

Defense Practice UPDATE

MARTIN CLEARWATER & BELL LLP

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In this Issue:

COURT OF APPEALS REAFFIRMS
THAT RECOVERY OF DAMAGES
FOR PURELY EMOTIONAL
DISTRESS IS LIMITED 1

SUMMARY JUDGMENT ON
CAUSATION: UNDERUTILIZED
AND UNDERRATED.....5

JURY SELECTION AND
DYNAMICS IN FEDERAL
COURT6

CASE RESULTS.....8

MCB NEWS.....13

Court of Appeals Reaffirms that Recovery of Damages for Purely Emotional Distress is Limited

BY: BARBARA D. GOLDBERG, ESQ.

In a decision highly favorable to the defense bar, the New York Court of Appeals recently reaffirmed that the circumstances under which damages for purely emotional distress may be recovered are narrowly circumscribed. In *San Miguel v. Grimaldi*, __N.Y.3d__, 2025 N.Y. LEXIS 1767, 67 (October 21, 2025),¹ the Court of Appeals, ruling on a question certified to it by the Appellate Division, First Department, held that a mother may not recover damages for purely emotional distress, regardless of whether her cause of action sounds in ordinary medical malpractice or lack of informed consent, where a child is born alive but in an impaired condition. As such, the Court of Appeals adhered to its prior determination in *Sheppard-Mobley v. King*, 4 N.Y.3d 627 (2005), despite an invitation by the Appellate Division, First Department to “revisit” its holding in *Sheppard-Mobley*.

In *San Miguel*, the defendant obstetrician attempted a vacuum-assisted extraction when the plaintiff mother’s labor did not progress.

REGARDLESS OF WHETHER HER
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OR LACK OF INFORMED CONSENT,
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PURELY EMOTIONAL DISTRESS
WHERE A CHILD IS BORN ALIVE BUT
IN AN IMPAIRED CONDITION.

When this proved unsuccessful, she performed an emergency cesarean section. The infant was delivered alive, but in serious condition, and died eight days later.

The plaintiff brought suit against the doctor, the hospital, and a certified nurse-midwife who participated in the delivery attempts, alleging medical malpractice on behalf of the infant’s estate and on her own behalf (Counts 1 and 2); lack of informed consent on behalf of the infant’s estate and on her own behalf (Counts 3 and 4), and loss of the infant’s ser-

1. Since there does not yet appear to be an official citation, page references to the decision are to the pages of the Slip Opinion of the Court of Appeals, No. 67. References herein are simply to “*San Miguel*.”

Court of Appeals Reaffirms that Recovery of Damages for Purely Emotional Distress is Limited

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vices (Count 5). As to Count 4, which alleged lack of informed consent on her own behalf, the plaintiff sought only emotional damages.

The defendant obstetrician moved for summary judgment dismissing the second and fourth causes of action, relying on *Sheppard-Mobley v. King*, which declined to recognize a cause of action for emotional distress on behalf of the mother where an infant was born alive but in an impaired condition. In response, the plaintiff conceded that Count 2 -- alleging medical malpractice on her own behalf -- should be dismissed. The Supreme Court dismissed the second cause of action but upheld the fourth cause of action alleging lack of informed consent on the part of the plaintiff, reasoning that summary judgment as to that claim was inappropriate because there were issues of fact as to whether the plaintiff consented to the use of the vacuum extractor, and whether the use of the vacuum extractor proximately caused the infant's injuries. *San Miguel v. Grimaldi*, 2020 NY Slip Op 3565(U) (Sup. Ct., Bronx County 2020).

A divided panel at the Appellate Division, First Department, affirmed. See *San Miguel v. Grimaldi*, 229 A.D.3d 152 (1st Dept. 2024). The majority concluded that *Sheppard-Mobley* did not bar the mother's claim for emotional distress, drawing a somewhat strained and artificial distinction between lack of informed consent claims and "general allegations of medical negligence" such as those at issue in *Sheppard-Mobley*. According to the majority, lack of informed consent "comprises different elements" and "implicates the prospective mother's active role as decision-maker for herself and on behalf

DAMAGES FOR PURELY EMOTIONAL DISTRESS ARE RECOVERABLE ONLY IN SPECIAL CIRCUMSTANCES, SUCH AS FALSE REPORTS OF A FAMILY MEMBER'S DEATH OR THE MISHANDLING OF REMAINS. FOR EXAMPLE, IN *JOHNSON*, THE PLAINTIFF WAS GIVEN A FALSE REPORT OF HER MOTHER'S DEATH AND ACTUALLY ARRANGED FOR A FUNERAL BEFORE REALIZING THAT THE BODY IN THE CASKET WAS NOT THAT OF HER MOTHER.

of her fetus, with both capacities concerning the mother's right to the integrity of her body." *Id.* at 159. On this basis, the majority held that the mother's claim for emotional distress was not barred by *Sheppard-Mobley*. *Id.* at 160.

The majority, however, went further and urged, alternatively, that "assuming for the sake of argument that *Sheppard-Mobley* applie[d] similarly to claims for ordinary medical malpractice and lack of informed consent," the Court of Appeals should revisit the issue, characterizing the result in *Sheppard-Mobley* as "unjust, as well as opposed to experience and logic." *Id.* Presiding Justice Dianne T. Renwick dissented in part in a well-reasoned opinion, concluding that *Sheppard-Mobley* mandated dismissal of the mother's claim for emotional distress because she did not suffer an independent physical injury stemming from the lack of informed consent. Rather, her emotional damages "ar[ose] solely from the physical injuries sustained by the infant who was born alive." *Id.* at

168. Rejecting the majority's contrived distinction between ordinary malpractice and lack of informed consent, the dissenting Justice held that "to the extent *Sheppard-Mobley* implicates the Court of Appeals' reluctance to expand emotional distress damages in cases involving prenatal torts," it "should apply with equal force to claims of lack of informed consent." *Id.* at 171.

