Defense Practice
UPDATE

MARTIN CLEARWATER & BELL LLP

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Discoverability of Social Media

BY: LAURIE A. ANNUNZIATO AND GABRIELLA M. LEVINE

As social media pervades our day-to-day lives, social media has fast become an important litigation tool. Social media provides litigants with a platform to discuss the legal issues of the particular case and can be a useful tool to obtain information related to liability issues as well as damages. Photographs, posts, reels, to name a few, have been increasingly recognized by the courts for their potential value during the discovery phase and the introduction of evidence at trial obtained via social media is slowly becoming the rule as opposed to the exception.

PHOTOGRAPHS, POSTS, REELS, TO NAME A FEW, HAVE BEEN INCREASINGLY RECOGNIZED BY THE COURTS FOR THEIR POTENTIAL VALUE DURING THE DISCOVERY PHASE AND THE INTRODUCTION OF EVIDENCE AT TRIAL OBTAINED VIA SOCIAL MEDIA IS SLOWLY BECOMING THE RULE AS OPPOSED TO THE EXCEPTION.

DISCOVERY OF SOCIAL MEDIA

The CPLR and New York case law provide broad principles governing discovery. CPLR § 3101 (a) requires "full disclosure of all matter material and necessary in the prosecution of defense of an action..." The words "material and necessary" are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay. The test is one of usefulness and reason."[1]

Just as the historically-used private investigator's video depicting an individual lifting one bag after another of heavy cement from a truck bed is relevant to discrediting the individual's claim of unrelenting, incapacitating back pain from a "botched" spinal surgery, so too does a TikTok video depicting a woman bungee jumping off a cliffside during her Hawaiian vacation.

WHAT INFORMATION IS DISCOVERABLE?

Public information is fair game. Studies have shown that most social media users elect to keep their profiles public and those who think that only their "friends" can view their posts, do not sufficiently understand the privacy options of the particular platform. In any event, plugging an individual's name in any search engine typically provides a plethora of infor-

1. *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 (1968).

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mation. Aggregate sites that look for an individual's social media presence across the web, like Spokeo.com, can come in handy when a person uses several social media platforms.

Private information, on the other hand, is more difficult to access informally and typically requires formal discovery efforts. An attorney should request screen names, passwords and other account-related information. While litigants are entitled to make demands for information or to obtain access to their adversary's social media accounts, when the relevant profile is kept private, discoverability becomes more difficult. Courts routinely look less favorably to overbroad and vague discovery demands without established time frames to access private social media accounts, especially those of non-parties and minors. Litigants therefore are advised to tailor their demands for posts, reels, and/or photographs that are or could be directly related to the issues of the case. For example, in a case where a semi-pro football player claims economic and physical injury due to an alleged improper ankle surgery, instead of demanding access to all photographs or reels on the patient's Instagram site, a demand for any and all photographs, reels or posts depicting or discussing physical activities after the date of injury will appear more reasonable and certainly more relevant to the presiding judge. In *Vasquez-Santos*, defendants' demand for plaintiff's Facebook posts that were limited in time to "only those items posted or sent after the accident" and further limited to "those items discussing or showing plaintiff engaging in basketball or other similar physical activities were considered discoverable.[2] Similarly, in *Caserta v. Triborough Bridge and Tunnel Authority*,[3] the plaintiff claimed he suffered "buckling right leg; swelling; tenderness; muscle strain; morning stiffness; and loss of sleep."[4] However, during his deposition, the plaintiff admitted to posting videos and photos of him going to concerts and playing instruments.[5] As such, the Appellate Division upheld the Supreme Court's decision granting defendant's motion for a so-ordered subpoena allowing access to plaintiff's social media accounts only, limited to "those items which show or discuss plaintiff attending and/or performing in concerts or playing in musical instruments since March 6, 2015."[6]

WHILE LITIGANTS ARE ENTITLED TO MAKE DEMANDS FOR INFORMATION OR TO OBTAIN ACCESS TO THEIR ADVERSARY'S SOCIAL MEDIA ACCOUNTS, WHEN THE RELEVANT PROFILE IS KEPT PRIVATE, DISCOVERABILITY BECOMES MORE DIFFICULT.

INTRODUCTION OF SOCIAL MEDIA AT TRIAL

Once relevancy is established, a bedrock of introducing any documentary evidence at trial is authentication and photographs, posts, etc. obtained via social media is not an exception. However, authenticating a photograph or post as belonging to a particular litigant can be more difficult when that person sets up their profile using pseudonyms or "tag names" that are different than their legal name. However the burden is slight and the party attempting to introduce the evidence from social media does not need to convince the court that the evidence is what the introducing party claims, only that a jury might ultimately find that it does.

Further establishing authentication can be achieved through circumstantial evidence. In these circumstances the key is to demonstrate connections between the individual and the particular piece or pieces of evidence from the social media site you intend to introduce. Birth dates or references to birthdays, demographics, known associates of the litigant, and known nicknames all can be used to verify that the evidence you want to introduce is or belongs to the litigant. And in these cases, more is actually better; the more connections between the evidence and your adversary, the more likely the authenticity requirement will be established.

USE SOCIAL MEDIA CAUTIOUSLY

While social media searches can provide helpful insight and understanding of your adversary and the credibility of the claims being made, one should be cautious of social media. No doubt one's heart can skip a beat when they see their adversary doing some physical activity he/she claims they can no longer do because of your client's alleged negligence, however you may find your heart in your throat when you try to confront your adversary with a particular photograph found on Facebook

2. 168 A.D.3d 587, 588 (1st Dept. 2019).
3. 180 A.D.3d 532 (1st Dept. 2020).
4. NYSCEF Doc. 31.
5. NYSCEF Doc. 37.
6. *Id* 180 A.D.3d at 532.

