Defense Practice
UPDATE

MARTIN CLEARWATER & BELL LLP

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In this Issue:

Frye-d Experts:

How Plaintiffs Attempt to Preclude Defense Experts Under Frye v. United States

BY: MICHAEL A. SONKIN, ESQ. AND RICHARD WOLF, ESQ.

When a plaintiff's expert attempts to proffer an opinion that a defendant physician departed from the accepted standard of care, and this opinion is based on a flimsy theory not based in medical science, a *Frye* motion is often a useful tool to preclude such testimony. Recently, however, we were confronted with a purported *Frye* motion to preclude our expert's testimony, despite the fact that it was not based on pseudo-science or a novel scientific theory, principle, or procedure. As the plaintiff's bar continues to get more creative with attempts to preclude defense experts, this is an opportune time to discuss what the *Frye* standard is, what a movant needs to prove in order to warrant a *Frye* hearing, and how to defend against a baseless *Frye* motion.

A *Frye* motion is based on the United States Court of Appeals for the D.C. Circuit's decision in *Frye v. United States* 293 F. 1013 (D.C. Cir. 1923). In that case, the Court held that expert testimony must be based on a principle that has "gained general acceptance in the particular field in which it belongs" in order to be admissible. *Id*. at 1014. The New York Court of Appeals has adopted the *Frye* standard in order to assess the admissibility of novel scientific evidence. *See People v. Wakefield*, ___ N.Y.3d ___, 2022 N.Y. Slip Op. 02771, *6 (Apr. 26, 2022); *People v. Wernick*, 89 N.Y.2d 111, 115 (1996). "The process is meant to assess whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." *People v. Williams*, 35 N.Y.3d 24, 37 (2020) (internal quotation marks omitted); *see People v. Brooks*, 31 N.Y.3d 939, 941 (2018); *People v. Wesley*, 83 N.Y.2d 417, 422 (1994). It is important to note that *Frye* is only applicable when the evidence at issue concerns a novel scientific theory. Neither the preclusion of evidence nor a hearing is warranted where the evidence

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at issue does not concern a novel scientific theory. *See Cabrera v. Port Auth. of New York*, 185 A.D.3d 491, 492 (1st Dep't 2020); *Cleasby v. Acharya*, 150 A.D.3d 605, 605–06 (1st Dep't 2017); *Likos v. Niagara Frontier Tr. Metro Sys., Inc.*, 149 A.D.3d 1474, 1475 (4th Dep't 2017), abrogated on other grounds, *Defisher v. PPZ Supermarkets, Inc.*, 186 A.D.3d 1062, 1063 (4th Dep't 2020); *Krackmalnik v. Maimonides Med. Ctr.*, 142 A.D.3d 1143, 1144 (2d Dep't 2016).

In our case, the plaintiff alleged that our client, a Board-certified orthopaedic surgeon, departed from the accepted standard of care in failing to warn against engaging in certain physical activity following bilateral knee arthroplasty. Months after the surgery, the plaintiff purportedly dislocated one knee while engaged in activity in which force was applied to the knee. We proffered a separate Board-certified orthopaedic surgeon as an expert witness, who would testify as to joint replacement devices and prosthetics, the strengths and limitations of such hardware, and what types of stress can cause prosthetic devices to fail. They also would testify with respect to human anatomy, including the joints of the knee and the soft tissues, ligaments, and muscles surrounding the knee.

The plaintiff filed a motion in limine seeking either the preclusion of our expert's testimony, or a hearing pursuant to *Frye*. However, the plaintiff did not contend that our expert's testimony was based on a novel scientific theory or principle at all. Rather, it was argued that the CPLR 3101(d) disclosure did not identify the methods used by the expert to determine the level of force or stress on the knee that caused the plaintiff's alleged injuries. Such an argument addressed the foundation for our expert's opinion, not whether his methodology was generally accepted in the field of orthopaedics. An inquiry under *Frye* is separate and distinct from the question of whether there is a proper foundation for evidence to be admitted. *See People v. Powell*, 37 N.Y.3d 476, 489 (2021). Accordingly, the plaintiff's motion was not made pursuant to *Frye* at all, and there were no grounds to either preclude our expert's testimony or to hold a *Frye* hearing.

