MH MONTFORTHEALY

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NEWSLETTER: WINTER 2018

MONTFORT, HEALY SUCCESSFULLY DEFENDS HOSPITAL AND PLASTIC SURGEONS AGAINST MEDICAL MALPRACTICE ACTION

Michael J. Boranian, a senior partner with the firm, recently obtained a defendant's verdict in a medical malpractice case that was tried in Nassau County Supreme Court on behalf of a local medical center and two individual plastic surgeons who were accused of alleged improper performance of a surgical repair after a chain saw accident.

The plaintiff was brought to the hospital after injuring his left hand with a chain saw while on the job. The initial injury had nearly severed the plaintiff's thumb and had severely injured the nerves and musculature to the fourth and fifth fingers as well. The essence of the plaintiff's claim was that the surgical repair was inappropriate and, therefore, left the plaintiff with a greater residual limitation than he otherwise would have experienced.

Mr. Boranian successfully argued that the initial injury was severe, the surgical technique employed by the attending surgeon and the resident was absolutely appropriate, and that the defendant surgeons competently and skillfully restored function to the plaintiff's hand, which would have otherwise been much more severely limited.

In addition to the testimony of the parties, the court and the jury heard testimony from the plaintiff's surgical expert, a subsequent treating surgeon and the defendant surgical expert. Upon cross-examination, Mr. Boranian was able to obtain concessions from both the plaintiff's expert (hand surgeon) and the subsequent treating hand surgeon regarding both the underlying injury and the surgical technique employed.

The jury verdict was 6-0 in favor of the defendants.

MONTFORT, HEALY SUCCESSFULLY OBTAINS MOTION FOR SUMMARY JUDGMENT

Susan H. Dempsey, an associate with the firm, successfully obtained a motion for summary judgment in a personal injury matter.

The plaintiff in the case alleged that, following a February 2014 automobile accident, he suffered serious injuries as defined by Insurance Law § 5102(d). Specifically, the plaintiff alleged significant limitation of use of body functions or systems, which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 of the first 180 days immediately following the accident.

Ms. Dempsey submitted a motion for summary judgment, arguing that the plaintiff did not suffer serious injuries as defined by New York State Insurance Law. On April 10, 2017, the Honorable Paul A. Goetz of the New York County Supreme Court signed an order granting a motion for summary judgment in favor of the defendants. The decision was made pursuant to Insurance Law § 5102(d), which requires the plaintiff to claim serious injuries resulting from the defendant's negligent ownership and/or operation of a motor vehicle.

The judge found that Ms. Dempsey sufficiently met her burden of proving that there was no material issue of fact in regards to the injuries sustained by the plaintiff. Relying on the reports of the defendant's radiologist and orthopedic surgeon, the court determined that the injuries to the plaintiff's lumbar and cervical spine were consistent with degenerative disease and not acute trauma. The plaintiff failed to raise a triable issue of fact by providing any objective medical evidence showing otherwise. Because there was no objective proof of a causal correlation between the accident and the plaintiff's injuries, the plaintiff's 90/180 claim could not be successful. See 2017 NY Slip Op 30731(U).

FIRM MATTERS OF INTEREST

Passenger Involved in Motor Vehicle Accident Not Qualified as Insured

The firm was successful in arguing to stay a supplementary underinsured motorist (SUM) coverage arbitration. In the case, the president and sole shareholder of a corporation was injured in a two-car collision while a passenger in another vehicle owned and operated by a colleague. After settling with the carrier for the adverse vehicle, he demanded SUM arbitration with the insurer of the vehicle owned by his corporation. Montfort, Healy, in representing the corporation's insurance carrier, argued that the president of the corporation did not qualify as an insured under the terms of its policy. Because the corporation president failed to make a showing, the court found he is not an insured as defined by the policy and, as a result, permanently stayed the arbitration.

Plaintiff's Injuries Not Related to Accident

Donald S. Neumann, Jr. was successful in arguing that a jury's verdict rendered in a motor vehicle accident case should stand. The jury returned a unanimous verdict finding that the motor vehicle accident was not a substantial factor in causing the plaintiff's alleged injuries. The plaintiff moved to set aside the verdict and for a judgment as a matter of law. After the initial request was denied, the plaintiff moved for leave to reargue. During the appeal, Mr. Neumann contended that the expert testimony of the physicians who examined the plaintiff on behalf of the defendants could lead the jury to believe the claimed injuries were solely the result of degenerative processes, and, therefore, were not the result of trauma. Upon review, the Second Department agreed with Montfort, Healy and reinstated the jury's verdict. See NY Slip Op 04423 [151 AD3d 696].