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at his/her deposition or at trial only to be told that the photo was taken two weeks before the alleged negligence. Therefore, it goes without saying one should always be mindful to determine when the particular photo or video was taken, and/or when the particular post was written.

As importantly, one should be aware of their *own* actions when conducting a social media search. Many attorneys have found themselves in ethical hot water when attempting to obtain discrediting information from social media. An attorney is not allowed to "friend" a plaintiff or ask a third party to "friend" an adversary for access to their networking profile. The New York Bar Ethics Community has stated that while a lawyer may access the publicly viewable pages of another party's social networking profile, he may not engage in trickery or misrepresentation in "friending" a witness to gain access to an otherwise private social networking page.[7] It is always therefore preferable to utilize the court's assistance when the parties disagree as to what is discoverable from private social media profiles. Formal demands for court decision as discussed above as well as a possible *in camera* inspection by the Courts of the individual's networking profile can accomplish access to your adversary's accounts.

Overall, social media can be a great tool and resource during the litigation process. However, before using social media, it is important to discuss what or who you are looking for, where you will be looking, how you intend to use it, and the necessity to keep the law in mind. ■

Laurie A. Annunziato is a Senior Trial Partner at Martin Clearwater & Bell LLP, where she defends our client physicians, hospitals, and other health care delivery centers in medical malpractice and professional liability matters.

Gabrielle M. Levine is a Law Clerk at Martin Clearwater & Bell LLP, she assists attorneys in their defense of doctors, teaching hospitals, health care systems and other medical professionals in medical malpractice matters.

Physicians Prevail in Suicide and Supervision Cases

BY: MICHAEL A. SONKIN AND BARBARA D. GOLDBERG

Failure to Prevent Suicide

The United States Court of Appeals for the Second Circuit recently affirmed a Federal District Court's summary judgment dismissal of an action alleging that the defendant physician failed to prevent the suicide of a patient, also a physician, who had a long history of depression and post-traumatic stress disorder with suicidal ideations. The defendant, who was trained as an anesthesiologist, specialized in providing Ketamine infusions to patients who suffered from severe depression which proved refractory to other forms of treatment.

The decedent treated with the defendant over a period of several months and seemingly obtained some relief from the Ketamine infusions. Two days before his final visit with the defendant, however, he experienced an onset of severe suicidal ideations, to the point where he began writing prescriptions and transfer notes for some of his patients. He advised the defendant that the suicidal ideations had begun abating the previous day, and that by the time he saw the defendant, he felt much better. He indicated that he wanted a Ketamine booster so that the suicidal ideations would not return. By the end of the session, which lasted over an hour, the defendant was convinced that the decedent did not pose a risk of harm to himself. Three days later, however, the decedent committed suicide while the plaintiff, his husband, was away on a business trip.

7. *See* New York Bar Ass'n Comm. on Prof'l Ethic Opinion 2010-02.

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Physicians Prevail in Suicide and Supervision Cases

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The plaintiff alleged that the defendant failed to contact the decedent's treating psychiatrist and coordinate care with him, despite explicit instructions from the decedent not to do so; that the defendant failed to develop a safety plan of action; and that he failed to contact the authorities or instruct the decedent to go to the emergency room. The District Court granted summary judgment in favor of the defendant as to each of these claims, finding that there was no reasonable view of the evidence by which a jury could find that the defendant's assessment of the patient was other than a careful examination, and that the plaintiff had failed to offer an expert opinion, or other evidence, from which a rational jury could find that the defendant's conduct was a proximate cause of the decedent's suicide.

The Second Circuit affirmed on the ground that the plaintiff had failed to put forward sufficient evidence to establish causation with respect to any of the claimed departures. More specifically, the Second Circuit found that the plaintiff's expert psychiatrist's opinions regarding proximate causation were speculative, and that he himself had conceded at his deposition that it was "unknowable" whether communication with the decedent's treating psychiatrist would have prevented the suicide. The Court also pointed out that the expert had similarly conceded that his opinions in this regard were speculative because the decedent could still have acted upon his expressed desire to kill himself, and that "[w]e'll never know."

Of note, since the action was a diversity action brought in Federal District Court, the defendant was entitled to take the deposition of the plaintiff's expert under the Federal Rules of Civil Procedure. As a result, defense counsel was able to elicit numerous concessions from the expert upon which both the District Court and the Second Circuit relied in concluding that no rational jury could find that plaintiff had satisfied the causation element of his *prima facie* case.

STATE COURTS HAVE ALSO FOUND THAT EXPERT OPINIONS SUBMITTED IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT THAT A SUICIDE COULD HAVE BEEN PREVENTED IF DIFFERENT TREATMENT MEASURES HAD BEEN IMPLEMENTED WERE IMPERMISSIBLY SPECULATIVE, AND GRANTED OR AFFIRMED SUMMARY JUDGMENT ON THAT BASIS AS WELL.

In New York State court actions, by contrast, depositions of experts are the exception rather than the rule. Nevertheless, summary judgment is frequently granted and upheld in state court actions alleging a failure to prevent suicide if the defendant offers evidence that his or her treatment choice was based on a careful examination of the patient. State courts have also found that expert opinions submitted in opposition to motions for summary judgment that a suicide could have been prevented if different treatment measures had been implemented were impermissibly speculative, and granted or affirmed summary judgment on that basis as well.

Supervision of Physician's Assistant

In another recent case, the Appellate Division, First Department, reversing the trial court's denial of a motion to set aside a verdict in favor of the plaintiff, held that an orthopedic surgeon was not vicariously liable for the negligence of a physician' assistant (PA) employed by the practice group of which the surgeon was a shareholder.