SUCH AN ARGUMENT ADDRESSED THE FOUNDATION FOR OUR EXPERT'S OPINION, NOT WHETHER HIS METHODOLOGY WAS GENERALLY ACCEPTED IN THE FIELD OF ORTHOPAEDICS. AN INQUIRY UNDER *FRYE* IS SEPARATE AND DISTINCT FROM THE QUESTION OF WHETHER THERE IS A PROPER FOUNDATION FOR EVIDENCE TO BE ADMITTED.

As an alternate ground for denial, we demonstrated that the plaintiff's motion was defective because of a failure to sustain the burden on the motion. A movant seeking a hearing to determine the acceptance of a scientific theory in the field must present "a credible challenge to the underpinning of the expert theory" before the burden of demonstrating its reliability shifts to the party offering the expert testimony. *Likos*, 149 A.D.3d at 1475; *Frye v. Montefiore Med. Ctr. ("Montefiore")*, 100 A.D.3d 28, 38 (1st Dep't 2012). In our case, the only thing submitted in support of the plaintiff's motion was an attorney's affirmation. The plaintiff did not provide any expert support presenting a credible challenge to our expert's proposed testimony, nor did counsel claim to have medical expertise themselves. The affirmation from counsel presented nothing more than amorphous and unsubstantiated legal arguments, with no expert support, that failed to establish the basis for the purported opinions. Accordingly, the affirmation was of no probative value, and was therefore insufficient to sustain the plaintiff's burden of presenting a credible challenge to the underpinning of our expert's theory. *See Likos*, 149 A.D.3d at 1475.

Next, we demonstrated that the plaintiff's arguments were completely baseless by producing evidence showing that our expert's opinions were based on principles that were generally accepted in the field. Under the *Frye* rule, judges do not take part in "verifying the soundness of a scientific conclusion." *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006) (internal quotation marks omitted). Instead, the emphasis is on "counting scientists' votes" to determine if there is general acceptance in the field as to the principles and methodology at issue. *Wesley*, 83 N.Y.2d at 439 (Kaye, C.J., concurring). Importantly, unanimity in the field is not required. *See Parker*, 7 N.Y.3d at 447; *Wakefield*, 2022 N.Y. Slip Op. 02771, at *6. Rather, a proponent of challenged evidence must show "consensus in the scientific community as to the methodology's reliability." *Williams*, 35 N.Y.3d at 37 (internal quotation marks omitted). This showing may be made through the submission of scientific or legal writings, such as medical articles and literature, as well as through judicial opinions which have addressed the issue, or

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Frye-d Experts: How Plaintiffs Attempt to Preclude Defense Experts Under *Frye v. United States*

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ULTIMATELY, THE PLAINTIFF WAS SIMPLY RAISING A FACTUAL DISAGREEMENT WITH OUR EXPERT'S OPINIONS ON CAUSATION, WHICH IS INSUFFICIENT TO WARRANT A *FRYE* HEARING.

expert opinions other than that of the proffered expert. *See Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 785 (2014); *Shah v. Rahman*, 167 A.D.3d 671, 672-73 (2d Dep't 2018); *Victor Q., Jr. v. Bronx Lebanon Hosp. Ctr.*, 149 A.D.3d 456, 456-57 (1st Dep't 2017). Moreover, for expert testimony on causation, "it is not necessary 'that the underlying support for the theory of causation consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion reached by the [] expert.'" *Lugo v. New York City Health & Hosps. Corp.*, 89 A.D.3d 42, 57 (2d Dep't 2011), quoting *Zito v. Zabarsky*, 28 A.D.3d 42, 44 (2d Dep't 2006).

