

New York State Law Digest

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Reporting on
Significant Court of
Appeals Opinions and
Developments in New
York Practice



CASE LAW DEVELOPMENTS

Claims that Doctor Negligently Transcribed Date of Driver's Last Seizure Sounded in Negligence, Not Medical Malpractice, Rendering Action Timely

Court Characterizes Failure as an Administrative One, Not Depending on Analysis of Medical Treatment Rendered

Distinguishing medical malpractice from negligence can be significant for statute of limitations purposes. Negligence is covered by CPLR 214 and carries a three-year limitation period, medical malpractice by CPLR 214-a with a two-and-a-half-year statute of limitations.

Generally, medical malpractice involves the negligence of a professional in rendering service to a patient. However, not every negligent act committed by a medical professional constitutes medical malpractice. The key issue is the nature of the act and the circumstances under which it occurred. Sometimes this can be clear, sometimes not. In fact, a similar act under varied circumstances can result in diametrically opposed conclusions by different courts. For example, where plaintiff's decedent was allegedly injured when he fell from a hospital bed in a hospital, the Second Department held that plaintiff's claim that defendant did not assess the level of supervision, nursing care and security required for the decedent after defendant administered pain medication to him was for medical malpractice. *Santana v. St. Vincent Catholic Medical Center of New York*, 65 A.D.3d 1119 (2d Dep't 2009). Conversely, a majority of the First Department found plaintiff's claim to be one in negligence, where decedent's right leg ruptured after it struck a bed rail at the defendant's extended care facility while aids were preparing her for dinner and adjusting her bedding. The primary basis for the majority's position was its conclusion that expert testimony was unnecessary. *Friedmann v. The New York Hospital Cornell Medical Center*, 65 A.D.3d 850 (1st Dep't 2009).

Recently, in *Lafferty v. Avila*, 2026 N.Y. Slip Op. 05147 (1st Dep't August 27, 2026), the issue was "whether a physician's alleged negligence in recording inaccurate information about a patient's medical condition on a New York State Department of Motor Vehicles form, used to evaluate whether the patient's driver's license should be reinstated," constituted medical malpractice or ordinary negligence. The court concluded that it was ordinary negligence, governed by the three-year limitation period. Thus, the plaintiffs' claims were timely.

A nonparty-driver had a brain lesion which caused frequent epileptic seizures. He had been treated by the defendant neurologist (Dr. Avila) since 2014. In 2017, the driver suffered an epileptic seizure while operating a vehicle, which resulted in a minor motor vehicle accident. His New York State driver's license was then suspended.

The driver sought to have his driver's license reinstated in May 2019. Because of his seizure-related loss of consciousness, the driver had to demonstrate that he was fit to drive and be licensed. One way to do that was to submit a physician's statement attesting that the driver had not lost consciousness within the prior 12 months. Thus, the driver submitted a New York State Department of Motor Vehicles (DMV) form (a physician's statement), which contained 10 questions concerning the driver's medical condition. Some questions required the doctor to provide information concerning the driver's medical condition generally as well as information ascertained from a recent examination of the driver. Other questions called for the physician's medical judgment or opinion.

After a May 15, 2019 physical examination, Dr. Avila made two notations in *his* records that the driver had suffered his last seizure on January 4, 2019 and had been seizure-free for four months. However, on the DMV form, the doctor noted that the driver's last epilepsy episode was in June 2017 and checked a box indicating that the driver's condition would "not interfere" with the safe operation of a motor vehicle. The

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DMV then granted the driver's application and reinstated his driver's license.

On July 28, 2019, the driver experienced a seizure-associated loss of consciousness while driving a vehicle, resulting "in a horrific multivehicle motor vehicle collision" and the deaths of two people (Timothy Lafferty and Samantha Shaw). On December 21, 2022, the plaintiffs, as the representatives of the estates of Lafferty and Shaw, commenced this action against Dr. Avila and the hospital which employed him. The complaint asserted claims for the decedents' conscious pain and suffering (survival-action claims), among others. While a majority of the complaint's allegations sounded in medical malpractice, others were for negligence.

Plaintiffs' bill of particulars similarly asserted medical malpractice theories *and* that Dr. Avila "negligently complet[ed] the DMV . . . form on May 15, 2019, which represented that [the driver] had been symptom free since June 2017, contrary to the history documented in defendant's office's notes." The argument was that if Dr. Avila had properly recorded the correct date of the driver's last seizure—January 2019, four months prior to the May 2019 examination—the driver's license would not have been reinstated by the DMV because the driver had not met the 12-month requirement (of having been seizure-free). As a result, the driver would not have been authorized to drive on the accident date.