The patient had previously undergone uneventful arthroscopic knee surgery performed by the orthopedic surgeon at an ambulatory surgery center. Approximately eight days later, she developed severe pain in her knee and was admitted to a hospital with an infection at the site of the surgery, which was later determined to be a methicillin-resistant staphylococcus aureus (MRSA) infection. For reasons that were unclear from the record, the surgeon was frequently listed as the "attending physician" in the patient's chart, even though no one from the hospital contacted him and he was not even aware of her admission until after the fact. Instead, the patient was seen on admission by a different surgeon from the orthopedic practice group and thereafter was evaluated on a daily basis by PAs employed by the group.

The patient was treated with Vancomycin, an antibiotic which can be nephrotoxic, and developed kidney failure during her admission. Fortunately, she completely recovered after only three courses of renal dialysis.

The patient brought suit against both the orthopedic practice group and the surgeon. Her principal claim against the group was that a PA who evaluated

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her had failed to take any action after a blood test he ordered showed rising BUN and creatinine levels which were consistent with decreasing kidney function. Her theory of causation was that if the Vancomycin had been stopped at that point, instead of two days later pursuant to the order of an infectious disease specialist who was also treating her, the episode of kidney failure might have been avoided.

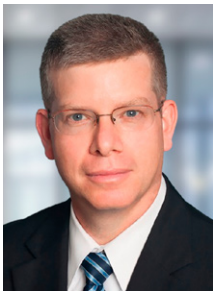
With respect to the surgeon, the patient did not allege any departures from accepted practice, but claimed instead that he was vicariously liable for the PA as a matter of law by virtue of 10 NYCRR § 94.2 and Education Law § 6542. Those provisions permit a PA to treat patients under the "supervision" of a physician, which shall be "continuous," but "shall not necessarily require the physical presence of the supervising physician at the time and place where the services are performed." Pursuant to 10 NYCRR § 94.2 (f), "[a] physician supervising or employing a licensed physician assistant…shall remain medically responsible for the medical services performed by the licensed physician assistant…whom such physician supervises or employs." The patient also relied on Business Corporation Law (BCL) § 1505 (a), which provides that "[e]ach shareholder, employee or agent of a professional service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation."

At trial, the jury found that the practice group was liable, based on the PA's failure to take any action in response to the patient's rising BUN and creatinine levels. The jury awarded the patient $3,000,000 in past pain and suffering damages for the transient episode of kidney failure. The trial court held that the surgeon was vicariously liable for the PA under the above-referenced provisions and denied the defendants' motion to set aside the verdict and for related relief, including judgment in favor of the surgeon as a matter of law and a reduction in damages.

On defendants' appeal, counsel for the surgeon argued that there was no evidence that the surgeon was ever in a position to supervise the PA during the admission at issue, let alone that he exercised "direct supervision and control" over the PA, as contemplated by BCL § 1505(a). Defendants also argued that the award of $3,000,000 for past pain and suffering was excessive, since the plaintiff's kidney function had fully returned to normal.

The Appellate Division modified the trial court's order to dismiss the surgeon from the action, noting that it was undisputed that he was not involved in the patient/plaintiff's treatment during the admission at issue, notwithstanding that he was often listed as the attending surgeon on her chart. Nor was the surgeon liable for the PA's conduct under 10 NYCRR § 94.2 or BCL § 1505 (a), since there was no indication that he, and not another of the doctors at the practice group, was the doctor supervising the PA at the time in question. Importantly, the Appellate Division concluded that it was not enough that the PA was employed by a professional service corporation of which the surgeon was a shareholder.

In addition, the Appellate Division held that the $3,000,000 award for past pain and suffering was excessive and ordered a new trial as to damages unless the plaintiff stipulated to a reduction to $500,000. To the extent that the plaintiff relied on cases involving wrongful death and the accompanying "apprehension of impending death" that may be an element of damages in such cases, the Appellate Division found that such reliance was misplaced. This aspect of the holding suggests that claims of fear or apprehension of impending death should be limited to wrongful death actions and may not properly be utilized to inflate damages in cases where the patient survives, and, as in this instance, fully recovers. ■



Michael A. Sonkin is a Senior Trial Partner at Martin Clearwater & Bell LLP. His practice encompasses all aspects of medical malpractice litigation from inception through trial. He has defended some of the Firm's largest hospital clients and numerous physicians.

Barbara D. Goldberg is a Partner and Head of the Firm's Appellate Practice Group. She is well known for her appellate expertise in high exposure, complex cases and has handled hundreds of motions and appeals in State and Federal Courts.

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The Radiologist's Limited Duty of Care:

Effective Use of Summary Judgment Motions in Radiology Cases

BY: DANIEL L. FREIDLIN AND MAUREEN P. BLAZOWSKI

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. Obtaining a complete dismissal in a medical malpractice case is difficult as the plaintiff's lawyer can often defeat the motion by submitting the affirmation of an expert witness that disputes the opinion of the defense expert. Another obstacle to obtaining summary judgment in cases involving a defendant radiologist and an allegation of failure to diagnose is that plaintiff's lawyer has a film or picture that a plaintiff expert can rely upon to opine that the defendant radiologist missed a critical finding. While these motions are costly, time-consuming, and can be difficult to win, especially in cases involving a failure to diagnose on a radiological study, defense counsel and their clients should not automatically dismiss the idea of moving for summary judgment simply because the defendant is a radiologist and the evidence is a glaring alleged miss on a film.

There are strategies that defense counsel can employ when defending a radiology defendant to set up the defense for a summary judgment motion and even if not successful, at least sending the message to the plaintiff and/or codefendants that the real issues in the case involve clinical judgment and not radiological interpretation. These strategies start with understanding the law and the radiologist's limited duty of care.

SUMMARY JUDGMENT MOTIONS IN RADIOLOGY CASES ARE INTIMIDATING AND DIFFICULT TO WIN, BUT THEY ARE NOT IMPOSSIBLE AND ARE OFTEN HELPFUL IN POSITIONING YOUR CLIENT FOR AN EVENTUAL FAVORABLE OUTCOME.