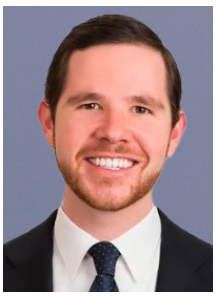
In our case, we were able to submit multiple journal articles and medical literature addressing specific activities in patients following total knee arthroplasty, as well as the generally accepted theory that an increased joint load may injure a prosthetic knee and/or the surrounding soft tissues. Our medical evidence demonstrated that deep knee flexion with standard total knee arthroplasties has been associated with increased load and, potentially, increased failure rates. Accordingly, even if the plaintiff had successfully raised a challenge to the methodology underlying our expert's opinions, we were able to demonstrate that his opinions were well-founded on scientific principles widely accepted in the field of orthopaedics.

Finally, we argued to the Court that the plaintiff's motion should be denied as untimely. The plaintiff did not request a *Frye* hearing until making a motion in limine just days before trial was set to commence. However, counsel had known of our theory of causation since our client's deposition, years beforehand. The First Department had held that a trial court providently exercised its discretion in denying a request to call an expert where the request would have required a midtrial continuance for a *Frye* hearing. *See People v. Fay*, 170 A.D.3d 404, 405 (1st Dep't 2019). We similarly argued that the plaintiff's motion should be denied given that it was not made until after a jury had already been selected.

Ultimately, the plaintiff was simply raising a factual disagreement with our expert's opinions on causation, which is insufficient to warrant a *Frye* hearing. *See Lipschitz v. Stein*, 65 A.D.3d 573, 576 (2d Dep't 2009). As the above example demonstrates, practitioners should be aware of how plaintiffs may attempt to misapply *Frye* in an attempt to preclude expert testimony. Practitioners should consider whether a purported *Frye* motion is, in actuality, an attack on the foundation for an expert's opinion, as opposed to a challenge to a novel scientific theory or principle. Practitioners should take care to assess whether the movant has submitted probative evidence sufficient to raise a credible challenge to the theory underlying an expert's opinion. Finally, practitioners should be prepared to submit scientific or legal writings, such as medical articles and literature, or judicial opinions or expert opinions other than that of the proffered expert, in order to demonstrate that their expert's opinion is supported by theories or principles generally accepted in the field. ■

IF YOU HAVE ANY QUESTIONS AS TO HOW TO BEST ADDRESS FRYE MOTIONS, PLEASE CONTACT MICHAEL A. SONKIN OR RICHARD WOLF.

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



Richard Wolf is an Associate at Martin Clearwater Bell LLP, and part of the Firm's Appellate practice group. He is well-versed in handling appellate matters, and was a former Senior Appellate Court Attorney at the Second Department of the New York Supreme Court.

COVID-19 Immunity Update

BY: KAREN B. CORBETT, ESQ. AND GREGORY A. CASCINO, ESQ.

The COVID-19 pandemic devastated New York's hospitals, nursing homes and other health care providers. Health care facilities and medical professionals were operating in sub-optimal conditions due to overwhelming need, shortages of staff, supplies and other challenges presented by this crisis. In response, New York enacted the Emergency Disaster Treatment Protection Act (the "EDTPA") to provide health care providers whose care was impacted by COVID-19 with immunity from civil and criminal liability arising from their treatment.

The EDTPA, which was enacted on April 6, 2020, provided immunity to physicians, hospitals, nursing homes and other health care providers from potential liability arising from decisions, actions and/or omissions related to the care of individuals with COVID-19. It provided protection from March 7, 2020, through August 3, 2020, to hospitals, nursing homes and other healthcare professionals against liability for negligent and non-reckless conduct for treatment of any patient whose treatment was impacted by the response to the pandemic, so long as the services or care was rendered in good faith. The EDTPA was subsequently modified for claims regarding conduct occurring between August 3, 2020 and April 6, 2021. For that period, civil immunity is available to a health care professional or facility only when the alleged act or omission occurred while they were providing services that related to the diagnosis or treatment of COVID-19, the assessment or care of a person with a confirmed or suspected case of COVID-19, and only if the services were being provided in accordance with law or pursuant to the COVID-19 emergency or the services or treatment at issue was impacted by the defendant's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives, and the services, or arrangements for services, were made in good faith.