Court Dismisses Complaint as Abandoned

Michael Baranowicz, Donald S. Neumann, Jr. and Jeffrey Present successfully appealed a Queens County Supreme Court decision in a case involving a motor vehicle accident that injured one plaintiff and led to the death of another. The defendant moved to dismiss the complaint as abandoned, but the court denied the defendant's motion on the ground that an automatic stay was imposed due to the death of the plaintiffs' attorney. When a new attorney for the plaintiffs appeared in the action, the defendant served an answer and moved to reargue and renew the prior motion for dismissal. The court issued an order adhering to its determination in the original order. Relying on prior cases directly on point, the Second Department ruled that the Supreme Court should have granted the defendant's motion to dismiss the complaint as abandoned. See 2017 NY Slip Op 03961 [150 AD3d 1019].

Bar Not Entitled to Summary Judgment under the Dram Shop Act

Donald S. Neumann, Jr. was successful in arguing that a bar was not entitled to summary judgment under General Obligations Law § 11-101, commonly known as the Dram Shop Act. The firm represented the driver of a vehicle that overturned and seriously injured the plaintiff. After the accident, the driver was found to have a blood alcohol content of .18%. In seeking summary judgment in the claims against it, the counsel for the bar submitted unsigned transcripts of two witnesses who spent several hours with the driver at the bar before the accident and claimed that the driver was not visibly intoxicated when he left the bar. Finding that the missing signatures resulted from law office failure, the trial court granted leave to renew the motion for summary judgment and, upon renewal, dismissed the Dram Shop Act cause of action. On appeal, the Second Department agreed that the failure to provide signed copies of the transcripts constituted "law office failure" and held that the Supreme Court properly granted renewal. However, the Second Department modified the order of the trial court by denying summary judgment, finding that the plaintiff raised a triable issue of fact as to whether the defendant was visibly intoxicated while he was at the bar. See 2017 NY Slip Op 03983 [150 AD3d 1041].

Court Dismisses Claim Against Hospital and Physician's Assistant

In a recent case in Nassau County Supreme Court, Michael J. Boranian, a senior partner with the firm, successfully represented a local hospital and its employed physician's assistant against claims of medical negligence and malpractice.

The plaintiff had presented to the hospital with complaints of nausea, vomiting and dehydration. After an initial work-up in the emergency room, the plaintiff's private attending physician was contacted and the hospital staff was advised to admit the patient. Upon consulting with members of the plaintiff's private physician's practice group, orders were placed in the chart regarding the plaintiff's diet. At some point after those orders were made, the plaintiff was fed his breakfast. He thereafter vomited and aspirated, resulting in aspiration pneumonia, adult respiratory distress, intubation, tracheostomy and a period of care in the intensive care unit.

Plaintiff's lawyer had claimed that the order allowing the patient to have diet as tolerated was inappropriate. Plaintiff sought to cast responsibility for the order on both the attending physician and the physician's assistant. During the course of the trial, Mr. Boranian was successful in eliciting testimony that effectively precluded any conflict between the physician's

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TIMOTHY A. JENKS AND NICHOLAS FERRARA JOIN THE FIRM

Timothy A. Jenks and Nicholas Ferrara have recently joined Montfort, Healy, McGuire & Salley LLP. Mr. Jenks has been named as one of the firm's associates and Mr. Ferrara will serve as one of MHMS' law clerks.

Timothy A. Jenks

Nicholas Ferrara

Mr. Jenks concentrates his practice in negligence, premises and general liability, motor vehicle accidents, construction site accidents, municipal liability and medical malpractice. Prior to joining the firm, he worked as an associate for a very prestigious personal injury law firm in New York City.

He is a member of the Nassau County Bar Association, the New York City Bar Association, the New York State Bar Association, the American Bar Association, the New York Law School Alumni Association, the Chaminade Alumni Lawyers Association, and the North Shore Republican Club. As a member of the New York City Bar Association, Mr. Jenks serves as a member of its New Lawyer Practice and Skills Committee.

Mr. Jenks earned his Bachelor of Arts from the University of Vermont and his Juris Doctor from New York Law School, where he was a member of the Moot Court Association.

Mr. Ferrara joins the firm after graduating from Touro Law Center in May 2017 and taking the July 2017 bar exam. While awaiting the results and admission to the bar, he is currently serving as a law clerk.

He attended the University of Maryland, where he was a standout football player. After graduation, he wanted to become a professional football player and attended New York Jets training camp as a walk-on, but a hip injury ended his prospects. After examining his post-football career options, he decided to take the LSAT and enroll in law school.

Mr. Ferrara is also a volunteer football coach at Saint Anthony's High School in South Huntington and assistant director of Koeppelin Kicking in Commack.

SUPER LAWYERS RECOGNIZES THREE ATTORNEYS FROM THE FIRM

Super Lawyers has recognized three attorneys from Montfort, Healy, McGuire & Salley LLP for 2017 honors. The three attorneys were recognized in the practice areas of civil litigation defense, personal injury defense and medical malpractice defense.