Courts have held that, "[a]lthough physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient."[1] The physician does not have a duty of care with respect to matters outside of that physician's expertise where the physician defers to a specialist for assessment and treatment of those medical matters.[2] Relying on these rather basic legal principles, appellate courts have held that radiologists have a limited duty of care to interpret radiological images and report the findings to the referring clinician. It is the clinician's duty to correlate the radiologist findings with the patient's clinical presentation to determine a plan of care.[3] Specifically, the appellate courts have recently held that the scope of care provided by the defendant radiologist was limited to performing the imaging study, interpreting the imaging study and documenting their findings, and that the radiologists did not have the general duty to order further testing or independently diagnose the patient's medical condition.[4]

Provided the defense can argue that the radiologist correctly reported the findings of the imaging study and did not assume a greater duty by making recommendations for follow-up, a reasonable defense strategy may include filing a summary judgment motion arguing that the radiologist did not have a duty to render a diagnosis or recommend a further treatment plan. Summary judgment motions in radiology cases are intimidating and difficult to win, but they are not impossible and are often helpful in positioning your client for an eventual favorable outcome. The below case summary highlights an undoubtedly unusual case where we were able to obtain a favorable outcome despite losing the summary judgment motion.

Martin Clearwater & Bell LLP recently handled a high exposure case involving a claimed failure to diagnose a nasal tumor resulting in spread to the cribriform plate and need for a craniotomy. Our client radiologist interpreted a CT scan and reported complete opacification and expansion within the right nasal cavity. Our client's impression included severe sinus disease and a

1. *Chulla v. DiStefano*, 242 A.D.2d 657, 658, 662 N.Y.S.2d 570 (2d Dept. 2007); *Markley v. Albany Med. Ctr. Hosp.*, 163 A.D.2d 639, 640, 558 N.Y.S.2d 688 (3d Dept., 1990); *Donnelly v. Finkel*, 226 A.D.2d 671, 641 N.Y.S.2d 872 (2d Dep't 1996).
2. *See, Wasserman v. Staten Island Radiological Associates*, 2 A.D.3d 713, 770 N.Y.S.2d 108 (2d Dep't 2003)(holding that the defendant radiologist did not have a duty to diagnose reflex sympathetic dystrophy in a patient's right ankle, where the radiologist did not examine the ankle, but only interpreted x-rays of the ankle and documented the findings).
3. *See*, *Donnelly v. Parikh*, 150 A.D.3d 820, 55 N.Y.S.3d, 274 (2d. Dept. 2017); *DeGiorgio v. Racanelli*, 136 A.D.3d 734 (2016); *Garbowski v. Hudson Valley Hospital Center*, 85 A.D.3d 724 (2011); *Mosezhnik v. Berenstein*, 33 A.D.3d 895 (2d Dept. 2006). Defense counsel can use these cases to stand for the proposition that if the defendant radiologist correctly interpreted and reported the imaging study, the radiologist did not have a further duty to order additional imaging or testing.
4. *Neyman v. Doshi Diagnostic Imaging Services, P.C.*, 153 A.D.3d 538 (2d Dept. 2017); *Mann v. Okere*, 195 A.D.3d 910 (2d Dept. 2021).

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right nasal polyp. Importantly, the defendant radiologist did not make any recommendations in her report.

The patient then continued under the care of her husband, an otolaryngologist, for the next sixteen months before the symptoms progressed and he ordered repeat imaging. Imaging revealed a bulky mass and suspicion for a cancer. Tissue sampling obtained during biopsy revealed a pathological diagnosis of esthesioneuroblastoma, a rare cancer. Plaintiff claimed that it was the radiologist's duty to suspect a cancer and recommend a MRI and/or biopsy. We filed a motion for summary judgment. While we understood that we were unlikely to win the summary judgment motion, we sent a strong message to plaintiff and her lawyer that we believed the physician at fault in the case was the plaintiff's husband.

FACTUAL HISTORY

Plaintiff, a then 55-year-old nurse practitioner, presented to a pulmonologist for evaluation of a dry cough and sinus congestion. As part of the workup, the pulmonologist order a CT scan of the sinuses to rule out a sinus infection.

Our client radiologist interpreted the CT scan as showing complete opacification of the right nasal cavity and expansion of the right sinuses. The left sinus demonstrated only minimal thickening. The defendant radiologist reported severe right frontal sinus disease with occlusion of the frontoethmoidal junction, mild right minimal left ethmoid sinus disease, mild right minimal left maxillary sinus disease, mild secretions at the left sphenoid sinus and a right nasal polyp. The radiologist reported the findings to the referring pulmonologist. The radiologist did not make any recommendations in the report. While a pulmonologist might not understand the significance of these unilateral findings, we were able to obtain concrete evidence that the radiology facility also faxed the report to the patient's treating otolaryngologist as well. That otolaryngologist turned out to be the patient's husband who was treating his wife from his home and office, without maintaining a patient record.

Plaintiff's husband prescribed antibiotics and steroids over the next sixteen months, and performed three nasal endoscopy procedures. Nasal endoscopy revealed what the plaintiff's husband testified appeared to be a nasal polyp. It was not until plaintiff underwent repeat imaging that a soft tissue mass was reported occupying the right anterior olfactory cleft. Plaintiff underwent a biopsy that confirmed the diagnosis of cancer.

PLAINTIFF'S CLAIMS AND DEFENSE POSITIONS

The plaintiff alleged that the defendant radiologist failed to identify and report a suspicious tumor eroding the nasal septum and appreciate the significance of the unilateral finding. Plaintiff contended that the mass was suspicious and required a recommendation of MRI and biopsy.

We deposed the plaintiff's husband, a non-party. At his deposition, he confirmed that he was the treating otolaryngologist who managed the plaintiff's sinus disease over the relevant time. His treatment included prescribing medication and performing nasal endoscopies. Notably, he testified under oath that he never reviewed the CT scan of the nasal sinuses performed on his wife and the subject of the lawsuit (although we had evidence that he called the radiology facility to ask for the report and the defendant faxed it to him).

