

HEALTH LAW

Robert P. Carpenter[†], Niall H. Harding^{††}, & Christine A. Sullivan^{†††}

CONTENTS

INTRODUCTION	815
I. NEW YORK STATE CASE LAW	816
A. <i>Limitation of Absolute Privilege as a Defense to Defamation</i>	816
B. <i>Discoverability of Social Media</i>	819
C. <i>Third Department Adopts Second Department’s Standard Regarding Disclosure of Medical Expert’s Qualifications</i>	823
D. <i>Necessary Particularity of the Plaintiff’s Bills of Particulars</i>	827
E. <i>Medical Providers’ Duty to Third Parties After Davis v. South Nassau Communities Hospital</i>	829
1. <i>Kingsley v. Price</i>	830
2. <i>Other New York State Cases</i>	834
3. <i>Torres v. Faxton St. Luke’s Healthcare (Northern District of New York)</i>	835
II. NEW YORK STATE LEGISLATURE	837
A. <i>New York Medical Marijuana Regulations Updates</i>	837
B. <i>Lavern’s Law</i>	844
III. FEDERAL LEGISLATION.....	846
A. <i>Right to Try</i>	846
CONCLUSION.....	849

INTRODUCTION

In this *Survey* year, the Court of Appeals curtailed the First Department’s broad expansion of the absolute privilege in quasi-judicial

[†] Mr. Carpenter is an Associate with Gale Gale & Hunt, L.L.C.; J.D., Syracuse University College of Law; B.A., State University of New York at Geneseo.

^{††} Mr. Harding is an Associate with Milber Makris Plousadis & Seiden, LLP; J.D., American University Washington College of Law; B.A., Syracuse University.

^{†††} Ms. Sullivan is an Associate with Gale Gale & Hunt, L.L.C.; J.D., SUNY Buffalo Law School; B.A., Hobart and William Smith Colleges. This Article addresses recent developments in New York State and federal health law from July 1, 2017 through June 30, 2018.

proceedings and provided guidance on the discoverability of social media.¹ The Third Department adopted an expert disclosure standard in line with the Second Department, and the Fourth Department clarified the necessary particularity with which a plaintiff must plead the individuals for whom a defendant is vicariously liable in her bill of particulars.² New York State courts also issued various decisions providing clarity to the scope of the Court of Appeal's momentous *Davis v. South Nassau Hospital* decision.³

The New York State Legislature adopted a date of discovery rule for claims relating to cancer or malignant tumor misdiagnosis, significantly modifying the statute of limitations for these claims, and there were further advancements with medical marijuana regulations.⁴

At the federal level, Right-to-Try legislation became the law of the land, providing terminally ill patients access to experimental therapies.⁵

I. NEW YORK STATE CASE LAW

A. Limitation of Absolute Privilege as a Defense to Defamation

The Court of Appeals overruled the First Department's decision in *Stega v. New York Downtown Hospital* in holding that the absolute privilege against defamation in an administrative proceeding cannot extend to statements made about an individual where the allegedly

1. *See generally* Forman v. Henkin, 30 N.Y.3d 656, 93 N.E.3d 882, 70 N.Y.S.3d 157 (2018) (holding that the First Department erred in using a heightened standard for production of Facebook records that depended on what the account holder chose to share publicly and that private materials on social media may be discoverable if they are reasonably calculated to contain relevant information).

2. Kanaly v. DeMartino, 162 A.D. 3d 142, 153, 77 N.Y.S.3d 234, 241–42 (3d Dep't 2018) (citing Thomas v. Alleyne, 302 A.D.2d 36, 44, 752 N.Y.S. 2d 362, 368 (2d Dep't 2002)); DeMartino v. Kronhaus, 158 A.D.3d 1286, 1286–87, 71 N.Y.S.3d 277, 278 (4th Dep't. 2018) (first quoting Marchetti v. East Rochester Cent. Sch. Dist., 26 A.D.3d 881, 881, 808 N.Y.S.2d 877, 878 (4th Dep't 2006); and then quoting Darrisaw v. Strong Mem'l Hosp., 74 A.D.3d 1769, 1770, 902 N.Y.S.2d 286, 287 (4th Dep't 2010)).

3. *See generally* Gallagher v. Cayuga Med. Ctr., 151 A.D.3d 1349, 57 N.Y.S.3d 544 (3d Dep't 2018) (holding that in a negligent infliction of emotional distress claim, the defendant did not owe the plaintiffs an independent duty of care when discharging their decedent son into their care); Kingsley v. Price, 163 A.D.3d 157, 80 N.Y.S.3d 806 (4th Dep't 2018) (holding that the defendants did not owe the plaintiff a duty of care because they did not launch a force or an instrument of harm); Melio v. John T. Mather Mem'l Hosp., 165 A.D.3d 645, 84 N.Y.S.3d 549 (2d Dep't 2018) (dismissing a medical malpractice claim on grounds that no physician-patient relationship existed).

4. N.Y. C.P.L.R. 214-a (McKinney Supp. 2019); N.Y. PUB. HEALTH LAW § 3369 (McKinney 2018).

5. 21 U.S.C. § 360bbb–0a (2018).

defamed individual has “no recourse to challenge the accusations.”⁶ For a detailed factual recitation and procedural history, please see Volume 68 of the *Survey*.⁷

As an initial matter, it should be noted that an absolute privilege applies to statements made during the course of a public function, such as a judicial proceeding, as long as they are “material and pertinent” to the questions involved.⁸ New York courts have recognized that agencies perform quasi-judicial functions in the course of certain administrative proceedings and have held that the absolute privilege extends to such proceedings.⁹ The purpose is to prevent a speaker’s personal interests, such as fear of civil litigation, from deterring her from participating in a public function.¹⁰

In reaching its decision, the Court of Appeals reviewed its prior holdings on absolute privilege as applicable to an administrative proceeding.¹¹ In *Toker v. Pollak*, the Court noted that there was no hearing for the subject of the alleged defamation to challenge the defamer’s statements.¹² Furthermore, the agency conducting the investigation could not grant relief that would be subject to judicial

6. 31 N.Y.3d 661, 664, 669, 107 N.E.3d 543, 545, 549, 82 N.Y.S.3d 323, 325, 329 (2018).

7. Andrew R. Borelli et al., *2017–18 Survey of New York Law: Health Law*, 68 SYRACUSE L. REV. 869, 888–92 (2018).

8. *Rosenberg v. Metlife, Inc.*, 8 N.Y.3d 359, 365, 866 N.E.2d 439, 443, 834 N.Y.S.2d 494, 498 (2007) (quoting *Wiener v. Weintraub*, 22 N.Y.2d 330, 331, 239 N.E.2d 540, 540, 292 N.Y.S.2d 667, 668 (1968)) (citing *Julien J. Studley, Inc. v. Lefrak*, 50 A.D.2d 162, 165, 376 N.Y.S.2d 200, 204 (2d Dep’t 1975)).

9. *See generally Rosenberg*, 8 N.Y.3d 359 (holding that national securities association investigating violations of Security Exchange Commission laws and regulations and its own rules engaged in quasi-judicial process). *See Wiener*, 22 N.Y.2d at 331–32, 239 N.E.2d at 541, 292 N.Y.S.2d at 669 (holding that a bar association investigating complaint of attorney misconduct engaged in a quasi-judicial proceeding); *Julien J. Studley*, 50 A.D.2d at 164, 376 N.Y.S.2d at 203 (first citing *Loudin v. Mohawk Airlines, Inc.*, 44 Misc. 2d 926, 926, 255 N.Y.S.2d 302, 303 (N.Y. Cty. 1964); and then citing *Alagna v. N.Y. & Cuba Mail S.S. Co.*, 155 Misc. 796, 796, 279 N.Y.S. 319, 320 (N.Y. Cty. 1935)) (holding that a licensing agency, i.e., Department of State, in a license revocation proceeding was entitled to an absolute privilege); *Stilsing Elec., Inc. v. Joyce*, 113 A.D.2d 353, 356, 495 N.Y.S.2d 999, 1002 (3d Dep’t 1985) (holding that the Department of Labor reviewing non-compliance of non-union employer with its statutory requirements of apprenticeship program was entitled to an absolute privilege).

10. *Rosenberg*, 8 N.Y.3d at 365, 866 N.E.2d at 442–43, 834 N.Y.S.2d at 497–98 (quoting *Toker v. Pollak*, 44 N.Y.2d 211, 219, 376 N.E.2d 163, 166, 405 N.Y.S.2d 1, 4 (1978)) (citing *Park Knoll Assoc. v. Schmidt*, 59 N.Y.2d 205, 209, 451 N.E.2d 182, 184, 464 N.Y.S.2d 424, 426 (1983)).

11. *See Stega*, 31 N.Y.3d at 661, 107 N.E.3d at 543, 82 N.Y.S.3d at 323 (discussing prior cases that involved absolute privilege and quasi-judicial proceedings).

12. *Id.* at 671, 107 N.E.3d at 550, 82 N.Y.S.3d at 330 (quoting 44 N.Y.2d at 222, 376 N.E.2d at 168–69, 405 N.Y.S.2d at 7).

review.¹³ The *Toker* Court therefore held that because the proceeding lacked the procedural safeguards of a quasi-judicial proceeding, the absolute privilege could not apply.¹⁴ The *Stega* Court interpreted *Toker* to hold that the privilege could only extend if there were procedural safeguards that enabled the defamed party to contest that which was said against her.¹⁵

The Court next examined its most recent decision in *Rosenberg* upon which the Appellate Court relied.¹⁶ The Court explained that because the allegedly defamed individual had the opportunity to defend himself against the alleged defamatory statement before a hearing panel, which was then potentially subject to SEC and judicial review, as well as at an arbitration proceeding where he could seek expungement of the statements, the administrative proceeding contained the procedural safeguards that the *Toker* Court had held were necessary for the absolute privilege to apply.¹⁷

Turning to the facts before it, here the Court explained that there was no forum for the allegedly defamed individual to challenge the accusations as in *Toker* and unlike in *Rosenberg*.¹⁸ Instead, the statements were discussed at a hearing, though the individual could neither contest them herself, nor would she have had standing to seek judicial review of the outcome.¹⁹ Therefore, because the administrative proceeding lacked the procedural safeguards of a quasi-judicial proceeding, the Court held that the statements could not be afforded absolute immunity.²⁰ It therefore reinstated the defamation claim the appellate division dismissed and fortified its position regarding the necessity of procedural safeguards for the allegedly defamed party in an administrative proceeding.²¹

Judge Rivera drafted a dissenting opinion in which Judge Garcia

13. *Id.*

14. *Id.*

15. *Id.* Impliedly, this was through either a hearing at which the alleged defamed party could contest the statements or where the alleged defamed party had standing to seek judicial review of a hearing at which the statements were contested.

16. *See Stega*, 31 N.Y.3d at 671–74, 107 N.E.3d at 551–53, 82 N.Y.S.3d at 331–33.

17. *Id.* at 672–73, 107 N.E.3d at 551–52, 82 N.Y.S.3d at 331–32 (citing *Rosenberg*, 8 N.Y.3d at 367–68, 866 N.E.2d at 444–45, 834 N.Y.S.2d at 499–500).

18. *See id.*

19. *Id.* at 673, 107 N.E.3d at 552, 82 N.Y.S.3d at 332.

20. *Id.* at 664, 673, 107 N.E.3d at 545, 552, 82 N.Y.S.3d at 325, 332 (first citing *Rosenberg*, 8 N.Y.3d at 367–68, 866 N.E.2d at 444–45, 834 N.Y.S.2d at 499–500; and then citing *Toker*, 44 N.Y.2d at 222, 376 N.E.2d at 168–69, 405 N.Y.S.2d at 7).

21. *Stega*, 31 N.Y.3d at 675, 107 N.E.3d at 553, 82 N.Y.S.3d at 333.

joined.²² Judge Rivera reasoned that the opportunity to challenge the statements in an administrative hearing was not necessary to grant absolute immunity.²³ Rather, Judge Rivera explained that the available recourses—a separate arbitration proceeding or court action—provided the necessary remedies for an alleged defamed party to warrant granting absolute immunity, as pursuant to *Rosenberg*.²⁴

The Court of Appeals' decision in *Stega* limited the First Department's significant expansion of the applicability of absolute privilege in the administrative context. It is not enough that the statements were themselves the subject of the hearing.²⁵ It is possible we can expect to see more clarification on the procedural safeguards necessary for an administrative proceeding to qualify as a quasi-judicial proceeding in light of the expanding role of agencies.

