HEALTH LAW

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INTRODUCTION

In this *Survey* year, the First Department addressed whether a plaintiff waives the physician-patient relationship for prior injuries not specifically at issue in a lawsuit. The decision from the First Department suggests an emerging split between the departments on the issue. The Fourth Department determined that consulting an attorney about a potential medical malpractice claim does not necessarily sever a continuous treatment relationship. The Second Department found a question of fact as to whether the continuous treatment doctrine may apply to toll the statute of limitations as to a retired provider. The Fourth Department explained that with a proper foundation, an expert may rely on hearsay as part of the basis for the expert's opinions. The Second Department issued the first appellate decision on the discoverability of audit trails.

On the legislative side, New York State took steps to ensure access to health care in response to developments in other states and on the federal level. The New York State Legislature passed the Reproductive Health Act, protecting access to reproductive health services for patients and the right to provide such services. The New York State Department of Health amended its regulations to firm up discrimination protections,

including extending protections to transgender individuals when accessing health care.

I. NEW YORK STATE CASE LAW

A. Brito v. Gomez*: Discoverability of Prior Medical Records*

In this First Department case, the plaintiff was in a motor vehicle accident ("MVA") and subsequently brought a personal injury action.[1] The plaintiff's bill of particulars alleged she suffered injuries to her cervical spine, lumbar spine, and left shoulder.[2] The plaintiff's damages also included loss of enjoyment of life.[3]

Testimony elicited at the plaintiff's deposition revealed she underwent surgeries on both knees prior to the MVA at issue.[4] The plaintiff further testified that these surgeries resulted in her using a cane to ambulate and "may have affected her ability to wear heels."[5] Nonetheless, the plaintiff alleged that her back and neck injuries sustained in the MVA prevented her from wearing heels and made it more difficult to walk.[6]

The defendants subsequently served demands for authorizations to obtain medical records from the facilities where plaintiff was treated for her prior knee surgeries.[7] Without responding to the defendants' request, the plaintiff filed the Note of Issue.[8] In turn, the defendants moved to strike the Note of Issue.[9]

The plaintiff opposed the motion on the basis that the requested records were unrelated to the action.[10] The defendants justified their request by pointing to the plaintiff's bill of particulars, which stated that plaintiff suffered injuries causing, *inter alia*, negative effects on her

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1. Brito v. Gomez, 168 A.D.3d 1, 2–3, 88 N.Y.S.3d 166, 168 (1st Dep't 2018).
2. *Id.* at 3, 88 N.Y.S.3d at 168.
3. *Id.* at 2, 88 N.Y.S.3d at 168.
4. *Id.* at 3, 88 N.Y.S.3d at 168.
5. *Id.*
6. *Brito*, 168 A.D.3d at 3, 88 N.Y.S.3d at 168.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

"day-to-day existence, activities, [and] functions . . ."[11] The defendants also referenced the plaintiff's deposition testimony about the prior surgeries' effect on her ability to walk and wear heels.[12] The trial court ordered that the plaintiff need not provide the authorizations for the knee surgery records and did not strike the Note of Issue.[13] Defendants appealed the decision.[14]

In assessing whether the defendants had a right to the authorizations, the court began by noting that the New York Civil Practice Law and Rules (CPLR) calls for disclosure of medical records and the opportunity for a medical exam when a litigant's physical or mental condition is at issue.[15] Such disclosure, however, is subject to the physician-patient privilege.[16] The privilege is waived when "a party affirmatively places his or her physical or mental condition in controversy."[17] The court further stated that to effectuate a waiver of the privilege, a party "must do more than simply deny the allegations in the complaint—he or she must affirmatively assert the condition either by way of counterclaim or to excuse the conduct complained of."[18] The party seeking the medical record disclosure has the burden of demonstrating that the condition is in controversy.[19]

Applying this standard to the case at bar, the First Department noted that "neither plaintiff's bill of particulars nor her deposition testimony places her prior knee injuries in controversy."[20] The court concluded that the plaintiff had only affirmatively placed her spinal and shoulder injuries at issue.[21]

Next, the court addressed the defendants' argument that the records were subject to disclosure because plaintiff asserted a lost earnings claim.[22] After reviewing its precedent, the court concluded that medical

11. *Brito*, 168 A.D.3d at 3, 88 N.Y.S.3d at 168.

12. *Id.*

13. *Id.* at 4, 88 N.Y.S.3d at 169.

14. *Id.*

15. *Id.* (citing N.Y. C.P.L.R.§ 3121(a) (McKinney 2018)).

16. *Brito*, 168 A.D.3d at 4, 88 N.Y.S.3d at 169.

17. *Id.* at 4–5, 88 N.Y.S.3d at 169 (first citing Cynthia B. v. New Rochelle Hosp. Med. Ctr., 60 N.Y.2d 452, 456–57, 458 N.E.2d 363, 366, 470 N.Y.S.2d 122, 125 (1983); then citing Koump v. Smith, 25 N.Y.2d 287, 292, 250 N.E.2d 857, 860, 303 N.Y.S.2d 858, 862 (1969)).

