MARTIN CLEARWATER & BELL LLP

DEFENSE PRACTICE UPDATE

DECEMBER 2015

Private Physicians and Practice Facilities – Considerations for Avoiding Vicarious Liability for an Independent Contractor

BY: PETER T. CREAN AND SAMANTHA E. SHAW

The general rule is that a hospital is not liable where a patient receives treatment from a private attending physician not in its employ. Having an affiliation with or privileges at a hospital or other facility is typically not sufficient to impute vicarious liability to the hospital or facility for negligent conduct above the individual's own liability exposure.

As with any rule, however, there are exceptions. For instance, under *Mduba v. Benedictine Hospital*[1] an exception exists when a patient enters a hospital through its emergency department or is assigned a physician not of his/her choosing by hospital employees. In those instances, because the patient is seeking treatment based on the reputation of the hospital itself rather than from any particular physician, the hospital is considered to be responsible for the acts of such an individual, employee or not, even in the case of a private attending physician or independent contractor with his or her own professional liability insurance. The liability is imposed pursuant to the principle of apparent or ostensible agency. Similarly, when a patient seeks medical care from a private medical practice or physician, it is generally accepted that liability for injuries resulting from malpractice in the treatment rendered lies with that private practice and/or with that private physician, even if the treatment was rendered by a non-employee.[2] Unless of course, the patient has ample reason to be aware of and accepts the independent, non-employee status of the independent contractor.

In many private medical practices, it is not uncommon to rely on independent contractors to render particular specialized services. Typical examples include anesthesiologists, pathologists, and radiologists. Practices utilizing the services of such individuals commonly have arrangements which include the requirement that they maintain their own professional liability coverage. Despite this, the principal may be held vicariously responsible for the individual's acts, even where the principal does not have expertise in the particular specialty and did not supervise or control the provider. When engaging an independent contractor in your private practice, one of the most common questions becomes, how does a private physician or private practice protect itself from liability for the negligence of an independent contractor, or, at a minimum, present the best possible defense position in the event of a lawsuit?

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1 *Mduba v. Benedictine Hosp.* 384 N.Y.S.2d 527 (N.Y. App. Div.1976).

2 Even in the case where the independent contractors have their own professional liability insurance.

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The precedent set by the seminal case *Mduba v. Benedictine Hosp.* regarding the standard for imposing vicarious liability based on ostensible agency is well-developed and greatly expanded. The analysis is more complex in the context of a non-emergent procedure or office practice setting. Being knowledgeable and taking the appropriate preventative steps can better protect a private physician and his/her practice. It is helpful to first gain an understanding of the requirements of apparent or ostensible agency.

Apparent or ostensible agency requires two elements that must be proven in order to establish vicarious liability. The first element is evidence that the individual is acting under the supervision and authority of the principal, or the principal, through affirmative words or conduct, gives rise to the appearance and reasonable belief that the independent contractor is an agent of the principal and possesses the authority to act on the principal's behalf.[3] The second element is reliance by the patient on this "holding out" of the agent by the principal.[4] There must be evidence that the patient relied on the appearance of the agent's authority to act for the principal and, as a result of this reliance, the patient accepted the medical services rendered by the agent. For instance, the absence of any indication that the agent was working independently of the principal will tend to suggest employment or agency from a patient's perspective. A separate listing of the individual and his or her specialty, or clear instructions on individual consent forms, identifying the provider as an independent professional performing an independent service as in the case of a non-employee anesthesiologist at a medical practice, is evidence that the patient had no basis to assume an agency relationship between the independent contractor and the principal.