Firm Partner Christopher T. Cafaro was recognized in the practice area of Civil Litigation: Defense. Frank J. Cafaro, of counsel with the firm, was recognized in two practice areas: Personal Injury — Medical Malpractice: Defense and Personal Injury — Defense. Philip J. Catapano, who is also of counsel with the firm, was recognized in the practice area of Personal Injury — Medical Malpractice: Defense.

"It is an honor to have these three attorneys named to such an exclusive list," said James Michael Murphy, the firm's managing partner. "This recognition reflects the hard work they perform and the effective representation they provide to their clients."

The Super Lawyers list is issued by Thomson Reuters. A description of the selection methodology can be found at www.superlawyers.com/about/selection_process.html.

Michael Boranian

MICHAEL BORANIAN NAMED AS ONE OF *LIBN*'S "ONES TO WATCH" IN LAW

Michael Boranian, a senior partner with the firm, was named as one of the "Ones to Watch" in Law by *Long Island Business News*. Mr. Boranian appeared in the October 13-19, 2017 issue of the publication. "Ones to Watch" is featured each week in *LIBN*, highlighting six people who stand out in their respective fields.

FIRM MATTERS OF INTEREST

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assistant and the attending physician. Given that there was no factual discrepancy between the parties, Mr. Boranian successfully argued to the court that the physician's assistant, having only followed the direction of the attending physician, could not be held liable to the plaintiff. Upon plaintiff's counsel's recognition of the facts as developed and the law as it stands, an agreement was reached to discontinue the hospital and physician's assistant from the case.

OTHER MATTERS OF INTEREST

Internet Video Shows Driver Lied about Accident

A claimant reported to his insurance company that he had crashed his 2012 Corvette Stingray while exiting an Arizona freeway. The insurance company paid $61,465 for the loss of the Corvette. Research into the crash led investigators to a YouTube video of the driver drag racing at a motorsports park, subsequently losing control of the car and crashing into the concrete barrier. The policy did not cover damage to the car if it was involved in racing. The claimant later admitted to making the false claim and was forced to pay back the insurance company. The claimant was also sentenced to two years of supervised probation.

YouTube Video Reveals Fraudulent Injury Claim

A veteran of the Port Authority Police Department fraudulently claimed that, due to a work accident, he was suffering from excruciating pain in his right arm, and loss of mobility. He was subsequently classified as injured on duty and was given full pay for nearly two years. During this time, the officer applied and received short-term disability payments from an insurer. An investigation into the officer exposed a YouTube video in which he was shown as a lead singer of a Brooklyn-based punk rock group and moving his arm in a violent back-and-forth manner that was inconsistent with his claim. After showing the video to the officer, he pleaded guilty to fraud and was sentenced to probation.

Facebook Post Shows Newlywed Did Not Lose Her Wedding Ring

An Arizona newlywed collected $26,500 after claiming that she had lost her wedding ring while swimming in the ocean. The husband also claimed to lose his wedding ring at a later date, which piqued the interest of an investigator as to the two claims. A quick view of the wife's Facebook page showed that she was wearing the ring that she had claimed to lose. The woman was charged and received probation. She was also required to pay back the insurance company for the claim.

Claimant Caught Riding in Bike Race after Filing for Disability Benefits

A California corrections officer filed a claim for disability insurance benefits. Just two days after his claim, he participated in a bicycle race. A video of the race taken from his helmet was uploaded to his Facebook page, and standings of the race revealed it was, in fact, him. The officer was sentenced to 45 days in jail, and was required to pay $5,000 in restitution to the department.

Hospital and Pediatricians Cleared in Medical Malpractice Case

A New York Court of Appeals cleared several pediatricians and a major New York hospital of a medical malpractice lawsuit that accused them of failing to diagnose an infant's tumor. The lawsuit alleged that the doctors breached the expected standard of medical care by not discovering and treating the infant's medulloblastoma, a type of brain tumor, earlier. After the five-judge appellate panel for the New York Supreme Court reviewed medical records and expert testimony submitted by the defendant pediatricians, the judges stated that the evidence showed the doctors had properly assessed the infant's vomiting symptoms. Upon assessing the infant's symptoms, the pediatricians referred the infant to specialists at the hospital, who diagnosed the brain tumor. Both specialists were cleared of liability in the case.

