MARTIN CLEARWATER & BELL LLP

DEFENSE PRACTICE UPDATE

APRIL 2018

Continuous Treatment Doctrine Application in Dental Malpractice Cases

BY: KAREN B. CORBETT AND MICHELLE A. FRANKEL

Unless a toll applies, any medical malpractice action must be commenced within two and one-half years after the alleged malpractice, otherwise it is barred by the statute of limitations. A defendant seeking dismissal on this ground must demonstrate that the plaintiff's time within which to commence an action has expired. Then the burden shifts to the plaintiff to establish that the action is timely. In this regard, a plaintiff may argue that the continuous treatment doctrine should apply to toll the statute of limitations. If applicable, the statute of limitations will not be determined to even begin to run until the end of the course of "continuous treatment." However, in order to get the benefit of the toll, the plaintiff must show that the original condition stated in the complaint is the same as the injury claimed and that treatment for that condition was continuous from the initial point until the latest treatment date upon which the statute of limitations is being calculated. The continuous treatment doctrine often arises in dental malpractice cases. This is because a plaintiff will often claim that a routine dental check-up is actually monitoring of a specific dental condition such as the need for a filling or root canal, or part of assessing an evolving disease process such as periodontal disease. In this setting, a plaintiff's attorney will assert that a course of treatment began many years earlier as a basis for bringing the older treatment into controversy by virtue of the continuous treatment doctrine toll.

In *Linda Greenstein v. Sol S. Stolzenberg, D.M.D., P.C.,* the Appellate Division, First Department recently addressed a plaintiff's attempt to use the continuous treatment doctrine to bring a dental malpractice suit in 2016 regarding treatment that occurred in 2003 and 2007. The plaintiff claimed that the toll on the statute of limitations applied because two root canal procedures, performed in 2003 and 2007, were part of a multiyear treatment plan. The Court did not find this argument persuasive. Rather it determined that the root canals were "isolated and discrete procedures" performed to address individual, emergent pain issues.[1] Since the root canals were not part of an ongoing treatment plan, the Court determined that the toll on the statute of limitations did not apply and dismissal was appropriate.

This decision is consistent with prior First Department cases regarding the application of the continuous treatment doctrine. For instance, the Court held that root canals were considered "isolated and discrete procedures" as opposed to treatment "for a single condition or complaint" in a case involving treatments on several differ-

Continued…

1. 2017 NY Slip Op 08639 (1st Dept. 2017).

ent teeth over the course of seven years.[2] Since plaintiff failed to establish that there had been a course of treatment related to the condition that gave rise to the lawsuit, which is essential, the Court denied the application of the continuous treatment doctrine. The consistency of these decisions appears to indicate that the Court will be reluctant to apply the doctrine loosely. This is significant from a defense perspective because if plaintiff fails to establish that the continuous treatment doctrine applies, then any claims based on treatment that occurred more than two and a half years prior to the commencement of the action are time-barred.

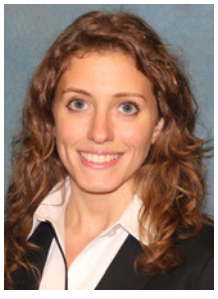
Moreover, these decisions are noteworthy because they support the rationale that patients benefit from receiving cohesive medical care, which may require further treatment with a single physician. However, the Court has indicated that the doctrine is not intended to connect all ongoing treatment in order to avoid applying the statute of limitations. It is insufficient to simply have a continuing physician-patient relationship or continuing diagnosis; rather there must be continuing efforts by a doctor to treat a particular condition. Such ongoing treatment must be affirmative such as surgery, therapy, or the prescription of medications. Monitoring of a patient's general health does not qualify as a course of treatment "where the patient initiates routine, periodic examinations to check a condition." While the statute of limitations defense may be particularly ripe in dental malpractice cases, the continuous treatment doctrine can apply in medical malpractice actions.

Establishing whether or not the continuous treatment doctrine applies and the general defensibility of a malpractice case can be strengthened by proper documentation. A patient's record with a clear history and documented treatment plan including reasons for treatment and/or patient refusal to undergo a recommended treatment can be useful to establish a course of treatment or lack thereof. Maintenance of any written informed consent and documentation of related discussions can also help establish that the standard of care was met during an isolated procedure. Similarly, if referrals are made when necessary and documented, then such information may be used to establish an endpoint in what might otherwise be considered a course of treatment.