B. Discoverability of Social Media

On February 13, 2018, the Court of Appeals issued a momentous opinion regarding the discoverability of social media that is sure to have a substantial and far-reaching impact on New York's discovery process.²⁶ In *Forman v. Henkin*, a plaintiff that had fallen off a horse alleged that she had suffered severe spinal and traumatic brain injuries that resulted in cognitive deficits, memory loss, difficulty communicating, and social isolation, among other things.²⁷ During her deposition, the plaintiff noted that she had a Facebook account and posted numerous photographs depicting her pre-accident life.²⁸ She also testified that she had deactivated her account about six months after the accident, and could not recall if she had posted any post-accident pictures.²⁹

Given her testimony, the defendant requested an unrestricted

22. *See id.* at 675–78, 107 N.E.3d at 553–55, 82 N.Y.S.3d at 333–35 (Rivera, J. dissenting).

23. *See id.* at 676, 107 N.E.3d at 554, 82 N.Y.S.3d at 334 (Rivera, J. dissenting).

24. *Id.* at 677–78, 107 N.E.3d at 555, 82 N.Y.S.3d at 335 (Rivera, J. dissenting). *See generally* *Rosenberg v. Metlife, Inc.*, 8 N.Y.3d 359, 866 N.E.2d 439, 834 N.Y.S.2d 494 (2007) (holding that national securities association investigating violations of SEC laws and regulations and its own rules engaged in quasi-judicial process).

25. *Stega*, 31 N.Y.3d at 671, 107 N.E.3d at 550–51, 82 N.Y.S.3d at 330–31.

26. *See generally* *Forman v. Henkin*, 30 N.Y.3d 656, 93 N.E.3d 882, 70 N.Y.S.3d 157 (2018) (holding that there is no heightened threshold for production of social media records that depend on what the account holder had chosen to share on the public portion of the account).

27. *Id.* at 659, 93 N.E.3d at 885, 70 N.Y.S.3d at 160.

28. *Id.*

29. *Id.*

authorization for her private Facebook account and a discovery battle ensued.³⁰ In short, the defendant argued that because the plaintiff had admitted to posting pre-accident pictures about her lifestyle on Facebook, her account would logically and reasonably contain information related to both her pre- and post-accident activity levels, especially since her damage claims included cognitive struggles, trouble with communication, and the inability to engage in physical or social activities.³¹ The plaintiff countered by stating that while the defendant had access to and was entitled to the plaintiff's public Facebook posts, he had not established a proper foundation for access to her private account, particularly because the public posts did not contradict her claims.³²

The Court of Appeals sided with the defendant, expressly rejecting appellate division decisions that had created a heightened discovery threshold for a party to meet before obtaining a plaintiff's social media materials.³³ The Court started by noting that Civil Practice Law and Rules (CPLR) 3101 was to be broadly read and interpreted liberally, allowing for the discovery of all relevant information that will assist the parties in preparing for trial and refining the issues in dispute.³⁴ Elaborating, the Court wrote: "New York['s] discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information."³⁵ In other words, if a party can lay an appropriate foundation and establish that social media exists and may contain materials relevant to the issues in the case, a request for the same is proper, so long as it is reasonable and tailored to the facts and circumstances of the individual case. This includes access to private accounts and applies even if the party does

30. *Id.*

31. *Forman*, 30 N.Y.3d at 659–60, 93 N.E.3d at 885–86, 70 N.Y.S.3d at 160–61.

32. *Id.* at 660, 93 N.E.3d at 886, 70 N.Y.S.3d at 16 (noting that the plaintiff did not set forth an argument regarding privileged material, which may have altered or complicated the Court's analysis on the matter).

33. *Id.* at 663, 93 N.E.3d at 888, 70 N.Y.S.3d at 163 (quoting *Tapp v. N.Y. State Urban Dev. Corp.*, 102 A.D.3d 620, 620, 958 N.Y.S.2d 392, 393 (1st Dep't 2013)) (which required the requesting party to "establish a factual predicate for their request by identifying relevant information in [the] plaintiff's Facebook account—that is, information that 'contradicts or conflicts with [the] plaintiff's alleged restrictions, disabilities, and losses, and other claims.'").

34. *Id.* at 661, 93 N.E.3d at 887, 70 N.Y.S.3d at 162 (quoting *Allen v. Crowell-Collier Publ'g. Co.*, 21 N.Y.2d 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.2d 449, 452 (1968)) ("The test is one of usefulness and reason."); see N.Y. C.P.L.R. 1301(a) (McKinney 2012).

35. *Id.* at 664, 93 N.E.3d at 889, 70 N.Y.S.3d at 164.

not know what the request will produce.³⁶

The Court did acknowledge that the right to discovery was not unlimited and that social media discovery could theoretically lead to disputes regarding relevance, burden, and privileged material.³⁷ However, it also opined that courts could adequately handle such issues simply by evaluating social media requests on a case-by-case basis and reasonably limiting them as necessary to protect a party from being unduly burdened or disclosing embarrassing or privileged information.³⁸ To help guide lower courts in making these determinations, the Court of Appeals proffered a two-step analysis.³⁹ This process first requires an evaluation of the nature of the litigation, injuries claimed, and facts of the case.⁴⁰ A court must then conduct a balancing test weighing the utility of the discovery sought against the party's privacy and burden concerns.⁴¹ After weighing these factors, the court must issue a tailored order distinguishing between relevant and non-relevant materials, limiting embarrassing content, and placing proper temporal restrictions on discovery.⁴²

Given the recency of this decision, there have not been many opportunities for New York courts to interpret and apply this ruling. However, one recent New York State supreme court decision is illustrative. In *Renaissance Equity Holdings, LLC v. Webber*, two parties disputed whether the defendant tenant was properly qualified under New York's landlord tenant statutes to exercise succession rights on a deceased family member's apartment lease without losing the prior rent stabilization accommodations.⁴³ In order to properly exercise those rights, the defendant, a reality television actress, had to prove that she had been primarily living in the apartment for two years.⁴⁴ Seeking to show that she did not, the plaintiff made a wide-ranging demand for

36. *Forman*, 30 N.Y.3d at 664, 93 N.E.3d at 889, 70 N.Y.S.3d at 164.

37. *Id.* at 661–62, 93 N.E.3d at 887–88, 70 N.Y.S.3d at 162–63.

38. *Id.* (quoting *Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 747, 731 N.E.2d 589, 594, 709 N.Y.S.2d 873, 878 (2000)) (“[R]equests ‘must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure.’”).

39. *See id.* at 665, 93 N.E.3d at 890, 70 N.Y.S.3d at 165.

40. *See id.*

41. *Forman*, 30 N.Y.3d at 665, 93 N.E.3d at 890, 70 N.Y.S.3d at 165.

42. *Id.* at 665–66, 93 N.E.3d at 890, 70 N.Y.S.3d at 165 (noting that while these requests may sometimes reveal private information, said information might be relevant, especially in personal injury cases where a plaintiff may put medical, physical, or mental health issues in question).

43. *See* 61 Misc. 3d 298, 300, 82 N.Y.S.3d 810, 812 (N.Y.C. Civ. Ct. Kings Cty. 2018).

44. *Id.* at 305–06, 82, N.Y.S.3d at 816 (citing 9 N.Y.C.R.R. § 2523.5(b)(1) (2018)).

social media materials and work-related documents.⁴⁵ Interpreting and applying *Forman*, Judge Zhuo Wang determined that while the plaintiff's general social media requests were undoubtedly relevant to determining whether the defendant was residing in the apartment at the applicable time, they were phrased far too broadly and without limitation, failing the second prong of *Forman* analysis.⁴⁶ Elucidating further, the judge noted that notwithstanding the defendant's profession as a reality television actress, the plaintiff's request for "all posts" was not properly tailored to address the narrow issue of the defendant's residency and would likely result in the disclosure of embarrassing and prejudicial materials or unnecessarily invade the defendant's privacy.⁴⁷ Noting that complying with the plaintiff's request would be "tantamount to revealing 'every transaction, communication, and photograph that [the] respondent shared with any person on any topic,'" the court crafted its own order, limiting the scope of the defendant's social media disclosure by the date, location, and content of the post, and requiring redaction where necessary.⁴⁸

Though *Forman* sets forth the new standard for social media discovery and *Renaissance* applies it accordingly, both primarily address the topic from a theoretical level—neither specifically details how the process should be practically carried out. For example, should the production of social media be treated like general discovery and depend on the candor of the plaintiff and the plaintiff's counsel to produce the relevant materials? Or is there something about social media that invites attempted tampering or destruction and therefore requires a different mechanism or perhaps supervision by an independent arbiter? Are the parties who are required to produce their social media really in the best position to determine what is "relevant" with respect to the case at hand, especially when it might negatively impact their theory of the case? *Forman* very briefly touches on this issue in a footnote, essentially stating that social media discovery is to be treated like any other discovery mechanism, with the party's attorneys bearing the responsibility of sifting through the material and producing what is relevant.⁴⁹ The footnote does express an undercurrent

45. *Id.* at 300–01, 307, 82 N.Y.S.3d at 812–13, 817.

46. *Id.* at 307, 82 N.Y.S.3d at 817 (quoting *Forman*, 30 N.Y.3d at 665, 93 N.E.3d at 890, 70 N.Y.S.3d at 165).

47. *Id.* at 306, 82 N.Y.S.3d at 817.

48. *Renaissance Equity Holdings*, 61 Misc. 3d at 307, 310, 82 N.Y.S.3d at 817, 819–20 (citing *Forman*, 30 N.Y.3d at 665, 93 N.E.3d at 890, 70 N.Y.S.3d at 165).

49. *Forman*, 30 N.Y.3d at 662 n.2, 93 N.E.3d at 887 n.2, 70 N.Y.S.3d at 162 n.2 (citing N.Y. C.P.L.R. 3120(1)(ii)(2) (McKinney 2018)) (noting that when the process is functioning

of concern about abuse, but explains it away by noting that attorneys are officers of the court and expected to act appropriately.⁵⁰

However, in more recent cases, courts appear to be taking some different approaches. For example, the Onondaga County Supreme Court, in an unpublished opinion deciding a dispute over private pictures on the plaintiff's Facebook account, encouraged and secured an agreement by the parties to allow an independent and neutral third-party to conduct a social media review. Jointly agreed to and paid for by the parties, this neutral reviewer was granted access to the plaintiff's social media and determined what materials were material and relevant to the case at hand, producing a report for both the parties and the court. While this particular method was not officially "ordered" by the court, it is unique, and certainly not the narrowly tailored and judge-created order the Court of Appeals referred to in *Forman*. Whether intentional or not, the court's decision in this case and the agreement of the parties regarding the same seem to indicate inherent concern and uncertainty about the proper mechanism for handling social media discovery.

It will be intriguing to see how New York courts interpret and apply *Forman* moving forward, in terms of both legal theory and practicality. This is especially so given the bevy of different social media platforms available to citizens and the increasing prevalence of social media among the general public. Will *Forman* itself serve as an adequate foundation for handling future social media issues, or will the Court of Appeals be forced to revisit this issue in the near future?

C. Third Department Adopts Second Department's Standard Regarding Disclosure of Medical Expert's Qualifications

The Third Department adopted a more liberal medical expert disclosure standard in line with the Second Department.⁵¹ In *Kanaly v. DeMartino*, the plaintiff served combined disclosure to all the defendants.⁵² As for her experts' qualifications, the plaintiff disclosed each experts' area of medical specialty, board certification, and the state in which each expert was licensed.⁵³ However, the plaintiff did not include the names of the schools where her experts studied nor any of

properly, there should be little need for the Court to involve itself).

50. *Id.*

51. *See Kanaly v. DeMartino*, 162 A.D.3d 142, 153, 77 N.Y.S.3d 234, 241–42 (3d Dep't 2018) (first quoting *Thomas v. Alleyne*, 302 A.D.2d 36, 44, 752 N.Y.S.2d 362, 368 (2d Dep't, 2002); and then quoting N.Y. C.P.L.R. 3103(a) (McKinney 2018)).