18. *Id.* at 5, 88 N.Y.S.3d at 169 (quoting Dillenbeck v. Hess, 73 N.Y.2d 278, 288, 536 N.E.2d 1126, 1132, 539 N.Y.S.2d 707, 713–14 (1989)).

19. *Id.* (citing *Dillenbeck*, 73 N.Y.2d at 288, 536 N.E.2d at 1133, 539 N.Y.S.2d at 714).

20. *Id.* at 5, 88 N.Y.S.3d at 170.

21. *Brito*, 168 A.D.3d at 5, 88 N.Y.S.3d at 170.

22. *Id.* at 5–6, 88 N.Y.S.3d at 170–71.

records disclosure in the context of a lost earnings claim is only required when the plaintiff alleges that the preexisting injuries were exacerbated or aggravated as a result of the injury at issue in the action.[23] Because the plaintiff did not allege that her prior knee injuries were aggravated by the car accident, the records were not subject to disclosure.[24]

Finally, the court rejected the defendants' argument that the records were discoverable to assess the plaintiff's loss of enjoyment of life claim, holding that "a claim for loss of enjoyment of life is not a separate item of recoverable damages, but a factor in assessing pain and suffering."[25] The defendants cited to Second Department cases standing for the proposition that a party "places his or her entire medical condition in controversy through 'broad allegations of physical injuries and claimed loss of enjoyment of life due to those injuries.'"[26] The court was not persuaded by the Second Department's reasoning and felt it did not follow the Court of Appeals' precedent.[27]

One Justice disagreed with the holding and wrote a lengthy dissent.[28] The dissent noted that the First Department previously permitted disclosure of medical records where a preexisting condition may have caused the same functional deficits or pain alleged as

23. *Id.* at 6, 88 N.Y.S.3d at 170 (first citing McGlone v. Port Auth. of N.Y. & N.J., 90 A.D.3d 479, 480, 934 N.Y.S.2d 161, 162 (1st Dep't 2011); then citing Rega v. Avon Prods., Inc., 49 A.D.3d 329, 330, 854 N.Y.S.2d 688, 689 (1st Dep't 2008); then citing Noble v. Ackerman, 216 A.D.2d 140, 140, 629 N.Y.S.2d 198, 198 (1st Dep't1995); and then citing Ciancio v. Woodlawn Cemetery Ass'n, 210 A.D.2d 9, 9–10, 618 N.Y.S.2d 816, 817 (1st Dep't 1994)).

24. *Id.* at 6, 88 N.Y.S.3d at 171 (first citing Felix v. Lawrence Hosp. Ctr., 100 A.D.3d 470, 471, 953 N.Y.S.2d 505, 506 (1st Dep't 2012); then citing Tomaino v. 209 E. 84 St. Corp., 68 A.D.3d 527, 529, 891 N.Y.S.2d 51, 53 (1st Dep't 2009)).

25. *Id.* (citing McDougald v. Garber, 73 N.Y.2d 246, 255–56, 536 N.E.2d 372, 375, 538 N.Y.S.2d 937, 940 (1989)).

26. *Brito*, 168 A.D.3d at 7, 88 N.Y.S.3d at 171–72 (first quoting Greco v. Wellington Leasing L.P., 144 A.D.3d 981, 982, 43 N.Y.S.3d 64, 66 (2d Dep't 2016); then citing Bravo v. Vargas, 113 A.D.3d 577, 578, 978 N.Y.S.2d 313, 315 (2d Dep't 2014); then citing Orlando v. Richmond Precast, Inc., 53 A.D.3d 534, 535, 861 N.Y.S.2d 765, 766 (2d Dep't 2008); and then citing Vanalst v. City of New York, 276 A.D.2d 789, 789, 715 N.Y.S.2d 422, 423 (2d Dep't 2000)).

27. *Id.* at 8, 88 N.Y.S.3d at 172.

28. *Id.* at 9–21, 88 N.Y.S.3d at 173–81 (Friedman, J., dissenting).

injuries.[29] The dissent, however, did not go so far as to suggest adopting the Second Department's "expansive" view of the scope of discovery.[30]

Obviously, the *Brito* decision represents a split between the First and Second Departments. Although civil discovery is intended to be broad, the First Department limited defendants' ability to build a case against alleged injuries by blocking access to records of plaintiffs' preexisting conditions.[31]The defendants in *Brito* will not be able to show the true extent of the plaintiff's injuries without records reflecting that the plaintiff's ability to ambulate was impaired prior to the accident. Consequently, the First Department's position could increase the possibility of awards to plaintiffs for preexisting injuries not caused by defendants' alleged negligence.