The defendants moved to dismiss and for summary judgment, asserting that plaintiffs' survival-action claims were for medical malpractice with a two-and-a-half-year limitation period and were untimely. Plaintiffs countered that their claims, which concerned the doctor's negligent notation of the last date of the driver's seizure on the DMV form, were ordinary negligence claims governed by a three-year statute of limitations and were thus timely. The trial court granted the defendant's motion, concluding that the plaintiffs' claims sounded in medical malpractice and were untimely.

The First Department reversed, noting that the "'distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence'"; the "distinction turns on whether the act complained of involves a matter of medical science or art requiring special skills not ordinarily possessed by lay persons (a medical malpractice claim), or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of fact (an ordinary negligence claim)"; "a claim sounds in medical malpractice when 'the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient'"; "when a plaintiff's allegations do not focus on negligence in furnishing medical treatment to a patient, but on a physician's failure in fulfilling a different duty, the claim sounds in ordinary negligence"; and "[i]n categorizing a claim for statute of limitations purposes, we must focus on the essence of the claim, and, critically, identify the nature of the duty owed to the plaintiff that the defendant allegedly breached." *Id.* at *5.

The court stressed that the plaintiffs' claims here were not that the doctor's negligence was in furnishing medical

treatment, but rather an administrative failure, that is, "transcribing a date from a treatment note to a governmental administration form." It did not depend on an analysis of the medical treatment rendered to the driver. Thus, jurors would be capable of using their "common everyday experience" to evaluate whether the doctor exercised due care:

That a physician made the alleged administrative error does not transform the claim from one sounding in ordinary negligence to one for medical malpractice; the characterization of a particular claim depends not on the title of the actor but on the nature of the challenged act. Moreover, whether expert testimony will be required or may be utilized at some future procedural juncture is not controlling in making the distinction between medical malpractice and ordinary negligence (citations omitted)

Id. at *6.

The fact that the complaint and bill of particulars contained medical malpractice allegations was of no moment:

An action may sound in both medical malpractice and ordinary negligence, and the process required to complete the DMV form implicated both types of claims. Clearly, certain questions on the DMV form called for medical skill or judgment (e.g., questions 6 [describing factors that caused or contributed to the episode of the condition] and 10 [giving medical opinion regarding whether patient's condition will interfere with safe operation of motor vehicle]). Plaintiffs, however, have clarified that they are pursuing their survival-action claims only insofar as those claims are premised on Dr. Avila's failure to accurately record on the DMV form the date of the driver's last seizure, an administrative act subject to the principles of, and statute of limitations associated with, ordinary negligence (citation omitted).

Id. at *7.

The First Department pointed out that it was dealing with this statute of limitations issue *before* discovery had been conducted. It was not opining on whether Dr. Avila breached a duty of care or whether such a breach was a proximate cause of the decedents' injuries. Thus, the court expressly afforded leave to the defendants to make another summary judgment motion after the completion of discovery.

Courts Continue to Be Confronted with Affirmations Lacking the Language Required Under CPLR 2106

Second Department Rules that Trial Court Should Not Have Considered Facts Only Asserted in the Deficient Affirmation

In prior editions of the *Law Digest*, we addressed the 2023 amendment (effective January 1, 2024) to CPLR 2106 allowing a statement by "any person, wherever made, subscribed and affirmed by that person to be true under the penalties of perjury" to be used in a New York action "in lieu of and with the same force and effect as an affidavit." We cautioned counsel to use the appropriate language set forth in the statute in an affirmation.

A 2025 clarifying amendment expanded the use of affirmations in lieu of affidavits by providing that while an

affirmation *cannot* be used in a “deposition, or an oath of office, or an oath required to be taken before a specified person other than a notary,” it can be used in the place of “a certificate, a response to a notice to admit, an answer to interrogatories, a verification of a pleading, a bill of particulars and any other sworn statement.” In addition, the proposed affirmation language was revised. CPLR 2106(a) now provides that the affirmation is to be “substantially” in the following form provided in the statute:

I affirm this __ day of ____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, except as to matters alleged on information and belief and as to those matters I believe it to be true, and I understand that this document may be filed in an action or proceeding in a court of law.