52. *Id.* at 145, 77 N.Y.S.3d at 236.

53. *Id.* at 148, 77 N.Y.S.3d at 239.

the hospitals at which they had worked.⁵⁴ Instead, the plaintiff only provided the geographic region for these qualifications.⁵⁵ The plaintiff also made general statements about professional organizations and publications.⁵⁶ She did not provide any dates for any information.⁵⁷

The defendants moved to compel the plaintiff to supplement or amend her expert disclosure.⁵⁸ The defendants argued that the qualifications of the experts were not provided with sufficient detail.⁵⁹ The plaintiff cross-moved for a protective order to prohibit the disclosure of this information, arguing that if she were to disclose some of the requested information, the attorneys would be able to identify her experts with only a few pieces of data.⁶⁰

The supreme court partially granted the defendants' motion pertaining to disclosing more of the experts' qualifications, ordering that the plaintiff provide: the state of any residencies, internships, employment, licensure, and colleges and medical schools that the expert attended; the nature of the employment that relates to his or her field of specialty; and dates of attendance of school attendance, employment, and initial board certifications.⁶¹ The plaintiff's cross-motion was thus denied.⁶² The plaintiff subsequently appealed.⁶³

Pursuant to C.P.L.R. 3101(d)(1)(i),

each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.⁶⁴

54. *Id.*

55. *Id.*

56. *Kanaly*, 162 A.D.3d at 148–50, 77 N.Y.S.3d at 239.

57. *Id.* at 150, 77 N.Y.S.3d at 239.

58. *Id.* at 145, 77 N.Y.S.3d at 236.

59. *Id.* at 147, 77 N.Y.S.3d at 238. The defendants also moved to compel the plaintiff to supplement or amend her expert disclosure regarding the facts upon which the expert would be basing his or her opinions as well as the experts' opinions to make the disclosure specific to each expert as well as each defendant. *Id.* at 145, 77 N.Y.S.3d at 236. The plaintiff's expert disclosure verbatim repeated the allegations in her bill of particulars. *Kanaly*, 162 A.D.3d at 147, 77 N.Y.S.3d at 238. The defendants also moved to compel the plaintiff to provide medical authorizations. *Id.* at 145, 77 N.Y.S.3d at 236.

60. *Id.* at 145, 77 N.Y.S.3d at 236.

61. *Id.* at 150–51, 77 N.Y.S.3d at 240.

62. *Id.* at 145, 77 N.Y.S.3d at 236.

63. *Kanaly*, 162 A.D.3d at 145, 77 N.Y.S.3d at 237.

64. N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 2018).

The statute further provides that in a medical malpractice action, a party may omit the names of medical, dental, or podiatric experts.⁶⁵ In regard to disclosure of an expert's qualifications, the then-current case law of the Third Department provided that a party could withhold disclosure where the demanded information would reveal the expert's identity.⁶⁶ In assessing the sensibility of this rule, in light of the broad access to information, the Third Department explained keeping an expert's identity anonymous had become "increasingly difficult."⁶⁷ As such, under the then-current rule, a party could withhold vast amounts of information thereby inhibiting the opposing party from adequately preparing for trial.⁶⁸

Pursuant to the CPLR, because only the name of an expert can be omitted from disclosure, the Third Department refused to apply the then-current standard and instead held that it would not "continue to interpret the [CPLR] in a way that permits parties to severely limit the amount of information they provide regarding their expert witnesses."⁶⁹ As such, the Third Department followed the Second Department and held that parties in medical malpractice cases "will ordinarily be entitled to full disclosure of the qualifications of [an opponent's] expert, [except for the expert's name,] notwithstanding that such disclosure may permit such expert's identification."⁷⁰ To the extent that there is a "reasonable probability" that both full disclosure of experts' qualifications would lead to their identification and that they would face "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" before trial, a party may seek a protective order pursuant to C.P.L.R. 3103(a).⁷¹

The Third Department therefore remitted to allow the plaintiff the opportunity to modify her motion for a protective order pursuant to the

65. *Id.*

66. *Kanaly*, 162 A.D.3d at 148, 77 N.Y.S.3d at 239 (quoting *Morris v. Clements*, 228 A.D.2d 990, 991, 644 N.Y.S.2d 850, 851 (3d Dep't 1996)) (first citing *Pizzi v. Muccia*, 127 A.D.2d 338, 340, 515 N.Y.S.2d 341, 343 (3d Dep't 1987); and then citing *Mead v. Dr. Rajadhyax' Dental Grp.*, 34 A.D.3d, 1139, 1140, 824 N.Y.S.2d 790, 792 (3d Dep't 2006)); see N.Y. C.P.L.R. 3101(d)(1)(i).

67. *Kanaly*, 162 A.D.3d at 150, 77 N.Y.S.3d at 240 (citing *Thomas v. Alleyne*, 302 A.D.2d 36, 43, 752 N.Y.S.2d 362, 362 (2d Dep't 2002)).

68. *Id.* at 152, 77 N.Y.S.3d at 241.

69. *Id.* at 153, 77 N.Y.S.3d at 241.

70. *Id.* (quoting *Thomas*, 302 A.D.2d at 45, 752 N.Y.S.2d at 369); see also N.Y. C.P.L.R. 3101(d)(1)(i).

71. *Id.* at 153–54, 77 N.Y.S.3d at 241–42 (quoting *Thomas*, 302 A.D.2d at 37–38, 752 N.Y.S.3d at 364) (citing N.Y. C.P.L.R. 3103(a) (McKinney 2018)).

new standard.⁷²

Currently, the First and Fourth Departments have not outright adopted this standard. It seems that the Fourth Department generally follows the old rule of the Second and Third Department (i.e., requesting disclosure of qualifications that would lead to disclosure of an expert's identity is "palpably improper.")⁷³ The First Department's standard is not as clear.⁷⁴ Notably, New York State has the most restrictive expert disclosure standard in the United States.⁷⁵ The trend, though, seems to be moving toward broader disclosure, perhaps more in line with the federal rules. The Fourth Department's seminal case on the issue, *Thompson*, was decided in 2002, so it is possible this issue may be revisited in light of the Third Department's holding.⁷⁶

72. *Kanaly*, 162 A.D.3d at 154, 77 N.Y.S.3d at 242. The Third Department upheld the supreme court's order for the plaintiff to supplement her disclosure by making it specific to each defendant. *Id.* at 146, 77 N.Y.S.3d at 238. The Third Department also upheld the supreme court's order for the plaintiff to provide medical authorizations. *Id.* at 145, 77 N.Y.S.3d at 237.

73. *See Thompson v. Swiantek*, 291 A.D.2d 884, 885, 736 N.Y.S.2d 819, 820 (4th Dep't 2002) (citing *Jasopersaud v. Tao Gyouun Rho*, 169 A.D.2d 184, 188, 572 N.Y.S.2d 700, 704 (2d Dep't 1991) (holding that disclosure of the expert's medical school as well as location of subsequent medical training would enable defendants to identify the expert's identity and thus was properly withheld), *overruled in part by Thomas*, 302 A.D.2d at 44, 752 N.Y.S.2d at 368.

74. *See Yablon v. Coburn*, 219 A.D.2d 560, 561, 631 N.Y.S.2d 351 (1st Dep't 1995) ("[T]he need for [disclosure of information] outweighs the unlikelihood that information would allow for the identification of the expert's name."); *see also Duran by Duran v. N.Y.C. Health & Hosps. Corp.*, 182 Misc. 2d 232, 233–34, 696 N.Y.S.2d 795, 796 (Sup. Ct. Bronx Cty. 1999) (interpreting *Yablon* to stand for the proposition that information ordered to be disclosed would not lead to disclosure of expert's identity); *Hara v. Levin*, No. 14134/01, 2003 N.Y. Slip Op. 50615(U), at 8–9 (Sup. Ct. Bronx Cty. 2003) ("The bottom line is that the expert witness's identity is to be concealed, and if providing the information . . . will lead to the discovery of the witness's identity, then this Court is of the opinion that the information is not discoverable."). *But see Allston-Rieder v. Schwartzman*, No. 103016/03, 2005 N.Y. Slip Op. 30459(U), at 4–5 (Sup. Ct. N.Y. Cty. 2005) (quoting *Thomas*, 302 A.D.2d at 43, 752 N.Y.S.2d at 362) ("[The] technological change points to the futility of attempting to conceal the identity of expert witnesses in medical malpractice cases"; Instead of being forced to play the game of 'In how few qualifications can I name your expert?', all parties should be required to give full disclosure of each expert's qualifications to help promote settlement or to prepare for trial.').

75. *Kanaly*, 162 A.D.3d at 152–53, 77 N.Y.S.3d at 241 (citing Richard S. Basuk, *Expert Witness Discovery for Medical Malpractice Cases in the Courts of New York: Is it Time to Take Off the Blindfolds?*, 76 N.Y.U. L. REV. 1527, 1528 n.6 (2001)) ("Patterned on either the current federal rules, or a previous version that allowed broad expert discovery through interrogatories, '[a]ll states except New York freely permit discovery of expert witnesses, including the expert's identity.'").

76. *See Thompson*, 291 A.D.2d at 884, 736 N.Y.S.2d at 820.

D. Necessary Particularity of the Plaintiff's Bills of Particulars

The Fourth Department fortified the long-standing rule that an opponent cannot raise a new argument in opposition to a summary judgment motion, a ruling critical for hospitals alleged to be vicariously liable for a patient's treating providers.⁷⁷ In *DeMartino v. Kronhaus*, the plaintiff alleged in his complaint that the defendant hospital was vicariously liable for its "employees, agents, apparent agents, independent contractors and/or staff members."⁷⁸ None of the defendant hospital's employees or staff were sued—rather, only a physician in private practice was sued.⁷⁹

The defendant hospital demanded that the plaintiff identify the employee or employees for which it was allegedly vicariously liable in his bill of particulars.⁸⁰ In response, the plaintiff only identified the co-defendant private physician.⁸¹ At the close of discovery, the hospital moved for summary judgment on the grounds that the private physician was not its employee.⁸² In response, the plaintiff argued that the hospital's nurses were negligent and that the hospital was vicariously liable for their negligence.⁸³ The plaintiff raised this argument for the first time in opposition to the hospital's motion.⁸⁴ The Onondaga County Supreme Court denied the defendant hospital's summary judgment motion.⁸⁵ The defendant hospital subsequently appealed.⁸⁶

The Fourth Department considered the plaintiff's identification of the nurses as raising a new theory of liability for the first time in opposition to a summary judgment motion, which has long been held to be an improper means of defeating such a motion.⁸⁷ As such, the Fourth

77. *DeMartino v. Kronhaus*, 158 A.D.3d 1286, 1286–87, 71 N.Y.S.3d 277, 278 (4th Dep't 2018) (quoting *Marchetti v. East Rochester Cent. Sch. Dist.*, 26 A.D.3d 881, 881, 808 N.Y.S.2d 877, 878 (4th Dep't 2006)) (citing *Darrisaw v. Strong Mem. Hosp.*, 74 A.D.3d 1769, 1770, 902 N.Y.S.2d 286, 287 (4th Dep't 2010)).

81. *Id.* at 1287, 71 N.Y.S.3d at 278.

82. *Id.*

83. *Id.*

84. *Id.*

85. *DeMartino*, 158 A.D.3d at 1287, 71 N.Y.S.3d at 278.

83. *Id.* at 1287, 71 N.Y.S.3d at 278.

84. *Id.*

85. *Id.* at 1286, 71 N.Y.S.3d at 278.

86. *Id.*

87. *DeMartino*, 158 A.D.3d at 1286–87, 71 N.Y.S.3d at 278 (quoting *Marchetti v. East Rochester Cent. Sch. Dist.*, 26 A.D.3d 881, 881, 808 N.Y.S.2d 877, 878 (4th Dep't 2006)) (citing *Darrisaw v. Strong Mem. Hosp.*, 74 A.D.3d 1769, 1770, 902 N.Y.S.2d 286, 287 (4th Dep't 2010)).

