



Change to New York Law Favoring Defendants in Personal Injury Matters in New York

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Summary

In *Brito v Gomez*, 2019 NY Slip Op 06452 (Decided September 9, 2019), the Court of Appeals (New York's highest Court) has drastically undercut well-settled First Department precedent, which has historically restricted discovery of prior medical conditions in personal injury cases, unless a plaintiff affirmatively claimed the injury in the lawsuit. The decision moves the law closer to the approach followed in the Second Department, which allows for more liberal discovery of prior medical conditions in personal injury cases, where a plaintiff has generally claimed a **loss of enjoyment of life**.

Full Explanation

Last week, a decision was authored by the Court of Appeals of New York regarding the issue of obtaining medical records for prior injuries not affirmatively placed into controversy by the plaintiff (i.e. unclaimed prior injuries or conditions). This decision greatly benefits the defense bar and has significant implications for cases venued in the First Department (Manhattan and Bronx Counties).

Historically, the First Department is known for a strict interpretation of the physician-patient privilege, which greatly benefits the plaintiff in a personal injury action. Essentially, the First Department has limited the ability to obtain a plaintiff's prior treatment records for injuries not affirmatively placed in controversy. As a result, defendants are greatly disadvantaged when seeking to minimize their potential exposure to broad allegations that are potentially related to prior injuries, such as lost earnings and loss of enjoyment of life. This decision hopefully softens, if not completely reverses, this long-held precedent. By Contrast, the Second Department has historically permitted far greater discovery into prior medical issues/conditions, holding that plaintiffs place such issues in controversy by claiming a "loss of enjoyment of life," etc.

In Brito v. Gomez, the plaintiff alleged that she suffered injuries to her cervical spine, lumbar spine, and left shoulder in an accident, and sought recovery for lost earnings and loss of enjoyment of life. At her deposition, she testified that she had been in two prior accidents, one which resulted in surgery on her left knee, and another which resulted in surgery on her right knee. The defendants sought authorizations for medical records relating to all treatment on her knees, claiming the records were relevant to her claims for lost earnings and loss of enjoyment of life. The Supreme Court denied the request.

On appeal, the Appellate Division, First Department was asked to decide whether a litigant in a personal injury action who makes a claim for lost earnings and loss of enjoyment of life thereby waives the physician-patient privilege with respect to prior injuries not raised in the lawsuit. Although the CPLR generally provides for liberal disclosure, the physician-patient privilege provides a strong protection that is deeply rooted in both statutory law and public policy. The prevailing sentiment in the First Department has traditionally been that the privilege is only waived when a litigant affirmatively places his or her physical and mental condition in controversy (including an aggravation or exacerbation of a prior injury). For example, cases exclusively related to orthopedic injuries prohibit defendants from obtaining medical records concerning a diabetic condition, high blood pressure, anxiety, cardiology, etc., even if the related injury speaks to lost earnings and loss of enjoyment of life. Following prior First Department precedent, the majority held that "the specified bodily injuries that are affirmatively placed in controversy are the spinal and shoulder injuries," and that "[t]he claims for lost earnings and loss of enjoyment of life alleged in the bill of particulars are limited to these specified injuries." The Court held that since the plaintiff did not claim that her prior knee injuries were exacerbated or aggravated as a result of the subject accident, neither her claim for lost earnings, nor her claim for loss of enjoyment of life

affirmatively placed the condition of her knees in controversy. Furthermore, a claim for lost earnings or loss of enjoyment of life is not a separate item of recoverable damages, but a factor in assessing pain and suffering.

Notably, the opinion clearly highlighted the First Department's divergence of opinion from the Second Department's "expansive view," which has held that a litigant places their entire medical condition in controversy through broad allegations of physical injuries and claimed loss of enjoyment of life due to those injuries. *See, Vodoff v. Mehmood*, 92 A.D.3d 773 (2d Dept. 2012); *Weber v. Ryder TRS, Inc.*, 49 A.D.3d 865 (2d Dept. 2008); *Diamond v. Ross Orthopedic Grp., P.C.*, 41 A.D.3d 768 (2d Dept. 2007); *McGlone v. Port Auth. of New York & New Jersey*, 90 A.D.3d 479 (2d Dept. 2011); *Gutierrez v. Trillium USA, LLC*, 111 A.D.3d 669 (2d Dept. 2013). The trial Court's decision was affirmed by the First Department and the appeal to the Court of Appeals followed.

On September 10, 2019, the Court of Appeals of New York reversed the decision. The Opinion stated in relevant part: "Plaintiff affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages." Furthermore, "Under the particular circumstances of this case, plaintiff therefore waived the physician-patient privilege with respect to the prior treatment of her knees and the discovery sought - authorizations pertaining to the treatment of plaintiff's knees is 'material and necessary' to defendants' defense of the action."

This decision is admittedly somewhat vague and leaves much for interpretation. However, we can reasonably infer that this is a positive step forward for defendants' ability to obtain records in cases which include injuries that are not "affirmatively" placed into controversy.

Thank you for reading and please feel free to contact us with any follow up questions or to discuss how this decision may impact a particular case.