MCB MARTIN CLEARWATER & BELL, LLP

Summer 2026 Newsletter

Defense Practice Update

LITIGATION INSIGHTS, CASE RESULTS, AND RECENT UPDATES FROM THE TRI-STATE AREA'S PREMIER MEDICAL MALPRACTICE DEFENSE FIRM.

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Defense Practice Updates

MARTIN CLEARWATER & BELL LLP

Revised AVOID Act Goes Into Effect, Altering Third-Party Practice, But Not as Drastically as Anticipated

BY BARBARA D. GOLDBERG ESQ. AND RICHARD WOLF ESQ.

On December 19, 2025, Governor Kathy Hochul signed into law the Avoiding Vexatious Overuse of Impleading to Delay ("AVOID") Act. The law's intent, according to the sponsor memo of Senator Joseph Addabbo, Jr., is to "ensure that defendants and third-party defendants implead all necessary parties within a year of the filing of the action and prevent defendant[s] from deliberately postponing the impleading of known or identifiable parties to delay the litigation." The AVOID Act initially amended CPLR § 1007, governing third-party practice, to impose strict deadlines for impleading third-party defendants and subsequent defendants (i.e., fourth-party defendants, fifth-party defendants, etc.). While new statutes often pose questions and challenges for practitioners, the AVOID Act has been particularly vexing since it was substantially amended after being signed into law but before going into effect.

Impleading Prior to the AVOID Act

"The AVOID Act has been particularly vexing—substantially amended after being signed into law, but before it ever went into effect."

Since 1992, CPLR § 1007 provided that a defendant could commence a third-party action against a non-party who may be liable to the defendant for all or part of the plaintiff's claim against the defendant by filing a third-party summons and complaint with the Clerk of the Court. The statute did not provide a time limit or restriction for commencing a third-party action, aside from requiring that the third-party summons and complaint be served on the plaintiff's attorney and third-party defendant within 120 days of the filing, consistent with the service deadline for an initiating summons and complaint pursuant to CPLR § 306-b. Given this lack of statutory deadline, individual judges and Courts often attempted to set a limit on impleaders, frequently requiring any third-party actions to be commenced within a certain amount of time after the final party deposition was conducted. Despite this, defendants would occasionally implead third-party defendants post-Note of Issue, or even on the eve of trial. According to Senator Addabbo, "[c]lever defendants ... developed an egregious strategy to add years to any case and, during that respite, avoid financial accountability" through "rolling" impleaders. In response, the AVOID Act was introduced, passed by the Legislature, and signed into law by Governor Hochul.

AVOID Act as Originally Enacted

The AVOID Act, as originally enacted, would have drastically limited the time in which to implead third-party (and successive) defendants. See L. 2025, ch. 704. The law, which was scheduled to go into effect on April 18, 2026, initially reduced the amount of time a

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defendant had to serve a third-party summons and complaint to 20 days after it was filed, down from 120 days previously. More significantly, the amendment would have required a third-party summons and complaint to be filed either: (i) within 60 days after service of the answer, if the impleaded third-party defendant's liability to the defendant-third-party plaintiff arose from a contractual relationship; or (ii) in all other circumstances, within 60 days after becoming aware that the third-party defendant is or may be liable to the defendant-third-party plaintiff for all or part of the plaintiff's claim. All subsequent defendants would have had reduced timeframes to implead their own defendants. Specifically, in the parlance of the AVOID Act, a third-party defendant-second third-party plaintiff would have had 45 days after service of the answer to implead another, a second third-party defendant-third-party plaintiff would have had 30 days after service of the answer to implead another, and each subsequent third-party defendant would have had just 20 days after service of the answer to implead another.

The AVOID Act further would have barred a third-party action from being commenced after the Note of Issue was filed. Any such belated third-party action would have been either severed or dismissed without prejudice. Had the law come into effect as originally passed, there would have been a narrow exception to these time limits for third-party actions against the plaintiff's employer in certain scenarios. If a third-party action was severed from the main action, and the third-party plaintiff commenced a new action against a severed third-party defendant, any motion to consolidate such actions would not be permitted.

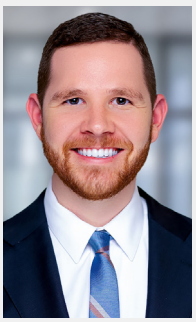
The Newly Effective CPLR § 1007

Prior to the original AVOID Act coming into effect, the Legislature and Governor Hochul substantially amended its provisions. See L. 2026, ch. 79. The now-effective CPLR § 1007 provides that a defendant must commence a third-party action within 90 days after service of its Answer, unless the Court orders otherwise. See CPLR § 1007(b). The defendant-third-party plaintiff must serve the third-party summons and complaint on the plaintiff's attorney and third-party defendant within 20 days of filing. See CPLR § 1007(a). A third-party action now cannot be commenced after the filing of the Note of Issue unless upon good cause shown or in the interest of justice. See CPLR § 1007(c). Notwithstanding these limitations, a defendant or third-party defendant may file a third-party summons and complaint against an employer of the plaintiff without needing an Order of the Court permitting same within 90 days after the later of: (i) when the defendant or third-party defendant learns the identity of the plaintiff's employer; and (ii) when the defendant or third-party defendant knows or should know that the plaintiff sustained a grave injury for purposes of the Workers' Compensation Law. See CPLR § 1007(e).