B. Clifford v. Kates*: Continuous Treatment and Consulting an Attorney*

The Fourth Department issued a Memorandum and Order related to the continuous treatment doctrine in a medical malpractice case in February, 2019.[32] Plaintiff Darlene Clifford filed suit on December 16, 2013 for alleged malpractice related to a hip replacement surgery that took place on July 9, 2008.[33] The defendants moved for summary judgment on statute of limitations grounds.[34] New York's medical malpractice statute of limitations is two-and-one-half years.[35]

The defendants argued that the plaintiff's continuous treatment ended upon her last treatment by defendant Dr. Kates on January 26, 2011, at a clinic operated by the hospital defendants.[36] The plaintiff argued that because she continued to receive treatment at the clinic until November 26, 2011, the statute of limitations was tolled and the action timely filed.[37] The trial court sided with the defendants, determining that the plaintiff failed to establish continuous treatment after January 14, 2009 because she received no care or treatment from Dr. Kates or the clinic for two years following that date, expressed dissatisfaction with

29. *Id.* at 18–19, 88 N.Y.S.3d at 179 (first citing Walters v. Sallah, 109 A.D.3d 401, 401, 970 N.Y.S.2d 219, 220 (1st Dep't 2013); then citing Bennett v. Gordon, 99 A.D.3d 539, 540, 952 N.Y.S.2d 166, 167 (1st Dep't 2012); and then citing Caplow v. Otis Elevator Co., 176 A.D.2d 199, 200, 574 N.Y.S.2d 321, 322 (1st Dep't 1991)).

30. *Id.* at 18, 88 N.Y.S.3d at 179.

31. *See generally Brito*, 168 A.D.3d 1, 88 N.Y.S.3d 166 (holding medical privilege is only waived where injuries are affirmatively placed in controversy).

32. Clifford v. Kates, 169 A.D.3d 1375, 1375, 93 N.Y.S.3d 477, 478 (4th Dep't 2019).

33. *Id.*

34. *Id.* at 1375–76, 93 N.Y.S.3d at 479.

35. *See* N.Y. C.P.L.R. § 214-a (McKinney 2019).

36. *Clifford*, 169 A.D.3d at 1376, 93 N.Y.S.3d at 479.

37. *Id.*

Dr. Kates's treatment, pursued the advice of other doctors, and obtained HIPAA releases for potential litigation.[38] Plaintiff appealed.[39]

As a threshold matter, the court found the plaintiff's claims against the hospital defendants to be timely for continuous treatment at the clinic through November 30, 2011and reversed the lower court's dismissal as to those allegations.[40] In addition, the court determined the plaintiff raised a question of fact about whether she intended to end her relationship with Dr. Kates on January 14, 2009.[41] The court noted that application of the continuous treatment doctrine depends on an "'on-going relationship of trust and confidence between the plaintiff and the physician."[42]

The court explained that continuous treatment analysis "focus[es] on the patient" and the patient's "continuing trust and confidence" in the physician.[43] The plaintiff submitted evidence that she continued to seek treatment from the clinic as her only "viable and stable avenue for treatment" and indeed, even asked Dr. Kates to perform corrective hip surgery in July 2011.[44] On January 26, 2011, Dr. Kates ordered an ultrasound for the plaintiff, who expected to follow up with Dr. Kates to discuss whether surgery was necessary.[45] The court concluded that the evidence did not establish that either Dr. Kates or the plaintiff considered their relationship ended after January 14, 2009, despite a gap in treatment and consultation with other providers.[46] In addition, citing a First Department case, the court opined that obtaining her medical records and consulting attorneys in 2010 to explore the possibility of a medical malpractice suit did not terminate the plaintiff's course of continuous treatment.[47]

In contrast, the Third Department previously concluded that contacting attorneys upon belief that medical malpractice occurred in

38. *Id.*

39. *Id.*

40. *Id.* at 1377, 93 N.Y.S.3d at 479.

41. *Clifford*, 169 A.D.3d at 1378, 93 N.Y.S.3d at 480.

42. *Id.* at 1377, 93 N.Y.S.3d at 480 (quoting Ushkow v. Brodowski, 244 A.D.2d 931, 932, 665 N.Y.S.2d 149, 150 (4th Dep't 1997)).

43. *Id.* (first quoting Lohnas v. Luzi (Appeal No. 2), 140 A.D.3d 1717, 1718, 33 N.Y.S.3d 637, 639 (4th Dep't 2016), *aff'd*, 30 N.Y.3d 752, 71 N.Y.S.3d 404, 94 N.E.3d 892 (2018); then quoting Gomez v. Katz, 61 A.D.3d 108, 115, 874 N.Y.S.2d 161, 167 (2d Dep't 2009)).

44. *Id.* at 1378, 93 N.Y.S.3d at 480.

45. *Id.* at 1378, 93 N.Y.S.3d at 480–81

46. *Id.* at 1378, 93 N.Y.S.3d at 481.

47. *Id.* at 1378, 93 N.Y.S.3d at 480 (citing Guarino v. Sharzer, 281 A.D.2d 188, 189, 721 N.Y.S.2d 631, 632 (1st Dep't 2001)).

addition to seeking treatment from other physicians "plainly severed whatever relationship of trust and confidence that previously may have been said to exist between plaintiff and defendant."[48] Continuous treatment doctrine analyses are always significantly fact-driven and these cases are no exception.[49] It appears that whether a plaintiff's consultation with attorneys severs a continuous treatment relationship depends greatly on the surrounding circumstances.