The Appellate Division subsequently granted leave to appeal to the Court of Appeals, certifying the question of whether its order was properly made. See 2024 NY Slip Op 71936(U) (1st Dept. 2024).

The Court of Appeals, with two judges dissenting, answered the certified question in the negative, and declined the Appellate Division's invitation to revisit *Sheppard-Mobley*, based in large part on considerations of stare decisis. In a well-reasoned opinion by Hon. Madeline Singas, the Court reviewed the narrow circumstances under which New York law has permitted recovery of purely emotional damages, noting that over the twentieth century, the Court had identified "three narrow instances where a plaintiff may recover for emotional suffering absent physical injury." *San Miguel*, p.5.

Specifically, damages for purely emotional distress are recoverable in special circumstances such as false reports of a family member's death or serious illness, or the mishandling of a family member's remains, as for example in *Johnson v. State of New York*, 37 N.Y.2d 378, 381-382 (1975). There, the plaintiff was given a false report of her mother's death and actually arranged for a funeral before realizing that the body in the casket was not that of her mother. In addition, a plaintiff may recover

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Court of Appeals Reaffirms that Recovery of Damages for Purely Emotional Distress is Limited

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NEVERTHELESS, AS NOTED IN *SAN MIGUEL*, THE COURT IN *BROADNAX* REAFFIRMED ITS “LONGSTANDING RELUCTANCE TO RECOGNIZE CAUSES OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, ESPECIALLY IN CASES WHERE THE PLAINTIFF SUFFERED NO INDEPENDENT PHYSICAL OR ECONOMIC INJURY.

where a defendant’s breach of a duty of care unreasonably placed the plaintiff in fear of physical harm, resulting in emotional harm with “physical manifestations.” This line of cases is exemplified by *Battalla v. State of New York*, 10 N.Y.2d 237, 238-239 (1961), where the infant plaintiff was negligently secured in a ski lift by the State’s employees, and as a result became “frightened and hysterical upon the descent, with consequential injuries.” *Id.* at 239. Finally, a plaintiff may recover for the negligent infliction of emotional distress under a “zone of danger” theory, where the plaintiff suffers emotional distress upon witnessing the death or serious physical injury of an immediate family member while the plaintiff is in the “zone of danger” created by the defendant’s negligence, as for example an automobile accident resulting in death or serious physical injury to a family member. See *Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984); see also *Greene v. Esplanade Venture Partnership*, 36 N.Y.3d 512, 522-523 (2021).

The majority opinion in *San Miguel* emphasizes that in applying these exceptions, the Court of Appeals has “re-

peatedly stressed their circumscribed nature and [has] remained ‘reluctant to permit recovery for negligently caused psychological trauma, with ensuing emotional harm alone.’” *San Miguel*, p. 6 (citations omitted). Applying these principles, the Court has consistently declined to allow recovery where parents claim emotional injury arising from the death or suffering of a child due to prenatal malpractice, as for example in cases where the defendants negligently failed to detect a genetic condition such as Tay-Sachs Disease which, if timely diagnosed, might have led the parents to terminate the pregnancy. See, e.g., *Howard v. Lecher*, 42 N.Y.2d 109 (1977).

The majority opinion in *San Miguel* noted that in *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 151 (2004), the Court had held that a mother could recover damages for purely emotional harm when medical malpractice caused a miscarriage or stillbirth, overruling its prior decision in *Tebbutt v. Virotek*, 65 N.Y.2d 931 (1985). As is made clear both in *Broadnax* and the majority opinion in *San Miguel*, this result was deemed necessary to address the anomalous situation created by prior precedent, whereby a medical provider who negligently caused a miscarriage or stillbirth was shielded from liability in the absence of independent physical injury to the mother. Nevertheless, as noted in *San Miguel*, the Court in *Broadnax* reaffirmed its “longstanding reluctance to recognize causes of action for negligent infliction of emotional distress especially in cases where the plaintiff suffered no independent physical or economic injury.” *San Miguel*, p. 8, citing *Broadnax*, 2 N.Y.3d at 153. Accordingly, *Broadnax* created “a limited, sui

generis exception to the bar on claims for purely emotional damages to ensure that medical professionals are not entirely immune from liability for malpractice resulting in a fetus’s death. . . .” *Id.* at 155, n. 4.

The majority in *San Miguel* noted that in *Sheppard-Mobley*, the Court “unanimously clarified” that *Broadnax* “narrowly ‘permit[s] a cause of action where otherwise none would be available.’” *San Miguel*, p. 9, citing *Sheppard-Mobley*, 4 N.Y.3d at 637. Accordingly, the Court of Appeals has consistently rejected attempts by lower courts to extend *Broadnax* to situations where an infant was born alive, because in those circumstances the infant (or the infant’s estate) could recover independently for the medical malpractice causing injury.

Against this backdrop of its longstanding precedent, the majority in *San Miguel* held that a mother may not recover for “purely emotional suffering due to medical malpractice resulting in in-utero injuries” to her child who is born alive. *San Miguel*, p. 9. The Court also rejected the “distinction” the majority at the Appellate Division attempted to draw between claims for ordinary medical malpractice and those sounding in lack of informed consent, explaining that while recovery for lack of informed consent is limited to the circumstances defined by Public Health Law § 2805-d (1), (3), it is nevertheless treated as form of medical malpractice based on negligence.