The application of the continuous treatment doctrine will continue to evolve, but the consistency of the Court's decisions thus far weighs in favor of the defense in dental malpractice cases. When appropriate, defense attorneys can raise the statute of limitations affirmative defense to bar the consideration of what may be decades of prior treatment. And, plaintiffs' attorneys attempting to refute the defense with the continuous treatment doctrine must make a proper showing of actual ongoing treatment for a specific condition, and will not merely be permitted to rely on routine check-ups to toll the statute.

...the Court has consistently indicated that the doctrine is not intended to connect all ongoing treatment in order to avoid applying the statute of limitations. It is insufficient to simply have a continuing doctor-patient relationship or continuing diagnosis; rather there must be continuing efforts by a doctor to treat a particular condition.

Karen B. Corbett is a Partner at Martin Clearwater & Bell LLP. Her practice encompasses all areas of medical malpractice, dental malpractice, podiatric malpractice, nursing home defense, general liability and professional liability.



Michelle A. Frankel is an Associate at Martin Clearwater & Bell LLP. Her practice encompasses all areas of medical malpractice, dental malpractice, podiatric malpractice, nursing home defense, general liability and professional liability.

2. *Marrone v. Klein,* 33 A.D.3d, 546 (1st Dept. 2006).
3. *Gomez v. Katz,* 61 A.D.3d 108 (2d Dept. 2009).
4. *Williamson v. PricewaterhouseCoopers LLP,* 9 N.Y.3d 1, 9 (2007).

Gomez v. Cabatic:

Punitive Damages Allowed for Alteration or Destruction of Records "In An Effort To Evade Potential Medical Malpractice Liability" Despite There Being No Harm to the Patient or the Plaintiff's Ability to Prove a Case

BY: BARBARA D. GOLDBERG AND GREGORY A. CASCINO

On January 17, 2018 a unanimous panel of the Appellate Division, Second Department expressly authorized a claim for punitive damages where a healthcare provider alters or destroys medical records in a supposed effort to avoid potential medical malpractice liability. This result was reached even though the conduct at issue had no impact on the treatment of the patient, since it occurred after the patient's death, and did not prevent the plaintiff from proving a departure from accepted practice and proximate causation at trial.

In *Gomez v. Cabatic,* a 6-year-old child was referred by her pediatrician Dr. Cabatic to pediatric endocrinologist Dr. Mercado because her blood sugar was high, and was seen by Dr. Mercado on October 31, 2009, November 14, 2009 and December 12, 2009. Dr. Mercado served a low-income population in Queens and her office was located in the basement of her sister's home.

During these visits Dr. Mercado treated the infant, who was somewhat obese, for the early stages of Type II diabetes, which is largely treated through diet and exercise. During her first visit a blood sample was taken, which was discussed during her second visit. The infant's blood sugar was higher than normal but not high enough to be considered diabetes, and Dr. Mercado recommended diet and exercise. The infant had lost some weight by the third visit on December 12, 2009. Dr. Mercado did not test her blood at that time. Rather Dr. Mercado recommended she lose another 1-2 pounds, and her notes state that she would administer another blood glucose test on the next visit. At the conclusion of this visit the patient's mother was given an appointment card for February 13, 2010.

On January 9, 2010, after the child allegedly had an episode of "palpitations" at school, Dr. Cabatic performed a focused cardiac examination, which was normal, as were the child's vital signs. On January 21-22, 2010, the child complained of a stomach ache, vomited several times, and was very thirsty and drowsy. Her mother failed to bring her back to Dr. Mercado but brought her to a local emergency room, where her blood sugar was measured to be five times the normal amount. The infant, who was then in diabetic ketoacidosis, was admitted and then transferred to a tertiary care facility the next day. Despite efforts to save her life, she died on January 24, 2010 from bilateral cerebellar tonsillar herniation secondary to cerebral edema following diabetic herniation.

Although the appointment card given to the infant's mother at the December 12, 2009 visit scheduled the infant's next appointment 2 months later on February 13, 2010, Dr. Mercado's typewritten notes for this visit state that the infant was to follow up in 4 weeks. This, according to plaintiff's counsel, was done purposely by Dr. Mercado to make it appear as if she wanted the infant to return much sooner for another blood glucose test, but her mother was non-compliant.

The child's parents retained counsel soon after their daughter's death. Counsel then wrote to Dr. Mercado to request her records. In February 2010, Dr. Mercado prepared and signed typewritten notes for all three visits which she sent to plaintiff's counsel.