C. Cohen v. Gold*: Continuous Treatment and Retirement*

In October 2018, the Second Department found that the continuous treatment doctrine may apply to a retired dentist where treatment was continuously rendered to a plaintiff by other dentists in his office after his retirement.[50] If adopted by the other departments, this decision would mean that dentists or physicians would need to be wary of lawsuits for an uncertain period after they are no longer practicing.[51] Such lawsuits could be brought based on the treatment provided by a retired physician or dentist many years earlier.[52]

In *Cohen v. Gold*, the plaintiff filed suit alleging inadequate treatment for abnormalities indicative of periodontal disease, beginning in 2009.[53] She commenced the dental malpractice lawsuit in June 2015.[54] The defendants moved for summary judgment dismissing the plaintiff's claims as time-barred for allegations related to treatment prior to December 2012, more than two-and-one-half years before the complaint was filed.[55] The contested time-barred allegations included any treatment by defendant Dr. Gold, who retired in June 2012.[56] The

48. Schloss v. Albany Med. Ctr., 278 A.D.2d 614, 615, 719 N.Y.S.2d 148, 149 (3d Dep't 2000) (citing Allende v. NYC Health &Hosps. Corp., 90 N.Y.2d 333, 339, 683 N.E.2d 317, 321, 660 N.Y.S.2d 695, 699 (1997)).

49. *See id.*at 614–15 (analyzing the record for details about the plaintiff's providers, treatment dates, and consults with attorneys); *Clifford*, 169 A.D.3d at 1378, 93 N.Y.S.3d at 480 (same); *Allende*, 90 N.Y.2d at 338–40, 683 N.E.2d at 320–21, 660 N.Y.S.2d 698–99 (same).

50. Cohen v. Gold, 165 A.D.3d 879, 883, 86 N.Y.S.3d 538, 542 (2d Dep't 2018).

51. *See id.* at 881–83, 86 N.Y.S.3d at 541–42 (denying summary judgment for defendant who retired three years prior to commencement of the action)

52. *See Id.* at 883, 86 N.Y.S.3d at 542 (determining continuous treatment may apply to defendant who retired in June 2012 for allegations spanning 2009 to 2015).

53. *Id.* at 881, 86 N.Y.S.3d at 541.

54. *Id.*

55. *Id.* at 879–80, 86 N.Y.S.3d at 540; *see* N.Y. C.P.L.R. § 214-a (McKinney 2019) (setting a statute of limitations for dental malpractice of two-and-one-half years).

56. *Cohen*, 165 A.D.3d at 881, 86 N.Y.S.3d at 541.

trial court granted the motion and dismissed the complaint as asserted against Dr. Gold.[57] Plaintiff appealed.[58]

The Second Department reversed, finding a question of fact as to whether the continuous treatment doctrine tolled the statute of limitations in regards to Dr. Gold.[59] The court noted that the continuous treatment doctrine applies when the alleged wrongful acts or omissions involve a continuous course of treatment related to the same original condition or complaint.[60] The court explained that "[t]he critical inquiry is . . . whether the plaintiff continued to seek treatment for the same or related conditions giving rise to his or her claim of malpractice . . . ."[61]

The court determined that the plaintiff brought a viable continuous treatment claim.[62] She alleged she was treated continuously by the defendants from 2009 through 2015 for symptoms ultimately traced to the cause of her injuries, abnormal and severe periodontal disease.[63] The court went on to indicate that the continuous treatment doctrine could be applied to Dr. Gold despite his retirement.[64] The court found an issue of fact regarding the relationship between the dentists in the practice.[65]

The cases cited by the court indicate that the continuous treatment doctrine may be applied to physicians or dentists after they have left the practice at which they treated the plaintiff.[66] These cases, however,

57. *Id.*

58. *Id.*

59. *Id.* at 883, 86 N.Y.S.3d at 542 (first citing Oviedo v. Weinstein, 102 A.D.3d 844, 847, 958 N.Y.S.2d 467, 469 (2d Dep't 2013); then citing Ozimek v. Staten Island Physicians Practice, P.C., 101 A.D.3d 833, 835, 955 N.Y.S.2d 650, 652 (2d Dep't 2012); and then citing Kimiatek v. Post, 240 A.D.2d 372, 373, 658 N.Y.S.2d 403, 404 (2d Dep't 1997)).

60. *Id.* at 882, 86 N.Y.S.3d at 541 (first citing Lohnas v. Luzi, 30 N.Y.3d 752, 94 N.E.3d 892, 71 N.Y.S.3d 404 (2018); then citing Young v. NYC Health &Hosps. Corp., 91 N.Y.2d 291, 693 N.E.2d 196, 670 N.Y.S.2d 169 (1998)).

61. *Cohen*, 165 A.D.3d at 882, 86 N.Y.S.3d at 542 (citing Couch v. Cty. of Suffolk, 296 A.D.2d 194, 197, 746 N.Y.S.2d 187, 190 (2d Dep't 2002)).

62. *Id.* at 883, 86 N.Y.S.3d at 542–43.

63. *Id.* at 883, 86 N.Y.S.3d at 542.

64. *Id.* (first citing Watkins v. Fromm, 108 A.D.2d 233, 240–42, 488 N.Y.S.2d 768, 773–76 (2d Dep't 1985); then citing Mule v. Peloro, 60 A.D.3d 649, 650, 875 N.Y.S.2d 146, 148 (2d Dep't 2009)).