Department reversed the lower court's holding.⁸⁸

The reasoning of the Court's holding is entirely unclear. A subsequent case from the First Department suggests that the issue is one of notice.⁸⁹ In *Anthony v. Smina*, the defendant hospital moved for summary judgment seeking to dismiss the plaintiffs' complaint in its entirety.⁹⁰ In the plaintiffs' complaint and bill of particulars, they alleged that the hospital was vicariously liable for its employees' failure to timely detect or diagnose the patient's lung cancer.⁹¹ They did not identify two particular employee physicians in either pleading, though one of these physicians was deposed.⁹² When the hospital moved for summary judgment, it submitted an affirmation of a physician expert who opined that the deposed doctor complied with the standard of care.⁹³

In opposition, the plaintiff identified the two employee physicians by name.⁹⁴ The defendant hospital argued that the plaintiff was asserting a new theory of liability in opposition to its summary judgment motion.⁹⁵ The First Department disagreed and simply stated that the defendant hospital attended one of the physician's depositions and knew of the physician's involvement before it moved for summary judgment as it had submitted an affirmation defending her care.⁹⁶ Impliedly, therefore, the hospital had notice that these were the physicians for whom it would be vicariously liable, the allegations against whom were encompassed within the allegations pleaded in the plaintiffs' complaint and bill of particulars.⁹⁷ In other words, because the hospital was alleged to be vicariously liable for its employees' failure to timely diagnose or detect the patient's lung cancer, claims of deviations from the standard of care by the two physicians' care could be encompassed

88. *Id.* at 1286, 71 N.Y.S.3d at 278.

89. *See generally* *Anthony v. Smina*, 159 A.D.3d 604, 73 N.Y.S.3d 167 (1st Dep't 2018) (holding that the lower court properly provided the defendant with an opportunity to depose the newly named defendant so as to eliminate any concern about lack of notice).

90. *Id.* at 604, 73 N.Y.S.3d at 167.

91. *Id.* at 604, 73 N.Y.S.3d at 168.

92. *Id.* at 604, 73 N.Y.S.3d at 167–68 (first citing *Atkins v. Beth. Abraham Health Servs.*, 133 A.D.3d 491, 492, 20 N.Y.S.3d 33, 34 (1st Dep't 2015); and then citing *Rhymes v. Patel*, 139 A.D.3d 543, 544, 33 N.Y.S.3d 170, 171 (1st Dep't 2016)).

93. *Id.* at 604, 73 N.Y.S.3d at 168 (citing *Harty v. Lenci*, 294 A.D.2d 296, 298, 743 N.Y.S.2d 97, 98 (1st Dep't 2002)).

94. *Anthony*, 159 A.D.3d at 604, 73 N.Y.S.3d at 167–68.

95. *Id.*

96. *Id.* Regarding the other physician's involvement, the defendant hospital was invited to depose the physician and to then renew or reargue based on any information obtained during that deposition. *Id.* at 604–05, 73 N.Y.S.3d at 168.

97. *See id.* at 604–05, 73 N.Y.S.3d at 168.

within this allegation in prior pleadings. The hospital also could be said to have had notice that these two physicians were the responsible actors since it had attended the one physician's deposition, underscored by the fact that it had even submitted an affirmation defending her care in support of its initial moving papers.⁹⁸ The claim itself was pled and the hospital seemingly had notice of the potential actors—that the plaintiffs had failed to particularize them in any prior pleading was negligible in light of this notice.⁹⁹ As such, this could not constitute a new theory of liability.¹⁰⁰

Going forward, hospitals moving for summary judgment at the close of discovery should be mindful of arguments advanced in opposition to their summary judgment motions in the event there are providers that plaintiff had failed to identify in prior pleadings. It seems that if the complaint does not establish a claim that could encompass these “new” providers' care, or if the hospital did not have notice that it could possibly be held vicariously liable for the “new” providers, then this may constitute a new theory of liability. Though, this is perhaps something that will be explored more fully by the appellate divisions in the future.

E. Medical Providers' Duty to Third Parties After Davis v. South Nassau Communities Hospital

In 2015, the Court of Appeals decided *Davis v. South Nassau Communities Hospital*.¹⁰¹ The case concerned a physician's failure to warn a patient that an administered medication would impair the patient's ability to drive.¹⁰² The patient left the hospital and crashed into a bus after crossing a double yellow line.¹⁰³ The bus driver brought a medical malpractice claim against the physician, claiming that the physician owed him a duty to warn the patient about the side effects of the administered drug.¹⁰⁴ The Court of Appeals, to the surprise of many practitioners, held that the physician did in fact owe a duty to the

98. See *Anthony*, 159 A.D.3d at 604, 73 N.Y.S.3d at 168 (citing *Harty*, 294 A.D.2d at 298, 743 N.Y.S.2d at 98).

99. See *id.* at 604, 73 N.Y.S.3d at 167–68 (first citing *Atkins v. Beth. Abraham Health Servs.*, 133 A.D.3d 491, 492, 20 N.Y.S.3d 33, 34 (1st Dep't 2015); and then citing *Rhymes v. Patel*, 139 A.D.3d 543, 544, 33 N.Y.S.3d 170, 171 (1st Dep't 2016)).

100. See *id.*

101. See generally 26 N.Y.3d 563, 46 N.E.3d 614, 26 N.Y.S.3d 231 (2015) (holding that the defendant hospital and medical professionals had a duty to the plaintiff to warn the patient that the medication the defendants gave the patient could impair her ability to drive).

102. *Id.* at 569, 46 N.E.3d at 616, 26 N.Y.S.3d at 233.

103. *Id.* at 570–71, 46 N.E.3d at 617, 26 N.Y.S.3d at 234.

104. *Id.* at 571, 46 N.E.3d at 617, 26 N.Y.S.3d at 234.

plaintiffs to warn the patient about the medication's side effects.¹⁰⁵ Since that decision, New York courts have further deliberated on the issue. A few notable cases are discussed below.

I. Kingsley v. Price

This case was initially brought by James Kingsley in the Niagara County Supreme Court.¹⁰⁶ Kingsley, an employee of New York State Electric and Gas Corporation (NYSEG), was required to submit to routine medical examinations to determine if he had any job-related diseases.¹⁰⁷ In April 2009, Kingsley went to Western New York Occupational Medicine, P.C., at Lockport Memorial Hospital for a physical examination and “B-Read chest x-ray,” which is specifically used to evaluate for asbestos exposure.¹⁰⁸

Upon arrival, Kingsley signed a consent form that stated that the medical examination was “for evaluation purposes for either employment suitability or worker’s compensation injury/illness treatment” and was not “to detect all underlying health conditions.”¹⁰⁹ The consent form further stated that the medical information would be relayed to the employer.¹¹⁰

Dr. DeSouza, a radiologist, reviewed Kingsley’s file and created a report that noted: “R[ight] infrahilar, 4x3 centimeter density. Needs CT.”¹¹¹ This report was then sent to an analyst at NYSEG on May 5, 2008.¹¹² It was determined that the condition was not work-related and NYSEG did not notify Kingsley of the findings.¹¹³ Kingsley eventually asked NYSEG for and received the information.¹¹⁴ Tragically, Kingsley succumbed to metastatic lung cancer on May 5, 2012, exactly four years after Dr. DeSouza first identified the mass.¹¹⁵

Prior to his death, James Kingsley commenced suit alleging medical malpractice and negligence against Dr. DeSouza and NYSEG, claiming they failed to notify him and/or his primary care physician

105. *Id.* at 571, 46 N.E.3d at 618, 36 N.Y.S.3d at 235. A more detailed analysis of *Davis* can be found in the 2015 Edition of the *Survey*.

106. *Kingsley v. Price*, 163 A.D.3d 157, 157, 80 N.Y.S.3d 806, 807 (4th Dep’t 2018).

107. *Id.* at 159, 80 N.Y.S.3d at 808.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Kingsley*, 163 A.D.3d at 159, 80 N.Y.S.3d at 808.

112. *Id.* at 160, 80 N.Y.S.3d at 808.

113. *Id.*

114. *Id.*

115. *Id.*

about the mass on the x-ray.¹¹⁶ After his passing, his wife, Susan M. Kingsley, continued the action as the administratrix of James Kingsley's estate and added a wrongful death cause of action.¹¹⁷ The defendant providers moved for summary judgment dismissing the complaint and any and all cross-claims,¹¹⁸ or, in the alternative, to dismiss the cause of action for medical malpractice.¹¹⁹ The supreme court denied their motion.¹²⁰ The defendant providers appealed.¹²¹

The Fourth Department began its analysis by clarifying that the case sounded in ordinary negligence rather than medical malpractice.¹²² The court concluded that there was no allegation that Dr. DeSouza misread the x-ray.¹²³ The court noted that the cause of action was based on the failure to notify Kingsley or his primary care physician.¹²⁴ Failure to communicate findings to a patient is ordinary negligence, not malpractice, the court noted.¹²⁵ The court further explained that a medical malpractice claim requires the presence of a physician-patient relationship.¹²⁶

Having defined the issue as a negligence claim rather than a malpractice claim, the court turned to determine what duty, if any, the defendants owed to the decedent.¹²⁷ The court noted the importance of logic, science, policy considerations, precedential impact, and limiting the legal consequences of wrongs to a controllable degree.¹²⁸

116. *Kingsley*, 163 A.D.3d at 160, 80 N.Y.S.3d at 808–09. Mr. Kingsley had named a number of other medical providers as well.

117. *Id.*

118. *Id.* at 160, 80 N.Y.S.3d at 809. NYSEG asserted cross claims for contribution and indemnification. *Id.* at 160, 80 N.Y.S.3d at 810.

119. *Id.* at 160, 80 N.Y.S.3d at 809.

120. *Kingsley*, 163 A.D.3d at 160, 80 N.Y.S.3d at 809.

121. *Id.*

122. *Id.*

123. *Id.* at 161, 80 N.Y.S.3d at 809.

124. *Id.*

125. *Kingsley*, 163 A.D.3d at 160, 80 N.Y.S.3d at 809 (quoting *Yaniv v. Taub*, 256 A.D.2d 273, 274, 683 N.Y.S.2d 35, 37, (1st Dep't 1998)) (citing *Mancuso v. Kaleida Health*, 100 A.D.3d 1468, 1468, 954 N.Y.S.2d 313, 314 (4th Dep't 2012)).

126. *Id.* at 160–61, 80 N.Y.S.3d at 809 (quoting *Cygan v. Kaleida Health*, 51 A.D.3d 1373, 1375, 857 N.Y.S.2d 869, 872 (4th Dep't 2008)) (citing *Gedon v. Bry-lin Hosps.*, 286 A.D.2d 892, 893, 730 N.Y.S.2d 641, 643 (4th Dep't 2001)). The Court of Appeals had noted in *Davis*, though, that the cause of action sounded in medical malpractice because the conduct bore a substantial relationship to the rendition of medical treatment. *Davis v. S. Nassau Cmty. Hosp.*, 26 N.Y.3d 563, 581, 46 N.E.3d 614, 624, 26 N.Y.S.3d 231, 241 (2015). In *Davis*, there was no direct physician-patient relationship between the plaintiff and the physician. *Id.* at 583, 46 N.E.3d at 626, 26 N.Y.S.3d at 243 (Stein, J., dissenting).

127. *Kingsley*, 163 A.D.3d at 161, 80 N.Y.S.3d at 809.

128. *Id.* at 161, 80 N.Y.S.3d at 809–10 (first quoting *De Angelis v. Lutheran Med. Ctr.*,

The plaintiff, along with NYSEG, argued that *Davis*¹²⁹ and *Landon v. Kroll Lab. Specialists*¹³⁰ compelled a finding that the defendant doctors had a duty to tell decedent, or his primary care physician, about the x-rays.¹³¹ The *Landon* decision, relied on by the plaintiffs, involved a false positive drug test.¹³² The plaintiff was a recently paroled man who was subject to random drug tests for the duration of his probation.¹³³ The defendant was the company that processed and tested the samples provided by the plaintiff pursuant to a contract with the county and probation department.¹³⁴ At some point during the probation, the defendant reported to the authorities that the plaintiff had tested positive for THC.¹³⁵ The plaintiff obtained an independent blood test on the same day, which was negative for illicit drugs.¹³⁶ In his action against the company, the plaintiff alleged “systematic negligence” in how the defendant processed and tested samples.¹³⁷ The *Landon* Court held that strong policy-based considerations compelled the finding that the defendant laboratory owed a duty to the plaintiff: despite the absence of a contractual relationship, a duty arose because the defendant laboratory, in failing to exercise reasonable care in the performance of its duties, “launche[d] a force or instrument of harm.”¹³⁸

The *Kingsley* court disagreed with the respondents, concluding that neither case necessitated that the court recognize a duty in the pending matter.¹³⁹ Significantly, the defendant providers here did not launch a force or instrument of harm.¹⁴⁰ The x-ray was correctly interpreted.¹⁴¹

58 N.Y.2d 1053, 1055, 449 N.E.2d 406, 407, 462 N.Y.S.2d 626, 627 (1983); and then quoting *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232, 750 N.E.2d 1055, 1060, 727 N.Y.S.2d 7, 12 (2001)).