Retained from the originally passed AVOID Act are the provisions requiring any third-party action filed in violation of the statute to be either severed or dismissed without prejudice. See CPLR § 1007(d). In addition, if a third-party action is severed from the main action, and the third-party plaintiff commences a new action against a severed third-party defendant, any motion to consolidate such actions shall not be permitted. See CPLR § 1007(f).

Practitioners should take care to review the newly-revised CPLR § 1007 to familiarize themselves with the new rules governing impleaders. While it is too soon for these new amendments to have been litigated, we will continue to monitor for new developments and issue future alerts if and when the Courts begin to interpret CPLR § 1007.

Barbara D. Goldberg is a Partner and Head of the Appellate Department at Martin Clearwater & Bell LLP, drawing on nearly four decades of appellate experience to win landmark decisions defending healthcare providers in medical malpractice and liability appeals.



Richard Wolf is a Partner in the Appellate Department at Martin Clearwater & Bell LLP, applying exceptional research and writing skills to defend doctors, hospitals, and healthcare systems in high-stakes medical malpractice matters on appeal.

Pre-Answer Motions to Dismiss Extend a Defendant's Time to Answer as Well as a Plaintiff's Right to Freely Amend a Complaint

BY SAMANTHA E. SHAW ESQ.

A unique procedural circumstance can complicate a Pre-Answer Motion to Dismiss. Pre-Answer Motions to Dismiss a Complaint are commonly made and such motions extend the time for a defendant to serve an Answer to the Complaint. However, such motions also extend the time within which a plaintiff may amend the Complaint as of right and need not seek the Court's approval to do so. If a plaintiff exercises this right while a Pre-Answer Motion to Dismiss is pending, the Amended Complaint becomes the only Complaint in the case and the Court is required to proceed as though the previous Complaint did not exist. As such, a knowing plaintiff can cure a deficiency or defect in a Complaint by simply serving an Amended Complaint while a Pre-Answer Motion to Dismiss is pending. Furthermore, as the Amended Complaint replaces the original Complaint, any pending Pre-Answer Motion to Dismiss automatically becomes directed at the new Amended Complaint, which can result in the motion being moot or not fully and accurately addressing novel causes of actions not previously contained in the original Complaint.

Under CPLR § 3025(a), a party may amend the pleadings "once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Pursuant to CPLR § 3211(f), the service of a notice of motion to dismiss under CPLR § 3211 subsections (a) or (b) made prior to the service of a responsive pleading to the Complaint "extends the time to serve the pleading until ten days after service of notice of entry of the order." Therefore, because the filing of a Pre-Answer Motion to Dismiss extends the time within which to file a responsive pleading to the Complaint, a plaintiff may amend the Complaint as of right under CPLR § 3025(a) while a Pre-Answer Motion to Dismiss is pending and prior to the extended deadline set forth in CPLR § 3211(f). See, e.g., Rosas v. Petkokvich, 218 A.D.3d 814, 815-16 (2d Dep't 2023); Roam Cap., Inc. v. Asia Alts. Mgt. LLC, 194 A.D.3d 585, 585-86 (1st Dep't 2021); Perez v. Wegman Cos., 162 A.D.2d 959, 959 (4th Dep't 1990); see also Zaiger LLC v. Bucher Law PLLC, 238 A.D.3d 687, 687 (1st Dep't 2025).

"A knowing plaintiff can cure a defect in a Complaint by simply serving an Amended Complaint while a Pre-Answer Motion to Dismiss is pending."

In Roam Cap., Inc., the First Department held that the Supreme Court improvidently exercised its discretion in denying the plaintiff leave to amend the Complaint, since a motion to dismiss was pending at the time the plaintiff sought to amend. Roam Cap., Inc., 194 A.D.3d at 585, supra. The First Department held that the motion to dismiss had extended the time allowed under CPLR § 3025(a) to seek amendment, and "since the court had not yet even decided defendant's CPLR § 3211 motion at the time plaintiff moved to amend its complaint," plaintiff could have amended as of right and was not required to seek leave to amend under CPLR § 3025(b). Id. at 585-86.

If an Amended Complaint is properly served and filed, the original Complaint is superseded and the Amended Complaint becomes the only Complaint in the action, requiring the court to proceed "as though the original pleading had never been served." See Zaiger LLC, 238 A.D.3d at 687-88, supra (quoting Halmar Distribs. v. Approved Mfg. Corp., 49 A.D.2d 841, 841 [1st Dep't 1975]) (citing Plaza PH2001 LLC v. Plaza Residential Owner LP, 98 A.D.3d 89, 99 [1st Dep't 2012]); see also Singe v. Bates Troy, Inc., 206 A.D.3d 1528, 1530 (3d Dep't 2022). Courts have held that in this circumstance the pending motion to dismiss must now

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be applied to the Amended Complaint. See Daniel Szalkieewicz & Assoc., P.C. v. Liu, 244 A.D.3d 652 (1st Dep't 2025); Mancilla & Fantone, LLP v. Liu, 242 A.D.3d 606, 607 (1st Dep't 2025); Zaiger, 238 A.D.3d at 687-88, supra (holding that the lower court "correctly applied [plaintiff's] pending motion to dismiss to the amended complaint" because service of the amended complaint superseded the original complaint); Singe, 206 A.D.3d at 1530, supra (holding that the amended complaint filed while a motion to dismiss was pending should have been treated as an amendment as of right and that the "Supreme Court necessarily concluded that the grounds for dismissal of the original complaint would apply with equal force to the amended complaint").