Apparently there continue to be circumstances in which an affirmation fails to track the language in the statute. Recently, in *Bellavia v. Hoppenstein*, 2026 N.Y. Slip Op. 05267 (2d Dep’t Sept. 16, 2026), the affirmation language that applied (prior to the 2025 amendment) read:

I affirm this __ day of ____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

The subject affirmation “was not in substantially the same form as required by former CPLR 2106” since it failed to refer to the “laws of New York” or the potential perjury penalties (fine or imprisonment). As a result, the Second Department held that the trial court improperly considered facts that were only asserted in that affirmation. The Appellate Division also found that CPLR 2001 was unavailing because “the plaintiffs failed to correct their error by submitting an affirmation in reply that conformed to CPLR 2106. Nor could the defect have been disregarded without causing prejudice to the defendant (citations omitted).” *Id.* at *3.

The Second Department did find, however, that the trial court properly considered the portions of the affirmation asserting legal arguments which were not based on facts only set forth in the affirmation. With respect to advancing legal arguments in an affirmation, the lower court “properly disregarded any defect or irregularity in the form by which the plaintiffs advanced their legal arguments pursuant to CPLR 3211(a) (citation omitted).” *Id.*

So, again, we urge practitioners to assure that any affirmation contain the magical language. Apparently, some individuals have expressed reticence in signing a document including the language referencing the penalties of perjury as including a fine or imprisonment. In such a circumstance, perhaps the individual can go back to signing an affidavit . . . with the requisite complications if the affidavit is executed out of state. This, of course, does not change the penalties associated with signing a perjurious affidavit or affirmation.

New York Law provides that “[a] person is guilty of perjury in the third degree when he swears falsely. Perjury

in the third degree is a class A misdemeanor.” Penal Law § 210.05. Moreover, Penal Law § 70.15(1) states with respect to a class A misdemeanor that a “sentence of imprisonment for misdemeanors and violation shall be a definite sentence,” not exceeding a year. Finally, “[a] sentence to pay a fine for a class A misdemeanor shall be a sentence to pay an amount, fixed by the court, not exceeding one thousand dollars.” Penal Law § 80.05(1).

Thus, the issue is not whether imprisonment or a fine is merited for perjurious testimony. It is whether that type of detail needs to be in the affirmation language. On the one hand, as discussed above, it appears that such details might discourage witnesses from signing affirmations. On the other hand, do we have an obligation to that person and to the system, in general, to warn witnesses and to remind them, and perhaps, to stress to them the importance of being extra careful in their rendition of the facts?

Second Department Holds That Plaintiff Established “Good Cause” Under CPLR 306-b Plaintiff Demonstrated Reasonable Diligence in Ascertaining Defendant’s Address

CPLR 304 provides that an action is commenced by filing. Thereafter, service of the initiating pleadings needs to be effected under CPLR 306-b within 120 days of commencement, unless the statute of limitations is four months or less, in which case service must be effected within 15 days after the expiration of the applicable statute of limitations. Failure to effect service in a timely fashion will result in dismissal of the action, unless the court extends the time “upon good cause shown or in the interest of justice.”

The “good cause” standard requires reasonable diligence in attempting service. The “interest of justice” standard, however, does not require the showing of such diligence as a prerequisite to its application, but is considered one of the factors, among others. They include the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of the plaintiff’s request for the extension, and prejudice to the defendant. *Leader v. Maroney, Ponzini and Spencer*, 97 N.Y.2d 95, 105–06 (2001). This is a discretionary determination of the trial judge, which will be upheld in the absence of an abuse of discretion.

In *M&T Bank v. Global Sign Cleaning & Maintenance, Inc.*, 2026 N.Y. Slip Op. 05092 (2d Dep’t August 26, 2026), the Second Department stated that “[t]here is a dearth of authority interpreting the ‘good cause’ standard, as courts generally have focused on the ‘broader and more flexible’ interest of justice prong of CPLR 306-b (citation omitted).” *Id.* at *1. In fact, most cases addressing good cause have held that the standard had not been met. Here, the court focused, however, on the “threshold” good cause standard and its applicability where the plaintiff demonstrates reasonable diligence in attempting service.