The Court in *San Miguel* noted that although *Sheppard-Mobley* involved a “traditional” medical malpractice claim, its holding was clear that a mother could not “recover damages for

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Court of Appeals Reaffirms that Recovery of Damages for Purely Emotional Distress is Limited

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emotional harm where . . . alleged medical malpractice causes in utero injury to the fetus, subsequently born alive.” *San Miguel*, p. 11, citing *Sheppard-Mobley*, 4 N.Y.2d at 634. Thus, since a lack of informed consent claim is a type of malpractice claim,² the majority in *San Miguel* ruled that “a straightforward reading of *Sheppard-Mobley* forecloses plaintiff’s claim.” *Id.*

The *San Miguel* Court also observed that in holding that informed consent and medical malpractice claims are distinguishable, the Appellate Division “ignored the broader context of the general rule barring recovery for purely emotional damages, which long predated *Sheppard-Mobley*.” *San Miguel*, p. 11, citing 229 A.D.3d at 170-171 [Renwick, P.J., dissenting]. “The core question is whether plaintiff’s claim for emotional injuries falls within any exception to that general rule. Because lack of informed consent claims are indistinguishable from traditional medical malpractice claims for purposes of that rule, our holding in *Sheppard-Mobley* forecloses any argument that the *Broadnax* exception governs and our prior cases – reaffirmed in *Sheppard-Mobley*, confirm that no other exception applies.” *Id.*, p. 12.

The Court found no justification to overrule *Sheppard-Mobley*, characterizing its rule as “logical and fit[ting] comfortably within New York’s tort jurisprudence disfavoring recovery for purely emotional injuries,” and noting that in contrast to the situation which prevailed prior to *Broadnax*, under

Sheppard-Mobley, a doctor is liable for negligence resulting in an infant’s death after birth, such that there is no gap in liability and thus no need to avoid such perverse incentives.” *San Miguel*, p. 14.

In concluding, the majority in *San Miguel* observed that “New York’s long-established skepticism of claims for purely emotional damages necessarily prohibits some plaintiffs with emotional injuries from recovering for that harm.” While the dissenting judges had sought to fashion an ad hoc exception to that rule for situations where an infant is born alive but succumbs to injuries shortly after birth, the majority cogently concluded that “[r]eversing course by creating an ad hoc exception to this rule would only engender the very inconsistency and confusion that our adherence to precedent seeks to avoid.” *Id.*, p. 17.

San Miguel thus makes it clear that a mother may not recover for purely emotional distress where an infant is born alive in an impaired condition, even where the infant succumbs to his or her injuries shortly after birth. *San Miguel*, however, may also prove of significant benefit to health care providers in other settings where a plaintiff seeks to recover for purely emotional injuries occasioned by negligence or medical malpractice. The message from the Court of Appeals in *San Miguel* is unmistakable: if the circumstance of the case do not fit within any of the narrowly circumscribed exceptions where the Court of Appeals has

THE MESSAGE FROM THE COURT OF APPEALS IS UNMISTAKABLE: IF THE CIRCUMSTANCES OF THE CASE DO NOT FIT WITHIN ANY OF THE NARROWLY CIRCUMSCRIBED EXCEPTIONS WHERE THE COURT HAS RECOGNIZED A CAUSE OF ACTION FOR PURELY EMOTIONAL DISTRESS, THEN SUCH CLAIMS SHOULD BE SUBJECT TO DISMISSAL AS A MATTER OF LAW.

recognized a cause of action for purely emotional distress, then such claims should be subject to dismissal as a matter of law unless and until such time as the Legislature decrees otherwise. ■



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2. The majority noted that both ordinary malpractice and lack of informed claims arise from injury caused by a medical procedure performed in breach of a professional duty.



Summary Judgment on Causation: Underutilized and Underrated

BY: YUKO A. NAKAHARA, ESQ.

Traditionally, motions for summary judgment are utilized to seek a dismissal of the action, or at the very least, certain individual claims, based upon the absence of liability. When making these motions, cursory arguments concerning the lack of causation are almost always included. In medical malpractice cases specifically, the rationale is that the appropriate care and treatment rendered by a provider could not have been a proximate cause of, or a substantial contributing factor in, a patient's claimed injuries.

It is quite uncommon that a motion for summary judgment is made, not on liability, but on causation alone. However, recent successes in the Supreme Court and the Appellate Division have reaffirmed the need for an in-depth analysis of the feasibility, and potential benefits, of a motion for summary judgment on causation, as it is often times underrated and therefore, underutilized.

In a medical malpractice case recently before the Appellate Division, Second Department, plaintiff claimed that a certified midwife mismanaged her prenatal care. Specifically, plaintiff claimed that she informed the midwife of decreased/infrequent fetal movement, yet the midwife failed to act, and further, failed to appropriately advise her. This purported negligence was claimed to have caused and/or contributed to the fetus' demise 2-3 weeks later.

Indeed, there was a triable issue of fact concerning whether plaintiff ever

reported decreased/infrequent fetal movement. With this, there was a further triable issue of fact as to whether the midwife responded appropriately, if plaintiff's complaint had been raised. Thus, it was recognized that a motion for summary judgment on liability, at least on these contested issues, would not be successful.

However, upon examining the impact of the potential on causation (or, here, the lack thereof), a motion for summary judgment on causation was pursued. In the motion, defendant conceded certain disputed facts – but argued that regardless of whether the midwife was negligent in the manner claimed by plaintiff, the claimed negligence had no impact on and/or causal connection with the fetus' demise that occurred approximately 2-3 weeks after plaintiff purportedly raised her complaints (of decreased/infrequent fetal movement).

Here, the autopsy of the fetus revealed that the cause of death was a placental abruption and/or a cord accident. With this, it was defendant's position, as supported by its expert, that neither the placental abruption, nor the cord accident, (1) existed as of when plaintiff purportedly made complaints, 2-3 weeks prior to the fetal demise (2) could have been prevented, and (3) could have been diagnosed prior to delivery. Thus, irrespective of complaints raised by plaintiff, if any, the midwife's care could not have caused the later unpreventable event(s).