Second Department Issues Sanctions against Defense in Medical Malpractice Case

In a medical malpractice action, the plaintiff demanded the names of all surgical bookers who were working in the hospital at the time surrounding a surgery in which the patient died. The defendants' attorney disclosed the name of two bookers and claimed that they no longer worked at the hospital. The plaintiff's counsel later learned that one of the defendants was, in fact, still employed there. The defendants' attorney claimed the earlier representation was an honest mistake. Upon further investigation, the plaintiff's counsel learned that there was also another surgical booker who was working at the hospital at the time in question. The defendants' attorney claimed that the failure was an "oversight." The plaintiff discovered that the defendants' attorney had interviewed the additional surgical booker not listed, and confirmed that the booker's handwriting appeared on the history and physical form in question. The court found the defendants' actions to be "inexcusable, and could only have been designed to conceal evidence and delay the proceedings" and decided to impose a monetary sanction upon the defendants. The Appellate Division found that the imposition of just monetary sanctions was insufficient to punish the defendants and their counsel for the willful conduct and that the defendants' answers should have been stricken after failing to submit a compliant affidavit. All but one of the defendants agreed to settle their claims. See 2017 NY Slip Op 01190.

OTHER MATTERS OF INTEREST

Insurance Company Allowed to View Breakdown of Hospital Services

A Nassau County Supreme Court case involved an individual injured in an accident in which her blood-alcohol content was .15%. The toxicology report taken by the hospital also showed the individual had THC in her system at the time of admission to the hospital room. The hospital submitted a bill for services to the insurer in the amount of $43,212.59. After learning of the toxicology report, the insurer requested verification in the form of a breakdown of which hospital services constituted emergency health services. The hospital refused to provide the documentation, claiming the breakdown was not required under Insurance or No-Fault Law. After the insurer failed to pay the bill, the hospital commenced the action. The insurer moved for summary judgment under Insurance Law § 5103(b)(2), claiming it would not pay the bill until it could determine the proper amount of "necessary emergency health services." The insurer provided evidence of a letter issued by the New York State Insurance Department, which defined "necessary emergency health services" as "sudden pain or injury that is treated until the patient is stabilized, generally in the emergency room." Because the insurer provided sufficient proof that the patient was intoxicated by alcohol and marijuana, the court ruled that the insurer was entitled to request information regarding the breakdown of services. See 2017 NY Slip Op 27056.

Facebook Evidence Denied in Medical Malpractice Case

During the discovery portion of a medical malpractice action against an orthopedist, the plaintiff was deposed three times. The defendant moved to conduct an additional deposition of the plaintiff, supporting the motion with "newly discovered evidence" regarding the defendant's Facebook page. When the plaintiff was once again deposed, the defendant presented him with printouts from what they believed was his Facebook account. The plaintiff did not deny he had a Facebook account, but denied the printouts came from him. After the deposition, the plaintiff demanded the name of the person who obtained the printouts and sought permission to depose that person. Most importantly, the plaintiff moved to preclude the Facebook statements from being offered at trial and to have the transcript of the fourth deposition suppressed. The Second Department decided that evidence from the defendant's Facebook page was not admissible unless the person who discovered it was available to be deposed. See 2017 NY Slip Op 03164 [149 AD3d 1057].

New York Court of Appeals Says No to Physician-Assisted Suicide

The New York State Court of Appeals determined that the New York State Constitution does not provide an individual the right to a physician-assisted suicide. The decision restricts a mentally competent and terminally ill person from obtaining a prescription for a lethal dose of drugs from a physician intended to be taken to cause death. The case involved numerous plaintiffs who brought an action against New York State's attorney general, in which they requested declaratory and injunctive relief to permit what they defined as "aid-in-dying." The plaintiffs sought to have the court rule that physicians who provide aid-in-dying are not liable under the state's assisted suicide statutes, and, further, that physicians who issue prescriptions to terminally ill, mentally competent patients cannot be prosecuted. The court found that the state had a rational basis for criminalizing assisted suicide, and the plaintiffs had no constitutional right to the relief they sought. Therefore, the First Department's decision was affirmed and the claims were dismissed. See NY Slip Op 06412 [30 NY3d 1].

Court Finds Case Is Not Time-Barred Because of Continuous Treatment

In the case of *Lewis v. Rutkovsky*, the First Department was asked to review the continuous treatment doctrine as it applied to a patient who brought a lawsuit against her primary care physician. The plaintiff alleged that her primary care physician failed to detect, diagnose, and treat her brain tumor. As a result of the doctor's failure to diagnose, the plaintiff underwent brain surgery that left her legally blind. The First Department reviewed the continuous treatment doctrine in determining whether the lawsuit should be time-barred. The court analyzed its earlier precedent set forth in *Wilson v. Southampton Urgent Medical Care, P.C.*, in which the plaintiff received treatment on eleven separate occasions during a three-year period for symptoms, including headaches, and was later diagnosed with lung cancer. Deposition testimony revealed that a brain tumor resulting from metastasized lung cancer was a possible cause of the plaintiff's headaches. Therefore, the court allowed the claim to proceed because there was an issue of fact as to whether the plaintiff's continuous treatment for headaches was traceable to lung cancer. The court agreed with the reasoning of the *Wilson* case in holding the claim was not time-barred.

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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 eighteen attorneys overall. We have 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.

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