In the circumstance where an Amended Complaint is filed while a Pre-Answer Motion to dismiss is pending, thereby superseding the original Complaint, the moving defendant is permitted, and compelled, to address any new claims asserted in the Amended Complaint. This may require submitting additional papers in support of the Motion to Dismiss even if they may otherwise be prohibited by the single motion rule. The failure to do so may result in a waiver of the defendant's objections or defenses to any of the new claims asserted in the Amended Complaint.

Where the Supreme Court or the parties do not address the Amended Complaint in the papers or order regarding the motion to dismiss, the appellate courts have held that, in circumstances addressing purely legal issues and in the interest of judicial economy, it is within the court's discretion to "institute the amended complaint as the operative pleading, and consider defendant[s'] motion to dismiss" as it would apply to the amended complaint." Singe, supra (internal quotation marks omitted) (quoting Bankers Conseco Life Ins. Co. v. Egan-Jones Ratings Co., 193 A.D.3d 539 (1st Dep't 2021); see Rosas, 218 A.D.3d at 816, supra.

Where the Amended Complaint contains substantially the same claims and factual allegations as the original Complaint, the defendant may not need to take any additional action and the court can apply the pending motion to dismiss to the Amended Complaint. However, when an Amended Complaint is filed and contains new claims or factual allegations, the defendant must address the new allegations or risk having their defenses or arguments deemed waived.

In Zaiger LLC, the plaintiff amended the Complaint as of right while a Pre-Answer Motion to Dismiss the Complaint was pending. See Zaiger, supra. On appeal, the defendant argued that "it was deprived of the opportunity to address the newly added cause of action in the amended complaint." Id. at 688. However, the First Department held that this argument was "without basis" because the "single motion rule" usually applied to motions to dismiss did not bar the defendant from moving to dismiss the new claim asserted in the amended complaint or, alternatively, to address "the new cause of action in the alternative in its reply or submit a supplemental objection." Id. Because the defendant failed to take any of these actions, the Court rejected the argument that the defendant did not have the opportunity to address the newly asserted claim. Id.

Ordinarily, the "single motion rule" specified by CPLR 3211(e) limits the defendant to only one motion based upon any ground specified in CPLR 3211(a). However, where a new cause of action is alleged in an Amended Complaint, the defendant is not barred from moving to dismiss the new claim by the "single motion rule." See Zaiger, 238 A.D.3d at 688, supra (citing Barbarito v. Zahavi, 107 A.D.3d 416, 420 [1st Dep't 2013]). In Barbarito, the First Department held that defendants were not barred by the "single motion rule" from moving to dismiss the Amended Complaint because "the fraud cause of action in the amended complaint is not the same as the corresponding cause of action in the original complaint." Barbarito, 107 A.D.3d at 420-21, supra.

Putting the above into a common scenario, we recently made a Pre-Answer Motion to Dismiss a Complaint based on a statute of limitations argument. Plaintiffs' Complaint contained causes of action sounding in intentional torts and false imprisonment that come with a one-year statute of limitations, which had long expired. While our Pre-Answer Motion to Dismiss was pending, plaintiffs filed an Order to Show Cause seeking leave from the Court to file an Amended Complaint to assert a cause of action for medical malpractice, which has a two-year six-month statute of limitations that had not yet expired. The lower court refused to sign the Order to Show Cause. However, in opposition to our Pre-Answer Motion to Dismiss, plaintiffs included their Amended Complaint as an exhibit and renewed their application to amend the original Complaint. While our Pre-Answer Motion to Dismiss was not moot as it still correctly argued that the causes of action for intentional torts and false imprisonment must be dismissed, our motion did not address

Pre-Answer Motions to Dismiss Extend a Defendant's Time to Answer as Well as a Plaintiff's Right to Freely Amend a Complaint

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the medical malpractice cause of action contained in the Amended Complaint. As we knew procedurally that the Amended Complaint could stand as of right, even though plaintiffs and the Court did not seemingly know that, we had to address the new cause of action asserted in the Amended Complaint in our reply papers in the event of an appeal.

Consequently, where a plaintiff amends the Complaint while a Pre-Answer Motion to Dismiss is pending, defense counsel should be aware that such an amendment is a right and defense counsel should take care in determining whether the Amended Complaint raises new claims or allegations that need to be addressed, whether by a supplemental objection or additional motion papers.

Samantha E. Shaw is a Partner at Martin Clearwater & Bell LLP, where she focuses her practice on defending client doctors, physician practice groups, teaching hospitals, and premier academic medical centers in malpractice matters. She is rated AV Preeminent by Martindale-Hubbell, their highest rating.

Can Women Sustain Orthopedic Injuries During Birth? One Summary Judgment Motion Win Indicates No

BY KENNETH BURFORD ESQ. AND SARAH E.T. ERTLE ESQ.

Recently, MCB successfully obtained summary judgment on behalf of our client hospital in a matter in which plaintiff alleged she sustained an acetabular labral tear during an uncomplicated, vaginal birth. The following is a discussion regarding the validity, or lack thereof, of orthopedic claims stemming from labor and birth and what to be aware of in the defense of such claims.