Although the appointment card given to the infant's mother at the December 12, 2009 visit scheduled the infant's next appointment two months later on February 13, 2010, Dr. Mercado's typewritten notes for this visit state that the infant was to follow up in four weeks. This, according to plaintiff's counsel, was done purposely by Dr. Mercado to make it appear as if she wanted the infant to return much sooner for another blood glucose test, but her mother was non-compliant. At trial Dr. Mercado testified that she had no involvement in selecting the date, rather she testified that her receptionist wrote the February 13, 2010 appointment card.

Continued…

During Dr. Mercado's deposition, which was read at trial, she testified that all of her typewritten reports had been generated on the same day as the appointments. Then during trial she denied being aware that the infant had been deceased for a month when she typed the office notes. Dr. Mercado also gave testimony to the effect that she saved the original contemporaneously prepared handwritten notes memorializing the infant's first visit because she considered them the patient registration form, but after receiving the letter from the plaintiff's attorneys she discarded the original contemporaneously prepared handwritten records memorializing the second and third visits.

Over the objection of Dr. Mercado's attorney, the Supreme Court agreed to submit the issue of punitive damages, based on the discarding of the handwritten notes for the second and third visits, to the jury. Plaintiff prevailed on the malpractice and wrongful death claims, and was awarded $400,000 for conscious pain and suffering and $100,000 for wrongful death damages. The jury also found that there was a basis for awarding punitive damages.

Immediately thereafter, the trial on the punitive damages award began, and plaintiff's counsel was allowed to offer evidence regarding Dr. Mercado's finances to the same jury. That evidence showed that her combined net adjusted gross income in 2012 was $79,891 and that she owed $21,284 in taxes.

Even though the Trial Court had expressly limited the basis for punitive damages to the discarding of the handwritten notes for the second and third visits, plaintiff's attorney delivered an inflammatory summation in which he exploited the discrepancy as to the date when the child was to return following the third visit to accuse Dr. Mercado of attempting to blame the mother for the child's death. These remarks clearly had their intended effect since the jury, despite the evidence as to Dr. Mercado's limited finances and the relatively modest awards for compensatory damages, awarded $7,500,000 in punitive damages – an amount which could easily destroy a highly lucrative practice, let alone a solo practitioner working from an office in her sister's basement. During post-trial motion practice, the Supreme Court reduced the punitive damage award to $1,200,000 – a sum which was still far in excess of Dr. Mercado's limited means and more than twice the compensatory damages award.

On appeal, in an opinion by Associate Justice John M. Leventhal, the Second Department held that "where a plaintiff recovers compensatory damages for a medical professional's malpractice, a plaintiff may also recover punitive damages for that medical professional's act of altering or destroying medical records *in an effort to evade potential medical malpractice liability.* Allowing an award of punitive damages for a medical professional's act of altering or destroying medical records *in an effort to evade potential medical malpractice liability* will deter medical professionals from engaging in such wrongful conduct, punish medical professionals who engage in such conduct, and express public condemnation of such conduct. Thus, the Supreme Court did not err in submitting the issue of punitive damages to the jury" (emphasis supplied).

Of note, Justice Leventhal, who was substituted on the morning of the oral argument for Justice William F. Mastro, who had originally been assigned to hear the case, had co-authored a lengthy article exploring the evolution of punitive damage awards in New York. The article appeared in the Albany Law Journal in 2013.

It should be emphasized that in the *Gomez* case, the act of altering the original office chart did not impede plaintiff's counsel's ability to try his case. That act did not affect the child, or the care the child received, and occurred over one month after the child passed away! There was clearly and undeniably no causal connection between the treatment the child received, or her demise, and the defendant's subsequent altering of her chart.

It should be emphasized that in the Gomez case, the act of altering the original office chart did not impede plaintiff's counsel's ability to try his case. That act did not affect the child, or the care the child received, and occurred over one month after the child passed away!

Moreover, there was no competent proof that the typewritten reports for the second and third visits were in fact falsified. The typewritten report for the first visit indicated "no polyuria" and "no polydipsia," meaning that there were no signs of frequent urination or excessive thirst, which can be symptomatic of Type I diabetes. These comments did not appear in the handwritten notes for that visit. In addition, the typewritten report contained a reference to acanthosis nigricans, an abnor-

Continued...

mal skin pigmentation which can be a sign of insulin resistance and is therefore consistent with Type II diabetes. Although these entries did not appear in the handwritten notes, *they were all shown to be accurate by independent sources, including the testimony of the child's parents, a teacher, and a prior treating physician.* Thus, there was nothing false or misleading about these entries, nor could they reasonably be seen as an attempt to conceal malpractice.

