



NEWSLETTER: SPRING 2017

MONTFORT, HEALY, MCGUIRE & SALLEY LLP SUCCESSFULLY VACATES DEFAULT JUDGMENT

Donald S. Neumann, Jr. of Montfort, Healy, McGuire & Salley LLP successfully vacated a \$600,000 default judgment on behalf of a Virginia resident in a personal injury matter.

On November 14, 2013, the defendant, a resident of Virginia, was involved in a motor vehicle accident with another car that was occupied by its driver and one passenger. The driver resided in Georgia, and his passenger resided in Maryland. The complaint did not set forth the state where the accident happened, and no connection to New York was pleaded or established.

The accident happened in Maryland. Nevertheless, the plaintiffs filed their action in the United States District Court, Southern District of New York, where they obtained a default judgment against the defendant and were awarded a judgment in the total amount of \$600,000 (\$300,000 for each plaintiff as demanded in the complaint).

After it was retained by the defendant's insurance company, the firm filed a motion to vacate the default judgment and dismiss the complaint on the grounds that the court did not have jurisdiction to hear the matter. The court (Robert W. Sweet, J.) agreed, holding that: "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 2181, 85 L. Ed. 2d 528 (1985) (quoting *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319, 66 S. Ct. 154, 160, 90 L. Ed. 95 [1945]). Judge Sweet vacated the default judgment and dismissed the complaint for want of personal jurisdiction. See 2016 *Burns v. Jacobs-Toney* (1:2015-cv-08925) No. 15 Civ. 8925 (RWS), New York Southern District Court.

MICHAEL J. BORANIAN LECTURES AT MAJOR AREA HOSPITALS



Michael J. Boranian

Michael J. Boranian, the head of the Medical Malpractice group at Montfort, Healy, McGuire & Salley, LLP, gave two presentations to major area hospitals over the past year. The first lecture was titled "The Legal Implications of Electronic Medical Record (EMR) Documentation for MDs/Nurses/MLPs: 'Charting' a Better Course." Mr. Boranian discussed

practice-related issues medical staff often encounter in the documentation process, the import and impact of narrative documentation in medical malpractice claims and the jury's perceptions of chart entries at trial.

The second lecture was titled "Top 3 Reasons for Litigation and How to Prevent Getting Sued." Mr. Boranian advised that the way a patient perceives their physician can be the basis

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OTHER MATTERS OF INTEREST

- Fee schedules and set services can make submitting claims to insurance companies complex. A Kings County Supreme Court case dealt with this complexity after an acupuncturist submitted claims for services provided to a patient's insurance company. The insurance company rejected the amount of the claim based on their fee schedule, and raised an affirmative defense that the acupuncturist failed to bill within the fee schedule as required by the insurance law. The acupuncturist failed to provide any evidence that the payments made to them by the insurance company were not within the fee schedule, and therefore the case was dismissed. See *East Coast Acupuncture, P.C. v. Hereford Ins. Co.* 2016 NY Slip Op 26042.
- The Appellate Division, Second Department recently overturned a lower court's decision to dismiss a patient's motion to compel a hospital to comply with discovery commands. The case was brought by a plaintiff who claimed her physician was engaging in medical malpractice while treating her. The plaintiff also named the hospital as a defendant, claiming that they should have been aware of the physician's malpractice based on the amount of surgeries he was reporting each day. The plaintiff motioned for the court to compel the hospital to produce all records of the doctor's surgical procedures during the time at question. The lower court denied the request due to the quality assurance privilege. However, upon review, the Second Department held that the records in question may have been duplicated, and therefore are not subject to the privilege. The case was remanded for a further investigation. See *Gabriels v. Vassar Brothers Hospital* 2016 NY Slip Op 00478 [135 AD3d 903].
- The New Jersey Supreme Court ruled in favor of a national auto insurer which sought reimbursement from a third party after the insured was involved in a car accident. The Supreme Court found that the insurer could be reimbursed for medical expenses from the insurance company of a convenience store that was sued by a drunk driver who bought a bottle of vodka from the store and consumed it before getting behind the wheel. Finding that the 2011 New Jersey Automobile Reparation Reform was not to be applied retroactively, the Supreme Court allowed the insurer to seek reimbursement from the third party. For a copy of the written decision or more information about this case, please contact Donald S. Neumann, Jr., Managing Partner, at 516-747-4082.
- The Appellate Division, First Department of New York State recently determined that an individual must make a *prima facie* showing of freedom from comparative fault in order to obtain summary judgment on the issue of liability.