Background

The case involved the then 29-year-old female patient who presented to our client hospital at 39 weeks and 6 days with contractions, vaginal bleeding, and a prior history of C-section. Throughout the prenatal course she desired a trial of labor after C-section and confirmed same that day. She pushed for 40 minutes until she delivered her baby who was 7 pounds and 5 ounces.

Complaints of pain to the perineum were noted and a second-degree laceration of same was repaired. Up to the time of her discharge a few days later, plaintiff made complaints of pain in her abdomen and perineum, both of which were relieved with ibuprofen and acetaminophen. She did not complain of hip pain. The chart indicated that plaintiff was able to perform ADLs without difficulty and was ambulating. At discharge, plaintiff was given a prescription for ibuprofen. However, plaintiff alleged she sustained an acetabular labral tear as a result of the delivery, and more particularly, the positioning during the delivery for which she may need surgery.

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Summary Judgment Motion Win

We filed a motion for summary judgment with the support of both an OB/GYN and orthopedics expert. Defendant's expert orthopedist conclusively demonstrated that 1) plaintiff did not sustain an acetabular labral tear due to her delivery and 2) she has never been diagnosed with same. He further affirmed that in his over 45-year career in orthopedics, he has never seen, heard, or treated a patient who sustained an acetabular labral tear from giving birth. These injuries often occur from high velocity trauma from twisting/torque often seen in tackle football or other high-impact sports.

Plaintiff submitted an opposition but failed to offer any oppositional support from an orthopedist. As such, plaintiff could not sufficiently oppose our motion, which we won. In his written Decision and Order on the motion, Justice Arthur F. Engoron, now retired, noted that plaintiff's claim that nurses applied excessive force to plaintiff's leg/hip during delivery defies common sense and should therefore be disregarded. To the hospital's credit, he also specified there was "overwhelming evidence of informed consent."

ACOG Article and Potential Need for *Frye* Hearing

During the work up of the case, it became clear that plaintiff's counsel based his arguments in this action on an article published by The American College of Obstetricians and Gynecologists ("ACOG") entitled, "Acetabular Labral Tear and Postpartum Hip Pain" by Adam G. Brooks, M.D. and Benjamin G. Domb, M.D. from 2012. The main contention of the article is that, "an acetabular labral tear[1] should be considered as part of the differential diagnosis for hip pain in postpartum women" and that, "freeing the distal lower extremity to externally rotate during labor may prevent an acute labral tear." The article states that ten patients who were postpartum women were clinically and radiographically diagnosed with acetabular labral tears which were confirmed by hip arthroscopy and surgically repaired.

Upon close review, we identified numerous reasons indicating this article should not be used as authoritative evidence of the contention that a natural delivery can result in acetabular labral tears. For instance, it was published by ACOG but written by two orthopedists who run practices diagnosing and surgically treating these alleged injuries, at least in part. In fact, the article is based upon only ten women who presented to one of the author's offices. As such, the small sample size of patients reported must be questioned. Anecdotally, it is this author's experience that orthopedists in no way consider giving birth as a mechanism that could give rise to such an injury.

When it became clear that plaintiff's counsel was using this article as a foundation to his arguments by citing it and attaching it as an exhibit to his opposition, we contemplated the need for a *Frye* hearing to attack and disestablish this article as being an authoritative scientific source. While ACOG is deemed as a generally accepted authoritative source by obstetricians, the same could not be said in the field of orthopedics. Also, we would argue that the methodologies used herein were scientifically inadequate due to the above details.

Ultimately, a pre-trial *Frye* hearing was not warranted in the instant matter because the summary judgment motion was granted. However, one may be recommended in the event this article arises in a future case as it may be deemed "junk science" and should not be relied on.

How Providers Can Protect Against Such Claims

Plaintiff's counsel attempted to create an issue of fact regarding the lack of a specific notation of how plaintiff was positioned during the birth at issue. Our expert obstetrician noted that the positioning, if in the common lithotomy position,[2] would not necessarily be specifically noted due to its ubiquity, as was the case here. Additionally, the notes were unclear regarding when and for how long the plaintiff's feet were in the stirrups versus being held by her husband and nursing staff. There was also conflicting testimony from the plaintiff, her husband, and the nursing staff's common practice regarding what angle the plaintiff's legs were held and for how long.

Ultimately, Justice Engoron did not have to find an issue of fact because he correctly deemed the contention that nursing staff (or plaintiff's husband)

1 An injury to the ring of specialized cartilage that lines the rim of the hip socket.
2 Where the mother lies on her back with her legs elevated and placed in stirrups.

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violently held plaintiff's leg at such an angle and with such force so as to cause an acetabular labral tear to be nonsensical.

However, to protect against such arguments, it is advisable to note the birthing position and that a patient's legs were in stirrups during the birth when possible. Recall that the ACOG article discussed above specifically advises that a patient's leg should be free to rotate as needed during birth to avoid any torque which could lead to a potential orthopedic injury.

In his decision, Justice Engoron also noted that numerous pre-natal notes confirming plaintiff's desire for a trial of vaginal labor following a prior C-section along with signed consent forms specifying same and further documented conversation preceding the birth all amounted to "overwhelming evidence" that the hospital had obtained proper informed consent to go forward with a vaginal birth. This was crucial to our win on summary judgment as plaintiff's counsel argued the alleged orthopedic injury would not have occurred if a C-section was pursued.