Nevertheless, the Second Department rejected Dr. Mercado's argument that punitive damages were not recoverable because the destruction of the original medical records did not contribute to the infant's development of diabetic ketoacidosis and death, and did not prevent the successful prosecution of the action. Justice Leventhal's opinion also rejected an amicus curiae argument by the Medical Society of the State of New York that there are numerous adverse consequences, such as discipline by the Office of Professional Medical Conduct, for a physician who fails to maintain medical records in accordance with Education Law § 6530(32), that are sufficient deterrence. The reasoning advanced by Justice Leventhal to justify this result was that Dr. Mercado "clearly was not deterred" by the possibility of such disciplinary action.

The Second Department did find that a $1,200,000 punitive damage award was excessive in light of United States Supreme Court precedent that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" As a result the Second Department further reduced the punitive damages award to $500,000, but did not address the discrepancy between an award of $500,000 and Dr. Mercado's limited resources and inability, as a practical matter, to pay such an award. In New York there is no insurance coverage for punitive damages.

The Takeaway from *Gomez*

Gomez is unprecedented because it goes further than any previous New York appellate court decision in expressly authorizing a claim for punitive damages where medical records are destroyed or altered in an apparent attempt to evade malpractice liability, even though such conduct had no impact on the treatment of the patient, did not harm the patient, and did not prevent the plaintiff from establishing a prima facie claim for medical malpractice. Notably, it took approximately 16 months following the oral argument for the Second Department to issue the decision, perhaps signaling significant initial disagreement amongst the Justices either on the result or the language.

It can be expected that the plaintiff's medical malpractice bar will seize upon this decision to assert claims for punitive damages simply because a health care provider cannot produce a plaintiff's entire file, or because a late entry is made in a plaintiff's chart after there is a negative outcome.

Following this decision, the determination was made to settle all claims against Dr. Mercado; thus there will be no appeal to the Court of Appeals. As a result, *Gomez* is currently the law of this State unless and until there is a contrary ruling by one of the other Departments of the Appellate Division, or the issue reaches the Court of Appeals. The basis for an appeal to the Court of Appeals is certainly present, since the Second Department rejected a line of cases holding that the alleged alteration of medical records cannot support a claim for punitive damages where it occurs subsequent to the alleged malpractice.

It can be expected that the plaintiff's medical malpractice bar will seize upon this decision to assert claims for punitive damages simply because a health care provider cannot produce a plaintiff's entire file, or because a late entry is made in a plaintiff's chart after there is a negative outcome. While *Gomez* will undoubtedly increase the number of claims for punitive damages, we believe its actual impact will be much more limited.

The Second Department expressly reserved the imposition of punitive damages only for what it considered the most egregious conduct; i.e, those instances where a medical provider alters or destroys medical records "in an effort to evade potential medical malpractice liability." To be sure, the failure to preserve records may subject a health care provider to spoliation sanctions ranging from an adverse inference charge to the striking of the provider's answer. Moreover, late entries in a patient's chart provide will provide ample fodder for a plaintiff's attorney questioning the person who made the late entry. However, absent clear and convincing proof from which the jury could conclude that a healthcare provider was affirmatively seeking to evade medical malpractice liability, punitive damages are not warranted.

Continued...

Gomez v. Cabatic...

Gomez, however, should serve as yet another reminder to healthcare providers that they should never, under any circumstances, attempt to dispose of or modify a patient's medical records after the fact, no matter how damaging an entry (or lack thereof) may retrospectively appear. Not only does such conduct expose the provider to professional discipline, but it is almost always uncovered during discovery. It is always more difficult to explain seemingly damaging entries where there was an attempted cover-up, than where the provider left the entries alone.

This decision also should serve as a reminder as to how important it is to have proper record retention policies and procedures in place. This is even more crucial following the recent enactment of "Lavern's Law," since certain types of medical malpractice claims can now be brought up to 7 years after the actions or omissions giving rise to the claim.

Barbara DeCrow Goldberg is a Partner and Head of the Firm's Appellate Practice Group. Ms. Goldberg is well known for her appellate expertise in high exposure and complex cases and has handled hundreds of significant motions and appeals in State and Federal Courts. She is noted for several important decisions in the areas of medical malpractice, negligence, workers' compensation and labor law.

Gregory A. Cascino is Of Counsel and a member of the Firm's Appellate Practice Group. He works on appellate matters involving all of the Firm's practice areas including medical malpractice, general liability and healthcare law.

MCB Featured in Top Rated Lawyers

Martin Clearwater & Bell LLP was featured in the Top Rated Lawyers section of the New Jersey Law Journal on February 28, 2018.