While it would appear self-evident, all principals should be careful to avoid any affirmative words or conduct that would indicate that an independent contractor, such as an anesthesiologist, is acting as an agent of the principal. Such oral statements are frequently cited in the cases, as are the billing arrangements between the physicians. Evidence that a practice billed for an independent contractor's services, as opposed to the independent contractor billing separately, tends to suggest an employment or agency relationship. Even though the law does not require that a principal explicitly inform a patient that an independent contractor is not an employee, a statement to that effect in writing to the patient is strong evidence that may either prevent or provide a strong defense against vicarious liability claims. It would be beneficial, and might even foreclose a claim of vicarious liability, to specifically delineate what portion of the procedure will be performed by the principal and what portion of the procedure or services will be carried out by the independent contractor. For example, a physician can explain that the anesthesiologist who will provide sedation during an in-office procedure is not the physician's employee, but is a member of a different practice group and will separately explain the risks of sedation and anesthesia. Having general pamphlets available for commonly performed procedures containing such information could be helpful if there is documentation that the patient was asked to read the pamphlet describing his or her procedure. Similarly, obtaining informational sheets or pamphlets authored by the independent contractors to give to patients will advise the patients of the independent contractor's role and his/her specialty and background so as to allow them to make an informed decision in accepting the services.

Under the current legal standard, the fact that an independent contractor's consent form is printed on the letterhead of the principal is insufficient in and of itself to invoke the theory of apparent agency. However, the Appellate Division has suggested that it would be "*preferable* for hospitals to clarify in their informational and consent forms the status of physicians enjoying privileges at the hospitals."[5] The Appellate Division's suggestion is also very pertinent to private physicians and practices. The takeaway is that in order to avoid any questions as to the distinct roles of the principal and the independent contractor, requiring that an independent contractor have separate consent and informational forms on his/her own letterhead would further suggest that the principal in no way created the appearance that the independent contractor was an employee or had authority to act on the principal's behalf. The separate consent form of the principal, in turn, should contain an explanation that although authorization for the procedure is being given to the principal and its medical staff, certain other medical providers involved in the procedure are not employees of the practice, are acting independently, and will supply an individual consent form. Identifying the independent contractors by name, where possible, is advisable.

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3 *King v. Mitchell,* 819 N.Y.S.2d 169 (N.Y. App. Div. 2006)

4 *Sullivan v. Sirop,* 905 N.Y.S.2d 240 (N.Y. App. Div. 2010); *Muslim v. Horizon Medical Group, P.C.* 988 N.Y.S.2d 628, (N.Y. App. Div. 2014); *Ford v. Unity Hosp.,* 299 N.E.2d 659, (N.Y. 1973).

5 *King v. Mitchell,* 819 N.Y.S.2d 169 (N.Y. App. Div. 2006).

Managing Litigation Risk through Admission Agreements: Two Approaches

By: Rosaleen T. McCrory and Michael F. Bastone

Over the past decades, there has been a steady increase in litigation against nursing homes and other residential health care facilities. Containing litigation risks, as well as expenses, is an ongoing battle for these facilities and insurers. Various agreements, often provided for in the Admission Package, offer more predictability regarding risks and help to decrease litigation expenses. Arbitration Agreements and Choice of Venue clauses are two such agreements.

ARBITRATION AGREEMENTS

Arbitration Agreements are contract provisions that provide that any dispute arising out of the resident's admission to a nursing facility be resolved through binding arbitration. The advantages of arbitration generally include faster resolution of disputes, reduced litigation expenses and more predictable outcomes.[1] The enforceability of these agreements has been litigated and there have been some recent favorable decisions.

In 1925, Congress enacted the Federal Arbitration Act[2] ("FAA") to support and encourage resolution of conflicts through arbitration. The FAA prohibits states from broadly invalidating Arbitration Agreements, including argument that are based on public policy grounds.However, the Act does provide that states may regulate or invalidate arbitration clauses based upon grounds that exist at law or in equity.[3] In 2012, the U.S. Supreme Court held that the FAA applies to personal injury and wrongful death claims asserted against nursing homes.[4]

Nevertheless, various arguments have been advanced to oppose the enforceability of Arbitration Agreements. In nursing home litigation, New York courts have traditionally held that Arbitration Agreements are not enforceable. Causes of action based on violation of Public Health Law ("PHL") § 2801-d[5] prohibit the enforcement of Arbitration Agreements. The PHL § 2801-d(7) provides that "any waiver by a patient or his legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void and without legal force or effect." Moreover, PHL § 2801-d(8) provides that "any party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect." Based on the language set forth in the PHL, Arbitration Agreements would then be unenforceable in nursing home litigation in which violations of the PHL are claimed.