NOW THAT THE PROTECTIONS OF THE EDTPA HAVE BEEN FULLY REPEALED, THE TRADITIONAL RULES OF NEGLIGENCE AND MEDICAL MALPRACTICE APPLY TO CLAIMS AGAINST HEALTH CARE PROVIDERS FOR CONDUCT OCCURRING ON OR AFTER APRIL 6, 2021. CURRENTLY THE FOCUS OF LITIGATION HAS SHIFTED TO WHETHER THE REPEAL OF THE EDTPA WAS INTENDED TO BE RETROACTIVE, SUCH THAT HEALTH CARE SERVICES WHICH WERE COVERED BY THE IMMUNITY WHEN THEY WERE PROVIDED ARE NO LONGER COVERED AND CAN POTENTIALLY GIVE RISE TO LIABILITY.

Then, as of April 6, 2021, the Emergency or Disaster Treatment Protection Act (EDTPA), Article 30-D of the Public Health Law, was fully repealed.[1] This effectively terminated the immunity from liability conferred on health care professionals shielding them against claims related to COVID-19. Now that the protections of the EDTPA have been fully repealed, the traditional rules of negligence and medical malpractice apply to claims against health care providers for conduct occurring on or after April 6, 2021.

Currently the focus of litigation has shifted to whether the repeal of the EDTPA was intended to be retroactive, such that health care services which were covered by the immunity when they were provided are no longer covered and can potentially give rise to liability. Notably, there is nothing in the statutory language providing that the repeal of immunity is to be applied retroactively, and as a general rule statutory amendments are only to be applied prospectively, unless explicitly stated otherwise. The legislation repealing the EDTPA states only that it will take effect "immediately."

Plaintiffs point to statements by New York State Assemblyman Ronald T. Kim, who advocated for retroactive repeal; however, other members of the Assembly did not agree. To date there has been a divergence of judicial opinions, with some Courts finding that the repeal of immunity is not retroactive (*see Saltanovich v. Sea View Hospital Rehabilitation Center*, Index No. 151312/2021 (Richmond Supreme, Aliotta, J.S.C., May 17, 2022) while others have applied the repeal retroactively because of Assemblyman Kim's statements (*see Whitehead v. Pine Haven Operating LLC*, Index No. E012022017995

1. *See*, A.03397/S.5177.

COVID-19 Immunity Update

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(Columbia Supreme, Zwack, A.J.S.C., June 8, 2022).

Counsel representing plaintiffs in other COVID cases pending against nursing homes recently filed a motion with the State of New York Litigation Coordination Panel ("LCP") seeking pretrial coordination of all such actions. On August 4, 2022 the LCP issued an order staying all such actions pending further guidance from the Appellate Divisions as to whether the repeal of immunity is to be applied retroactively. Thus, the retroactivity issue is evolving, and we are hopeful to have some clarification from the Appellate Divisions soon. ■

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.

Gregory A. Cascino is a Partner at Martin Clearwater & Bell LLP and a member of the Firm's Appellate Practice Group. He works on appellate matters involving all of the MCB's practice areas including medical malpractice, general liability and healthcare law.

Electronic Medical Records – The Benefit and Bane to Healthcare

BY: CHRISTOPHER A. TERZIAN, ESQ. AND ALEXANDER C. COOPER, ESQ.