Workplace Sexual Harassment in the Age of #MeToo and #Time'sUp

By: Gregory B. Reilly and Aisling M. McAllister

Women are speaking out against sexual harassment and misconduct in the workplace in numbers never before seen. From Hollywood to Washington D.C., this has affected employers of all sizes and across all industries. After one sexual harassment allegation is made against a perpetrator, there are now often other victims asserting that they too (or #MeToo) were victimized. Formerly silent victims are speaking up and declaring that time is up for these perpetrators and their behavior (or #Time'sUp). This movement has resulted in the downfall of previously powerful men such as Bill O'Reilly, Matt Lauer, Senator Al Franken and others who may have used their power to subject women to inappropriate sexual behavior in the workplace. It has also resulted in the Time's Up legal defense fund which was created to assist the victims of sexual harassment assert and litigate legal claims. As a result of this movement, a lot of employers are asking "What are some of the legal ramifications in the workplace?" The picture is not yet entirely clear, but some observations can be made.

A. Current Laws That Govern or Impact Sexual Harassment Claims

While the media has extensively reported on the firings of powerful and prominent men, the definition of sexual harassment, as a legal matter, has not changed. The media coverage seemingly suggests that perpetrators of sexual harassment are now routinely fired. This might be true in some situations like the "caveman" type of *quid pro quo* sexual harassment, e.g., sleep with me or you will lose your job. However, the present law still tolerates boorish, annoying and even sexually inappropriate or questionable behavior. Indeed, the more common "hostile work environment" type of sexual harassment is defined under federal law as when the perpetrator's actions are so "severe or pervasive" as to affect the terms and conditions of a victim's employment. Thus, under current law, some pornography in the workplace or a few inappropriate sexually charged jokes are typically not sufficient to constitute illegal sexual harassment unless such misconduct is severe or pervasive. Accordingly, while inappropriate sexual conduct should never be tolerated, it may not merit terminating the perpetrator when other types of remedial action may prevent and punish the behavior, e.g., written warnings, suspensions and/or mandatory training. Simply stated, each situation requires thorough investigation and resolutions often must be crafted on a case-by-case basis taking into account the severity and frequency of the behavior.

While the law has not changed – at least not yet – the #MeToo and #Time'sUp movements have clearly affected the factors employers must consider in resolving such harassment claims.

While the law has not changed – at least not yet – the #MeToo and #Time'sUp movements have clearly affected the factors employers must consider in resolving such harassment claims. The new federal tax law, the Tax Cuts and Jobs Act, contains a buried provision amending the Internal Revenue Code to prohibit business tax deductions for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement … ." 26 U.S.C. §162. The new law seemingly creates a tax disincentive for sexual harassers and/or their employers for including nondisclosure language in settlement agreements, language which might otherwise keep such settlements confidential and from blossoming into publicized #MeToo and #Time'sUp claims. At this point, there are many unanswered questions about this new law, which will require IRS guidance. Among the open issues, as examples, are how this tax law amendment affects settlements paid by insurance, how settlements involving multiple workplace legal claims in addition to sexual harassment are affected and what constitutes a "nondisclosure agreement," which is undefined in the present tax amendment.

Continued…

B. Anticipated Changes to Laws That Govern or Impact Sexual Harassment Claims

It appears that the #MeToo and #Time'sUp movements will result in some legal changes in the near future, both on the federal and state level. For example, the Equal Employment Opportunity Commission ("EEOC") recently published its seventy-five (75) page draft enforcement guidance concerning unlawful harassment. The draft guidance defines sexual harassment and provides direction on how to prevent it in the workplace. Although the EEOC guidance does not have the force of law, following the guidance is usually the best way to avoid legal claims and, in the event of a claim, to have viable defenses. Acting EEOC Chair Victoria Lipnic has advised that the final version of the EEOC's harassment guidance shall be published "soon."

In addition to the EEOC's anticipated guidance, there will likely be changes to state and local laws. For instance, the New York City Council is expected to pass legislation that will require New York City private employers with fifteen (15) or more employees to conduct annual sexual harassment training. It is expected that New York City Mayor Bill de Blasio will approve such a law.

In addition to the possibility of new laws and guidance, the #MeToo and #Time'sUp movements have caused many employers to rethink the value of confidential settlements of sexual harassment claims. Several of the recently publicized victims were purportedly bound by confidentiality agreements and yet decided to speak out anyway. What is not reported in the media is the fact

In addition to the possibility of new laws and guidance, the #MeToo and #Time'sUp movements have caused many employers to rethink the value of confidential settlements of sexual harassment claims.

that most employers in this situation – the same employers that sometimes paid hundreds of thousands of dollars for confidentiality – lost the benefit of their bargain. Are these same employers filing suit in court for breach of contract? The short answer is no. Most employers are reluctant to take this step because such breach of contract litigation could create a public relations nightmare and would keep the sexual harassment allegations in the public eye. For these reasons, employers now need to give serious consideration to whether paying a settlement in exchange for a confidentiality agreement is worth the cost.