Ultimately, the Trial Court granted defendant's motion for summary judgment – holding that a dismissal of the

IT IS QUITE UNCOMMON THAT A MOTION FOR SUMMARY JUDGMENT IS MADE, NOT ON LIABILITY, BUT ON CAUSATION ALONE. HOWEVER, RECENT SUCCESSES IN THE SUPREME COURT AND THE APPELLATE DIVISION HAVE REAFFIRMED THE NEED FOR AN IN-DEPTH ANALYSIS OF ITS FEASIBILITY AND POTENTIAL BENEFITS.

action was warranted, as the damage/injury (i.e. the fetal demise) was unequivocally caused by something other than defendant's claimed negligence. The dismissal was thereafter upheld by the Appellate Court.

In the context of a Labor Law case, similar motions for summary judgment on causation should also be considered. In a matter involving a laborer involved in a work-related accident, plaintiff claimed in his Bill of Particulars that he sustained injuries to his back, such that he ultimately required back surgery. Despite these allegations, plaintiff went on to testify at his deposition that he was, indeed, caused to sustain injuries to his back. However, he went on to testify that he informed by his physicians that the surgery was unrelated to the acute injuries that he sustained in the accident, but rather, that it was secondary to a degenerative condition. Defendants collectively moved for summary judgment on the issue of liability, but for reasons unknown, only some included the argument that plaintiff's claim for the surgery as an injury/dam-

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Summary Judgment on Causation: Underutilized and Underrated

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THE POTENTIAL BENEFITS OF A CAUSATION MOTION FAR EXCEED THE RISK. IT MAY LEAD TO AN OUTRIGHT DISMISSAL OF THE ENTIRE ACTION, THE DISMISSAL OF CLAIMED INJURIES THEREBY REDUCING CASE VALUE, OR SHARPEN THE FACTUAL AND LEGAL ISSUES TO GET A CLEARER PICTURE OF WHAT CLAIM THE DEFENSE IS UP AGAINST.

age should be dismissed, as plaintiff conceded that it was unrelated to the subject accident (i.e. no causation).

Ultimately, most of defendants' motions for summary judgment on liability were only granted in part (leaving in certain claims concerning negligence

and/or the applicability of the Labor Law depending on the respective involvement of each defendant). Significantly, however, plaintiff's claim concerning his back surgery was dismissed as to all defendants. The Court held that there was no triable issue of fact, especially given plaintiff's (repeated) testimony concerning the lack of causation between the accident and the back surgery – even though he maintained his position that he sustained back injuries, generally, as a result of his accident. This dismissal was monumental to the defense as it significantly reduced the value of plaintiff's claim, thereby facilitating the parties' ability to resolve the case.

The above cases serve as a reminder that a motion for summary judgment on causation are not just theoretically available. Rather, they should be pur-

sued more frequently, in conjunction with a motion on liability, or, even as a stand-alone motion. The potential benefits far exceed the risk, and it may lead to an outright dismissal of the entire action, lead to the dismissal of claimed injuries thereby reducing case value, sharpen the factual and legal issues and/or necessitate the inclusion of specific opinions by opposing experts as to get a clearer picture of what claim the defense is up against. ■



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Jury Selection and Dynamics in Federal Court

BY: CHRISTOPHER A. TERZIAN, ESQ.

Jury trials of medical malpractice cases in federal court are quite different than New York State Court practice. The most glaring difference is how jurors are picked and where they are seated in the courtroom.

I recently defended a case in United States District Court, in Brooklyn, which is the federal jurisdiction of the Eastern District of New York. In federal courts, jury selection is governed by Rules 47 and 48 of the Federal Rules Civil Procedure. Pursuant to Rule 47,

the Court invariably asks prospective jurors the questions, although the rule does allow the parties or their attorneys to examine prospective jurors as well. When the court examines the jurors, it must permit the attorneys to make or ask any additional questions the court considers proper. Each side has 3 peremptory challenges pursuant to 28 U.S.C. 1870. Pursuant to Rule 48, the size of the jury can be anywhere from 6 to no more than 12 jurors. The verdict also must be unanimous.

In New York State Court, the number

of jurors who decide a case is 6, and the verdict can be either unanimous (6 out of 6) or 5/6 jurors in favor of one side.

Jury selection in federal court is completely different from New York State court. In federal court, the magistrate judge may ask the parties to submit proposed jury questions for prospective jurors. The magistrate judge will have his or her own set of questions to ask a prospective panel. On the day of jury selection, the magistrate judge will seat as many people in the courtroom as possible. The first 12 people

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Jury Selection and Dynamics in Federal Court

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in the jury box will then be questioned by the magistrate judge. The attorneys do not question the prospective panel. If a juror voices a concern or expresses bias, the parties have a side bar with the magistrate judge and the prospective juror. This sidebar is the only time either the plaintiff's attorney or the defense counsel may interact with the prospective juror. However, the magistrate judge can prevent the parties from asking any direct questions of the prospective juror, and only the judge will.

In New York State court, jury selection allows the plaintiff's counsel and defense attorneys to interact directly with the jurors and select them without judicial intervention. In doing so, both sides can begin the process of trying to influence potential jurors to see that their position is the correct one. While the goal of jury selection is to get jurors who are not biased towards either side, the reality of New York State practice is that influencing prospective jurors begins during the jury selection process. The attorneys introduce themselves, and the prospective jurors get to know them. Oftentimes the process is both lighthearted and serious, as each attorney may mix humor with concern over the ability to get an impartial jury. The attorneys get to see how the prospective jurors react to their questions and presentations, which gives each attorney insight as to whether a particular person could be a useful juror for their position.