The plaintiff’s affidavit of service averred that the process server affixed the initiating documents to the defendant Brown’s door at “437 FOSTER AVENUE, 1, BROOKLYN, NY 11230.” The address was apparently the first floor of a

three-floor, three-apartment multi-family home, with each apartment on a separate floor. The process server had made two prior attempts to serve at the same address, and mailed the documents to Brown at that address. Brown moved to dismiss, asserting that he lived in apartment 3 on the third floor at the same address. He referenced the following, among other, supporting documents: a confirming utility bill with a mailing address of “437 FOSTER AVE 3FL”; a neighbor’s affidavit attesting to living in the first floor apartment of the three-floor building and Brown residing on the third floor, and annexing a utility bill showing a first floor address and a photograph of four door buzzers, the top of which noted the name “Brown” and the bottom depicting the neighbor’s surname, but none of which were numbered; and portions of surveillance video footage of the entrance of the building at the time service was allegedly effected.

The plaintiff opposed the motion and cross-moved to extend the time to serve the summons and complaint upon Brown under CPLR 306-b. The plaintiff attached, among other things, an information subpoena from years before this action was commenced, which was returned by Brown after it was mailed to the address at which service was effected here (apt 1); and a DMV driver license abstract and a LexisNexis “Smartlinx” report from a month or two before the action was commenced, both of which noted the general address without specifying a particular apartment. Plaintiff’s counsel also represented that the mailed pleadings were not returned.

The trial court granted Brown’s motion to the extent of directing a traverse hearing, and granted plaintiff’s cross-motion to extend the time to serve. The plaintiff then served Brown.

The Second Department acknowledged that good cause does not include law office failure or when a movant does not attempt service or make a reasonably diligent effort to effect service. Good cause can be established, however, where the plaintiff’s failure timely to serve results from circumstances beyond the plaintiff’s control. For example, good cause has been found “where the plaintiff’s counsel demonstrated difficulty in locating the defendant, who served in the armed forces, and the plaintiff’s counsel had unsuccessfully searched an armed forces database and hired a private investigator” or where “the petitioner served an order to show cause commencing the proceeding pursuant to a defective method set forth by the Supreme Court in the order to show cause, holding that the petitioner should not be penalized for his reliance on the Supreme Court’s order to show cause.” *Id.* at *3.

The Second Department held that, under the facts of this case, the trial court properly found that the good cause standard had been met:

The plaintiff established reasonable diligence in ascertaining Brown’s address. The plaintiff’s counsel reasonably relied upon the representation made by Brown in response to the information subpoena, and counsel confirmed those representations by conducting database inquiries. Moreover, the process server established that

he acted with reasonable diligence in effecting service. In response, Brown’s conclusory assertions did not raise an issue warranting the denial of that branch of the plaintiff’s cross-motion which was pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon Brown or a hearing.

Id.

The Appellate Division rejected the argument that the trial court erred in granting the CPLR 306-b motion *before* holding the traverse hearing that it directed. “CPLR 306-b does not contain any language stating that a court must decide whether an initial attempt at service of process was valid before granting an extension of time to re-attempt service. A court may, in the interests of judicial economy, grant an extension before holding a traverse hearing (citations omitted).” *Id.*

Three Strikes and Everyone Is Out **CPLR 3126 Violations Result in Multiple Pleadings Being Stricken**

CPLR 3126 provides, in part, that where a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article,” the court is empowered to grant an array of relief, including the striking of pleadings. However, the latter penalty is generally reserved for circumstances where the party’s failure to disclose or obey a discovery order is “willful or contumacious.”

In *Sofra Mediterranean Grill, Ltd. v. Chebli*, 2026 N.Y. Slip Op. 05206 (2d Dep’t Sept. 2, 2026), the parties managed to accomplish quite a feat, that is, the striking of the amended complaint, the defendant’s answer with counterclaims, the third-party complaint, and the answer of the third-party defendants:

Here, the Supreme Court providently exercised its discretion in granting that branch of the motion of the plaintiff and the third-party defendants which was pursuant to CPLR 3126 to strike the defendant’s answer with counterclaims and the third-party complaint. The defendant’s willful and contumacious conduct can be inferred from his failure over an extended period of time, inter alia, to schedule a deposition and subsequent failure to appear for a scheduled deposition. The court also providently exercised its discretion in granting the defendant’s cross-motion pursuant to CPLR 3126 to strike the amended complaint and the answer of the third-party defendants. The willful and contumacious conduct of the plaintiff and the third-party defendants can be inferred from their repeated failures to comply with the court-ordered discovery, to respond to the defendant’s demands for discovery without an adequate excuse, and to appear for a scheduled deposition (citations omitted).

Id. at *1.