C. Proactive Approaches for Employers to Prevent Sexual Harassment in the Workplace

Employers need to reevaluate and most likely revise their policies and practices in light of the #MeToo and #Time'sUp movements, the EEOC guidance, and anticipated state and local legal changes. An employer's policy should always provide for multiple avenues for redress, should include affirmative representations that

Continued...

MCB Upcoming CLE Programs & Educational Seminars

MAY 8, 2018

Employment & Labor Update Webinar
1 CLE Credit

For more information about our CLE programs, visit www.mcblaw.com

complaints will be promptly investigated and will not result in retaliation and, when necessary, the employer will implement prompt remedial action. However, what the #MeToo and #Time'sUp movements exemplify is that employees often do not complain of sexual harassment at the time it occurs. Indeed, many of the highly publicized claims of alleged sexual harassment arise from incidents that occurred years prior. Accordingly, one policy change employers should consider is that their policy makes it clear that employees should make their complaint of harassment contemporaneous to the misconduct occurring, otherwise, the employer may not be able to properly investigate or provide adequate redress.

Of course, several of the employers with reported #MeToo and #Time'sUp claims were sophisticated, had appropriate policies and provided regular training to prevent sexual harassment. Clearly, policies and training by themselves are not enough. Employers must consider ways to ensure a company's culture creates an environment where sexual harassment is never tolerated and employees feel comfortable in making a complaint without fear of reprisal. In this respect, a company's leadership must establish the "tone from the top," which is both a challenge and a necessary responsibility.

Gregory B. Reilly is a Partner and the Head of Martin Clearwater & Bell LLP's Employment & Labor Practice Group. Greg is an experienced litigator and counselor who has been practicing in the employment and labor law field for over 20 years in a variety of areas including healthcare, hospitality, staffing and retail.

Aisling M. McAllister is a Partner in Martin Clearwater & Bell LLP's Employment & Labor Practice Group. She has experience advising employers of all sizes in diverse industries including health care, finance, manufacturing, transportation and hospitality.

Case Results

November 2017: Defense Verdict in Kings County Supreme Court: Partner, Laurie A. Annunziato obtained a defense verdict in a case where Plaintiff claimed that our defendant dermatologist failed to properly perform laser tattoo removal. After a five month course of treatment with our client, she transferred her care to another dermatologist who removed another tattoo using a different type of laser. The plaintiff claimed that the test to determine her response to laser treatment improperly performed over too large and area, using the wrong laser and with improper pulse rates resulting in permanent scarring. We were able to establish that the laser used was FDA approved for tattoo removal and appropriate to use, especially on darker pigmented skin. We demonstrated that the laser plaintiff's expert exalted as the laser that should have been used was not yet approved in the U.S. The defense also established that all risks, including permanent scarring, were explained to the plaintiff prior to the procedure and that the "alternative" procedures to laser tattoo removal would necessarily result in scarring. The jury rendered a unanimous verdict for the defense as to all questions of liability.

January 2018: Dismissal Granted in Queen County Supreme Court: Partner Karen B. Corbett obtained summary judgment in a case where the 42 year old female plaintiff alleged that our defendant Hospital and Emergency Department physician failed to timely diagnose a stroke and administer thrombolytic treatment. Plaintiff presented to our emergency department with complaints of dizziness after taking a nap which began 16 hours earlier. The ED Attending's note indicated the patient was talking quickly and was hyperventilating and became acutely dizzy. Although cardiovascular and pulmonary examinations were normal, no neurological evaluation was documented and a brain CT scan was not performed. The patient was given anti-nausea

Continued...

medication and was discharged with a final diagnosis of hyperventilation syndrome and vertigo. The next day, she was diagnosed with an acute stroke at another hospital. Plaintiff alleged that the defendants failed to do an appropriate work-up including a brain CT scan which would have enabled them to make the diagnosis of a stroke, precluding the plaintiff from any treatment options such as tPA. On our motion for summary judgment, we argued that the "three hour window" to administer tPA expired by the time she arrived to our defendant Hospital, and thus no treatment was available to her even if the stroke was diagnosed. Plaintiff opposed our motion by asserting that the patient was experiencing a transient ischemic attack at our hospital and not performing a brain CT scan or giving her anticoagulant therapy were deviations which frustrated her ability to avoid having the stroke after her discharge. Judge O'Donoghue granted our summary judgment motion and held that plaintiff's opposition papers did not raise an issue of fact because plaintiff's expert failed to challenge our expert's opinion and instead relied on a new theory of liability which was not previously pled.