The past decade has seen the advent of electronic medical records (EMRs). Indeed, they are now the norm, existing in nearly every private medical practice, hospital, and nursing home. Unfortunately, despite the practicality and convenience of EMRs, they have also become an all too common source of malpractice litigation. In this article, we will not only enumerate some of the tremendous benefits of electronic medical records, but also its various pitfalls; a balance which undermines the use of EMRs, while promoting technological advancement in medical care and greater protections against malpractice.

Compared to handwritten notes in a medical chart that are often illegible, misinterpreted, or do not provide a comprehensive record of treatment, electronic health records provide accurate, up-to-date, and complete information about patients at the point of care. Additionally, EMRs help treatment providers effectively diagnose patients, reduce medical errors, and render safer care. Aside from the aforementioned convenience and the cost-benefit of EMRs, the exchange of health information electronically can improve communications between patients and providers. An electronic medical record also enables quick access to patient records, as well as a more efficient and coordinated effort among specialists within and outside of hospitals, nursing homes, and private practices involved in a patient's care.

Overall, there are many advantages to the use of electronic medical records. However, implementation of the EMR system opens the door to several liability concerns that medical providers must be acutely aware of now and in the future. Every time a medical provider uses an EMR, whether in the hospital, from their office, or at their home, an "electronic footprint" is created. This footprint is otherwise catalogued or known as metadata, which leaves behind information showing when an item was created, edited, revised,

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Electronic Medical Records – The Benefit and Bane to Healthcare

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printed, accessed, tampered with, or produced. At times, it can also indicate why a practitioner used the EMR or accessed a patient's chart; a function referred to as the audit trail. Consequently, metadata and audit trails have become more prevalent in litigation and New York courts have permitted their discovery as a means of establishing the credibility and veracity of evidence, including a doctor's deposition testimony. In *Vargas v. Lee*, 170 A.D.3d 1073 (2nd Dept. 2019), the Appellate Division, Second Department held that the discovery of an audit trail was required because the information sought was "material and necessary" to the prosecution of the case, and the audit trail was "reasonably likely to yield relevant evidence." Since the metadata and audit trail can bear directly on the timing, author, and editor of a patient's care, it is more likely subject to the low threshold of discovery and deemed admissible evidence at trial.

Now, this does not mean that doctors should "walk on egg shells" and avoid using the electronic medical record for fear of litigation, but practitioners must be cognizant of their actions and endeavor to document their treatment of a patient contemporaneous with their consult or visit. Separate and apart from addendums to a note, which may be made hours or days after the care at issue, creating, editing, or changing a note after a lawsuit has been filed can lead to significant issues that are detrimental to the doctor's credibility, regardless of the efficacy of their treatment.

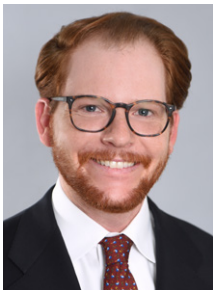
Likewise, medical providers must be aware of the limitations of prompts, templates, or drop-down boxes associated with their EMR system and undertake the use of addendums or "free texts" to more thoroughly and accurately document their treatment. Although template-based medical records are designed to increase efficiency through streamlined lists and fields commonly thought of by physicians during physical examinations, etc., sometimes the templates or drop-down boxes retain unnecessary, outdated, or inapplicable information regarding the patient's clinical status. In addition, many templates have an "autopopulate" feature, which can reference prior entries or incorporate symptoms or reviews that are wrong and do not reflect the doctor's interaction with the patient at that time. The resulting poor record can lead to costly malpractice litigation, which the electronic health record is supposed to improve. Again, it is recommended that physicians and medical facilities pre-evaluate and modify their templates prior to using them, or incorporate timely addendum of free-text features, which allow for complete documentation of a patient's treatment.

