



NEWSLETTER: WINTER/SPRING 2016

**FIRM SUCCESSFULLY DEFENDS IN TWO STAGED LOSS CASES**

Montfort, Healy, McGuire & Salley LLP recently secured a victory on behalf of the insurer it represented in the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

The case concerned a 2009 accident in which a vehicle occupied by a driver and two passengers was allegedly struck in the rear by another vehicle, whose driver was insured. The driver and the passengers of the struck vehicle filed claims with the driver's carrier, which disclaimed coverage on the grounds that the contact between the vehicles resulted from an intentional act.

The driver of the struck vehicle then filed an uninsured motorist claim with her own insurance carrier, which commenced a proceeding to stay arbitration. At the Framed Issue Hearing, evidence was presented on issues raised in the underlying Petition to Stay. The issue for the Supreme Court to adjudicate was whether the disclaimer of coverage was proper. The Supreme Court concluded that it was not because the carrier had not met its *prima facie* burden to establish that the accident was a "staged loss." The Supreme Court, therefore, granted the

petition for a permanent stay of arbitration and directed the client to provide liability coverage to its insured.

On appeal, the Second Department found that strong circumstantial evidence had been presented at the hearing sufficient to establish the accident at issue was staged. The Second Department further found that the Supreme Court wrongly directed its focus on whether or not photographs showed



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## MORE MATTERS OF INTEREST

- The firm successfully represented a defendant by securing summary judgment in a personal injury case arising from a motor vehicle accident. The case was pending before the New York State Supreme Court in Queens County. Summary judgment was granted based on the plaintiff's inability to meet the "serious injury threshold" requirement as set out in Insurance Law §5102(d). The plaintiff was unable to substantiate that his injuries were caused by the accident, and further testimony revealed that he did not request to be taken by ambulance to the hospital. Furthermore, the Court examined injuries the plaintiff sustained in an unrelated assault, finding that the alleged motor vehicle accident injuries were most likely a result of the earlier assault. In failing to demonstrate that his injuries were related to the motor vehicle accident, the Court found the evidence of causation to be speculative "at best," and dismissed the plaintiff's complaint.
- The firm successfully represented a client at the Appellate Division, securing a judgment on the grounds of *res judicata* against a plaintiff seeking recovery for injuries sustained in a motor vehicle collision that was previously determined to have been intentionally caused. The Appellate Division found that both elements of *res judicata* were satisfied. The firm proved that the "successive litigation [is] based on the same transaction or series of transactions [in that] (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was.
- The firm successfully defended an architect at the Appellate Division in a case involving the demolition of a church that caused structural damage to the surrounding buildings. The firm argued that, because the architect neither gave the order for excavation nor carried out the demolition personally, under New York State law he was free from liability for the ensuing damage.
- The firm successfully defended an insurance adjuster in federal court in a case of alleged false arrest and malicious prosecution where the plaintiff was arrested on charges of grand larceny. The court dismissed the plaintiff's §1983 suit on the grounds that he failed to state a claim, given that the defendants did not act in concert with the government to deprive the plaintiff of his constitutional rights.
- The firm successfully defended a client who was a third-party defendant in a three-car accident. The court denied a motion for summary judgment at the appellate level, ruling the defendant was not at fault because she was acting in accordance with New York State traffic law by yielding to emergency vehicles at the time the accident occurred.
- The firm was Of Counsel to a police officer's widow in a groundbreaking legal decision. The court determined that the defendant, a retired police officer, owed a duty of care when he negligently misidentified the plaintiff's husband, a plainclothes police officer responding to a crime scene, resulting in the plaintiff's husband being fatally shot.

## CHRISTOPHER CAFARO ELECTED TO FEDERATION OF DEFENSE & CORPORATE COUNSEL



Christopher Cafaro

Christopher Cafaro, a partner with the firm, has been elected as a member of the Federation of Defense & Corporate Counsel (FDCC). The group's Board of Directors elected Mr. Cafaro based upon the recommendation of its Admissions Committee.

FDCC is composed of recognized leaders in the legal community who have achieved professional distinction and is dedicated to promoting knowledge, fellowship and professionalism of its members as they pursue the course of a balanced justice system and represent those in need of a defense in civil lawsuits.

## FIRM SUCCESSFULLY DEFENDS IN TWO STAGED LOSS CASES

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damage to the striking vehicle rather than on the totality of the circumstantial evidence. Because the unrebuted circumstantial evidence established, *prima facie*, that the collision had been staged, the Second Department found the incident was not covered under the striking vehicle's policy and confirmed its prior holdings that "a deliberate collision by an insured is not a covered event under an insurance policy." Accordingly, the Second Department found that the Supreme Court erred in granting the petition for a permanent stay of arbitration.

The firm also secured a victory in the Appellate Division, Second Judicial Department on a similar case of



*Donald S. Neumann, Jr.*

staged loss. The case involved an appeal by an insurance carrier from an order of the New York State Supreme Court, which directed the carrier to provide liability coverage under its policy for injuries sustained by a passenger in an alleged staged collision. On appeal, the Appellate Division, Second Judicial Department disagreed with the referee's decision to grant a permanent stay on arbitration sought by the insurance carrier. It held that, if the insurance carrier was able to prove that the collision was staged, then there would be no liability coverage under its policy.

These matters were handled by Donald S. Neumann, Jr., managing partner of the firm.

## MONTFORT, HEALY, MCGUIRE & SALLEY SUCCESSFULLY REPRESENTS A MAJOR AREA HOSPITAL



*Michael J. Boranian*

Firm Partner Michael J. Boranian, who heads the medical malpractice department at Montfort, Healy, McGuire & Salley LLP, was recently successful in the defense of an action brought against a major area hospital. Mr. Boranian represented the hospital both at trial in the New York State Supreme Court in Suffolk County

and in the Appellate Division, Second Department, which recently affirmed the trial court's dismissal of the complaint.

The case concerned a cancer patient who asserted that the hospital should be held vicariously liable for the alleged negligence of her private treating physician. The plaintiff alleged that, due to a negligent delay in diagnosing her condition, the cancer spread, and her chance of a cure was diminished, so she was forced to undergo more extensive surgery than would have been the case, had the diagnosis been made in a timely

manner. The trial court ruled that the hospital could not be held vicariously liable for the actions of the private treating physician because his treatment of private patients, such as the plaintiff, was not within the scope of his employment.

The plaintiff attempted to convince the trial court that various contractual provisions and tangential contacts the physician had with the hospital indicated that the hospital had control over the physician's actions when it came to treating patients. Despite these provisions and contacts, the trial court determined, upon essentially undisputed evidence, that the clear language of the contract established that treatment of patients was not within the scope of the employment agreement and, therefore, the hospital could not be held vicariously liable.

On appeal, the Appellate Division, Second Department affirmed, holding that the complaint against the hospital was properly dismissed.



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

Our firm takes pride in its exceptional stability. Our trial attorneys average over fifteen years of litigation experience. The firm is comprised of seven partners and sixteen attorneys overall. We have a support staff of over twenty.

Our 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.

Our 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 New York metropolitan 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.

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