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As such, the FAA and the PHL appear to be in conflict. As the FAA has been held to apply to personal injury and wrongful death claims in nursing home litigation, and prohibits broad invalidations of such Agreements based on public policy issues, it would appear to preempt the PHL. However, arguments have been asserted that the FAA does not preempt the PHL prohibition on Arbitration Agreements. It has been argued that under the federal McCarran-Ferguson Act, state laws that regulate the business of insurance "reverse-preempt" federal laws.[6] It is claimed that although the PHL at issue (PHL § 2801-d) does not directly speak to insurance, other sections of the PHL peripherally address insurance issues.

Further, it has been argued that such Agreements are both procedurally[7] and substantively[8] unconscionable due to unfairness in the bargaining process between the parties and the stressful circumstances in which they are executed. As such, it has been argued that they should be deemed unenforceable.

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1 Average total cost for claims resolved with Arbitration Agreements are 16% lower than claims resolved without Arbitration Agreements in place. *2013 Long Term Care General Liability and Professional Liability Actuarial Analysis,* AON RISK SOLUTIONS.

2 *9 U.S.C. § 1 et seq.*

3 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

4 *Marmet Health Care Ctr., Inc. v. Brown,* 132 S. Ct. 1201 (2012).

5 PHL §2801-d provides for private actions by patients of residential facilities for alleged deprivation of rights conferred by state or federal statutes or codes.

6 *Bernstein ex rel. Comm'r of Banking & Ins. v. Centaur Ins. Co.*, 606 F. Supp. 98 (S.D.N.Y. 1984)(where the court held that the FAA does not address the business of insurance and that based on the McCarran-Ferguson Act, "if New York has a law that specifically prohibits arbitration in disputes involving the insurance business, arbitration may be precluded…").

6 *Lawrence v. Graubard Miller*, 901 N.E.2d 1268 (N.Y. 2008)(where procedural unconscionability was defined as an agreement entered into without meaningful choice on the part of one party and where substantive unconscionability was defined as an agreement in which the terms unreasonably favor one party).

7 *Simar Holding Corp. v. GSC*, 928 N.Y.S.2d 592 (N.Y. App. Div. 2011) (where it was reiterated that a finding of unconscionability generally requires a showing of both procedural and substantive unconscionability).

The Practical Application of Collateral Estoppel in Perso

BY MICHAEL A. SONKIN AND YUKO A. NAKAHARA

THE doctrine of collateral estoppel can be explained, in its most simple form, as a measure to prevent a plaintiff from re-commencing an action after the issue of liability has already been ruled against him/her, leaving him/her dissatisfied. However, it is most certainly rare for such an event to occur. So, what is the practical application of collateral estoppel in the context of personal injury litigation?

Pursuant to the doctrine of collateral estoppel, a litigant is barred from re-litigating any issue that was necessarily decided against him/her.[1] As "mutuality of parties is not required," the litigant seeking to benefit from a collateral estoppel effect of a previously decided issue need not have been involved in the original dispute.[2] Rather, only the litigant against whom a collateral estoppel effect is sought must have had a full and fair opportunity to litigate the issue.[3]

In exploring the applicability of the doctrine of collateral estoppel in the context of a personal injury action, *Emmanuel v. MMI Mech., Inc.*, is instructive.[4] In this case, defendant Wartburg Lutheran Home for the Aging (hereinafter "The Wartburg Home"), represented by Martin Clearwater & Bell LLP, as well as the defendant MMI, successfully argued that the plaintiff was collaterally estopped from maintaining his civil action. In *Emmanuel*, plaintiff was an employee of MMI (a general contractor), an entity that was retained by The Wartburg Home (property owner) to perform work on its premises. Plaintiff claimed that he was acting within the scope of his employment for MMI, when he sustained injuries while working at The Wartburg Home. He thereafter applied for Workers' Compensation benefits. However, MMI contested plaintiff's application, claiming that the plaintiff's work-related accident did not actually occur.