129. See generally 26 N.Y.3d 563, 46 N.E.3d 614, 26 N.Y.S.3d 231 (holding that the defendant hospital and medical professionals had a duty warn the patient that the medication the defendants gave the patient could impair her ability to drive). For a more thorough examination of the *Davis* decision, see the 2015 Edition of the *Survey*.

130. See generally 22 N.Y.3d 1, 999 N.E.2d 1121, 977 N.Y.S.2d 676 (2013) (holding that a laboratory owed a duty of reasonable care when testing his biological sample because a false positive would have negative, life-altering consequences on the patient’s life).

131. *Kingsley*, 163 A.D.3d at 162, 80 N.Y.S.3d at 810.

132. 22 N.Y.3d at 4, 999 N.E.2d at 1122–23, 977 N.Y.S.2d at 677–78.

133. *Id.* at 4, 999 N.E.2d at 1122, 977 N.Y.S.2d at 677.

134. *Id.*

135. *Id.* at 4, 999 N.E.2d at 1123, 977 N.Y.S.2d at 678.

136. *Id.* at 4, 999 N.E.2d at 1122–23, 977 N.Y.S.2d at 677–78.

137. *Landon*, 22 N.Y.3d at 5, 999 N.E.2d at 1123, 977 N.Y.S.2d at 678.

138. *Id.* at 6, 999 N.E.2d at 1124, 977 N.Y.S.2d at 679 (quoting *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136, 140, 773 N.E.2d 485, 488, 746 N.Y.S.2d 120, 123 (2002)).

139. *Kingsley v. Price*, 163 A.D.3d 157, 163, 80 N.Y.S.3d 806, 811 (4th Dep’t 2018).

140. *Id.*

141. *Id.*

Too, the consent form signed by Mr. Kingsley indicated that the medical information would be reported to his employer, a provision with which the defendant providers complied, and there was no evidence that the providers were ever made aware of the identity of the decedent's primary care physician.¹⁴² The court underscored its hesitation to extend a doctor's duty to non-patients and expressed concerns about exposing doctors "to a prohibitive number of possible plaintiffs."¹⁴³ Too, it noted that the *Davis* Court specifically limited its holding to the facts before it.¹⁴⁴ Additionally, the court quoted language from *Davis* for the proposition that "[w]hile the temptation is always great to provide a form of relief to one who has suffered . . . the law cannot provide a remedy for every injury occurred."¹⁴⁵

Based on this analysis, the court reversed the lower court's decision and ordered that the defendant's motion for summary judgment dismissing the plaintiff's complaint and the employer's cross claims be granted.¹⁴⁶

A lone dissent was filed by Justice Curran.¹⁴⁷ Justice Curran would have held that the *Davis* decision compelled a finding that the defendants owed the decedent a duty of care.¹⁴⁸ After reviewing the *Davis* decision, Justice Curran concluded that the plaintiff and defendant in this case had a closer relationship than the doctor and driver in *Davis*.¹⁴⁹ Relying on *Davis*, Justice Curran opined, "a physician who examines a person and becomes aware of a potentially deadly condition in that person has a duty to make at least minimal efforts to notify that fellow human being of such condition."¹⁵⁰ Too, it was established that it was practice of the defendant providers to contact examinees regarding such findings such that imposing a duty in this circumstance would not require anything beyond their normal

142. *Id.*

143. *Id.* (quoting *McNulty v. City of New York*, 100 N.Y.2d 227, 232, 792 N.E.2d 162, 166, 762 N.Y.S.2d 12, 16 (2013)).

144. *Kingsley*, 163 A.D.3d at 164, 80 N.Y.S.3d at 811 (citing *Davis v. S. Nassau Cmty. Hosp.*, 26 N.Y.3d 563, 571, 46 N.E.3d 614, 618, 26 N.Y.S.3d 231, 235 (2015)).

145. *Id.* (quoting *Davis*, 26 N.Y.3d at 580, 46 N.E.3d at 624, 26 N.Y.S.3d at 241).

146. *Id.* at 165, 80 N.Y.S.3d at 812.

147. *See id.* (Curran, J., dissenting).

148. *Id.* (Curran, J., dissenting) (citing *Davis*, 26 N.Y.3d at 579–80, 46 N.E.3d at 624, 26 N.Y.S.3d at 241).

149. *Kingsley*, 163 A.D.3d at 166, 80 N.Y.S.3d at 813. *See generally Davis*, 26 N.Y.3d 563, 46 N.E.3d 614, 26 N.Y.S.3d 231 (finding that medical professionals had a duty to a non-patient who was a complete stranger to the physician-patient relationship).

150. *Kingsley*, 163 A.D.3d at 166, 80 N.Y.S.3d at 813.

practice.¹⁵¹

The reasoning for the court's outcome seems grounded in two significant facts: (1) the x-ray was not negligently interpreted, and therefore no "instrument of harm" was launched; and (2) Mr. Kingsley seemingly explicitly limited the duty of the defendant providers in signing a consent form defining their relationship as one limited to evaluation for work suitability or work-related injuries for purposes of worker's compensation, the results of which Mr. Kingsley agreed would be reported to the employer.¹⁵² It will be interesting to see what role the Fourth Department's "instrument of harm" analysis will play in potentially limiting the *Davis* duty in contractual scenarios.

2. Other New York State Cases

A decision from the Third Department has signaled a hesitancy to expand a physician's duty to third parties, albeit with less analysis than the *Kingsley* decision.¹⁵³ A decision from the Second Department, though, seems to follow the *Davis* jurisprudence.¹⁵⁴

In *Gallagher v. Cayuga Medical Center*, the plaintiffs brought a claim of negligent infliction of emotional distress against a physician.¹⁵⁵ In that case, a teenager was hospitalized for drug-related problems.¹⁵⁶ The teenager had a history of self-injury and was discharged with instructions to return to the emergency room if suicidal thoughts resurfaced.¹⁵⁷ The teenager committed suicide shortly after discharge.¹⁵⁸

In analyzing the subsequent claim of negligent infliction of emotional distress, relying on the long-standing hesitance of New York State courts to recognize emotional distress claims of a patient's family members, the Third Department simply concluded that the "defendants did not owe [the] plaintiffs an independent duty in discharging decedent to their care."¹⁵⁹ The court's only interaction with *Davis* was when it

151. *Id.* at 166–67, 80 N.Y.S.3d at 813–14.

152. *Id.* at 163, 80 N.Y.S.3d at 811.

153. *Gallagher v. Cayuga Med. Ctr.*, 151 A.D.3d 1349, 1355, 57 N.Y.S.3d 544, 550 (3d Dep't 2017).

154. *Melio v. John T. Mather Mem'l Hosp.*, 165 A.D.3d 645, 646, 84 N.Y.S.3d 549, 551 (2d Dep't 2018) (first citing *Davis*, 26 N.Y.3d at 579–80, 46 N.E.3d at 624, 26 N.Y.S.3d at 241; then citing *Tenuto v. Lederle Labs.*, 90 N.Y.2d 606, 614, 687 N.E.2d 1300, 1303–04, 665 N.Y.S.2d 17, 20–21 (1997); and then citing *Fox v. Marshall*, 88 A.D.3d 131, 139, 928 N.Y.S.2d 317, 323 (2d Dep't 2011)).

155. 151 A.D.3d at 1355, 57 N.Y.S.3d at 550.

156. *Id.* at 1350, 57 N.Y.S.3d at 546.

157. *Id.* at 1350, 57 N.Y.S.3d at 546–47.

158. *Id.* at 1350, 57 N.Y.S.3d at 547.

159. *Id.* at 1355, 57 N.Y.S.3d at 550 (first citing *McNulty v. City of New York*, 100

cited to the decision with a contrary signal.¹⁶⁰

In *Melio v. John T. Mather Memorial Hospital*, the Suffolk County Supreme Court held that a hospital did not owe a duty to a cab driver.¹⁶¹ There, a man was brought to a hospital's emergency department by the police for public intoxication.¹⁶² After an unknown period of time, the man was released.¹⁶³ Upon release, the man called for a taxi cab and proceeded to sexually assault the cab driver.¹⁶⁴ The cab driver brought claims sounding in negligence and medical malpractice, alleging that the hospital prematurely released the man.¹⁶⁵ The court concluded that the hospital did not owe a duty to the cab driver, noting that to hold otherwise "would require [the] defendant . . . to access [the man's] entire medical, social and psychiatric history, including his sex offender status."¹⁶⁶ The Second Department affirmed the dismissal of the medical malpractice claim on the grounds there was no physician-patient relationship, though reversed the dismissal of the negligence claim in a brief opinion.¹⁶⁷

3. *Torres v. Faxton St. Luke's Healthcare (Northern District of New York)*

In a 2017 decision, the Northern District of New York signaled approval of the duty articulated in *Davis*.¹⁶⁸ The case, *Torres v. Faxton St. Luke's Healthcare*, involved a tragic set of facts.¹⁶⁹ Police had been

N.Y.2d 227, 232–34, 792 N.E.2d 162, 165–67, 762 N.Y.S.2d 12, 15–17 (2003); then citing *Cohen v. Cabrini Med. Ctr.*, 94 N.Y.2d 639, 642–44, 730 N.E.2d 949, 951–52, 709 N.Y.S.2d 151, 153–54 (2000); then citing *Shaw v. QC-Medi N.Y., Inc.*, 10 A.D.3d 120, 124–25, 778 N.Y.S.2d 791, 794–95 (4th Dep't 2004); then citing *Landon v. N.Y. Hosp.*, 101 A.D.2d 489, 495–96, 476 N.Y.S.2d 303, 307–08 (1st Dep't 1984); and then citing *Davis*, 26 N.Y.3d at 579–80, 46 N.E.3d at 624, 26 N.Y.S.3d at 241).

160. *Gallagher*, 151 A.D.3d at 1355, 57 N.Y.S.3d at 550 (citing *Davis*, 26 N.Y.3d at 579–80, 46 N.E.3d at 624, 26 N.Y.S.3d at 241).

161. Motion Decision at 2, *Melio v. John T. Mather Mem'l Hosp.* (Suffolk Cty. Sup. Ct. Feb. 22, 2017) (No. 6527/16).

162. *Id.* at 1.

163. *Id.*

164. *Id.*

165. *Id.*

166. Motion Decision, *supra* note 161.

167. *Melio v. John T. Mather Mem'l Hosp.*, 165 A.D.3d 645, 646, 84 N.Y.S.3d 549, 550–51 (2d Dep't 2018) (citing *Fox v. Marshall*, 88 A.D.3d 131, 928 N.Y.S.2d 317 (2d Dep't 2011) (granting a motion to dismiss for a medical malpractice claim against a doctor who did not owe a duty to the decedent)).

168. *Torres v. Faxton St. Luke's Healthcare*, 227 F. Supp. 3d 216, 241–42 (N.D.N.Y. 2017) (citing 26 N.Y.3d at 574, 46 N.E.3d at 620, 26 N.Y.S.3d at 237).