The decision by the Appellate Division now aligns with the Second Department, and finally sets the standard for the trial courts within the department which were issuing conflicting decisions on the subject. See *Rodriguez v. City of New York* 2016 NY Slip Op 05943 [142 AD3d 778].

- In any litigation involving an insurance policy, parties are often left with arguing over language which sometimes seems to be a different language. With that in mind, in two 2016 cases [see *Selective Ins. Co. of America v. County of Rensselaer*, 26 NY3d 649 (2016) and *Cragg v. Allstate Indem. Corp.* 17 NY3d 118, 122 (2011)], the New York State Court of Appeals clearly stated its process of evaluating an insurance policy. The primary understanding of the courts is that the terms and conditions of an insurance policy should be construed in the same manner as any other contract. While the approach is similar to any contract dispute, the court recognized that actual analysis has been proven to be much more difficult on the courts when analyzing an insurance policy due to the complex language of the documents.
- In a case involving complications following an abdominal surgery of an 85-year-old man, the court determined that there was no "reasonable degree of medical certainty" that the doctor's actions led to the injury to the patient's nerves. Therefore, the court dismissed the action for a failure to show the doctor breached the standard of care. See *Ongley v. Mount Sinai Health System, Inc. et al* (1:14-cv-03360), New York Southern District Court.
- Federal judge Paul E. Davison approved a settlement after a plaintiff brought suit for improper prenatal care given by the staff. The \$2.7 million settlement came after the doctors and nurses of a major hospital failed to determine the plaintiff was in premature labor, and discharged her on consecutive days. The plaintiff then gave birth to her son on the bathroom floor, and he now suffers from numerous permanent ailments. See *J.K. v. U.S. et al* (7:14-cv-03010), New York Southern District Court.



MONTFORT, HEALY, MCGUIRE & SALLEY LLP WINS MOTION FOR SUMMARY JUDGMENT ON APPEAL



Donald S. Neumann, Jr.

Donald S. Neumann, Jr. of Montfort, Healy, McGuire & Salley LLP was successful in representing a housing development corporation in a trip-and-fall case in New York's Appellate Division, First Department.

The action arose out of a trip-and-fall accident in 2012, when an imperfection in the sidewalk allegedly caused the plaintiff to trip and sustain injuries. Montfort, Healy, McGuire & Salley LLP appeared in the action representing a housing development corporation that owned property in the neighborhood where the plaintiff tripped. Within four months after appearing in the action, the firm filed a motion for summary judgment, arguing that the housing development had no relationship to the sidewalk at issue. And, furthermore, it did not engage in any act that might

have caused the alleged imperfection.

The trial court denied the firm's motion as untimely, even though the housing development was not impleaded into the action until four months after the note of issue was filed. A motion filed by a co-defendant to strike the note of issue and allow additional discovery was also denied.

The First Department held that the trial court should have considered the motion for summary judgment on its merits. The trial court erred when it failed to extend the time within which to file the motion because "good cause" existed to excuse any delay in filing the motion. The First Department concluded by issuing an order that granted the motion and dismissed the action as against the housing development corporation. See *Kellogg v. All Sts. Hous. Dev. Fund Co., Inc.* 2017 NY Slip Op 00412 [146 AD3d 615].

MICHAEL J. BORANIAN LECTURES AT MAJOR AREA HOSPITALS

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for a lawsuit. Three common reasons why physicians are sued by their patients, according to Mr. Boranian, are bad outcomes, lack of communication, and documentation that is either poor, vague, or inaccurate.