Plaintiff was represented by counsel, was afforded the opportunity to testify during numerous hearings held before the Workers' Compensation Board, and was permitted to submit documentary evidence to prove that the work-related accident did, in fact, occur. Similarly, MMI had the opportunity to submit testimony and documentary evidence in support of its position to the contrary. After due deliberation, the Workers' Compensation Board ultimately denied plaintiff's application for benefits, and in its determination, held that the work-related accident did not occur. On appeal before the Workers' Compensation Board, the denial of plaintiff's Workers' Compensation application was affirmed.

Subsequently, plaintiff commenced an action in the Kings County Supreme Court against MMI, and The Wartburg Home. In this case, plaintiff alleged that he sustained injuries as a result of the very same work-related accident which was the subject of his Workers' Compensation claim. Upon completion of discovery, and after ascertaining the Workers' Compensation Board's determination that plaintiff's work-related accident did not occur, motions for summary judgment were filed on behalf of The Wartburg Home, as well as MMI.

Utilizing the doctrine of collateral estoppel as the basis for the motion for summary judgment, defendants argued that the issue of whether the alleged work-related accident had actually occurred was previously litigated before the Workers' Compensation Board. As plaintiff was afforded a full and fair opportunity to litigate the issue (as he was represented by counsel and was permitted to submit testimony and documentary evidence in support of his claim), and further, as the issue was necessarily decided against plaintiff in the form of an administrative decision, defendants successfully argued plaintiff was barred from re-litigating the same issue (i.e. whether the accident occurred) in a civil litigation matter. As a result of the prior determination of this critical issue, the civil action was dismissed in its entirety. Note, that The Wartburg Home's lack of involvement in the Workers' Compensation proceeding was irrelevant to the applicability of the doctrine of collateral estoppel, as only the litigant *against whom* a collateral estoppel effect is sought "must have had a full and fair opportunity to litigate the issue."[5]

Plaintiff appealed the Supreme Court's decision granting defendants' motions for summary judgment. The appeal was heard before the Appellate Division, Second Department, and the Supreme Court's order was affirmed. The Appellate Division held that "defendants established their prima facie entitlement to judgment as a matter of law by showing that the issue decided in a Workers' Compensation Board proceeding

1 *Hirsch v. Fink*, 931 N.Y.S.2d 866 (N.Y. App. Div. 2011).

2 *Bernard v. Proskauer Rose*, LLP, 27 N.Y.S.2d 655 (N.Y. App. Div.2011); *Matter of Metro-North Commuter R.R. Co. v. New York State Exec. Dept. Div. of Human Rights*, , 707 N.Y.S.2d 50 (N.Y. App. Div. 2000).

3 *Morgan Stanley & Co., Inc. v. Feeley*, 906 N.Y.S.2d 13(N.Y. App. Div. 2010).

4 16 N.Y.S.3d 285 (N.Y. App. Div. 2015).

5 *Morgan Stanley, supra.*

6 Citing, *Ridge v. Gold*, 983 N.Y.S.2d 14 (N.Y. App. Div. 2014); *McRae v. Sears, Roebuck & Co.*, 767 N.Y.S.2d 799 (N.Y. App. Div. 2003).

7 Citing, *JPMorgan Chase Bank v. Ezagui*, 934 N.Y.S.2d 454 (N.Y. App. Div. 2011).

… was identical to that presented in this action to recover damages for personal injuries."[6] Plaintiff's opposition, in turn, "failed to raise a triable issue of fact as to whether the issue was identical and failed to show that [he] lacked a full and fair opportunity to litigate the issue."[7]

What can be learned from the *Emmanuel* matter is that even an issue decided within the context of an administrative proceeding may be successfully utilized to collaterally estop a litigant from re-litigating the issue in a different, yet related, matter. In the case at bar, the determination in a Workers' Compensation proceeding that the alleged accident did not actually occur, ultimately led to plaintiff being precluded from maintaining his entire subsequent civil action. Thus, it is imperative for defense counsel to explore and investigate prior decisions which may be used to either limit the issues asserted against their clients, or to have the matter dismissed in its entirety.