We retained three expert neuroradiology experts, the first two providing a lukewarm defense and raising issues with the characterization in the report of a nasal polyp. However, our experts all agreed that the defendant radiologist correctly identified the finding and reported it. Our first two experts, however, opined that our client should have recommended an MRI. Our final expert agreed that our client appropriately deferred further management to the clinician. We also retained an expert otolaryngologist who opined that the plaintiff's husband failed to appreciate the significance of the unilateral findings and failed to recognize that any unilateral soft tissue mass in the nasal cavity, polypoid or not, should be biopsied. The management of the disease and decision for further workup was for the otolaryngologist to decide. To the extent that the plaintiff's husband contends, he relied on the pulmonologist's verbal report of the CT scan findings to him and that he did not review the report himself, our expert otolaryngologist opined that it would be a grave departure from the standard of care to treat a patient's sinus disease without at a minimum reviewing the imaging report.

THE MOTION FOR SUMMARY JUDGMENT

At the close of discovery, we filed a motion for summary judgment on behalf of our client radiologist and radiology facility. In support of our motion, we submitted expert opinions from two specialists. Our experts included a board certified radiologist and otolaryngologist. Our expert radiologist

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opined that our client appropriately reported a unilateral mass and expansion of the nasal cavity. Further, our radiologist opined that it is not the role of the radiologist to order a further workup but rather this duty falls upon the clinician, in this case the patient's husband. Our expert otolaryngologist opined that the plaintiff's husband departed from the standard of care in failing to recognize the significance of unilateral disease, in failing to order further imaging or a biopsy, and failing to maintain a medical record.

The plaintiff's attorney opposed our motion as expected with the opinion of a radiologist. Notably, the plaintiff did not submit the opinion of an otolaryngologist to support the defense of his client's husband. Notably, the plaintiff's lawyer did not submit a strong argument in opposition to the fact that the radiologist has a limited duty of care and merely argued that any claimed blame shifting was an issue for the jury to decide.

From a strategic standpoint, we accomplished the goal of shifting the focus of the case to the plaintiff's husband, who served as her treating otolaryngologist. We sent the message to plaintiff very clearly that if this case proceeded to trial, we intended to argue that the real culprit in the case is the clinician and the only reason plaintiff did not name him as a defendant in the case is because they were husband and wife. We also raised the issue that he did not maintain medical records relative to his wife, a departure and a potential disciplinary issue. It was important to let the plaintiff know that if this case proceeded to trial, her husband would be in the proverbial "hot seat."

COURT DECISION AND CASE DISPOSITION

The Suffolk County Supreme Court IAS Judge denied our summary judgment motion, holding that the plaintiff's expert radiology opinion that our client failed to appreciate the significance of the unilateral finding on imaging created an issue of fact. The Court did not adopt our argument that the radiologist had a limited duty of care, because the radiologist did not appropriately report the findings by including a diagnosis of "polyp." The Court also ruled that any argument regarding the culpability of the non-party clinician was an issue of fact for the jury.

Leading to trial, we served expert responses including an expert response for an otolaryngologist to testify that the information related by the defendant radiologist provided sufficient information to inform the treating otolaryngologist that a further workup was required. We also notified the Court of our intention to move in limine to preclude plaintiff's experts from opining that our client radiologist had a duty to recommend further workup.

On the eve of trial, plaintiff discontinued the case against our clients.

DISCUSSION

This case demonstrates the utility in filing a motion for summary judgment even when the likelihood of success is questionable. A well-crafted motion can send a message to the other parties that your defense is stronger than it really is. This is even true in radiology cases, where often the plaintiff will argue that the defendant failed to report a critical finding. In this case, the plaintiff's lawyer did not appreciate the strength of our factual and legal arguments. As such, we clearly set out our arguments on paper and put the patient on notice that her husband was going to be our target at trial. We also subtly pointed out that her husband's failure to maintain a medical record would not only look bad to a jury but also subjected him to potential discipline.

While we lost the motion, by the plaintiff and her lawyer heard our message loud and clear. When the plaintiff's lawyer appreciated that we did not intend to settle the case and intended to proceed to trial, he discontinued the case.

Attorneys and clients alike often avoid summary judgment motions when the likelihood of receiving a dismissal is low. However, this case demonstrates 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, or in our case a discontinuance. ■

Daniel L. Freidlin is a Senior Trial Partner at Martin Clearwater & Bell LLP. Mr. Freidlin focuses his practice on the defense of medical malpractice and professional liability cases and represents major teaching hospitals in New York as well as individual physicians.

Maureen P. Blazowski is a Partner at Martin Clearwater & Bell LLP, where her practice is concentrated in the areas of general tort and complex medical malpractice litigation, with additional expertise in Health IT, Privacy and Data Security.

Recent Case Results

Unanimous Defense Verdict in Gynecology Case

Partner **Thomas Kroczynski** assisted by Senior Associate **Kerona Samuels** and Associate **Edmund Rakowski** obtained a defense verdict in Suffolk County Supreme Court before Justice Thomas Whalen. In this matter, the plaintiff was a 45-year-old who underwent an elective hysterectomy by the defendant gynecologist. On the day of discharge two days after the surgery, every other surgical staple used to close the incision in the skin was removed to decrease the risk of infection. Plaintiff alleged that removing half of the staples two after the surgery was premature, particularly given her obesity and history of four prior C-sections. Plaintiff alleged she experienced a dehiscence of the surgical site, which then became infected, and necessitated hospitalization where she received blood transfusions and IV antibiotics through a PICC line.