Mr. Boranian regularly lectures before health care institutions as a public service. If you are interested in hosting a presentation, contact Mr. Boranian at (516) 747-4082 or at mboranian@mhms-law.com.

MATTERS OF INTEREST

- Donald S. Neumann, Jr., Michael A. Baranowicz and Christopher T. Cafaro successfully represented a defendant third-party plaintiff-appellant telecommunications company before the New York State Appellate Division, Second Department. The client sought action against a subcontractor for indemnification for attorneys' fees in conjunction with the successful dismissal of a personal injury action against the telecom company and its subcontractor. After review of the contract between the two parties, the MHMS lawyers argued the plain and unambiguous terms in the agreement between the parties did not condition the subcontractor's obligation to indemnify the telecom company for attorneys' fees. The court agreed with the attorneys' position, and reversed the lower court's decision. See *Cuellar v. City of NY* 2016 NY Slip Op 04014 [139 AD3d 996].
- Associate attorney Michael K. Chin was successful in the dismissal of a medical malpractice claim in Nassau County Supreme Court. The claim involved an individual who fell during a physical therapy session. Representing the hospital

and rehabilitation center, Mr. Chin argued that the claim against the facility was a medical malpractice claim rather than a negligence claim and thus barred by the two-and-a-half-year statute of limitations. For a copy of the written decision or more information about this case, please contact Donald S. Neumann, Jr., Managing Partner, at 516-747-4082.

- Donald S. Neumann, Jr. defended a New York automobile accident claim on appeal in the New York Appellate Division, Second Department. After a lower court determined the claimant did not meet the serious injury threshold for damages, Mr. Neumann argued that the lower court's jury verdict should not be set aside contrary to the weight of the evidence, unless the jury could not have reached its verdict on any fair interpretation of the evidence. After a review of the evidence presented, the court agreed with Mr. Neumann and found that the jury arrived at their decision based on a fair interpretation of the evidence, thereby affirming the lower court's decision. See *Pyeong Sun Yun v. GEICO Ins. Co.* 2016 NY Slip Op 08214 [145 AD3d 694].

LINDSEY BROWN JOINS MONTFORT, HEALY, MCGUIRE & SALLEY, LLP



Lindsey Brown

Lindsey Brown has joined Montfort, Healy, McGuire & Salley LLP as one of the firm's associates. Ms. Brown concentrates her practice in the areas of tort law, insurance law, personal injury litigation and medical malpractice defense. After taking the bar exam in July 2015, she joined the firm in August 2015. On April 6, 2016, Ms. Brown was admitted to the New York State Bar.

She earned a Bachelor of Arts in Psychology from Long Island University at C.W. Post College, where she was a Dean's List student, and obtained her Juris Doctor from Touro College Jacob D. Fuchsberg Law Center.

Ms. Brown is a member of the Nassau County Bar Association. She is also a volunteer with the United Cerebral Palsy Association of Greater Suffolk, where she helps organize and conduct the organization's annual fundraising event.



Established in 1950 and committed to the principles of honesty, integrity and communication, Montfort, Healy, McGuire & Salley has earned an outstanding reputation throughout the New York metropolitan area, and within the insurance industry, for the competent and ethical practice of law. The goal of the firm is to contribute to our clients' success by providing effective, efficient and expeditious legal representation.

The firm takes pride in its exceptional stability. Our trial attorneys average over fifteen years of litigation experience. The firm is comprised of five partners and fifteen attorneys overall, as well as a support staff of over twenty.

The firm has received the highest ratings from the authoritative Martindale-Hubbell Law Directory, having earned the designation of Preeminent, based upon confidential recommendations submitted to the publishers by lawyers and judges in the law firm's primary areas of practice.

The firm's attorneys practice in state and federal courts, on both trial and appellate levels, and represent clients before administrative agencies. They regularly handle matters in all counties of the metropolitan New York area, including the five boroughs of New York City as well as Nassau, Suffolk and Westchester Counties. The firm also represents clients in the United States District Court for the Southern and Eastern Districts of New York.