Conclusion

In conclusion, health care providers need not be concerned about a wave of orthopedic claims stemming from vaginal births; however, it is useful to be aware of the ACOG article that claims that acetabular labral tears result from vaginal birth. More importantly, providers should be aware of its weaknesses. To our knowledge, this article has not been formally tested in the courts in relation to its scientific soundness, but if a future *Frye* hearing must go forward, the result could potentially have a large impact on the litigation of post-birth injuries.

Kenneth Burford is Partner at Martin Clearwater & Bell LLP, bringing to the Firm more than three decades of experience handling medical malpractice and professional liability claims and litigation, as well as employment and toxic tort claims.

Sarah E.T. Ertle is a Senior Associate at Martin Clearwater & Bell LLP, where she defends the Firm's client doctors, hospitals, health care systems, and other medical professionals against various types of medical malpractice claims.

Recent Case Results

MARTIN CLEARWATER & BELL LLP

Defense Verdict Secured in Angioplasty and Pseudoaneurysm Case


Rosaleen T. McCrory


Elizabeth J. Sandonato


Edmund T. Rakowski

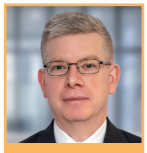
Senior Trial Partner **Rosaleen T. McCrory**, Partner **Elizabeth J. Sandonato**, and Associate **Edmund T. Rakowski** obtained a Defense Verdict in a Queens County Supreme Court matter arising from a 2021 left superficial femoral and posterior tibial arterial angioplasty. The plaintiff underwent a left lower extremity angiogram with balloon angioplasty of the superficial femoral artery, with access obtained through the right common femoral artery under ultrasound guidance. Two days later, the plaintiff returned reporting recurrence of rest pain.

The following day, the plaintiff underwent a repeat left lower extremity angiogram, during which an attempt was made to gain access through the right femoral artery. Upon ultrasound-guided assessment, a stable pseudoaneurysm was identified. The angiogram was then performed through the left common femoral artery, during which dissections of the superficial femoral artery were managed with angioplasty and stenting.

After closure of the groin access site, while still in the procedure room, the plaintiff became hypotensive and complained of leg and abdominal pain. It was determined that there was active extravasation from the right common femoral artery at the site of the pseudoaneurysm. The plaintiff developed clots occluding the right lower extremity arteries and, after transfer to the hospital and the performance of a thrombectomy, the plaintiff ultimately underwent a right below-the-knee amputation and transmetatarsal amputation of the left foot.

Plaintiff alleged a failure to diagnose and treat the pseudoaneurysm and a failure to admit him to the hospital, claiming the amputations would have and could have been avoided in a hospital setting. MCB established that the pseudoaneurysm was not diagnosable until identified during the second performance of the angiogram, was stable, and did not require immediate treatment and/or hospital admission. MCB further established that performing the procedures in a hospital setting would not have changed the outcome. Plaintiff's expert conceded that referral to interventional radiology and outpatient treatment were appropriate. Prior to trial, plaintiff made a $12 million settlement demand. The jury ultimately returned a defense verdict in favor of MCB's client.

Defense Verdict for Cardiologist in Case Alleging Failure to Address Pericardial Effusion


Michael A. Sonkin


Deborah A. Dyckman


Brian M. Frankoski

Senior Trial Partner **Michael A. Sonkin**, Partner **Deborah A. Dyckman** and Senior Associate **Brian M. Frankoski**, along with Jillian Kuper, successfully obtained a unanimous defense verdict in Kings County after a three-week trial. The plaintiff, on behalf of the decedent, alleged that MCB's client, a cardiologist, failed to appreciate the significance of a moderate pericardial effusion in a patient who had undergone coronary artery bypass surgery two weeks earlier for myocardial infarction and diffuse coronary artery disease, and was allegedly

Case Result: Defense Verdict for Cardiologist in Case Alleging Failure to Address Pericardial Effusion

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presenting at a post-operative clinic visit with severe shortness of breath due to a slow bleed into the pericardium. It was claimed that the pericardial effusion in a patient with severe shortness of breath required immediate hospital admission and close monitoring to avoid progression to tamponade.

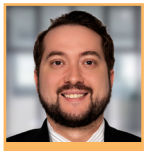
MCB maintained that the patient did not have severe shortness of breath given his normal heart rate and respiratory rate, lack of documented complaints, failure to present to an ER in the interim period of time, and normal cardiac function on echocardiogram despite the identified effusion. The defense further argued that this information demonstrated that the patient was not actively bleeding as of that post-operative visit and that admission was not warranted for a moderate pericardial effusion that was not impacting heart function. The patient was instructed to keep a previously scheduled appointment with his surgeon for two days later; however, he failed to appear for that appointment and died two days there after. Hospital records suggested the occurrence of a tamponade.

The plaintiff contended that the autopsy demonstrated that the patient died from progressive bleeding into the pericardium causing tamponade given the substantial amount of blood and clots found in the pericardium and chest. The defense denied the decedent died from a tamponade and instead maintained that the patient instead suffered from a repeat myocardial infarction given post mortem coronary artery occlusions found, with the presence of blood on autopsy attributable to a detached bypass graft following extensive CPR performed as part of the resuscitative effort. Following the lengthy trial, the jury deliberated for only one hour before returning their unanimous verdict for the defense.