Moreover, healthcare providers must take caution in transmitting patient records and information before and during the litigation process. Not only is HIPAA-compliance essential to protecting a physician or medical facility from legal problems, but uploading and sending complete data and records to the patient, their other healthcare providers, or their attorneys can improve their care and prevent hardship throughout pre-trial discovery. Notably, the electronic transmission of medical records can cause unanswered prompts, fields, or templates (as described above) to be left out. As a result, patients and attorneys are without complete medical records and doctors may be faced with the misconception that their examination was deficient.

LIKEWISE, MEDICAL PROVIDERS MUST BE AWARE OF THE LIMITATIONS OF PROMPTS, TEMPLATES, OR DROP-DOWN BOXES ASSOCIATED WITH THEIR EMR SYSTEM AND UNDERTAKE THE USE OF ADDENDUMS OR "FREE TEXTS" TO MORE THOROUGHLY AND ACCURATELY DOCUMENT THEIR TREATMENT.

In sum, while electronic medical records offer valuable benefits to providers and patients alike, they also raise potential concerns that impact malpractice liability. The big picture behind electronic health records and an understanding of the benefits derived and the damages that can be mitigated is critically important to all healthcare professionals, patients, and attorneys. ■

Christopher A. Terzian is a Partner at Martin Clearwater & Bell LLP with over three decades of legal experience. He is responsible for achieving the final disposition of hundreds of medical malpractice cases and many favorable summary judgment decisions.



Alexander C. Cooper is an Associate at Martin Clearwater Bell LLP. He defends individual doctors, hospitals, comprehensive medical delivery systems, and medical practice groups against medical malpractice claims and appellate matters.

Recent Case Results

Summary Judgment Win in Pressure Ulcer Case

Senior Trial Partner **Thomas Mobilia** and Partner **Karen Corbett**'s motion for summary judgment was granted in Queens County Supreme Court. In this matter, the plaintiff was a then 67-year-old male who suffered an acute stroke which left him a right sided hemiplegic. He commenced this personal injury action against our client hospital concerning a Stage IV sacral pressure sore he developed while he was a patient in co-defendant's hospital. It is alleged that the pressure ulcer worsened while he was a resident at our client's nursing home, during his multiple admissions there, and during his subsequent admissions to co-defendant's Hospital. Plaintiff asserted claims against our nursing home sounding in negligence, medical malpractice, lack of informed consent and violation of resident rights under NY Public Health law.

The Court's Decision and Order granted our summary judgment motion and dismissed all of the claims against our client Nursing Home. The decision noted that we had established a prima facie case of entitlement to summary judgment on all nine causes of action, including the claims of violation of resident rights under the New York Public Health Law, by virtue of the affirmation of our geriatrician expert who attested that the care and treatment the plaintiff received during each of his admissions to our client's facility was compliant with the standard of care and did not cause or exacerbate any of the injuries claimed in this case. The court found that the expert affirmation by the Doctor which plaintiff submitted in opposition to our motion was insufficient to rebut this showing as he failed to mention every departure set forth in the bill of particulars – all of which were addressed by our expert. The court further found that plaintiff's expert's opinions were conclusory, speculative and were not supported by the evidence. The court's decision dismissed all of plaintiff's claims against our client with prejudice.

Defense Verdict in Obstetrician/Gynecologist Case

Senior Trial Partner **Daniel Freidlin** and Associate **Christina Pingaro** obtained a defense verdict in Suffolk County Supreme Court in an obstetrician/gynecologist case. In this matter, the plaintiff, a then 51-year-old married female, presented to defendant obstetrician/gynecologist with a complaint of painful menstruation and heavy bleeding due to a fibroid uterus. Our client offered and performed a laparoscopic hysterectomy. At the conclusion of the operation, our client re-insufflated the pneumoperitoneum and retraced his surgical steps. He noted the ureters to be patent and peristalsing. The operative report did not, however, document identification of the ureters intraoperatively. Plaintiff argued that our client failed to properly visualize the ureters intraoperatively resulting in a ureteral transection and need for a laparotomy to re-implant the ureter. We argued to the jury that injury to the ureter is a known risk of hysterotomy, that the operative report documents that the appropriate surgical steps were taken to identify the ureter, that identification of the ureter is a basic principle of performing hysterectomy and is implied by taking these surgical steps, and that negligence cannot be implied by the subsequent development of an injury. The jury returned a defense verdict in under three hours.