169. *Id.* at 225.

called to a family residence after reports of a domestic disturbance.¹⁷⁰ The police investigation concluded with one Paul Bumbolo being taken to Faxton St. Luke's for a medical evaluation.¹⁷¹ The police officer who escorted Bumbolo to the hospital filled out an Emergency 9.41 form.¹⁷² The form requested that a hospital staff member contact the officer before Bumbolo was released.¹⁷³

Later in the day, the hospital discharged Bumbolo without notifying the police.¹⁷⁴ After release, Bumbolo proceeded to murder three members of his family.¹⁷⁵ The estates later charged various hospital employees with claims sounding in negligence, medical malpractice, and wrongful death.¹⁷⁶ The defendant medical providers argued that the case should be dismissed because they did not owe a duty to the decedents.¹⁷⁷

After surveying New York law, the district court concluded that New York recognizes certain duties owed by medical providers to non-patients.¹⁷⁸ In particular, the court noted that *Davis* could stand for an "expansive formulation of a physician's duty."¹⁷⁹ In reaching this conclusion, the *Torres* Court pointed to the *Davis* Court dissent in which Judge Stein opined that the holding of *Davis* expanded a physician's duty beyond a "specific, identifiable group of third parties to all members of the public at large," which went far beyond the Court's prior holdings.¹⁸⁰ Per Judge Stein, prior holdings supported the recognition of such a duty in situations where the plaintiff was a member of a "readily identifiable third party of a definable class," such as a family member of the plaintiff, and was someone that the provider knew or should have known could be injured by an affirmative creation of a risk of harm through treatment of a patient.¹⁸¹ The district court

170. *Id.*

171. *Id.* at 227–28.

172. *Id.* at 228; *see also* N.Y. MENTAL HYG. LAW § 9.41 (McKinney 2011).

173. *Torres*, 227 F. Supp. 3d at 228.

174. *Id.* at 229.

175. *Id.*

176. *Id.* at 240.

177. *Id.*

178. *See Torres*, 227 F. Supp. 3d at 241 (quoting *Fox v. Marshall*, 88 A.D.3d 131, 138, 928 N.Y.S.2d 317, 322 (2d Dep't 2011)) (citing *Rivera v. N.Y.C. Health & Hosps. Corp.*, 191 F. Supp. 2d 412, 418 (S.D.N.Y. 2002)).

179. *Id.* at 242 (citing *Davis*, 26 N.Y.3d at 569, 46 N.E.3d 614, 616, 26 N.Y.S.3d at 233).

180. *Id.* (citing *Davis*, 26 N.Y.3d at 587–88, 46 N.E.3d at 630, 26 N.Y.S.3d at 247 (Stein, J., dissenting)).

181. *Davis*, 26 N.Y.3d at 587, 46 N.E.3d at 630, 26 N.Y.S.3d at 247 (Stein, J., dissenting) (first citing *McNulty v. City of New York*, 100 N.Y. 2d 227, 233–34, 792 N.E.2d 162, 166–67, 762 N.Y.S.2d 12, 16–17 (2003); then citing *Cohen v. Cabrini Med.*

went on to note that the non-patients in the current case were both family members of the patient, and were living with the patient.¹⁸² Too, the providers were aware of how the patient was removed from the home and observed his violent behavior.¹⁸³ The family here fell within the group of “identifiable third parties” who the providers knew or should have known were relying on their treatment decisions for the patient’s violent mental condition.¹⁸⁴ In the court’s view, these facts “easily satisfy even Judge Stein’s narrower formulation of the rule” such that it did not even have to rely on the expansion of that duty by the *Davis* majority and refused to dismiss the claim.¹⁸⁵

To summarize, the extent to which a physician owes a duty to a third-party remains unsettled in New York. While *Davis* appears to stand for a more expansive formulation of the duty owed by providers to non-patients, at least some appellate division cases in its aftermath appear content to limit *Davis* to its facts. Too, the Northern District of New York relied on the rule outlined in Judge Stein’s *Davis* dissent in reaching its decision, thereby perhaps signaling a hesitation to embrace *Davis*.

II. NEW YORK STATE LEGISLATURE

A. New York Medical Marijuana Regulations Updates

In the last several years, medical marijuana has become a hot-button legal issue at both the State and Federal levels of government. This is especially true for New York State, which passed medical marijuana legislation in 2014 and is in the midst of developing a regulatory framework to appropriately govern this emerging industry.¹⁸⁶ Consequently, this *Survey* year saw a number of changes to New York’s medical marijuana regulations as the State’s Department of Health (DOH) attempts to improve the program and expand access to a greater number of qualifying patients.

By way of background, New York’s initial medical marijuana

Ctr., 94 N.Y.2d 639, 642–44, 730 N.E.2d 949, 951–52, 709 N.Y.S.2d 151, 153–54 (2000); and then citing *Eiseman v. State*, 70 N.Y.2d 175, 188, 511 N.E.2d 1128, 1135, 518 N.Y.S.2d 608, 614 (1987)).

182. *Torres*, 227 F. Supp. 3d at 243.

183. *Id.* at 242.

184. *Id.* at 243 (first citing *Davis*, 26 N.Y.3d at 587, 46 N.E.3d at 630, 26 N.Y.S.3d at 247 (Stein, J., dissenting); and then citing *McNulty*, 100 N.Y.2d at 233, 792 N.E.2d at 166, 762 N.Y.S.2d at 16).

185. *Id.* at 243, 245.

186. N.Y. PUB. HEALTH LAW § 3369-b (McKinney 2018).

legislation, the Compassionate Care Act, was signed into law by Governor Andrew Cuomo in July 2014.¹⁸⁷ At a perfunctory level, the goal of the program is simple—to provide qualifying patients with legitimate healthcare conditions with access to non-smokable forms of medical marijuana that can ease their pain and suffering.¹⁸⁸ However, establishing a functional regulatory scheme for the program was difficult and time-consuming, especially given the State’s lengthy administrative process.¹⁸⁹ As such, the program was slowly implemented over the next eighteen months and only became operational in January 2016.¹⁹⁰

In order to obtain medical marijuana, a patient must suffer from a “severe debilitating or life-threatening condition.” At the law’s inception, this included: cancer, HIV/AIDS, ALS, MS, Parkinson’s disease, epilepsy, inflammatory bowel disease, Huntington’s disease, neuropathy, and a spinal cord injury with intractable spasticity (with some limitations).¹⁹¹ In addition, this qualifying condition must also be clinically accompanied by a complicating condition such as Cachexia or wasting syndrome, severe or chronic pain that results in a substantial functional limitation, severe nausea, severe or persistent muscle spasms, or seizures.¹⁹² Should a patient believe that they have a qualifying condition, they must enroll online with the DOH, who refers them to a State-certified physician for evaluation.¹⁹³ If the certified provider

187. *Id.*; Press Release, N.Y. Governor’s Office, Governor Cuomo Signs Bill to Establish Comprehensive Medical Marijuana Program (July 7, 2014), <https://www.governor.ny.gov/news/governor-cuomo-signs-bill-establish-comprehensive-medical-marijuana-program> [hereinafter Creation Press Release].

188. Compassionate Care Act, S. Res. A06357E (N.Y. 2013); *see* Creation Press Release, *supra* note 187; N.Y. DEP’T OF HEALTH, TWO-YEAR REPORT: MEDICAL USE OF MARIJUANA UNDER THE COMPASSIONATE CARE ACT (July 2016) [hereinafter TWO-YEAR REPORT 2016].

189. *See* TWO-YEAR REPORT 2016, *supra* note 188, at 1–2; *see also* Press Release, N.Y. Governor’s Office, NYS Department of Health Announces January 7 Launch of the Medical Marijuana Program (Jan. 5, 2016), https://www.health.ny.gov/press/releases/2016/2016-01-05_launch_of_medical_marijuana_program.htm [hereinafter Announcement Press Release] (noting that the launch of the medical marijuana program occurred 18 months after the Compassionate Care Act was signed into law).

190. *See* TWO-YEAR REPORT 2016, *supra* note 188, at 1; Announcement Press Release, *supra* note 189.

191. 10 N.Y.C.R.R. § 1004.2(a)(8) (2018); *see* N.Y. PUB. HEALTH LAW § 3360(7)(i) (McKinney 2018) (listing the original conditions under the definition of “serious condition” before chronic pain was added, but also giving the commissioner of health the authority to add additional conditions).

192. PUB. HEALTH § 3360(7); 10 N.Y.C.R.R. § 1004.2(a)(9).

193. N.Y. PUB. HEALTH LAW §§ 3361–3363 (McKinney 2018); 10 N.Y.C.R.R. §§ 1004.2–1004.3 (2018); *see also* *Frequently Asked Questions*, N.Y.S. DEPT. OF HEALTH, https://www.health.ny.gov/regulations/medical_marijuana/faq.htm (last updated May 2019)

agrees that the patient qualifies for medical marijuana, both the patient and provider must submit additional information to DOH so the patient can be certified.¹⁹⁴ Once the patient is approved by DOH, they are then given a State-issued medical marijuana registration card, which can be used at a number of State-approved dispensaries to buy appropriate amounts of medical marijuana.¹⁹⁵

While the program's goal was well-defined and its starting framework was simple enough, it was initially hampered by a wealth of efficiency and logistical issues that oftentimes frustrated the program's goals.¹⁹⁶ For example, at the outset, there was a noted issue with product supply, driven primarily by the fact that the State had only approved a select few companies for the growth and manufacture of medical marijuana.¹⁹⁷ Patients had a paucity of options when it came to dispensaries, the lack of availability discouraged some people from participating in the program, and those that did enroll faced higher prices due to demand that outstripped the circumscribed supply of product.¹⁹⁸

[hereinafter FAQ] (providing a broad overview of New York's Medical Marijuana Program, including instructions on how to register, locations and processes of dispensaries, pricing of products, program history, etc.).

194. PUB. HEALTH §§ 3361–3363; 10 N.Y.C.R.R. §§ 1004.2–1004.3; FAQ, *supra* note 193.

195. PUB. HEALTH §§ 3361–3363; 10 N.Y.C.R.R. §§ 1004.2–1004.3 (limiting medical marijuana prescriptions to non-smokable forms or product and dosages lasting no more than thirty days).

196. *See* TWO-YEAR REPORT 2016, *supra* note 188, at 12–13 (providing a list of recommendations to remedy issues like limited patient access, lack of certified providers, over-restrictive manufacturing requirements, pricing, etc.); *see also* DRUG POLICY ALLIANCE, ASSESSING NEW YORK'S MEDICAL MARIJUANA PROGRAM: PROBLEMS OF PATIENT ACCESS AND AFFORDABILITY 8–9 (June 2016), <http://www.drugpolicy.org/sites/default/files/NY%20MMJ%20Implementation%20Report%20Q1%20June%2013%202016.pdf>; *The New York Medical Marijuana Program: 2016 Bill Summaries*, COMPASSIONATE CARE NY (May 9, 2016) [hereinafter *2016 Bill Summaries*], http://www.compassionatecareny.org/wp-content/uploads/CCNY-2016-Bills-Fact-Sheet_Updated-May-13.pdf (summarizing a number of proposed bills aimed at fixing perceived shortcomings in the program).

197. *See* DRUG POLICY ALLIANCE, *supra* note 196, at 6; Press Release, N.Y.S. Dep't. of Health, NYSDOH Announces Ability for Wholesaling of Medical Marijuana Products and Removes Cap on Number of Products Available to Patients (Dec. 8, 2016), https://www.health.ny.gov/press/releases/2016/2016-12-08_wholesaling_of_medical_marijuana_products.htm [hereinafter *Wholesaling Press Release*]; *2016 Bill Summaries*, *supra* note 196.

198. *See* DRUG POLICY ALLIANCE, *supra* note 196, at 7–8; *Wholesaling Press Release*, *supra* note 197; *2016 Bill Summaries*, *supra* note 196; *see also* Matthew Hamilton, *Discounts Planned for Repeat New York Medical Marijuana Customers*, TIMESUNION (Jan. 29, 2017, 11:04 PM), <https://www.timesunion.com/local/article/Discounts-planned-for-repeat-New-York-medical-10893034.php> (referencing the prohibitive nature of the high

The overall quantity of medical marijuana was not the only supply concern, as New York had also tightly restricted the forms that medical marijuana could be dispensed in such that patients had a limited array of products from which to choose.¹⁹⁹ Additionally, many felt that the program's parameters were underinclusive and did not allow enough patients to qualify for medical marijuana, counterintuitively stunting its potential growth and undercutting its primary purpose.²⁰⁰ Further, even when patients did have the appropriate conditions to qualify for the program, there was a shortage of State-approved providers to certify them, and many non-approved providers were wholly uninformed as to what the program required and how patients could get involved.²⁰¹

In response to these initial growing pains, New York embarked on an ambitious campaign to revise the program, seeking to increase patient access and provide an improved user experience while simultaneously maintaining common-sense restrictions.²⁰² In the 2016–2017 *Survey* year alone, the State proposed and passed regulations adding chronic pain as a complicating condition, allowing nurse practitioners and physician assistants to certify patients, and lifting manufacturing caps that allowed additional State-approved companies to begin growing and dispensing medical marijuana, among other things.²⁰³ This *Survey* year, they have gone even further.