65. *Id.* (first citing Oviedo v. Weinstein, 102 A.D.3d 844, 847, 958 N.Y.S.2d 467, 469 (2d Dep't 2013); then citing Ozimek v. Staten Island Physicians Practice, P.C., 101 A.D.3d 833, 835, 955 N.Y.S.2d 650, 652 (2d Dep't 2012); and then citing Kimiatek v. Post, 240 A.D.2d 372, 373, 658 N.Y.S.2d 403, 404 (2d Dep't 1997)).

66. *Cohen*, 165 A.D.3d at 883, 86 N.Y.S.3d at 542 (first citing *Watkins*, 108 A.D.2d at 240–42, 488 N.Y.S.2d at 773–76; then citing *Mule*, 60 A.D.3d at 650, 875 N.Y.S.2d at 148; then citing *Oviedo*, 102 A.D.3d at 847, 958 N.Y.S.2d at 469; then citing *Ozimek*, 101 A.D.3d at 835, 955 N.Y.S.2d at 652; and then citing *Kimiatek*, 240 A.D.2d at 373, 658 N.Y.S.2d at 404)).

involved a particular relationship between the practice and the patient and the physicians within the practice. For example, in *Watkins v. Fromm* the defendants' deposition testimony supported a finding that the patient was considered a patient of the entire group rather than a patient of any particular doctor.[67] As a result, the plaintiff may not have even been aware when two of the defendant physicians left the group.[68] He may not have known that they were no longer providing him treatment and that he needed to bring suit against them to preserve his claim.[69] Therefore, the court determined that fairness dictated tolling of the statute of limitations as to the physicians who left the practice based on the unique factual situation.[70]

In *Kimiatek v. Post*, the plaintiff's dentist, defendant Dr. Post, sold his practice to defendant Dr. Stein.[71] Subsequently, however, the defendants continued to work together on a regular basis, sharing office space in a manner that gave the appearance of sharing a single practice.[72] Moreover, Dr. Post treated the plaintiff patient following the sale of his practice.[73] Therefore, the court found an issue of fact as to whether the relationship between the defendants could serve as a basis for applying the continuous treatment doctrine to Dr. Post.[74]

Although in *Cohen* the court found a question of fact as to whether the continuous treatment provided by the practice could allow the tolling of the statute of limitations as to Dr. Gold, the facts would have to show a continued relationship between Dr. Gold and the remaining providers or with the patient for the statute to be tolled as to Dr. Gold's treatment.[75] Research revealed no decisions by the other departments tolling the statute of limitations in situations like that of Dr. Gold.[76] In

67. 108 A.D.2d at 240, 488 N.Y.S.2d at 773.

68. *Id.* at 240; 488 N.Y.S.2d at 774.

69. *Id.* at 241; 488 N.Y.S.2d at 774.

70. *Id.*

71. 240 A.D.2d at 373, 658 N.Y.S.2d at 403.

72. *Id.*

73. *Id.*

74. *Id.* at 373; 658 N.Y.S.2d at 404 (first citing Parker v Jankunas, 227 A.D.2d 537, 642 N.Y.S.2d 959 (2d Dep't 1996); then citing Grippi v. Jankunas, 230 A.D.2d 826, 646 N.Y.S.2d 829 (2d Dep't 1996)).

75. Cohen v. Gold, 165 A.D.3d 879, 883, 86 N.Y.S.3d 538, 542 (first citing Oviedo v. Weinstein, 102 A.D.3d 844, 847, 958 N.Y.S.2d 467, 469 (2d Dep't 2013); then citing Ozimek v. Staten Island Physicians Practice, P.C., 101 A.D.3d 833, 835, 955 N.Y.S.2d 650, 652 (2d Dep't 2012); and then citing Kimiatek v. Post, 240 A.D.2d 372, 373, 658 N.Y.S.2d 403, 404 (2d Dep't 1997)).

76. *See Watkins*, 108 A.D.2d at 240, 488 N.Y.S.2d at 773 (finding continuous treatment when the patient had a relationship with the entire group rather than one physician); *Kimiatek*, 240 A.D.2d at 373, 658 N.Y.S.2d at 404 (finding possible continuous treatment

most cases, the required relationship with the practice or the patient will likely prevent continuous treatment from being applied to retired providers, even in the Second Department.

D. Tornatore v. Cohen*: Experts and Professional Reliability*

Defendant Jean Cohen, D.C., appealed to the Fourth Department from a jury verdict finding negligence and awarding plaintiff damages including future medical and life care expenses.[77] Among other bases for the appeal, Dr. Cohen argued that the trial court erred in denying her motion to strike the testimony of the plaintiff's life care planning expert.[78] The defendant argued that the expert's opinions were improperly based on inadmissible hearsay statements made by the plaintiff's treating physician.[79]

The court first acknowledged that "opinion evidence must be based on facts in the record or personally known to the witness."[80] It also noted, however, that an expert may offer opinion testimony based upon facts not in evidence "where the material is 'of a kind accepted in the profession as reliable in forming a professional opinion.'"[81] The court clarified that such material may not form the sole or principle basis for the expert's opinion.[82]

In its analysis, the court reviewed the expert's testimony regarding her professional methodology for developing a life care plan.[83] That methodology included discussions with the plaintiff's treating physician which formed the basis of several components of the life care plan.[84]

based on the relationship between defendants and a continued relationship between defendant and plaintiff).