Summary Judgment in Alleged Negligence Case

Senior Trial Partners **Rosaleen McCrory** and **Daniel Freidlin** obtained summary judgment on behalf of our client nursing facility in a matter involving the development of decubitus ulcers and sepsis in the then 91-year-old decedent. In addition to allegations of negligent care resulting in the development of decubitus ulcers and sepsis, gross negligence and res ipsa loquitur was also alleged.

We argued that our client only became involved in the decedent's subject care after the pressure ulcers had already developed and were identified, thereby negating any claims that the defendant failed to timely diagnose the development of pressure ulcers, thus rendering these allegations moot. Moreover, we asserted that the plan of treatment and wound care directives were implemented by non-party physicians, with the defendant's staff merely following physician directives. As the plan of care was not implemented by our client and the evidence clearly showed defendant staff followed the physician's orders, we asserted that there was no merit to any claims that our client failed to timely and properly treat the decedent's pressure ulcers. Finally, we established that the falls allegedly suffered by decedent were at the co-defendant assisted living facility, well after services with our client had already been discontinued. In addition to seeking summary judgment as to plaintiff's allegations, we also sought dismissal of the cross-claims asserted by the co-defendant.

In its decision, the Court granted our summary judgment motion, in its entirety, noting that we had established a prima facie showing of entitlement to summary judgment. In reviewing the arguments proffered and the expert affirmation submitted, the Court agreed with our above outlined positions, finding that there were no departures on behalf of our client and that the care rendered was not a proximate cause of any of the alleged injuries.

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Case Results

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Summary Judgment Granted in Brain Damaged Baby Case

Senior Trial Partner **Kenneth Larywon** and Partner **Jason Kaufman** obtained Summary Judgment in a case involving a brain damaged infant. The matter involved the prenatal, delivery and post-delivery care and treatment of the infant-plaintiff. By history, the plaintiff-mother had received prenatal care from co-defendant private ob/gyn. During the prenatal period, the plaintiff-mother had been referred to a Maternal Fetal Medicine (MFM) specialist, secondary to her diabetes and history of pre-eclampsia. During the prenatal period, the amniotic fluid level was found to be low, and the mother was referred to our client hospital for monitoring. However, she was ultimately discharged and she thereafter continued to follow with both defendant doctors. On January 6, 2015, the mother presented to the defendant doctor's office for a scheduled visit, and at that time, made complaints of headaches, vomiting and dizziness. She was then referred to the L&D Unit and she subsequently underwent a C-section without incident. The infant was delivered and transferred to the MICU.

MCB moved for Summary Judgment on causation and standard of care grounds. In support of our motion, we submitted the expert affirmations of an MFM physician and Pediatric Neurologist. MCB argued that there was no evidence of an neurological event in utero, and that the standard of care was met at all times during the pre-natal period with respect to management of the plaintiff's low amniotic fluid. Plaintiff filed a correspondence with the Court indicating they would not be opposing our client hospital's Motion for Summary Judgment. Opposition was filed against some of the remaining defendants.

Summary Judgment in Pediatric Neurology Case

Partner **Michael B. Manning** obtained summary judgment and dismissal of our client's doctors and children's physician practice group. In this matter, MCB filed a Motion for Summary Judgment supported by an expert affirmation from a pediatric neurologist, explaining why plaintiff's theory of liability was flawed and unsupported by the medical records and relevant deposition testimony. Thereafter, plaintiff's counsel moved to be relieved as counsel (likely due in part to the opinions of defendant's expert). Plaintiff's counsel's application to be relieved as counsel was granted and the plaintiff-mother was provided ample time by the Court to retain new counsel, or proceed pro se, and to oppose defendant's motion. The plaintiff mother did neither and the judge granted our motion for summary judgment, dismissing the Complaint against our clients.