On August 1, 2017, in an attempt to decrease prices and increase

costs of medical marijuana).

199. See DRUG POLICY ALLIANCE, *supra* note 196, at 7–9; TWO-YEAR REPORT 2016, *supra* note 188, at 4, 12; Press Release, N.Y.S. Dep't of Health, New York State Department of Health Announces New Regulations to Improve State's Medical Marijuana Program for Patients, Practitioners, and Registered Organizations (Aug. 10, 2017), https://www.health.ny.gov/press/releases/2017/2017-08-10_new_mmp_regulations.htm [hereinafter Improvement Press Release] (alluding to the lack of medical marijuana forms available to patients prior to the new regulations); 2016 *Bill Summaries*, *supra* note 196.

200. See DRUG POLICY ALLIANCE, *supra* note 196, at 2, 8; TWO-YEAR REPORT 2016, *supra* note 188, at 12–13; 2016 *Bill Summaries*, *supra* note 196.

201. See DRUG POLICY ALLIANCE, *supra* note 196, at 2, 8; TWO-YEAR REPORT 2016, *supra* note 188, at 12–13; 2016 *Bill Summaries*, *supra* note 196; see also 10 N.Y.C.R.R. §§ 1004.1(a)(2), 1004.2 (2018); Press Release, N.Y. State Dep't of Health, NYSDOH Announces Expansion of Medical Marijuana Program (Nov. 22, 2016), https://www.health.ny.gov/press/releases/2016/2016-11-22_medical_marijuana_program_expansion.htm [hereinafter Expansion Press Release].

202. Expansion Press Release, *supra* note 201.

203. See 10 N.Y.C.R.R. §§ 1004.1(2), 1004.2(a)(8)(xi); see also Expansion Press Release, *supra* note 201; Wholesaling Press Release, *supra* note 197; Press Release, N.Y. State Dep't of Health, NYSDOH Announces Chronic Pain to Be Added As Qualifying Condition for Medical Marijuana (Dec. 1, 2016), https://www.health.ny.gov/press/releases/2016/2016-12-01_chronic_pain_condition_added.htm (though the rulemaking and final addition was not

complete until March of 2017).

the geographical availability and overall supply of medical marijuana, the DOH announced that it had authorized five additional companies to manufacture and dispense medical marijuana.²⁰⁴ On November 11, 2017, Governor Cuomo signed a bill adding post-traumatic stress disorder (PTSD) as a qualifying medical condition, expanding access to veterans and others who had suffered traumatic experiences.²⁰⁵ On December 27, 2017, a number of DOH regulations took force that grew the program even further.²⁰⁶ For starters, these regulations broadened the type of approved medical marijuana products that could be sold, expanding from pills, oils, and vapors to products “including topicals such as ointments, lotions and patches; solid and semi-solid products, including chewable and effervescent tablets and lozenges; and certain non-smokable forms of ground plant material.”²⁰⁷ These regulations also shortened the length of the course required for practitioners to become certified, streamlined manufacturing requirements and laboratory testing protocols, increased the ability of registered dispensaries to advertise, and allow patients and prospective patients to discuss products and treatment directly with dispensary representatives.²⁰⁸

On July 12, 2018, the DOH filed emergency regulations that classified opioid use as a qualifying condition and allowed patients to replace a valid opioid prescription with medical marijuana.²⁰⁹ This

204. Press Release, N.Y. State Dep’t of Health, New York State Department of Health Adds Five New Registered Organizations to Medical Marijuana Program (Aug. 1, 2017), https://www.health.ny.gov/press/releases/2017/2017-08-01_mmp.htm. See generally 10 N.Y.C.R.R. § 1004 (2018) (NYSDOH using the parameters of Part 1004 to add companies authorized to manufacture and dispense marijuana).

205. See 10 N.Y.C.R.R. § 1004.2; see also Press Release, N.Y. Governor’s Off., Governor Cuomo Announces Legislative Package to Further Support New York Veterans (Nov. 11, 2017), <https://www.governor.ny.gov/news/video-audio-transcript-governor-cuomo-announces-legislative-package-further-support-new-york>.

206. Press Release, N.Y. State Dep’t of Health, New York State Department of Health Announces New Medical Marijuana Regulations (Dec. 8, 2017), https://www.health.ny.gov/press/releases/2017/2017-12-08_new_medical_marijuana_regulations.htm [Marijuana Regulations Press Release]. See generally 10 N.Y.C.R.R. § 1004 (referencing all updates made in December 2017 regulations).

207. Marijuana Regulations Press Release, *supra* note 206 (specifically referencing and incorporating Improvement Press Release from August 2017); see also Improvement Press Release, *supra* note 199.

208. Marijuana Regulations Press Release, *supra* note 206.

209. See 10 N.Y.C.R.R. § 1004.2; Press Release, N.Y. State Dep’t of Health, New York State Department of Health Announces Opioid Replacement Now a Qualifying Condition for Medical Marijuana (July 12, 2018), https://www.health.ny.gov/press/releases/2018/2018-07-12_opioid_replacement.htm [hereinafter Opioid Press Release #2] (explaining that while the regulations go into

essentially allows patients with severe pain that does not reach the level of “chronic pain” to use medical marijuana and potentially avoid developing opioid dependence, which has quickly become both a State and national health epidemic.²¹⁰ In addition to these regulatory changes, the DOH also created a list of certified providers for patients to consult, allowed for temporary identification cards so patients can receive medical marijuana sooner, set up a financial hardship system for indigent patients, revamped its website to provide patients and providers with information, and engaged in continued research and community dialogue to improve the program.²¹¹

With these changes, New York’s medical marijuana program is rapidly expanding. At the close of the last *Survey* year, statistics showed that the program was serving just over 26,000 patients, with over 1,100 registered practitioners and a noted seventy-seven percent increase in enrollment since the program’s launch.²¹² As of July 10, 2018, just after the close of this *Survey* year, over 62,000 patients were enrolled in the program and the amount of registered practitioners had climbed to over 1,700.²¹³ As of October 2018, those numbers have burgeoned to over 77,000 and just shy of 2,000, respectively.²¹⁴ Prices have dropped as the program has expanded, supply has increased, and the DOH asserts new price-caps every year based on financial statistics obtained from the manufacturers.²¹⁵

While the State has undoubtedly succeeded in expanding access to the medical marijuana program and removing some of the proverbial red tape that existed at its inception, the quest for improvement is still ongoing. For instance, while the pricing of medical marijuana products has improved with the aforementioned changes, it is still expensive for some patients to purchase these products, especially since insurers often

immediate effect on a temporary basis due to emergency, proposed permanent regulations will be published in the State Register on August 1, 2018 and subject to a sixty-day notice and comment period); Press Release, N.Y. State Dep’t of Health, New York State Department of Health Announces Opioid Use to be Added as a Qualifying Condition for Medical Marijuana (June 18, 2018), https://www.health.ny.gov/press/releases/2018/2018-06-18_opioid_use.htm [hereinafter Opioid Press Release #1].

210. 10 N.Y.C.R.R. § 1004.2; Opioid Press Release #2, *supra* note 209; Opioid Press Release #1, *supra* note 209.

211. *See* FAQ, *supra* note 193.

212. Improvement Press Release, *supra* note 199.

213. Opioid Press Release #2, *supra* note 209.

214. *See generally* FAQ, *supra* note 193 (maintaining a continuously updated count of both registered practitioners and certified patients); *see* N.Y. DEP’T OF HEALTH, TWO-YEAR REPORT: MEDICAL USE OF MARIJUANA UNDER THE COMPASSIONATE CARE ACT 4 fig.1, 6 fig.3 (July 2018) [hereinafter TWO-YEAR REPORT 2018].

215. FAQ, *supra* note 193; *see also* TWO-YEAR REPORT 2018, *supra* note 214, at 14.

do not cover expenses related to medical marijuana.²¹⁶ Consequently, legislators in the New York State Assembly recently introduced a bill seeking to classify medical marijuana as a “covered drug” that would authorize State public insurance programs like Medicaid, Child Health Plus, and Workers’ Compensation to cover such prescriptions, while allowing private insurers to cover the same.²¹⁷ The State is also loosening its stance on the home delivery of medical marijuana and trying to work with private employers regarding drug-testing policies that could unfairly result in employee firing for the ingestion of legitimate medical marijuana products.²¹⁸ Moreover, Governor Cuomo’s office just recently announced a set of fifteen “listening sessions” to elicit public comment on the generalized legalization of cannabis and the existing medical marijuana program.²¹⁹ The State is also hopeful that increased access will result in increased revenue for the State, especially since it levies a seven percent excise tax on all medical marijuana activities.²²⁰

Though in its infancy, New York’s medical marijuana program has changed significantly since its inception and is rapidly expanding. A unique initiative with exponential potential, a noble purpose, public fervor, and bipartisan support in an oft-tumultuous political climate—it will be fascinating to see where New York’s medical marijuana program goes in the next *Survey* year, particularly as key elections loom and the State engages in more serious debate about the legalization of

216. FAQ, *supra* note 193; DRUG POLICY ALLIANCE, *supra* note 196, at 7–8; SENATE MAJORITY TASK FORCE ON HEROIN & OPIOID ADDICTION, 2018 REPORT & RECOMMENDATIONS 2 (2018) (concurring that one way to combat the ongoing opioid crisis would be to pass legislation expanding insurance coverage of medical marijuana and thereby allow medical marijuana prescriptions to replace opioid prescriptions); Hamilton, *supra* note 198; *Insurers to Pay for Medical Marijuana in NY*, MARIJUANA DOCTORS (Apr. 27, 2017), <https://www.marijuanadoctors.com/blog/ny-insurers-medical-marijuana/>.

217. Assemb. B. No. 11390, 241th Sess. (N.Y. 2018).

218. Sara E. Payne & Geoffrey A. Mort, *Medical Marijuana in the Workplace: A Current Look at Cannabis Law*, NYSBA, https://www.nysba.org/Journal/2018/Jul/Medical_Marijuana_in_the_Workplace/ (last visited May 19, 2019); Melissa Schiller, *New York Continues to Expand Medical Marijuana Program, Looks for Ways to Improve Patient Access*, CANNABIS BUSINESS TIMES (July 13, 2018), <http://www.cannabisbusinesstimes.com/article/new-york-expand-medical-marijuana-program/>.

219. Noah Potter, *New York State Holds ‘Listening Sessions’ On Cannabis Legalization*, BENZINGA (Oct. 17, 2018), <https://www.benzinga.com/markets/cannabis/18/10/12503027/new-york-state-holds-listening-sessions-on-cannabis-legalization>.

220. *Excise Tax on Medical Marijuana*, N.Y. DEP’T TAX’N & FIN., https://www.tax.ny.gov/pubs_and_bulls/tax_types/med_marijuana_tax.htm (last updated July 18, 2018).

recreational cannabis.

B. Lavern's Law

Governor Cuomo signed “Lavern’s Law” into effect on January 31, 2018.²²¹ The law made amendments to CPLR 203 and CPLR 214-a, the provisions which govern the statute of limitations for medical malpractice claims.²²² Lavern’s Law is notable because it dramatically changes how the statute of limitations is calculated for certain medical malpractice claims.²²³

Prior to Lavern’s Law, pursuant to CPLR 214-a, a patient had two and a half years from the date of the alleged malpractice to commence a medical malpractice action.²²⁴ For claims against a municipality or officer or employee of New York State, a party had ninety days after the date of the alleged malpractice to serve a notice of claim.²²⁵ This allowed for scenarios where diagnosis occurred after the statute of limitations had already expired, therefore precluding the patient from bringing a claim. This was the case for the woman for whom the law is named: Lavern Wilkinson, who died from lung cancer in 2013 after diagnostic imaging from three years earlier revealed a mass in her right lung.²²⁶ By the time she became aware of her diagnosis, it was too late to commence suit.²²⁷

While previous iterations of the bill would have made changes to all medical malpractice claims, the law Governor Cuomo signed, and the changes to the CPLR, only affect medical malpractice claims which allege a failure to diagnose cancer or a malignant tumor.²²⁸ For these claims, the statute of limitations no longer runs from the date of misdiagnosis, but rather the time when the plaintiff knew, or reasonably should have known, about the misdiagnosis.²²⁹ Put another way, the

221. N.Y. Senate Bill No. 7588A, 241st Sess. (2017) (enacted); Bruce Golding, *Cuomo Announces ‘Lavern’s Law’ Deal for Cancer-Related Lawsuits*, NEW YORK POST (Jan. 28, 2018, 5:34 PM), <https://nypost.com/2018/01/28/cuomo-announces-laverns-law-deal-for-cancer-related-lawsuits/>.