In federal court, the attorneys have no ability to personally interact with any of the jurors. This prevents each side from getting to know the jurors, and how they might consider the evidence presented at trial. Further, the inability to personally interact with jurors,

JURY SELECTION IN NEW YORK STATE COURTS IS MORE FAVORABLE FOR THE ATTORNEYS, BECAUSE IT GIVES THEM THE OPPORTUNITY TO INTRODUCE THEMSELVES, AND ESTABLISH THEIR POSITIONS PERSONALLY AND INTIMATELY.

reduces each attorney's ability to "connect" with them during trial. In a state case, during jury selection, usually each side is able to get several people they like and have good personal interaction with during the process, on the jury. When this happens, it allows the attorneys to speak in a personal and direct way to the jury during opening statements, reminding the jurors of points they made during jury selection. For example, if a defense attorney has concern about sympathy towards the plaintiff, her or she will remind the jurors who were selected that they all agreed to put sympathy aside and decide the case solely on the evidence.

The courtroom dynamics are also quite different in federal court. In the Second Circuit trial courtrooms I have been in, the plaintiff and his/her attorney sit at tables in front of the defense table. The plaintiff sits with their attorney, not only in front of the defense table, but also in front of the jury. In New York State courts, the plaintiffs do not sit with their attorneys, and the attorney's tables are next to each other, with the plaintiff's table being closest to the jury.

The effect of this courtroom setting up is more helpful for plaintiffs that defendants. The jury has an unobstructed view of the plaintiff and her attorney

and can only see the defense attorney with a limited view, behind the plaintiff and her counsel. This means throughout the trial, the plaintiff and her counsel can establish nonverbal communication with the jurors. Jurors may gaze at the plaintiff and/or the plaintiff's attorney throughout the trial or may make direct eye contact with them on purpose or inadvertently. Conversely, with the plaintiff and her counsel sitting in front of the defense attorneys, combined with the significant distance between the defense table and the jury box, the defense attorneys have limited opportunity to nonverbally "connect" with jurors. In one courtroom I recently was in, I estimated the distance between the jury box and where I was sitting was about 50 feet. The only time the jurors had an unobstructed view of me was when I questioned the witness; while I was seated, their view of me was completely obstructed.

Jury selection in New York State courts is more favorable for the attorneys, because it gives them the opportunity to introduce themselves, and establish their positions personally and intimately. Federal Court jury selection is a sterile process which prevents the attorneys and jurors from getting to know each other before the trial begins. However, the courtroom logistics of where the jurors and the attorney sit, favors plaintiffs. ■



Christopher A. Terzian is a Senior Trial Partner at Martin Clearwater & Bell LLP. He has achieved final disposition of medical malpractice defense verdicts and favorable summary judgments in NY courts of Queens, Brooklyn, Staten Island, Dutchess and Westchester counties.

Recent Case Results



Michael A. Sonkin



Casey M. Hughes



Keleisha A. Milton

Defense Verdict Secured in Post-Hysterectomy Bowel Injury Case

Senior Trial Partner **Michael A. Sonkin**, Senior Associate **Casey M. Hughes** and Associate **Keleisha A. Milton** successfully obtained a Defense Verdict in a Nassau County matter arising from a 2014 laparoscopically assisted vaginal hysterectomy performed by MCB's clients, along with a prolapse repair performed by a co-defendant, which the plaintiff alleged caused a bowel perforation. The

co-defendant settled out just before trial, and MCB argued on behalf of our clients that no perforation occurred during either procedure, highlighting that the patient was afebrile and reported no unusual abdominal pain in the immediate postoperative period. After returning to the hospital thereafter with a fever, a CT scan revealed an abscess consistent with an infection. MCB argued that the abscess was not due to perforation, as the patient's fever, elevated white blood cell count, and pain all improved following IR drainage. Although a rectovaginal fistula ultimately developed 10 days postoperatively, MCB maintained that this was not caused by the perforation but by an infection leading to breakdown of the bowel wall in an area of a prior surgery. The case was tried over a two-week period, with the jury returning a unanimous defense verdict in less than one hour.

Defense Verdict Secured in Hospital Negligence Case Alleging Negligent Performance of an Echocardiogram

Senior Trial Partner **Daniel L. Freidlin**, Partner **Anina H. Monte**, and Associate **Timothy M. O'Toole** successfully secured a Defense Verdict in a case where the plaintiff alleged that MCB's Hospital client and its employed echocardiogram technologist, negligently applied excessive force to the sternum during the performance of an echocardiogram, resulting in the fracture of sternal wires placed at the conclusion of his aortic valve replacement three years earlier.



Daniel L. Freidlin



Anina H. Monte



Timothy M. O'Toole

Prior to trial, MCB filed a motion for a *Frye* hearing. While the Court ultimately denied the request, the motion was successful in that the plaintiff submitted an Affirmation from their trial expert to oppose our motion. At trial, the plaintiff testified that the echocardiogram technologist applied undue pressure across his sternum and ribs, causing pain during the procedure. The plaintiff was diagnosed with asternal wire fracture within several weeks of the echocardiogram with apparently no other intervening traumatic event.

The echocardiogram technologist testified at trial that he could not recall performing this specific test on the plaintiff, but using invariable practice, as to his testimony, established the performance of the examination was performed while seated, and using his non-dominant hand. He further explained that while the test may cause discomfort for some patients, no patient has ever complained to him of pain. We cross-examined the plaintiff's expert with his sworn Affirmation and established that an echocardiogram has never been found to have ever caused sternal wire fractures. MCB also demonstrated evidence of sternal wire fracture on imaging from two years earlier than the performance of this echocardiogram.