77. Tornatore v. Cohen, 162 A.D.3d 1503, 1504, 78 N.Y.S.3d 542, 544 (4th Dep't 2018).

78. *Id.* at 1504, 78 N.Y.S.3d at 545.

79. *Id.*

80. *Id.* at 1504–05, 78 N.Y.S.3d at 545 (quoting Hambsch v. NYC Transit Auth., 63 N.Y.2d 723, 725, 469 N.E.2d 516, 518, 480 N.Y.S.2d 195, 197 (1984)) (internal quotation marks omitted).

81. *Id.* at 1505, 78 N.Y.S.3d at 545 (first quoting *Hambsch*, 63 N.Y.2d at 726, 469 N.E.2d at 518, 480 N.Y.S.2d at 197) (internal quotation marks omitted); then citing Wagman v. Bradshaw, 292 A.D.2d 84, 86–87, 739 N.Y.S.2d 421, 423 (2d Dep't 2002)).

82. *Tornatore*, 162 A.D.3d at 1505, 78 N.Y.S.3d at 545 (first quoting In re State N.Y. v. Fox, 79 A.D.3d 1782, 1783, 914 N.Y.S.2d 550, 551 (4th Dep't 2010); then citing Kendall v. Amica Mut. Ins. Co., 135 A.D.3d 1202, 1205–06, 23 N.Y.S.3d 702, 706 (3d Dep't 2016); then citing Borden v. Brady, 92 A.D.2d 983, 984, 461 N.Y.S.2d 497, 498 (3d Dep't 1983); and then citing People v. Sugden, 35 N.Y.2d 453, 460–61, 323 N.E.2d 169, 173, 363 N.Y.S.2d 923, 929 (1974)).

83. *Id.*

84. *Id.* at 1505, 78 N.Y.S.3d at 546.

The court concluded that the record established a sufficient basis for the opinion with the hearsay statements of the physician as merely "a link in the chain of data upon which [she] relied."[85]

According to the court, the expert properly based her opinions on a combination of sources, including the treating physician's recommendations, facts in evidence, professionally accepted outside sources, and her own knowledge and expertise.[86]*Tornatore* confirmed that experts may rely on outside sources, including hearsay statements, as part of the basis for their opinion with the proper foundation.[87] Conversely, the decision signaled that an opposing party should move to preclude expert testimony if hearsay information forms the sole basis of the expert opinion or if the expert failed to establish that the outside source is not accepted in the expert's profession as reliable material for forming an opinion.[88]

E. Vargas v. Lee*: Audit Trails*

In this medical malpractice action, plaintiff Jose Vargas underwent foot surgery at defendant-hospital on May 1, 2012.[89] Subsequently, he developed swelling and gangrene, necessitating amputation of his leg from the knee down.[90] Later, the plaintiffs brought an action alleging that the hospital "failed to timely and properly manage and treat" an ischemic injury following the initial surgery.[91]

During discovery, the plaintiffs moved to compel disclosure of the audit trail of Mr. Vargas's electronic medical record from May 1, 2012 through May 17, 2012.[92] In support of the motion, the plaintiffs argued the entries created in the hospital audit trail following the May 1, 2012 surgery would be relevant to "the timing and substance" of the care for

85. *Id.* (first quoting Anderson v. Dainack, 39 A.D.3d 1065, 1067, 834 N.Y.S.2d 564, 566 (3d Dep't 2007) (internal quotations omitted); then citing *Kendall*, 135 A.D.3d at 1205, 23 N.Y.S.3d at 706)).

86. *Id.* at 1505–06, 78 N.Y.S.3d at 546 (first citing *Anderson*, 39 A.D.3d at 1067, 834 N.Y.S.2d at 566–67; then citing Madden v. Dake, 30 A.D.3d 932, 937, 819 N.Y.S.2d 121, 126 (3d Dep't 2006)).

87. *See Tornatore*, 162 A.D.3d at 1505, 78 N.Y.S.3d at 546 (quoting *Anderson*, 39 A.D.3d at 1067, 834 N.Y.S.2d at 566) (internal quotation marks omitted).

88. *See id.* at 1505–06, 78 N.Y.S.3d at 546 (first citing *Anderson*, 39 A.D.3d at 1067, 834 N.Y.S.2d at 566–67; then citing *Madden*, 30 A.D.3d at 937, 819 N.Y.S.2d at 126).