As a result of the bacterial infections and/or medications to treat the infections, plaintiff alleged that she subsequently developed fibromyalgia and was no longer able to work or perform her activities of daily living. After a Frye/Parker hearing, plaintiff was precluded only from pursuing the theory that she developed fibromyalgia as a consequence of the medications to treat the infections. At trial, among other things, it was shown that a wound dehiscence did not occur, infection is a risk of any surgery and that the cause of fibromyalgia is unknown. The jury deliberated during their lunch break and returned a unanimous verdict for the defendant.

Discontinuance in Pain Management Death Case After MCB moves for Summary Judgment

Senior Trial Partner **Kenneth Larywon**, Partner **Christopher Terzian** and Associate **Christopher Daniel** secured a discontinuance in a pain management case in Rockland County. A then 53-year-old married man with three children presented to a regional hospital with severe abdominal pain, for which the decedent would typically receive Dilaudid. Martin Clearwater & Bell LLP represented three physicians and a physician's assistant who treated the decedent during the beginning of the decedent's admission to the hospital. The MCB represented Emergency Medicine Physician ordered 1 mg of Dilaudid for pain relief and the MCB represented Hospitalist ordered another 1 mg of Dilaudid shortly after the decedent's arrival to the hospital. Another 1 mg of Dilaudid was ordered by the MCB represented physician's assistant a few hours later. Later that same day, the decedent was administered further Dilaudid by non-MCB represented providers and arrested a couple of hours thereafter.

Ultimately, the decedent passed away days later. The plaintiff-wife brought suit and alleged that all of the defendants improperly administered Dilaudid to the decedent and caused the decedent's arrest and death. MCB moved for summary judgment on behalf of the MCB represented providers and argued, with expert support, that the Dilaudid ordered for the decedent by the MCB defendants was appropriate and within the standard of care for pain management and the Dilaudid administered was appropriate to address the decedent's complaints of abdominal due to the prior success of Dilaudid in treating that pain. MCB's attorneys also argued that the Dilaudid administered pursuant to the orders of the MCB defendants did not proximately cause the decedent's death because that Dilaudid had already metabolized and therefore, could not have caused the decedent's arrest and death.

MCB moved on behalf of 4 providers and due to our strong arguments, plaintiff's counsel chose to discontinue his claims against each provider rather than oppose the motion.

Summary Judgment in Gunshot Wound Case

Partner **Karen Corbett** and Appellate Partner **Gregory Cascino** obtained summary judgment in an occupational therapy case. Plaintiff was treated in our client hospital's emergency room after sustaining 2 gunshot wounds in his right arm resulting in the loss of sensation to the 4th and 5th digits of his right hand. On discharge, the plaintiff was referred to our client hospital's outpatient clinic for occupational therapy. At his first therapy session, the OT applied a hot pack to his right hand and allowed the plaintiff to sit with hot pack on for 20 minutes. The plaintiff alleges that he sustained a burn as a result of the hot pack application. He testified that he noticed a blister on the tip of his 5th finger when the hot pack was removed which he brought to the attention of the OT. According to the plaintiff, the OT told him the blister was caused by friction from the splint and it did not require treatment, however the plaintiff was told to return to the clinic if the blister opened or worsened. A week later the blister burst and the plaintiff presented to our client hospital's Emergency Room where he was diagnosed with a second degree burn. He later developed necrosis of the finger. He brought a malpractice action against our client's hospital and clinic in which he alleged that our client hospital's OT negligent application of the hot pack caused the burn, which the OT and other medical providers at our client hospital failed to diagnose and treat.

Case Results

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The Court granted our summary judgment motion which was supported by an expert affirmation from a physician who opined that the application of the hot pack to the right hand could not have caused a burn to only one finger tip, and even if it, did there were no departures from the standard of care in diagnosing and treating the injury. The plaintiff's opposition papers, which were not supported by an expert affirmation, contended that the OT was negligent in applying the hot pack knowing that the plaintiff was insensate, and because this was ordinary negligence, not malpractice, no expert opinion was necessary to support that position. The lower court granted our motion and dismissed the action based on the finding that plaintiff could not raise a triable issue of fact without submitting an expert affidavit. On appeal, the Second Department affirmed the Court's decision. The appellate court found that our motion made a *prima facie* case which plaintiff could not rebut without an expert opinion.

Summary Judgment in Neurologically Impaired Infant Case

Senior Trial Partner **Daniel Freidlin** and Partner **Anthony Chionchio** obtained Summary Judgment in a neurologically impaired infant case. This case involved a then 34-year-old woman who alleged that our client obstetrician/gynecologist failed to timely suspect a placental abruption and deliver the infant. Plaintiff alleged that the delay in delivery resulted in maternal hemorrhage with resultant decreased perfusion to the fetus resulting in cerebral palsy. MCB moved for summary judgment arguing that our client appropriately instructed the patient to present to the hospital when she called him in the middle of the night reporting vaginal bleeding. She was stable in the hospital but then developed acute hemorrhage. The hospital resident called our client to report the change in status. We argued that our client appropriately instructed the resident obstetrician that he was on his way to the hospital but in the interim to get the operating room ready, start an IV, draw blood, as well as notify anesthesia, neonatology and the house attending of a possible emergent delivery. On arrival, he evaluated the patient and delivered the baby within twenty minutes. Critical to the defense was his deposition testimony that on arrival, the fetal status was reassuring and that the emergent delivery was to prevent the mother from bleeding to death. Further, arterial blood gases at delivery proved that there was no evidence of a hypoxic-ischemic injury. Plaintiff was unable to overcome our arguments and Judge McCarthy granted our motion for summary judgment.