In summation, MCB argued that returning a plaintiff verdict would require the jury to conclude that the plaintiff was the first person in world history where this has ever occurred and to ignore the findings of the prior imaging. The jury returned a unanimous defense verdict in well under an hour.



Christopher A. Terzian

MCB Secured Unanimous Defense Verdict in High-Stakes Delayed Diagnosis Case

Senior Trial Partner **Christopher A. Terzian**, achieved a defense verdict in Supreme Court, Westchester County, in a jury trial before Judge David J. Squirrell. The plaintiffs alleged the defendant doctor departed from good and accepted gynecologic practice, leading to a delayed diagnosis of a non-malignant abdominal wall desmoid tumor. They asked the jury to award \$1 million for past pain and suffering to the plaintiff wife, an unspecified amount for her future damages, and \$400,000 for the plaintiff husband's alleged loss of services.



Case Results

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The plaintiff wife had twins delivered by the defendant doctor via C-section. Approximately 13 months later, she reported feeling a mass in her lower abdomen, just below the scar, during her annual gynecologic visit. The doctor had no recollection of the complaint, and his note from the visit made no mention of it. He examined her scar and abdomen as part of the visit and found no abnormalities.

Five months later, she visited a primary care physician and complained of swelling, induration, and mild discomfort near the C-section scar. An ultrasound was ordered, which led to the diagnosis of an abdominal wall desmoid tumor. She sought surgery, but a surgeon at Memorial Sloan Kettering advised against it due to the complexity and risk of recurrence if removed. She was instead treated with targeted medication that destroyed the tumor's cellularity and turned it into fibrous tissue.

After about three years of treatment, the Oncologist advised the plaintiffs that the tumor had lost its cellularity and no further medical treatment was needed. She was taken off medication and has since been monitored radiographically to determine whether the tumor grows, remains stable, or regresses. The plaintiff wife alleged that the delayed diagnosis cost her the opportunity for surgical removal and forced her to endure three years of treatment with side effects including hair loss, nausea, vomiting, weakness, and sleep deprivation.

Mr. Terzian, through his expert gynecologist, argued that the doctor's care was within good and accepted practice of gynecology on the day she allegedly reported feeling a mass. His expert surgical oncologist explained that the tumor was difficult to palpate at the time because it was interwoven with the C-section scar. He further testified that desmoid tumors are benign and grow within healing tissue at the scar site. Medical therapy, not surgery, was the current and appropriate standard of care due to the complexity and high risk of recurrence following surgical removal.

Through his expert oncologist, Mr. Terzian also argued that the plaintiff wife was ultimately better off having received medical treatment. Surgery would have required permanent removal of abdominal muscles, leading to disfigurement, core weakness, and additional scarring.

The jury returned a unanimous defense verdict in 43 minutes, finding that the doctor had not departed from accepted gynecologic practice on the day of the alleged complaint. As a result, the jury did not need to determine whether the delayed diagnosis of the benign tumor caused any injury.

Summary Judgment Secured in Bladder Surgery and Ureter Injury Case

Senior Trial Partners **Rosaleen T. McCrory**, **Daniel L. Freidlin**, Of Counsel **Robert J. Betz** and Associate **Daniel P. Borbet** successfully obtained summary judgment in a case involving surgery performed by urologist and urogynecologist at MCB's client Hospital to repair a bladder herniation (cystocele) and place a mesh sling for ongoing incontinence. During the surgery, the right ureter was transected, and one of MCB's clients, a urologist, was consulted intraoperatively to perform a right ureter re-implantation which was done. The intended sling procedure could not be completed at that time. Plaintiff alleged negligence in the original operation, resulting in a right ureter transection, as well as in the subsequent ureter repair performed. She claimed to suffer ongoing incontinence, abdominal pain, and right leg pain/weakness, contrary to medical records.

The Honorable Tracy Catapano-Fox issued a detailed Decision & Order, finding that the defendants established a prima facie entitlement to summary judgment. The Court held that, based on documentary evidence and affirmations from experts in urogynecology and urology, the defendants did not depart from accepted standards of care and did not proximately cause the plaintiff's alleged injuries.

The Court found that MCB's experts properly determined the surgery was indicated, the plaintiff gave an informed consent for the procedure, and her family provided informed an consent for the intraoperative laparotomy. The Court also found that an injury to the ureter is a known and accepted risk of the procedure and could not be assessed until surgery. MCB's client urogynecologist immediately obtained a consultation with the other MCB consulting urologist, who repaired the ureter intra-



Rosaleen T. McCrory



Daniel L. Freidlin



Robert J. Betz



Daniel P. Borbet

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Case Results

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operatively. The Court further found that the operating physician acted within the standard of care by not performing the sling portion of the procedure during the initial surgery to avoid further complications, which explained the plaintiff's continued incontinence, and that her incontinence resolved once the sling was performed at a later date.

The Court found, in her opposition papers, the plaintiff had failed to raise a triable issue of fact. Regarding the initial operating urologist, the Court determined that the plaintiff's expert opinions were vague, conclusory, and unsupported by the medical records. Specifically, there was no evidence that the physician acted "roughly or aggressively" to cause the alleged injury. The Court also specifically documented that the expert opinion failed to account for the fact that a ureter injury is a known risk and complication of the procedure and that the plaintiff's anomalous anatomy had contributed to the outcome. Finally, the Court rejected the expert's claims that MCB's client departed from the standard of care by not placing a Foley catheter before incision and by failing to maintain the bladder at midline, as these issues were not alleged in the Bill of Particulars.

The Court further held that the plaintiff had failed to raise a triable issue of fact regarding the other MCB client urologist, as the plaintiff's expert offered no opinions concerning the repair. Similarly, the Court found that the plaintiff failed to establish a triable issue of fact with respect to claims of lack of informed consent, negligent hiring and supervision, and any liability on the part of MCB's client Hospital. The case was dismissed in its entirety against both MCB client physicians, as well as the Hospital.