89. Vargas v. Lee, 170 A.D.3d 1073, 1073, 96 N.Y.S.3d 587, 588 (2d Dep't 2019).

90. *Id.*

91. *Id.*

92. *Id.* at 1073, 96 N.Y.S.3d at 588–89.

the alleged failure to timely and properly manage Mr. Vargas's injury.[93] The trial court denied the motion.[94]

In reaching its decision, the trial court noted that the audit trail was "metadata," or "data about data."[95] The court explained that the data "describes the 'history, tracking or management of an electronic document' and includes the 'hidden text, formatting, codes, formulae, and other information associated' with an electronic document."[96] The court then stated that "[s]ystem metadata is not routinely produced unless the requesting party shows good cause."[97] Notably, the trial court relied on federal court decisions and secondary commentary to establish this framework of analysis.[98]

The trial court concluded that the plaintiffs failed to establish the audit trail would provide information that could not be obtained through the electronic medical record.[99] The plaintiffs raised no authenticity or other issue regarding the "utility and necessity of such production."[100] Accordingly, the trial court denied plaintiffs' motion.[101]

The plaintiffs renewed their motion, arguing that the hospital withheld portions of the injured plaintiff's patient file.[102] In opposition, the hospital argued that it provided over 1400 pages of records to the plaintiffs, albeit after the motion was made.[103] The defendant also argued that a request for an audit trail was "overreaching, overbroad, unduly burdensome and beyond the scope of discovery" and that the audit trail would be duplicative of previously disclosed information.[104]

93. *Id.* at 1074, 96 N.Y.S.3d at 589.

94. *Vargas*, 170 A.D.3d at 1074, 96 N.Y.S.3d at 589.

95. Vargas v. Lee, No. 507923/2013, 2015 N.Y. Slip Op. 31048(U), at 3–4 (Sup. Ct. Kings Cty. June 5, 2015).

96. *Id.* (quoting Aguilar v. Immigration & Customs Enf't Div. of U.S. Dep't of Homeland Sec., 255 F.R.D. 350, 354 (S.D.N.Y. 2008)).

97. *Id.* at 4 (citing *Aguilar*, 255 F.R.D. at 353).

98. *See id.* at 3–5 (first quoting *Aguilar*, 255 F.R.D. at 352; then quoting Autotech Techs. Ltd. P'Ship v. AutomationDirect.com, Inc., 248 F.R.D. 556, 557 n.1 (N.D. Ill. 2008); and then citing SEDONA CONFERENCE WORKING GRP. ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT (2d ed. 2007)).

99. *Id.* at 4.

100. *Vargas*, 2015 N.Y. Slip Op. 31048(U), at 5.

101. *Id.* at 5.

102. *Vargas*, 170 A.D.3d at 1074, 96 N.Y.S.3d at 589.

103. *Id.*

104. *Id.*

The trial court denied the renewed motion and plaintiff appealed.[105] The Second Department reversed.[106]

In beginning its analysis, the Second Department emphasized the liberal construction given to CPLR Section 3101(a).[107] The court then cautioned that disclosure under the rule "is not unlimited."[108] Specifically, the court noted that "the need for discovery must be weighed against any special burden to be borne by the opposing party."[109] This, in turn requires a "case-by-case" analysis.[110] The court noted the abuse of discretion standard applied to discovery determinations.[111]

Turning to the papers submitted in support of the renewed motion, the court held that plaintiffs met the "threshold burden of demonstrating that the portion of the audit trail at issue was 'reasonably likely to yield relevant evidence.'"[112] The court specifically stated that it disagreed with any portion of the trial court's decision that applied a higher burden for a request for audit trails.[113] The court also noted that both state and federal law require hospitals to keep audit trails.[114] The court concluded that the plaintiffs successfully demonstrated—without opposition from the defendant—that the audit trail would show "the sequence of events related to the use of a patient's electronic medical records; i.e., who accessed the records, when and where the records

105. *Id.* at 1075, 96 N.Y.S.3d at 589.

106. *Id.*

107. *See Vargas*, 170 A.D.3d at 1075, 96 N.Y.S.3d at 590 (first 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); then citing Forman v. Henkin, 30 N.Y.3d 656, 661, 93 N.E.3d 882, 887, 70 N.Y.S.3d 157, 162 (2018); and then citing DAVID D. SIEGEL, NEW YORK PRACTICE 568–69 (5th ed. 2011)).

108. *Id.* at 1076, 96 N.Y.S.3d at 590 (quoting *Forman*, 30 N.Y.3d at 661, 93 N.E.3d at 887, 70 N.Y.S.3d at 162).

109. *Id.* (first quoting O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 529, 523 N.E.2d 277, 281, 528 N.Y.S.2d 1, 5 (1988); then citing Kavanagh v. Ogden Allied Maint. Corp., 92 N.Y.2d 952, 954, 705 N.E.2d 1197, 1198, 683 N.Y.S.2d 156, 157 (1998)).

110. *Id.* (quoting *Forman*, 30 N.Y.3d at 662, 93 N.E.3d at 888, 70 N.Y.S.3d at 163 (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))).

111. *Id.* (first quoting *Andon*, 94 N.Y.2d at 747, 731 N.E.2d at 594, 709 N.Y.S.2d at 878; then citing *Forman*, 30 N.Y.3d at 662, 93 N.E.3d at 888, 70 N.Y.S.3d at 163).

112. *Vargas*, 170 A.D.3d at 1076, 96 N.Y.S.3d at 591 (quoting *Forman*, 30 N.Y.3d at 666, 93 N.E.3d at 891, 70 N.Y.S.3d at 166).