Summary Judgment Granted in Plastic and Reconstructive Facial Surgery Case

Senior Trial Partner **Michael Sonkin**, Partner **Elizabeth Sandonato**, and Associate **Casey Hughes** obtained Summary Judgment in a case involving facial plastic surgery. Plaintiff alleges the defendant, our client doctor, improperly performed an insertion implant, repair, reconstruction, and re-section of the plaintiff's right malar, improperly placed hardware in the right cheek, improperly allowed a drill bit to fall onto the floor of the right orbit, utilized an improper surgical technique, improperly fixated metal plate to the bone, placed an inadequate number of screws during surgery and did not fixate plates to the bone, and failed to identify a misplaced drill bit operatively. The claimed injuries include: post-traumatic facial injury; deformity of right face including eyelid ectropion; drill bit left along the right orbit; severe pain and suffering; jaw pain; inability to chew food; loss of vision; blurriness; and loss of equilibrium.

MCB moved for summary judgment, contending the care and treatment was proper, the drill bit was discovered by our client doctor during the second surgery he performed on the plaintiff, that he did not use a drill bit when he did his first surgery, and that the plaintiff's injuries were pre-existing, difficult to heal/resolve/eradicate, and that consent was properly obtained for all surgeries. One of the codefendant surgeons and their respective hospital also moved. Plaintiff technically opposed, but the opposition did not oppose our motion. The Reply highlighted this point. Following two oral arguments, the Court issued a decision and order, granting our motion and dismissing the complaint in its entirety.

Summary Judgment Granted in Nursing Home Case Involving an Improper Maintenance Operation

Senior Trial Partner **Jeffrey Shor**, Partner **Conrad Chayes**, and Associate **Victor Ivanoff** received Summary Judgment in a nursing home case. This was an action brought on the behalf of a then 62-year-old nursing home resident, wherein plaintiff claimed medical malpractice and improper maintenance/operation of a Hoyer lift. Suit was also commenced against the manufacturer of the medical device. The Hoyer lift apparently malfunctioned, dropping the plaintiff to the floor, and resulting in skull fracture and brain bleeding.

We utilized three experts in support of our motion for summary judgment: Geriatric and Internal Medicine, Neurology, and Engineering. Affidavits were prepared on behalf of each expert, the internist opined as to the overall medical care rendered at

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the facility, the proper operation of the lift, and decedent's death; the neurologist provided opinions as to the decedent's neurological baseline and the fact that the fall did not impact decedent's functional baseline; and, our engineering expert provided opinions as to the facility's maintenance and operation of the lift, his inspection of the lift, and that our insureds complied with the manufacturer instructions. Our initial arguments addressed the medical malpractice claims, Public Health Law claims, negligence claims, punitive damages, and wrongful death cause of action. We advanced over one dozen medical and legal defenses to the direct claims, as well as addressed the cross-claims raised by the very adversarial codefendant lift manufacturer. Our substantive motion papers totaled in excess of ninety pages, exclusive of the nearly three dozen exhibits in support.

Plaintiff submitted opposition to our Motion, though same was only supported by the affidavit of an engineering expert; thus, we argued in reply that the plaintiff was unable to overcome our arguments with respect to the claimed injuries, wrongful death cause of action, and duration of/ability to perceive pain and suffering. Further, the plaintiff failed to oppose our arguments with respect to dismissal of the Public Health Law claims, the medical malpractice claims, punitive damages, the son's derivative claims, and the cause of action for wrongful death. We cited opinions issued by the same Judge, dismissing the respective actions under similar circumstances, as further exhibits.

With respect to plaintiff's arguments under *res ipsa loquitur*, we argued same requires a showing of exclusive control over the mechanism of injury; here, plaintiff alleges that our facility maintained the lift, but that the lifts were negligently designed or manufactured by the codefendant. This constitutes a concession on the part of plaintiff that there do exist alternate causes for the claimed injuries.

Justice O'Donoghue adopted each of our arguments in dismissing the case as against our insured facility, together with the codefendant's cross-claims, in their entirety and with prejudice. Additionally, on the basis of our proximate causation arguments, the Court also dismissed the action as against the codefendant lift manufacturer.

Summary Judgment Obtained in ENT Case

Senior Trial Partner **Peter Crean** and Partners **Elizabeth Sandonato** and **Emma Glazer** obtained Summary Judgment in an ENT case involving an alleged delay in diagnosis and treatment of a rare infection called Ludwig's angina. Our defendant provided a telephonic consult after the patient was already on appropriate antibiotics and confirmed that surgery was not indicated. She did not see the patient in person. MCB moved for summary judgment on the basis that as a matter of law, our defendant did not owe a duty of care to this patient whom she did not see and did not make affirmative treatment recommendations. Even if she did, she met the standard of care because our expert agreed that surgery was not indicated and none of her actions or inactions caused the patient's injury. This case was dismissed as to our clients.

Summary Judgment Granted in Radiology Case

Senior Trial Partner **Daniel Freidlin** and Partner **Maureen Blazowski** obtained summary judgment in a radiology case. Plaintiff alleged that our client radiologist failed to identify a disc fragment that became embedded in the L4 nerve root resulting in the need for an L3-L4 laminectomy and microdiscectomy. Plaintiff claimed that the failure to diagnose and report the finding resulted in her undergoing aggressive chiropractic maneuvers that exacerbated the condition and prevented it from healing. She alleged that it resulted in the need for surgery.

MCB submitted expert affirmations of an orthopedic surgeon and chiropractor (we were unable to secure a favorable opinion from a radiologist). Our orthopedic surgeon opined that the disc fragment appeared on only one frame of an MRI containing multiple series and hundreds of frames. Our expert opined that the finding was so subtle that the failure to report it did not constitute a departure from the standard of care. Moreover, the standard of care for management of herniated disks includes conservative treatment regimens such as epidural injections, physical therapy, pain medication and chiropractic maneuvers for three months. If the patient's symptomatology does not improve after three months, surgery is considered. Our expert chiropractor opined that the treatment rendered by the patient's treating chiropractor was consistent with treatment for symptomatic relief of herniated disks and did not exacerbate the patient's complaints.

The plaintiff opposed our motion with a radiology expert, and in reply we argued that the expert was not qualified to create an issue of fact related to proximate cause. The Court agreed with our position and dismissed the case.