Defense Verdict in Case Alleging Failure to Diagnose Arterial Occlusion

Michael J. Boranian

Kenya S. Hargrove



Igor M. Murta

Partner **Michael J. Boranian**, Of Counsel **Kenya S. Hargrove**, and Associate **Igor M. Murta** successfully obtained a defense verdict in Nassau County Supreme Court in a case involving a then 55-year-old retired laborer who alleged that MCB's client hospital, its vascular surgeon and staff, as well as codefendant Emergency Department physicians, failed on multiple occasions to diagnose a right-sided arterial occlusion, leading to the development of thrombus and complete occlusion of blood flow to the lower extremity. Plaintiff claimed that the alleged delay allowed the occlusion to progress, ultimately necessitating an endarterectomy and reperfusion surgery, which in turn allegedly caused compartment syndrome, the need for a fasciotomy, a permanent foot drop, and related sequelae.

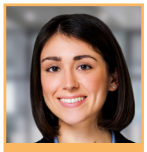
MCB maintained that the Emergency Department (ED) treatment rendered was appropriate, that the plaintiff never presented in an emergent state, that the indicated diagnostic studies were properly performed, and that referral to the patient's primary care physician following each emergency encounter was appropriate. MCB further established that a later change in circumstances occurred which impacted the plaintiff's vasculature and ultimately necessitated surgical intervention. It was further demonstrated that surgery was not indicated until the plaintiff's final presentation to MCB's client hospital, during which the plaintiff requested transfer to another facility, thereby further delaying the required surgery by an additional two days.

At trial, MCB established that the applicable emergency medicine and vascular surgery standards of care were met and that the plaintiff's foot drop had not occurred prior to transfer from MCB's client hospital. Following an eight-day trial, the jury deliberated for less than one hour during its lunch break before returning a unanimous defense verdict.

Summary Judgment for Surgeon in Robotic Hysterectomy Case Involving Alleged Bowel Injury


Laurie A. Annunziato


Amy E. Korn


Lauren Bisogno

Senior Trial Partner **Laurie A. Annunziato**, Partner **Amy E. Korn** and Senior Associate **Lauren Bisogno** obtained Summary Judgment in a Kings County Supreme Court in a case involving a then 43-year-old female plaintiff who was admitted to a New York hospital in July 2015 for a robotic hysterectomy performed by a codefendant physician. Representing both the hospital and a bariatric surgeon, MCB established that during the procedure, the surgeon was called to perform an intra operative consultation for a possible enterotomy; however, no signs of bowel injury were identified, and the procedure continued without complication.

Three days post-operatively, a CT scan of the abdomen and pelvis revealed a perforated bowel. The plaintiff was returned to the operating room by MCB's client for an exploratory laparotomy, which revealed two bowel enterotomies, which were repaired by MCB's client. The plaintiff there after required additional surgeries, including washouts and debridements, a small bowel resection, repair of fistulas, and abdominal wall reconstruction.

The plaintiff alleged that MCB's client failed to timely diagnose and treat bowel perforations during the robotic hysterectomy, and that MCB's institutional client was vicariously liable for the intra-operative surgical consultation.

MCB successfully argued on summary judgment that its surgeon properly performed the intraoperative consultation during the early stages of the procedure, and that any expert opinion in opposition that the consulting physician failed to identify the perforations was speculative as the record was devoid of any evidence that the enterotomies occurred prior to the MCB surgeon's intra-operative consultation, which was performed after trochar placement, but prior to any substantive portions of the hysterectomy. MCB further successfully argued that its institutional client was not vicariously liable for the intra-operatively consulting surgeon, who was not an employee of the Hospital.

MCB's motion for Summary Judgment was granted in full as to the consulting bariatric surgeon and hospital, and thereafter MCB defeated attempts by plaintiff to renew and reargue the motion.

Summary Judgment Case Secured in Failure to Diagnose TMD Case


Elizabeth J. Sandonato


Joseph P. Ennis

Senior Trial Partner **Elizabeth J. Sandonato** and Senior Associate **Joseph P. Ennis** obtained Summary Judgment in Nassau County Supreme Court, for MCB's client, a general dentist, in a case involving a then 57-year-old plaintiff who alleged a failure to timely diagnose and treat temporomandibular joint disorder ("TMD"), as well as the improper extraction of a bottom right rear wisdom tooth, which she claimed caused her to develop temporomandibular joint disorder (TMD), necessitating the extraction of all of her natural teeth and replacement with a full mouth of dental implants. The plaintiff further claimed that she sustained arthritis in her left knee and osteopenia in her left hip as a result of the alleged malpractice.

MCB moved for summary judgment, supported by an affirmation from a general dentist. MCB's general dentist expert asserted that as a general dentist, MCB's client properly assessed right rear wisdom tooth as hopeless and determined that that extraction was the only appropriate treatment, as the tooth could not be saved. Moreover, this expert also opined that the plaintiff's TMD was attributable to a Class III skeletal deformity which was a hereditary condition that could not have been caused or exacerbated by its client's care; and the expert further opined that MCB's client promptly referred the plaintiff to a specialist for evaluation and treatment upon presenting with signs of TMD, in accordance with the standard of care. Accordingly, MCB's client could not have caused and the timing of the referral to a specialist did not exacerbate any of the alleged dental injuries or TMD. Plaintiff opposed the motion with an expert affirmation by periodontist who attested that TMD should have been diagnosed on the first visit with MCB's client and the delay in referring the patient to a specialist exacerbated her condition necessitating a full mouth restoration.