Michael A. Sonkin is a Senior Partner and the Firm's Managing Partner. His legal practice primarily encompasses medical malpractice matters in which he defends individual physicians and major teaching hospitals, as well as, general liability and professional liability matters.

Yuko A. Nakahara is a Partner at Martin Clearwater & Bell LLP. Her practice focuses on all aspects of medical malpractice litigation as well as general liability and nursing home defense.

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Most recently, the Appellate Division, First Department, has addressed these arguments and held that an Arbitration Agreement executed by plaintiff as part of the admission agreement is enforceable, not invalidated by PHL § 2801-d, and neither procedurally or substantively unconscionable.[8] Moreover, the Court held that as the facility is engaged in interstate commerce,[9] the FAA preempts PHL § 2801-d and the McCarran-Ferguson Act does not "reverse preempt" the state law as the PHL § 2801-d was not enacted for the purpose of regulating the business of insurance.[10]

Although the *Friedman* decision would seem to confirm the enforceability of pre-dispute Arbitration Agreements in nursing home litigation, these Agreements will continue to be contested. The competency of the resident at the time of the execution of the Agreement or the authority of the family member or guardian who executed the Agreement on the resident's behalf will be questioned. Litigants will still contend that the individual Agreement is unconscionable. Courts will continue to examine the content of the Agreements and the circumstances surrounding their execution to evaluate their enforceability under the particular circumstances.

Care in the drafting of the Arbitration Agreement will increase the likelihood that it is deemed enforceable. The terms of the Arbitration Agreements should apply equally to both parties. Although Arbitration Agreements are often executed as part of the Admission Package, it should be clear that admission to the nursing home is not contingent on the execution of the Arbitration Agreement. The Arbitration Agreement should clearly state (preferably in all capitals or bold print) that the parties understand that they are "giving up and waiving their constitutional right to have any claim decided in a court of law before a judge and a jury." Moreover, the Agreement should allow the resident a period of time (generally 30 days) within which to rescind it.

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8 *Friedman v. Hebrew Home for the Aged at Riverdale,* 13 N.Y.S.3d 896 (N.Y. App. Div. 2015).

9 Although the decision does not identify the basis for the finding that the facility engaged in interstate commerce, the Supreme Court of the United States has interpreted the term "involving commerce" in the FAA as equivalent to the more familiar term, "affecting commerce," describing it as the "words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco,* 539 U.S. 52, 56 (2003). The High Court explicitly stated that "it is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce'-that is, 'within the flow of interstate commerce.'" *Id.*

10 As of the date of print of this article, it is unknown if leave to appeal to the Court of Appeals has been requested or granted in the *Friedman* case.

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An enforceable Arbitration Agreement can provide for reduced litigation expenses and increased predictability in outcomes, thereby reducing risks in nursing home litigation.

Choice of Venue Clauses

The venue of a case can have a significant impact on the cost and outcome of litigation. The variability of jury verdicts and awards from venue to venue affect, the predictability and risk assessment of cases. Variation in court efficiency can also impact the time the case takes to reach resolution, causing notable variability in litigation expenses.

Nursing facilities can exercise control over the venue for litigation by including a Choice of Venue clause (or Forum Selection clause) in their Admissions Agreements. A Choice of Venue clause provides for a particular venue for any litigation that arises out of the admission. Such Forum Selection clauses are routinely upheld as valid in nursing home litigation.[11] Contractual Forum Selection clauses are deemed valid and enforceable unless shown to be "unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court."[12]

The venue chosen in the Forum Selection clause does not have to be the venue in which the nursing facility is located. Therefore, a facility located in Kings County can designate Nassau or Suffolk County as the venue of choice.[13] Additionally, it is not required that the defendant serve a written demand to change venue pursuant to CPLR 511(a) prior to moving to change venue based on a Venue Selection clause.[14]

In this instance, also, care in the drafting of the clause can increase the likelihood of the Venue Clause being upheld. Both parties should be required to submit to the venue designated in the agreement. The agreement should provide that it is also binding on the "heirs, executors, administrators, distributors, successors, and assigns of the parties." Although it is not mandatory for the designated venue to be the venue in which the facility is located, the choice should be geographically reasonable.