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Case Results

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Summary Judgment Granted in Wrongful Death Action

Senior Trial Partner **Rosaleen McCrory**, Partner **Elizabeth Sandonato** and Associate **Edmund Rakowski** obtained summary judgment in a wrongful death action venued in Kings County. The claims against defendant related to the care and treatment that was rendered during the admission. At the time of her admission, the decedent, was 77 years of age and a long-term resident of the codefendant nursing home due to advanced Parkinson's dementia. The claims focused on the alleged development of compression fractures in the lumbar spine and rib fractures due to an alleged fall and the development of a deep tissue injury on the sacrum. Through experts in nuclear medicine and geriatrics, we established the fractures pre-dated the admission at issue and during the 9-day admission, skin was intact. The DTI was identified on re-admission to the codefendant and remained the same for a month after she returned to the codefendant facility. By then, the ulcer declared itself and the decedent was actively dying. The court ruled our experts' affirmations bolstered by the Hospital's medical records clearly proved the treatment rendered was within the appropriate standard of care and any alleged departure did not proximately cause the decedent's injuries and death. In opposition, plaintiff failed to raise a question of fact as to the Hospital's liability. ■

SUITED *for* SUCCESS

PROFESSIONAL CLOTHING & ACCESSORIES DRIVE

Helping law students look their very best while making their way to a career in law.

Martin Clearwater & Bell LLP is collecting professional clothing, accessories and/or gift cards for its first annual Suited for Success distribution event to be held on March 11, 2023 from 10:00 am to 1:00 pm at the Nassau County Bar Association, 133 15th Street, Mineola, NY 11501.

Law students will be able to "shop" new and lightly used business attire and accessories at no cost. Other activities will include mock/flash interviews and a raffle for great prizes.

We're excited to help these young professionals make a great first impression!

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What's New at MCB?

MCB
MARTIN CLEARWATER & BELL LLP


Thomas J. Kroczynski

PARTNER THOMAS J. KROCZYNSKI RATED AV PREEMINENT BY MARTINDALE-HUBBELL®

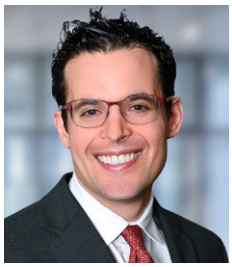
Martindale-Hubbell® AV PREEMINENT® Peer Rated for Highest Level of Professional Excellence 2022

Congratulations to our Partner Thomas J. Kroczynski for receiving Martindale-Hubbell's highest rating: AV Preeminent! This rating is achieved through an online survey where a lawyer's ethical standards and legal ability in a specific area of practice are assessed by their peers. Through this peer review, the distinguished AV Preeminent rating is only given to attorneys who are ranked at the highest level of professional excellence.

MCB CONGRATULATES 2 NEW PARTNERS!

MCB is pleased to announce the promotion of two talented attorneys to our team of partners, effective January 1, 2023. Both have demonstrated outstanding legal skill and dedication to their clients. We appreciate their contribution to the success of our Firm, and congratulate them on this well-deserved professional achievement.


Maureen P. Blazowski


Evan R. Schnittman


Karen B. Corbett

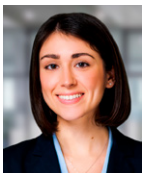
PARTNER KAREN CORBETT PRESENTS AT JAMAICA HOSPITAL MEDICAL CENTER – DEPARTMENT OF OB/GYN

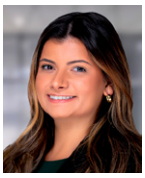
On February 3rd, Partner Karen B. Corbett presented on Mitigating Legal Exposure in OB/GYN cases to attending and resident physicians at Jamaica Hospital Medical Center – Department of OB/GYN. Her talk focused on specific issues faced by OB/GYN physicians in medical malpractice cases.

MCB SPONSORS AHRMNY'S 2023 ANNUAL EDUCATIONAL & NETWORKING EVENT

MCB proudly sponsored AHRMNY's 2023 Annual Evening Educational & Networking Event on at Lenox Hill Hospital on February 15th, featuring Rapid Risk Management Round Tables.

MCB Welcomes 13 New Attorneys!


Lauren Bisogno

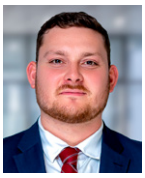

Raquel Chavez

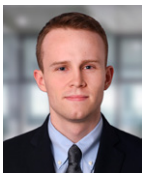

Catherine Fiore


Brandon Fernandes


Kelsey Gittler

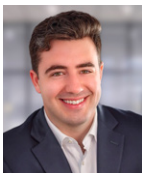

Simone Grey


Matthew Hallock

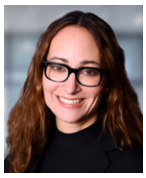

Fiachra Moody


Ashley Mullings-Maragh


Aran O'Gara


Justin Provvido


Nameer Shukri


Jennifer Wanner

NEW YORK, NY
220 East 42nd Street
New York, NY 10017
PHONE (212) 697-3122
FAX (212) 949-7054

EAST MEADOW, NY
90 Merrick Avenue
East Meadow, NY 11554
PHONE (516) 222-8500
FAX (516) 222-8513

WHITE PLAINS, NY
245 Main Street
White Plains, NY 10601
PHONE (914) 328-2969
FAX (914) 328-4056

ROSELAND, NJ
101 Eisenhower Parkway
Suite 305
Roseland, NJ 07068
PHONE (973) 735-0578
FAX (973) 735-0584

ROCHESTER,NY
16 West Main Street
Suite 728
Rochester, NY 14614
PHONE (585) 413-1699
FAX (585) 413-3430

STAMFORD, CT
1 Landmark Square
Stamford, CT 06901
PHONE (203) 738-5226
FAX (203) 738-5227

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