February 2018: Jeff Lawton Obtains Defense Verdict in Kings County Brain Damaged Baby Case: Senior Partner Jeff Lawton represented the defendant Hospital at trial in a case involving a claimed failure to diagnose hyperbilirubinemia. There were no complications at birth and codefendant neonatologist concluded that the infant could be admitted to the regular newborn nursery as he was over 35 weeks gestation. There were no complications at birth and codefendant neonatologist concluded that the infant could be admitted to the regular newborn nursery as he was over 35 weeks gestation. After several days in the nursery, the infant was discharged with instructions to follow up with a pediatrician in two weeks. The child's bilirubin level was not tested prior to discharge. Three days after discharge, the infant's mother brought the infant to another hospital as she noticed the child was having seizures and not eating. At that time, doctors ordered a bilirubin test and found that plaintiff was suffering from hyperbilirubinemia. Despite three weeks of treatment, including blood exchange transfusion to remove the affected blood and replace it with new blood, the infant suffered brain damage resulting in cognitive and motor deficits. Prior to trial, the plaintiff agreed to a $2.2 million settlement with the codefendant pediatrician. At trial, the plaintiff alleged that our defendant hospital's policies and procedures were inadequate, and that it should have had a policy requiring mandatory bilirubin testing of all newborns, that its policies should have permitted for nurses to order bilirubin testing without a physician's order and that the discharge instructions were inadequate as they should have instructed for a return visit in 48 hours. After a six week trial, the Court submitted a verdict sheet with six departure questions which the jury would have to find in our favor for the hospital to prevail. After deliberations, the jury returned a verdict sheet which found that our defendant hospital and codefendant neonatologist were not liable for the infant's injuries. However, the jury for reasons unknown went on to apportion damages as follows: 80% to the codefendant who settled prior to trial, 15% liability to the hospital that ultimately administered the bilirubin testing and 5% liability to our defendant hospital. The jury calculated over $20 million in damages despite finding no departures. The Judge planned to have the jury reconvene to settle the discrepancy on the verdict sheet, but before the jury could do so, the plaintiff's attorney accepted a modest confidential settlement from MCB's defendant hospital.

February 2018: MCB Obtains Dismissal of EMTALA Claim: Plaintiff brought this action in United States District Court, Southern District of New York, alleging that our client defendant hospital and the other defendants violated the Emergency Medical Treatment and Active Labor Act ("EMTALA") when they treated the plaintiff's deceased husband. Partner Gregory J. Radomisli made a motion to dismiss this matter, arguing that EMTALA does not apply because the decedent had been admitted to our client defendant hospital for treatment, and that a hospital's obligations end when a patient is admitted to the hospital, rather than simply treated in an Emergency Department. The Court granted our motion, and dismissed this case. The Court recognized that although the Second Circuit never ruled on this issue, other Circuit Courts have held that a hospital has fulfilled its obligations under EMTALA when a patient is admitted to the hospital, and therefore cannot be held in violation of the statute.

Continued…

Case Results

February 2018: MCB Motion for Summary Judgment Granted: Senior Associate Amy Korn secured a dismissal in a failure to diagnose melanoma resulting in the death of a 47 year old married male with four young children and earning a mid-six figure income. MCB successfully demonstrated that there was no malpractice for the alleged failure to order a CT scan to investigate the plaintiff's complaint of a lump in the right groin that developed after exercise. It was demonstrated that the CT scan was ordered and it was the plaintiff who failed to follow the recommendation. When the plaintiff returned to our client nine months later, the lump was appreciably larger and now tender. A diagnosis of Stage IV metastatic melanoma was made shortly thereafter. In granting summary judgment, the Judge agreed with our position that the care rendered by our client internist and hospital was appropriate and that the plaintiff's expert affirmations, particularly as related to causation, were speculative and conclusory.