Appellate Division, First Department Overturns Lower Court's Ruling in Favor of MCB's Podiatric Practice Client

Senior Trial Partner **John Barbera**, Partners **Karen Corbett**, **Gregory Cascino**, and Senior Associate **Kerona Samuels** were successful in dismissing all claims against our client podiatric practice in this malpractice action. Briefly, the matter involved a patient who received treatment for a right hallux ulcer from the co-defendant podiatrist who worked as an independent contractor at a podiatry practice owned by our client's corporation. Plaintiff developed osteomyelitis and underwent an amputation of the great right toe. Plaintiff alleged that co-defendant failed to diagnose an infection, and claimed that our client failed to supervise the co-defendant and thus was vicariously liable for the plaintiff's injuries as the owner of the practice.

MCB's motion for summary judgment argued that there was no basis for vicarious liability, since the practice was owned by a corporation, not our client individually. We also asserted there was no duty to supervise the care of the co-defendant who was able to independently treat the plaintiff as a licensed podiatrist. In opposition to our motion, plaintiff made a cross motion to amend the caption to bring our client's corporation in as a direct defendant. The trial court partially granted our motion, but refused to dismiss all of the vicarious liability claims, and granted plaintiff's cross motion allowing the plaintiff to amend the complaint and name our client's corporation as a direct defendant. MCB filed an appeal.

The Appellate Division, First Department issued a Decision granting our appeal and reversed the Court's decision on all counts. The Appellate Division found there was no basis upon which to hold our client liable for the plaintiff's injuries since the evidence shows he never treated him, had any role in his care and since he did not direct the co-defendant podiatrist who actually cared for the patient. The court also found that there was also no basis for vicarious liability since it was our client's corporation, who was not a party to the action, that allegedly employed the treating podiatrist, and there were no facts to support piercing the corporate veil.

The Decision also overturned the lower court's granting of plaintiff's cross motion which had allowed them to amend the complaint to name our client's corporation as a direct defendant. The decision found that there was no basis to grant the cross motion in light of the prejudice to our client's corporation as the statute of limitations had lapsed, there was no basis upon which to apply the relation back doctrine and because plaintiff offered no excuse for waiting until after the note of issue was filed to seek to add the corporation as a defendant. ■

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What's New at MCB?

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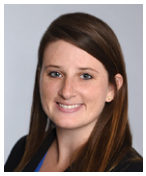
The Firm congratulates Partners Peter T. Crean, Bruce G. Habian, Kenneth R. Larywon, Jeff Lawton, Michael F. Madden, Anthony M. Sola and Michael A. Sonkin for their selection to the New York City edition of *The Best Lawyers in America*© 2023. The listing will be published in *The New York Times*, *The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

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

10 ATTORNEYS RECOGNIZED IN BEST LAWYERS®: ONES TO WATCH 2023

Best Lawyers
ONES TO WATCH

MCB is proud to congratulate 10 of its bright, young attorneys for being selected to Best Lawyers®: Ones to Watch 2023 in the field of Medical Malpractice Law – Defendants. These attorneys have been recognized early in their careers for professional excellence in private practice.


Nicole S. Barresi


Gregory A. Cascino


Conrad A. Chayes


Alexander C. Cooper


Michael A. DeRosa


Emma B. Glazer


Amy E. Korn


Michael B. Manning


Kerona K. Samuels


Samantha E. Shaw

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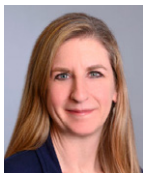
MCB congratulates Partners Jaqueline D. Berger and Barbara D. Goldberg for receiving Martindale-Hubbell's highest rating: AV Preeminent, an award given to attorneys who are ranked at the highest level of legal expertise, communication skills, and ethical standards by their peers.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