In granting MCB's motion, Justice Sher determined that MCB's expert affirma-

Case Result: Summary Judgment Case Secured in Failure to Diagnose TMD Case

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tion made out a prima facie case that MCB's client did not depart from good and accepted standards of care as a general dentist and did not proximately cause or contribute to the plaintiff's injuries. The Court found that plaintiff's expert affirmation was insufficient to rebut that showing because the expert, who specialized in periodontics, did not attest to the standard of care as a general dentist; failed to set forth evidence in support of his opinion that TMD should have been diagnosed on the first visit and that the patient could have averted any injury or treatment had the condition been diagnosed sooner.

Summary Judgment Granted in Alleged Psychiatric Malpractice and Wrongful Death Action


Gregory J. Radomisli


Richard Wolf


Shannon L. Stewart

Partner **Gregory J. Radomisli**, Appellate Partner **Richard Wolf**, and Associate **Shannon L. Stewart**, successfully obtained Summary Judgment in Nassau County Supreme Court in a case involving a then 59-year-old male who committed suicide. MCB's client psychiatrist began treating the decedent in November 2021. The decedent had a long standing history of depression, with no prior history of suicidal thoughts or attempts.

Over the following three to four months, MCB's client psychiatrist treated the decedent and prescribed medications to address his symptoms which included lack of interest activities, problems with sleep, and anxiety. At each appointment, the decedent repeatedly denied suicidal thoughts and showed improvement with medications. MCB's client psychiatrist saw the decedent on February 23, 2022 when the decedent indicated that he was feeling better and had been brighter, and that his restlessness had also began to dissipate. The decedent then committed suicide by gun shot on March 4, 2022.

The Plaintiff brought a multitude of allegations including failures to appreciate the decedent's history, recognize and appreciate his symptoms, perform a suicide risk assessment, properly manage his medications, as well as claims for wrongful death.

With the assistance of our expert psychiatrist, MCB demonstrated that all treatment rendered by our client psychiatrist was within the appropriate standard of care. MCB further argued that the decedent's mood was improving, and he was looking forward to the future, and that suicide in itself was an impulsive behavior that cannot always be predicted. Additionally, MCB relied on the decedent's wife's deposition testimony, which established that, even on the day of his suicide, he was making plans for the future and did not seem suicidal.

The Court found that MCB met all the necessary elements to establish a prime facie argument for summary judgment. The Court further held that the plaintiff's psychiatry expert opinions were purely speculative, conclusory, and contradicted by the record.

Summary Judgment Secured in Case Involving Alleged Mismanagement of Pressure Injuries


Kerona K. Samuels

Partner **Kerona K. Samuels** secured Summary Judgment in Bronx County Supreme Court on behalf of MCB's client, a nursing home, which was alleged to have departed from accepted standards of care in the treatment of the plaintiff's pre-existing bilateral buttock pressure ulcers. The plaintiff also sought punitive damages for alleged violations of state and federal statutes governing nursing homes.

MCB submitted an expert Affirmation establishing that the nursing home met the standard of care in its treatment of the resident and did not violate any applicable statutes. The plaintiff opposed the motion with an expert who opined that the nursing home departed from accepted standards of care in its treatment of the resident's pressure injury, arguing that, given the decedent's compromised medical history, the facility should have acted above the standard of care to prevent worsening.

Case Result: Summary Judgment Secured in Case Involving Alleged Mismanagement of Pressure Injuries

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In reply, MCB identified errors relied upon by the plaintiff's expert and argued that the expert had either misread the medical records or applied an incorrect standard. The Court found that the plaintiff's expert failed to raise a triable issue of fact and granted the motion, dismissing the case against the nursing home in its entirety.

Summary Judgment Secured in Case Alleging Negligent Episiotomy During Labor and Delivery

Laurie A. Annunziato

Fiachra P. Moody

Senior Trial Partner **Laurie A. Annunziato** and Partner **Fiachra P. Moody** successfully obtained Summary Judgment in Kings County Supreme Court in an action brought on behalf of a then 29-year-old married female patient, in which the plaintiff alleged that the codefendant OB/GYN physician had negligently performed a contraindicated episiotomy on September 7, 2021, during the plaintiff's labor and delivery admission at MCB's client hospital.

We argued that Summary Judgment was warranted because no independent acts of negligence were alleged against the hospital. The record established that the plaintiff was privately admitted for obstetrical care and treated throughout her prenatal course by a private physician, with a covering provider present at delivery pursuant to a private practice arrangement.

We further argued that the hospital could not be held vicariously liable under Mduba or any theory of ostensible agency. The evidence demonstrated that the plaintiff's relationship was exclusively with her private physician and that the covering provider was not a hospital employee. Under these circumstances, the alleged malpractice at issue could not be attributed to the hospital. Accordingly, Summary Judgment dismissing all claims against the hospital was warranted and granted.

Judgment of Dismissal in Bench Trial Dental Case

Yuko A. Nakahara

Brandon J. Fernandes

Senior Trial Partner **Yuko A. Nakahara** and Senior Associate **Brandon J. Fernandes** successfully secured a favorable judgment of dismissal following a comprehensive bench trial in Queens Civil Court. This specific dental malpractice litigation centered on allegations MCB's client Medical Center failed to timely and appropriately perform a root canal resulting in an eight-month period of pain and suffering.