Careful drafting of these agreements, and attention to the competency of the resident signing the agreements or the authority of the family member signing them, can ncrease the likelihood of these agreements being enforced by the courts.

Including a choice of Venue Clause in the Admission Agreement can offer a measure of control over litigation expenses and provide some predictability to risk management.

General Considerations

Use of Arbitration Agreements and Choice of Venue clauses in Admission Agreements can serve to decrease litigation expenses, both with respect to the cost of litigation, as well as indemnification. Moreover, these agreements can provide some predictability as to risk management. Careful drafting of these agreements, and attention to the competency of the resident signing the agreements or the authority of the family member signing them, can increase the likelihood of these agreements being enforced by the courts. Such Agreements can be useful tools in providing predictability in nursing home litigation and in controlling costs.

Rosaleen T. McCrory is a Senior Partner with over 25 years of experience at the Firm. Her legal practice primarily encompasses medical malpractice defense and nursing home litigation in which she defends individual doctors, nurses, aides and technicians, along with hospitals, nursing homes and dialysis centers in professional liability matters.

Michael F. Bastone is an Associate at Martin Clearwater & Bell LLP. His practice focuses on all aspects of medical malpractice defense and nursing home litigation.

11 *Puelo v. Shore View Center for Rehabilitation*,17 N.Y.S.3d 501 (N.Y. App. Div. 2015); *Casale v. Sheepshead Nursing & Rehabilitation*, 13 N.Y.S.3d 904 (N.Y. App. Div. 2015),

12 *LSPA Enter., Inc. v. Jani-King of N.Y., Inc.*, 817 N.Y.S.2d 657 (N.Y. App. Div. 2006), *abrogated on other grounds by Lischinskaya v. Carnival Corp.*, 865 N.Y.S.2d 334 (N.Y. App. Div. 2008).

13 *Casale v. Sheepshead Nursing, supra.*

14 *Puleo v. Shore View Center, supra.*

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It may be helpful to avoid a contractual arrangement with the independent contractor or the independent contracting group that limits the independent contractor from practicing elsewhere or binds him/her to exclusive services with the practice. The Appellate Division has held that an issue of fact as to apparent agency existed where there was proof that a hospital was contractually obligated to use anesthesiologists from a single practice group and the anesthesiologists from that particular group were prohibited from practicing elsewhere without the hospital's written approval. In that particular case, the anesthesiologists were not employees of the hospital, but this was not disclosed to patients and all of the forms and questionnaires provided to patients by the anesthesiologists had the hospital logo.

If possible, the principal should attempt to have conversations to obtain medical history, pre-operative evaluations and informed consent conversations regarding the procedure that are separate and distinct from evaluations and discussions by the independent contractor. This will help to further distance the principal from the independent contractor. Of course, in these conversations, the individual's independent status should be clarified, and the information provided to the patient in this regard can be documented in the procedure notes. Also, any listing of employees should not include the individual unless specifically identified as an independent contractor. During the procedure, the principal should most certainly avoid supervising or entering the field of expertise of the independent contractor to prevent the appearance of control in order to avoid vicarious liability for the contractor's conduct.[6]

There is no foolproof way to protect a private physician or medical practice from a claim of vicarious liability for the alleged negligence of an independent contractor. While the standard of establishing apparent or ostensible agency is a seemingly straightforward two-prong test, the analysis will depend on the facts of each case. The above-suggestions are not inclusive of all steps that should be taken to protect a private physician or practice, but they provide possible strategies to avoid a lawsuit or to ensure a successful defense of vicarious liability allegations under the current state of the law.

6 Business Corporations Law §1505(a)

Peter T. Crean is a Senior Partner and trial attorney at Martin Clearwater & Bell LLP. With over 30 years of experience, he focuses his practice on the defense of medical malpractice, professional liability and legal malpractice actions. He is a member of the American College of Trial Lawyers.