222. N.Y. Senate Bill No. 7588A; Golding, *supra* note 221; *see also* N.Y. C.P.L.R. 203 (McKinney Supp. 2019); N.Y. C.P.L.R. 214-a (McKinney Supp. 2019).

223. N.Y. Senate Bill No. 7588A; Golding, *supra* note 221.

224. N.Y. C.P.L.R. 214-a (McKinney 2003); *see* Bruce Golding, *supra* note 221.

225. N.Y. GEN. MUN. LAW § 50-e(1)(a) (McKinney 2016); N.Y. CT. CL. ACT art. 2, § 10(3) (Consol. 2004).

226. Bruce Golding, *supra* note 221.

227. *Id.*

228. *See id.*; *see also* N.Y. C.P.L.R. 203(g) (McKinney Supp. 2019); N.Y. C.P.L.R. 214-a (McKinney Supp. 2019).

229. N.Y. C.P.L.R. 203(g); N.Y. C.P.L.R. 214-a.

2019]

Health Law

845

statute of limitations begins to run when the plaintiff “discovers” the misdiagnosis. Importantly, no matter when a potential plaintiff discovers the misdiagnosis, a claim cannot be brought any more than seven years after the date of the alleged misdiagnosis unless the plaintiff can establish continuous treatment, in which case the statute begins to run on the last date of treatment for such injury, illness, or condition.²³⁰ CPLR 214-a establishes the discovery rule where the statute of limitations is two and a half years, while CPLR 203(g) establishes the discovery rule for all other claims, such as those brought pursuant to Municipal Law §§ 50-e and 50-i and § 10 of the Court of Claims Act.²³¹

The amendments took immediate effect and apply to all negligent acts or omissions occurring after January 31, 2018.²³² The amendment was also made applicable to certain acts which occurred before January 31, 2018.²³³ For claims commenced pursuant to CPLR 203(g), other than those brought pursuant to § 10 of the Court of Claims Act, the amendment covers acts occurring one year and ninety days before the effective date.²³⁴ For claims brought pursuant to § 10 of the Court of Claims Act, which includes claims against the State, the amendment covers acts occurring two years before the effective date.²³⁵ Finally, for claims brought pursuant to CPLR 214-a, the amendment covers acts occurring two and half years before the effective date.²³⁶ Notably, previous iterations of the bill would have covered acts occurring up to seven years before the effective date.²³⁷

The law also allowed for the revival of certain actions which were previously time-barred.²³⁸ Specifically, the law revived any claim which had become time-barred within the ten months preceding the effective date of the amendment.²³⁹ The recently revived claims had to be brought within six months of the effective date of the amendment, after which they were once more time-barred.²⁴⁰ Ten months prior to January 31, 2018 was March 31, 2017. Therefore, any claim alleging a failure to

230. N.Y. C.P.L.R. 203(g); N.Y. C.P.L.R. 214-a.

231. N.Y. C.P.L.R. 203(g); N.Y. C.P.L.R. 214-a; *see* N.Y. GEN. MUN. LAW § 50-e(1)(a) (McKinney 2016); N.Y. CT. CL. ACT art. 2, § 10(3) (Consol. 2004).

232. *See* N.Y. Senate Bill No. 7588A, §§ 4–5, 241st Sess. (2017) (enacted).

233. *Id.* § 6.

234. *Id.*

235. *Id.*

236. *Id.*

237. N.Y. Senate Bill No. 7588A, § 6.

238. *Id.* § 4.

239. *Id.*

240. *Id.*

diagnose cancer which became time-barred between March 31, 2017, and January 31, 2018, could have been successfully brought until July 31, 2018. After this date, the claims became time-barred.²⁴¹

New York State is one of the few states whose medical malpractice statute of limitations does not run from the date of discovery, though this amendment certainly signifies a substantial move towards the majority. It will be interesting to see what impact this broad expansion of the statute of limitations has in New York State courts in the upcoming *Survey* year.

III. FEDERAL LEGISLATION

A. Right to Try

During his first State of the Union Address in January 2018, President Donald Trump gave a ringing endorsement of “Right to Try” legislation, shining the national spotlight on a relatively little-known health law issue.²⁴² The brainchild of libertarian think tank The Goldwater Institute (“Goldwater”), Right-to-Try is legislation that seeks to give people with qualifying life-threatening or terminal medical conditions access to experimental and investigational drugs that have not yet received approval by the U.S. Food and Drug Administration (FDA).²⁴³ Initially drafted and distributed in 2014, Goldwater’s model Right-to-Try legislation spread quickly and was soon up for consideration in almost every state, as well as in Congress.²⁴⁴ It was first passed in Colorado in 2014, and soon became the law in forty-one states, though New York was not one of them.²⁴⁵ Right-to-Try bills had been introduced in New York in 2015 in both the Senate and Assembly, but expired at the end of the legislative session in 2016 when no action was taken.²⁴⁶ They were reintroduced in both chambers once again in January 2017, but had yet to make it out of their respective health

241. *Id.*

242. See Blair Guild, *President Trump Signs “Right to Try Act”*, CBS NEWS (May 30, 2018, 6:05 PM), <https://www.cbsnews.com/news/president-trump-signs-right-to-try-act-today-live-stream/>; see also Lisa Kearns, *Ethical Implications of Right to Try Legislation*, 23 NYSBA HEALTH L. J., no. 1, 28, 30 (2018).

243. Christina Corieri, *The Right to Try*, GOLDWATER INSTITUTE (Oct. 5, 2014), <https://goldwaterinstitute.org/article/right-try/>; see Kearns, *supra* note 242, at 28; *What is Right to Try*, RIGHTOTRY, <http://righttotry.org/about-right-to-try/>.

244. See Kearns, *supra* note 242, at 28; *What is Right to Try*, *supra* note 243.

245. See *What is Right to Try*, *supra* note 243; see also Kearns, *supra* note 242, at 28 (noting that at the time of writing, thirty-eight states had passed Right-to-Try laws).

246. See N.Y. Assembly Bill No. 6889, 238th Sess. (2015); N.Y. Senate Res. 4716 (2015); Kearns, *supra* note 242, at 29.

committees when President Trump signed federal legislation in May 2018 that made Right-to-Try the law of the land, New York included.²⁴⁷

While Right-to-Try has been heralded by many, the Trump administration included, the law really only makes minor changes to a pre-existing federal program serving the same purpose: the FDA's expanded access program.²⁴⁸ Sometimes referred to as the compassionate use program, expanded access had been in existence since the late 1980s and, like Right-to-Try, gave qualifying patients with terminal or life-threatening conditions access to experimental or investigational drugs.²⁴⁹ While there are other minute differences between the programs, the substantive distinction is the simple fact that while expanded access required FDA approval before the patient could receive the medication, Right-to-Try does not—it eliminates the FDA's role in the process.²⁵⁰

Under the expanded access program, the patient and physician would submit an application to the FDA and were required to show that: (1) they had a qualifying serious or life-threatening condition; (2) they were unable to participate in a clinical trial for the drug being sought; (3) there were no satisfactory alternatives to the drug; and (4) use of the drug would not interfere with its clinical development.²⁵¹ As long as the FDA determined that the experimental drug did not pose a greater risk to the patient than the disease itself, its institutional review board would review and sign-off on the application.²⁵² It was then up to the individual pharmaceutical company to decide whether they would fulfill the request.²⁵³ Of note, the FDA approved over ninety-nine percent of applications and averaged a response time of approximately four days, or less than one day in the case of emergencies.²⁵⁴ Under the newly

247. N.Y. Assembly Bill No. 3932, 240th Sess. (2017); N.Y. Senate Res. 2044 (2017); see 21 U.S.C. § 360bbb-0a (2018); Kearns, *supra* note 242, at 28–31.

248. Kearns, *supra* note 242, at 28–31. Compare Corieri, *supra* note 243, with *Expanded Access*, FOOD & DRUG ADMIN. (page last updated June 14, 2018), <https://www.fda.gov/NewsEvents/PublicHealthFocus/ExpandedAccessCompassionateUse/ucm429687.htm> (highlighting the subtle differences between the programs).

249. See Kearns, *supra* note 242, at 28–31; *Expanded Access*, *supra* note 249.

250. See Kearns, *supra* note 242, at 28–31. Compare Corieri, *supra* note 243, with *Expanded Access*, *supra* note 248 (explaining that FDA approval is not required with the Right to Try program); see also Morten Wendelbo & Timothy Callaghan, *What is "Right to Try" and Will it Help Terminally Ill Patients?*, CBS NEWS (May 31, 2018, 9:42 AM), <https://www.cbsnews.com/news/right-to-try-bill-trump-signing-will-it-help-terminally-ill-patients-today-2018-05-30/>.

251. *Expanded Access*, *supra* note 248.

252. See *id.*; see Kearns, *supra* note 242, at 28–31.

253. See Kearns, *supra* note 242, at 28.

254. *Id.* See generally Jonathan P. Jarrow et al., *Overview of FDA's Expanded Access*

signed federal Right-to-Try legislation, the patient must still meet the initial four qualifying criteria, and must also submit a written certificate of informed consent.²⁵⁵ However, they do not have to garner FDA approval, and instead can directly request medication from the pharmaceutical company.²⁵⁶ Additionally, while expanded access regulations left it up to the FDA's institutional review board to determine which experimental and investigational drugs should or should not be administered, the Right-to-Try bill circumvents this process and specifically authorizes patients to request any drug that has passed phase one of FDA clinical investigation.²⁵⁷

Though on paper the differences between the iterations of the experimental medication program are few, and Right-to-Try has theoretically made the process simpler, there has been a wealth of arguments as to whether this legislation is realistically beneficial to the United States. For instance, there are a number of spirited policy debates surrounding the wisdom and practicality of removing the FDA from the process, especially since they are experts in the pharmaceutical area; have special insight given the fact that they oversee clinical trials, investigations, and phasing; and had an impeccable track-record when it came to approving applications under the expanded access program.²⁵⁸

Was the removal of bureaucracy and resulting gain in time/efficiency and individual control/participation worth the loss of expertise and oversight? Are those gains in time/efficiency and individual control/participation theoretical or will they be realized? The debate between expanded access and Right-to-Try aside, some critics take issue with both programs due to the fact that neither program mandates the pharmaceutical company to provide the requested drug, and neither program requires insurers to cover or contribute towards these medications.²⁵⁹ While the wisdom of these provisions is up for debate, as is the question about whether Right-to-Try or expanded access is a better program, the fact remains that Right-to-Try is now the law of the land. It will be interesting to see how the program develops in the coming years and whether there are any practical differences in the

Program for Investigational Drugs, 51 *THER INNOV. REGUL. SCI.* 2 (2017).

255. See 21 U.S.C. § 360bbb-0a (2018); Kearns, *supra* note 242, at 28–30.

256. 21 U.S.C. § 360bbb-0a; Kearns, *supra* note 242, at 28–30; Wendelbo, *supra* note 250.

257. Wendelbo, *supra* note 250.

258. Kearns, *supra* note 242, at 28–31 (explaining and contributing to the ongoing policy debate and detailing what she perceives to be several pros/cons of Right-to-Try legislation on both the state and federal levels).

259. *Id.*

2019]

Health Law

849

access to and efficiency of the program.

CONCLUSION

We anticipate additional clarification on the scope of a physician's duty to third parties in upcoming *Survey* years as well as more advancements with medical marijuana laws. It will be interesting to see whether the Fourth and First Departments adopt the expert disclosure standard of the Second and Third Departments and how far courts are willing to expand the absolute privilege in quasi-judicial proceedings in light of the Court of Appeals' limitation. Finally, it will be interesting to see what impact the broad expansion of the statute of limitations in cancer and malignant tumor cases has on New York State courts.