plaintiff at the three subject urgent care visits and provided proper treatment and recommendations. Our expert opined that the treatment rendered at our client urgent care was entirely appropriate and the plaintiff's clinical presentation was not consistent with bacterial endocarditis. Our expert emphasized that the role of the urgent care facility is/was to treat acute and episodic conditions, and that the plaintiff was properly instructed to return to his primary care physician (co-defendant) for care of his chronic conditions. The expert also opined that given that the diagnosis was made on March 21st ,there was no causal connection to the alleged delay and the plaintiff's damages stemming from the March 21st visit.

Defense Verdict in Cardiothoracic Surgery Case

Senior Trial Partner **Peter Crean**, Partner **Anina Monte**, and Associate **Christina Pingar**o received a defense verdict in Suffolk County Supreme Court before Judge Condon. This matter involved allegations of negligence in the timing of the diagnosis and management of the decedent's aortic dissection. It is claimed that due to unnecessary delays in the emergency department and in preparing the patient for surgery, plaintiff coded and passed away before life-saving open heart repair surgery could be performed by our physician-client.

Our team was successful in limiting the scope of the allegations and expert testimony submitted to the jury, while demonstrating the speed in which our client's emergency medical team and cardiothoracic team fully and timely assessed and treated this patient for a life threatening and fatal condition. The jury agreed with the defense's presentation and that the care rendered did not cause or contribute to the patient's death.

What's New at MCB?

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7 ATTORNEYS RECOGNIZED IN *THE BEST LAWYERS IN AMERICA*© 2023

Best Lawyers RECOGNIZED BY


Peter T. Crean


Bruce G. Habian


Kenneth R. Larywon


Jeff Lawton


Michael F. Madden


Anthony M. Sola


Michael A. Sonkin

The Firm congratulates Partners Peter T. Crean, Bruce G. Habian, Kenneth R. Larywon, Jeff Lawton, Michael F. Madden, Anthony M. Sola and Michael A. Sonkin for their selection to the New York City edition of *The Best Lawyers in America*© 2023. The listing will be published in *The New York Times*, *The Daily News* and *The Wall Street Journal* on December 2, 2022.

These seven Partners represent the breadth and depth of the legal experience at MCB. Their selection demonstrates the Firm's expertise in five practice areas: Medical Malpractice Law – Defendants; Health Care Law – Defendants; Legal Malpractice Law – Defendants; Professional Malpractice Law – Defendants; and Personal Injury Litigation – Defendants.

8 MCB ATTORNEYS RECOGNIZED IN BEST LAWYERS®: ONES TO WATCH 2023

Best Lawyers
ONES TO WATCH


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Gregory A. Cascino


Conrad A. Chayes


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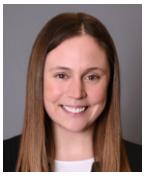
Amy E. Korn


Michael B. Manning


Kerona K. Samuels


Samantha E. Shaw

All seven Partners represent the breadth and depth of the legal experience at MCB. Their selection demonstrates the Firm's expertise in five practice areas: Medical Malpractice Law – Defendants; Health Care Law – Defendants; Legal Malpractice Law – Defendants; Professional Malpractice Law – Defendants; and Personal Injury Litigation – Defendants.

MCB is proud to congratulate 8 of its bright, young attorneys for being selected to Best Lawyers®: Ones to Watch 2023 in the field of Medical Malpractice Law – Defendants. These attorneys have been recognized early in their careers for professional excellence in private practice.

2 PARTNERS RECENTLY RATED AV PREMINENT BY MARTINDALE-HUBBELL®

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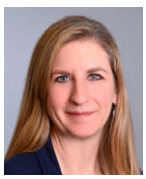
Jacqueline D. Berger


Barbara D. Goldberg

MCB congratulates Interim Managing Partner Jacqueline D. Berger and Partner Barbara D. Goldberg for receiving Martindale-Hubbell's highest rating: AV Preeminent, an award given to attorneys who are ranked at the highest level of legal expertise, communication skills, and ethical standards by their peers.

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