Samantha E. Shaw is an Associate at Martin Clearwater & Bell LLP where she focuses her practice on the defense of medical malpractice matters.

FALL 2015
Defense Verdicts and Significant Appellate Decisions

Senior Trial Partner, Jeffrey A. Shor, assisted by Appellate Associate, Iryna S. Krauchanka, succeeded in dismissing the claims initiated against a mental health provider as a result of an unanticipated patient suicide. MCB sought appellate review of a Supreme Court, Bronx County order denying summary judgment to their client. Despite plaintiffs' expert's assertions that the treating psychologist should have asked decedent whether he had access to weapons, the Appellate Division held that the provider exercised his "professional medical judgment in his examination and evaluation of decedent, including his determination whether to inquire about decedent's access to firearms." In reaching its decision, the Court cited its prior opinion, *Park v. Kovachevich*, where MCB likewise obtained a reversal and dismissal of claims against a hospital.

Senior Trial Partner, Anthony Sola, assisted by Partner, Laurie A. Annunziato, and Associate, Maxwell Sandgrund, obtained a defense verdict in the Supreme Court, New York County, in a trial before Justice Alice Schlesinger. The plaintiff claimed a delay in diagnosis of breast cancer in a post-menopausal woman who presented to our clients with a complaint of bleeding from her nipple. An ultrasound of the retroareolar area performed by our defendant radiologist was interpreted as negative. The pathology of a ductal excision performed by our defendant breast surgeon was benign. Four months later, the patient reported pain and swelling, and then two months later was found to have an 8 cm. invasive ductal carcinoma with metastasis to the liver, lung and spine. Plaintiff alleged that the wrong area was evaluated and the cancer was diagnosable at the initial visit. The defense proved - based on the tumor profile and employing doubling times - that this was a fast growing tumor that was not detectable earlier and, further, that it metastasized to the liver very soon after it first developed. The jury found no departures on any of the five questions submitted.

Partner, Laurie A. Annunziato, assisted by Senior Associate Francesca L. Mountain and Associate Christina Casarella, obtained a directed verdict in Supreme Court, Westchester County tried before Justice Lester Adler. The case involved a claimed failure to timely diagnose an infected knee prothesis following total knee replacement performed by codefendant surgeon at our client Hospital resulting in sepsis and death. Decedent sustained a patella tendon rupture weeks later and was readmitted for surgical repair. Plaintiff claimed that the initial wound never healed and signs of infection were not appreciated by the defendants. Several weeks later, the patient was readmitted for further evaluation of the wound. Antibiotics were started and the patient underwent irrigation and debridement. Based on wound cultures, the surgeon recommended monitoring only. Several days later, however, the patient requested transfer to another hospital where the prothesis was removed. The patient became septic, developed respiratory failure and died several months later. On plaintiff's case, we established that decedent was admitted to the Hospital by her private orthopedic surgeon for each of the admissions and that the care was managed entirely by the surgeon, non-employed private attending physicians and consultants specifically requested by the surgeon. The plaintiff was unable to elicit expert testimony that the hospital staff deviated from the standard of care in the treatment of the patient. At the close of the plaintiff's case, our motion for a directed verdict arguing that the client Hospital could not be held vicariously liable for the acts of the surgeon or other nonparty physicians and that the plaintiff failed to offer any evidence of direct liability was granted.

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Martin Clearwater & Bell LLP.

Manhattan
220 East 42nd Street
New York, NY 10017
212-697-3122 *phone*
212-949-7054 *fax*

Nassau County
90 Merrick Avenue
East Meadow, NY 11554
516-222-8500 *phone*
516-222-8513 *fax*

Westchester County
245 Main Street
White Plains, NY 10601
914-328-2969 *phone*
914-328-4056 *fax*

New Jersey
744 Broad Street
Newark, NJ 07102
973-735-0578 *phone*
973-735-0584 *fax*

Rochester
16 West Main Street
Suite 728
Rochester, NY 14614
585-413-1699 *phone*
585-413-3430 *fax*

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