Thomas A. Mobilia



Richard Wolf



Stephen C. Lanzone

Summary Judgment Obtained in Alleged Failure to Diagnose Appendicitis Case

Senior Trial Partner **Thomas A. Mobilia**, Partner **Richard Wolf** and Senior Associate **Stephen C. Lanzone** successfully obtained summary judgment in a case involving allegations of a failure to diagnose appendicitis in a then 12-year-old female, who presented to MCB's client Emergency Department with upper abdominal pain, nausea, and vomiting.

After two physical examinations by the attending ED physician and the administration of Pepcid and Maalox, her symptoms resolved. She was discharged with a diagnosis of gastritis and advised to return if symptoms recurred. The next evening, the infant-plaintiff visited a co-defendant hospital ED, where appendicitis was ruled out via physical examination and ultrasound. Two days later, she was diagnosed with acute appendicitis at a non-party hospital.

MCB moved for summary judgment on behalf of the attending ED physician, two ED nurses, and the Hospital, supported by a pediatric emergency medicine expert affirmation. The expert opined that the infant-plaintiff's symptoms were typical of a benign GI issue, not appendicitis, and the resolution of symptoms post-medication administration supported her discharge.

Plaintiff opposed with an expert affirmation, citing deposition testimony from the mother and infant-plaintiff, which claimed she presented with different symptoms than those documented in the ED record. Plaintiff's expert opined that appendicitis lacks a classic presentation in many cases, and that the defendants in this matter failed to rule-out the diagnosis.

The Court granted MCB's motion in full, finding that the care rendered reflected reasonable medical judgment, and that plaintiff failed to raise a triable issue of fact.

Summary Judgment Secured in Alleged Delay in Diagnosis of Diverticulitis

Senior Trial Partner **Laurie A. Annunziato** and Partner **Michael B. Manning** successfully obtained summary judgment in a case involving care rendered to the plaintiff at MCB's client Hospital. The case involved claims that the defendants failed to timely diagnose and treat diverticulitis, which resulted in ruptured diverticulitis, colon perforation, purulent peritonitis, sepsis, emergency laparoscopic sigmoid colectomy and colostomy, and the need for a Hartmann's Pouch.



Laurie A. Annunziato



Michael B. Manning

MCB filed a motion for summary judgment supported by an Expert Affirmation from a Board certified Gastroenterologist, and argued that the treatment and care rendered by the Hospital and its staff was at all times within good and accepted standards

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Case Results

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of medical practice, and further, the treatment rendered by the Hospital and its staff did not proximately cause or substantially contribute to the plaintiff's claimed injuries. MCB further argued that the Hospital cannot be held vicariously liable for any treatment rendered by the plaintiff's private physician/gastroenterologist or the co-defendant radiologist. MCB's expert opined that the progression of the plaintiff's diverticulitis, eventually resulting in the perforation, was unrelated to the management and care at MCB's client Hospital. The expert further opined that its staff timely and properly appreciated, investigated, and treated the plaintiff's diverticulitis, which was controlled and consistent with uncomplicated diverticulitis until July 13, 2017. On that date, the plaintiff's condition changed, and it became apparent upon imaging, that the plaintiff had suffered a perforation despite having received appropriate therapy, including antibiotics.

After MCB's motion for summary judgment was fully submitted, plaintiff's counsel moved to be relieved as counsel. Thereafter, the pro se plaintiff was directed to retain new counsel to oppose MCB's motion pro se, which the plaintiff failed to do. The Court rendered a Decision and Order granting MCB's motion for summary judgment. The Court found that MCB's client Hospital had made a prima facie showing for summary judgment, including establishing that all of the care by MCB's client Hospital was within good and accepted standards of medical practice and did not proximately cause or contribute to the plaintiff's claimed injuries. Further, the Court concluded that the pro se plaintiff, despite having had "proper and additional time" to respond to MCB's motion, failed to submit any evidentiary facts or materials to rebut the prima facie showing that MCB's client Hospital was not negligent. The Court dismissed the Complaint against MCB's client Hospital in its entirety.



Aryeh S. Klonsky



Ashley Mullings-Maragh

Summary Judgment Secured in Alleged Wrongful Death Case Involving Pulmonary Embolism

Senior Trial Partner **Aryeh S. Klonsky** and Associate **Ashley Mullings-Maragh** obtained summary judgment in a case involving allegations of a failure to properly manage the anti-coagulation regimen of a then 45-year-old female, who ultimately died, between January 2014 and January 2015. The case also involved an alleged failure to properly interpret radiological imaging, resulting in a delayed diagnosis of pulmonary embolism. The decedent, whose medical history included pulmonary emboli and deep vein thrombosis (DVT), presented to the co-defendant Emergency Department with complaints of shortness of breath and chest pain. She was reportedly not taking Coumadin, an anticoagulant, and her INR was 1.1 (normal range for a patient not on anti-coagulation therapy).

During the ED evaluation, the decedent underwent a CT angiogram of the chest with contrast, a chest X-ray, and a Doppler ultrasound of the legs. MCB's client radiologist interpreted the CT angiogram as not suspicious for pulmonary emboli. A second radiologist client interpreted the Doppler ultrasound of the legs and the portable chest X-ray as negative as well. The decedent was discharged with instructions to follow up with her primary care providers and to discuss restarting Coumadin. Anticoagulation medication was never resumed. The decedent ultimately died due to pulmonary embolism on January 14, 2015, due to pulmonary emboli.

MCB moved for summary judgment on behalf of its radiologist clients. The Court found that MCB had established a prima facie case, demonstrating that its radiologist clients did not deviate from the accepted standards of radiological care and that there was no causal connection between the alleged malpractice and the decedent's injuries and ultimate death. As such, the Court granted the motion, dismissing all claims against MCB's clients.