February 2018: Motion for Partial Summary Judgment Granted: Partner Thomas Kroczynski represented a Radiology facility and Radiologist in a Queens County Supreme Court case where the 41 year old plaintiff alleged a failure to timely diagnose breast cancer. Plaintiff presented to her internist complaining of intermittent right breast pain for the past few months. The Internist palpated a tender mass in the right breast and ordered a diagnostic mammogram. The imaging of the right breast was interpreted by MCB's defendant Radiologist as benign. Plaintiff was told to return in 6 months for a follow-up mammogram and ultrasound and was sent several letters as reminders over several months. Plaintiff was referred back to the Radiology facility in October 2013, 14 months later, to undergo a screening mammogram due to complaints of right breast pain. The screening mammogram was interpreted by the same Radiologist as benign. In April 2015, Plaintiff was diagnosed with right breast cancer. Plaintiff alleged the 2012 and 2013 radiology studies were misread. On a motion for partial summary judgment, we moved to dismiss the treatment provided in August 2012 as beyond the statute of limitations for medical malpractice. Although Plaintiff argued that the statute of limitations for the 2012 treatment should be tolled because there was continuous treatment of the Plaintiff's right breast between 2012 and 2013, Justice Peter O'Donoghue agreed with our position that the continuous treatment doctrine was inapplicable because Plaintiff did not return to the Radiology facility within 6 months of her August 2012 visit as she had been told to do. Additionally, the Court held that the doctrine was not applicable because the two visits were separate and discreet. Further, the Court held that the continuous treatment doctrine was not applicable because if the allegation was a failure to diagnose breast cancer, the Radiologist and Radiology facility could not have been continuously treating a condition they never diagnosed.

Meet MCB's Of Counsel Attorneys

Elizabeth J. Sandonato
Long Island Office
(516) 712-3144
elizbaeth.sandonato@
mcblaw.com

Gregory A. Cascino
Long Island Office
(516) 712-3146
gregory.cascino@
mcblaw.com

Tracy A. Abramson
Long Island Office
(516) 479-3681
tracy.abramson@
mcblaw.com

Christopher A. Terzian
Westchester Office
(914) 467-7779
christopher.terzian@
mcblaw.com

Carmen O. Barroso
New York City Office
(212) 916-0905
carmen.barroso@
mcblaw.com

MCB NEWS

What's New at MCB?

Peter Crean Invited to Sit on Board of Directors for LiveOnNY (formerly the New York Organ Donor Network)

Effective September 2017, Partner Peter T. Crean has begun serving on the Board of Directors of LiveOnNY, a nonprofit, federally designated organ procurement organization (OPO) dedicated to the recovery of organs and tissue for transplant in the greater New York metropolitan area. The organization works closely with transplant centers and hospitals in the region to facilitate donation. Mr. Crean joins prominent New York doctors, surgeons, and hospital administration and is currently the only attorney to sit on the Board.

Thomas Mobilia Receives Platinum Client Champion Award from Martindale-Hubbell

Partner Thomas Mobilia received the Martindale-Hubbell Platinum Client Champion Award, the highest of the Client Champion Awards, an exclusive recognition that demonstrates an attorney's commitment to client service based on the quantity and quality of their scores on Martindale-Hubbell client reviews. Less than 1% of all attorneys have qualified to receive the award.

MCB's New Jersey Office Relocation

MCB's New Jersey Office is now open in Roseland, New Jersey! The new office location address is: 101 Eisenhower Parkway, Suite 305, Roseland, NJ 07068.

Employment Partners presenting in FMLA webinar for Lorman Education Services on May 24, 2018

Partner and Head of Employment & Labor Practice Group, Gregory B. Reilly, and Employment & Labor Partner Aisling M. McAllister will be presenting in an educational webinar entitled "FMLA Extension: When 12 Weeks Is Not Enough" on May 24, 2018. Check MCB's website for registration details.

Defense Practice Update
is a publication of
Martin Clearwater & Bell LLP.

Manhattan
220 East 42nd Street
New York, NY 10017
212-697-3122 *phone*
212-949-7054 *fax*

Nassau County
90 Merrick Avenue
East Meadow, NY 11554
516-222-8500 *phone*
516-222-8513 *fax*

Westchester County
245 Main Street
White Plains, NY 10601
914-328-2969 *phone*
914-328-4056 *fax*

New Jersey
101 Eisenhower Parkway
Suite 305
Roseland, NJ 07068
973-735-0578 *phone*
973-735-0584 *fax*

Rochester
16 West Main Street
Suite 728
Rochester, NY 14614
585-413-1699 *phone*
585-413-3430 *fax*

Connecticut
1 Landmark Square
Stamford, CT 06901
203-738-5226 *phone*
203-738-5227 *fax*

www.mcblaw.com

STAY UP TO DATE WITH MCB

Don't forget to check www.mcblaw.com for the latest updates and news from MCB