In the defense of the Medical Center, MCB meticulously established an evidentiary record demonstrating that the care rendered was, in all respects, adherent to the standard of care. Through the strategic presentation of expert medical testimony, the MCB effectively illustrated that the Medical Center's providers and clinical staff at no point deviated from the standard of care. Furthermore, it was decisively shown that the defendant's actions were not the proximate cause of the plaintiff's alleged damages.

The testimony further elucidated the clinical decision-making process, confirming that the comprehensive treatment plan formulated during the plaintiff's initial emergency presentation was entirely consistent with accepted medical and dental protocols. MCB successfully argued that despite the appropriateness and clinical viability of the recommended root canal therapy, the plaintiff unilaterally later elected to undergo a total extraction of the tooth in question.

What's New at MCB?

MARTIN CLEARWATER & BELL LLP

Our table of MCB swag and firm information set up at the event.

Barbara D. Goldberg, left, and Jacqueline D. Berger, right, attended the Association for Healthcare Risk Management of New York's Annual Full-Day Conference.

JUNE 5, 2026

MCB Sponsors AHRMNY's Annual Full-Day Conference

On June 5, Senior Trial Partner Jacqueline D. Berger and Appellate Partner Barbara D. Goldberg attended The Association for Healthcare Risk Management of New York's Annual Full-Day Conference & Reception. MCB was proud to once again serve as a sponsor of this annual event.

This year's program focused on the challenges and opportunities surrounding human capital and patient-centered care. Through sessions covering healthcare safety, communication, workplace wellness, and organizational accountability, MCB gained valuable perspectives on the evolving healthcare landscape.

This event continues to be an excellent opportunity to connect with healthcare risk management professionals, share insights, and engage in discussions that support positive change across the healthcare industry.

JUNE 15, 2026

MCB Welcomes New Associates Linda Reinmann and Kachatur Arabachian

The firm is pleased to welcome Linda Reinmann and Kachatur Arabachin to MCB as Associates, to further strengthen our medical malpractice defense team. They both bring a strong foundation in medical malpractice defense, positioning them to skillfully defend hospitals, physicians, and health care systems at every stage of litigation.

MCB Congratulates 26 Attorneys on their Selection to the 2026 Super Lawyers and Rising Stars List

The firm is pleased to announce that 26 attorneys were selected to the 2026 Super Lawyers New York list. This selection--awarded to only 5% of lawyers annually in each state for Super Lawyers and 2.5% of lawyers annually for Rising Stars--is a prestigious award.

Selected to the 2026 New York Super Lawyers® List


Laurie Ann Annunziato


Jacqueline D. Berger


Michael J. Boranian


Kenneth J. Burford


Peter T. Crean


Daniel L. Freidlin


Barbara D. Goldberg

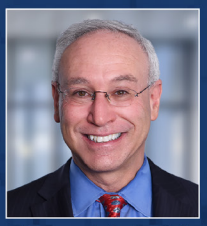

Kenneth R. Larywon


Michael F. Madden


Rosaleen T. McCrory


Thomas A. Mobilia


Graham T. Musynske


Gregory J. Radomisli

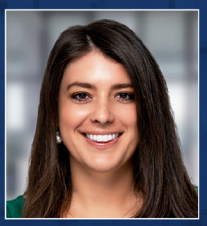

Charles S. Schechter


Michael A. Sonkin

Selected to the 2026 New York Rising Stars List


Nicole S. Barresi


Daniel P. Borbet


Sarah E.T. Ertle


Brandon J. Fernandes


Emma B. Glazer


Victor M. Ivanoff


Amy E. Korn


Stephen C. Lanzone


Justin J. Provvido


Richard Wolf

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JUNE 26, 2026

MCB Organizes Annual Firm Softball Game

On Thursday, June 26, MCB's annual Partners vs. Associates softball game returned to Central Park for another afternoon of friendly competition and team spirit.

The Associates delivered a strong performance this year, earning an 8–2 victory and claiming this year's bragging rights.

With perfect weather, an incredible turnout, and plenty of laughs both on and off the field, the celebration continued at Dive Bar, where colleagues gathered to cap off another memorable MCB tradition.

JULY 1, 2026

Senior Associate Graham T. Musynske has been promoted to Partner

We're proud to announce that Graham Musynske has been promoted to Partner at Martin Clearwater & Bell LLP. A key member of MCB's Medical Malpractice team, Graham defends hospitals, health care systems, nursing homes, and practitioners across a wide range of malpractice matters. In 2026, he was named to Best Lawyers: Ones to Watch® in America for Medical Malpractice Law – Defendants and earned his first selection to the New York Metro Super Lawyers list, after six years as a Rising Star (2019–2024). Congratulations, Graham!

JULY 9, 2026

Partner, Michael J. Boranian Receives Martindale-Hubbell's Highest Rating: AV Preeminent

Congratulations to our Partner, Michael J. Boranian for receiving Martindale-Hubbell's Highest Rating: AV Preeminent! Martindale-Hubbell conducts a thorough review of attorneys who wish to receive a Martindale-Hubbell Peer Review Rating, through a secure online peer review survey where a lawyer's ethical standards and legal ability in a specific area of practice are assessed by their peers. Mr. Boranian received Martindale-Hubbell's highest peer rating standard: AV Preeminent. This is given to attorneys who are ranked at the highest level of professional excellence for their legal expertise, communication skills, and ethical standards by their peers.

Get in Touch

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