Summary Judgment Secured for Hospital in COVID-19 EDTPA Immunity Case

Senior Trial Partner **William P. Brady**, Partner **Gregory J. Radomisli**, and Senior Associate **Fiachra P. Moody** successfully obtained summary judgment in a case involving a then 79-year-old widowed female with a history of hypertension, carotid stenosis, and a significant smoking history. She presented to MCB's client Hospital's Emergency Department on 3/31/2020 with a 3-day history of right-sided weakness and speech difficulty. She was



William P. Brady



Gregory J. Radomisli



Fiachra P. Moody

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Case Results

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diagnosed with a CVA and admitted to the Neurological ICU. She had limited improvement in her aphasia and failed her SLP evaluation. As such, a PEG tube was placed for feeding. Once stabilized, she was discharged on 4/8/20 and, according to the Complaint, she died on 9/10/20. Plaintiff alleged that the MCB's client's employed physicians failed to provide necessary medical care and nursing services (i.e. turning and positioning) resulting in serious injuries including pressure ulcers and causing and/or accelerating the decedent's death.

The Court found that MCB's client Hospital and its employed physicians had met their burden of establishing a prima facie case for summary judgment through the expert affirmation of MCB's expert physician and the Affirmation of a wound care nurse, which established that the Hospital and its employees did not commit any gross negligence in the care and treatment of the decedent. Furthermore, the care and treatment provided to the decedent between March 31, 2020 and April 8, 2020 was impacted by MCB's client Hospital's response to the COVID-19 Outbreak and in response to or support of the New York State's COVID-19 Directives, thereby benefiting from the immunity provisions bestowed by the EDTPA.

In opposition, plaintiff submitted the affirmation of a physician who opined that MCB's client Hospital had failed to provide actual proof that the decedent's stay was impacted by the COVID-19 pandemic. The Court found these arguments unavailing, pointing to MCB's expert nurses' Affirmation which established that staff were reassigned due to overflow in intensive care units resulting in less time for each staff member to dedicate to each patient's care, which also impacted the provision of wound care.

Plaintiff also argued that the repeal of the EDTPA, as of April 6, 2021, was retroactive and, therefore, no immunity should be afforded to our client Hospital. In reply, we cited to the numerous Appellate Court level decisions, including *Hasan v Terrace Acquisitions II LLC d/b/a Fordham Nursing and Rehabilitation Center a/k/a Kings Terrace Nursing Home* (2024 NY Slip Op 00739 [1d Dept. 2024]), which held that the immunity repeal was not retroactive.

The Court found that MCB's client Hospital had met the burden of establishing a prima facie case in relation to the immunity from liability conferred by the EDTPA and found that the gross negligence claim asserted by plaintiff, which if established would have precluded EDTPA immunity, was inadequately pled to survive a motion to dismiss.

Accordingly, summary judgment was granted. In addition, the Court granted MCB's request for dismissal based on plaintiff's failure to state a cause of action. ■

What's New at MCB?

Achievements



Anina H. Monte

MCB PARTNER RATED AV PREEMINENT BY MARTINDALE-HUBBELL®

Congratulations to Anina Monte for being rated AV Preeminent by Martindale Hubbell®, their highest rating for professional excellence, legal knowledge, communication skills and ethical standards.



Jessica H. Ramsawak

NEW YORK BAR ADMISSION

Jessica H. Ramsawak has been admitted to the New York State Bar Second Judicial Department. We congratulate Jessica on this significant professional achievement and welcome her as a newly admitted attorney in New York.



MCB CONGRATULATES 20 ATTORNEYS ON THEIR SELECTION TO THE 2025 SUPER LAWYERS AND RISING STARS LISTS

It is our pleasure to announce that 14 MCB Partners were selected to the 2025 New York Metro Super Lawyers list. Additionally, 5 Partners and 1 Associate were selected to New York Metro 2025 Rising Stars.

Being chosen to the Super Lawyers list is a distinction awarded to only 5 percent of attorneys annually in each state. Those selected to the Rising Stars list are among only 2.5 percent of attorneys annually in each state.

Congratulations!



Community

THANKSGIVING EVENTS

MCB shared great food and camaraderie at its annual Thanksgiving Potluck in November. Additionally, thanks to the generosity of our employees, MCB collected food donations and raised over \$500 in monetary contributions for the Uniondale School District.



Events & Sponsorships

MCB is honored to support a wide range of charitable initiatives, with a special focus on the causes championed by our health care clients. We furthermore remain actively engaged in the legal community by attending and sponsoring functions that are vital to the advancement of our profession.



Oct 09

FORDHAM ANNUAL LAW PRACTICE AREA FAIR

Associate Elizabeth Athy, represented MCB at the Fordham Practice Area Fair, which offered students an inside look at our Firm and the exciting opportunities that await as they begin their legal careers.

Oct 16

BRONX COUNTY BAR INSTALLATION DINNER (PATRON SPONSOR)

MCB was a proud Patron Sponsor of this year's Bronx County Bar Installation Dinner. Three of our partners represented the Firm at the event, which celebrated the installation of the Association's new officers and board members.



Oct 30

WMC MARIA FARERI CHILDREN'S HOSPITAL - WINES OF THE WORLD EVENT

MCB was honored to attend Westchester Medical Center's Maria Fareri Children's Hospital *Wines of the World* event to support the essential advanced care services that benefit children and adults across the Hudson Valley.

Nov 08

4TH ANNUAL MEDISYS GALA

A wonderful evening was had at the 4th Annual Medisys Gala honoring William S. Bernstein and supporting Medisys Health Network, Inc.'s mission to expand comprehensive cancer care.



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