113. *Id.* (citing *Forman*, 30 N.Y.3d at 666, 93 N.E.3d at 890–91, 70 N.Y.S.3d at 165–66).

114. *Id.* (first citing 45 C.F.R. § 164.312(b) (2018); then citing 10 N.Y.C.R.R. § 405.10(c)(4)(v)) (2019)).

were accessed, and changes made to the records."[115] The plaintiffs also demonstrated that the disclosure would assist in determining whether defendant provided complete records.[116]

In assessing the defendant-hospital's counterarguments, the court found it failed to establish that the request for audit trails was improper.[117] Specifically, the court concluded defendant failed to establish that the audit trail would not contain any information useful to plaintiffs.[118] Notably, the defendant also submitted an affidavit from the hospital's vice president of information technology, which stated that acquiring the audit trail would be "time-consuming."[119] The court found the affidavit was conclusory and insufficient to show that disclosing the audit trail would be "unduly onerous."[120]

The *Vargas* case represents the first instance of the appellate division addressing the issue of medical record audit trail discoverability. Based on the decision, in the Second Department, plaintiffs will be entitled to audit trails if they are relevant to the allegations or necessary to determine whether the disclosed records are complete.[121] Development of caselaw in this area will obviously be on-going. Defendants may be able to limit the metadata provided to the information necessary to address the relevant issues.

II. NEW YORK STATE LEGISLATION AND REGULATIONS

A. New York Reproductive Health Act

Enacted on January 22, 2019, the New York Reproductive Health Act (RHA)[122] codified *Roe v. Wade*, expanding protections for those seeking and providing abortions and removing abortion law from the

115. *Id.* (first citing Gilbert v. Highland Hosp., 52 Misc. 3d 555, 557, 31 N.Y.S.3d 397, 399 (Sup. Ct. Monroe Cty. 2016); then citing Irwin v. Onondaga Cty. Res. Recovery Agency, 72 A.D.3d 314, 320–21, 895 N.Y.S.2d 262, 267 (4th Dep't 2010)).

116. *Id.* at 1077, 96 N.Y.S.3d at 591 (citing 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)).

117. *Vargas*, 170 A.D.3d at 1077, 96 N.Y.S.3d at 591.

118. *Id.*

119. *Id.*

120. *Id.* (citing Andon v. 302-304 Mott St. Assocs., 94 N.Y.2d 740, 747, 731 N.E.2d 589, 593–94, 709 N.Y.S.2d 873, 877–78 (2000)).

121. *See generally id.* (reversing trial court's denial of plaintiffs' motion to compel production of audit trail).

122. N.Y. Senate Bill No. S240, N.Y. Assembly Bill No. A21, 242d Sess. (2019) (enacted); Reproductive Health Act, 2019 McKinney's Sess. Laws of N.Y., ch. 1, at 1 (codified at N.Y. PUB. HEALTH LAW § 2599-aa (McKinney 2019)).

criminal code. It also allowed licensed health care providers other than physicians to perform abortions within their lawful scope of practice.[123]

New York's abortion laws were first enacted in 1970, legalizing abortion three years before *Roe v. Wade* was decided.[124]At that time, physicians were the only medical providers recognized in state law and thus were the only practitioners authorized to provide abortion care.[125] Prior to 2019, medical professionals recognized that physician assistants, nurse practitioners, and midwives possessed the skills and expertise to perform abortion procedures and represented valuable resources for expanding abortion access;[126] the RHA merely codified their ability to provide such services.[127]

Significantly, New York abortion law was previously encoded as criminal statutes.[128] Under the prior law, any abortion performed beyond twenty-four weeks was considered a crime, unless the physician reasonably believed it was necessary to preserve the pregnant person's life.[129] No exception existed to protect the pregnant individual's health after twenty-four weeks beyond life-threatening circumstances.[130]Abortions not considered "justifiable"—performed with consent by a licensed physician within twenty-four weeks or to preserve the pregnant patient's life—were classified as felonies, or a misdemeanor if committed by the pregnant person themselves.[131] The person upon whom the unjustifiable abortion was performed could also be found guilty of a misdemeanor for submitting to the "abortional act."[132]

123. Reproductive Health Act, at 2.

124. N.Y. PENAL LAW § 125.05, L. 1970, c. 127 § 1 (McKinney 2019) (repealed 2019) (defining justifiable abortion); *see generally* 410 U.S. 113 (1973) (finding that certain criminal abortion laws violated the due process clause of the Fourteenth Amendment which protects the right to privacy, including a woman's qualified right to terminate her pregnancy).

125. PENAL LAW § 125.05(3) (repealed 2019) (defining justifiable abortions as those committed by "a duly licensed physician"); *see* N.Y. EDUC. LAW §§ 6540–46(regulating Physician Assistants, added in 1971); *see also* N.Y. EDUC. LAW § 6910 (requiring certificates for Nurse Practitioners, added in 1988); *see also* N.Y. EDUC. LAW §§ 6950–58 (regulating the practice of midwifery, added in 1992).

126. *See* NAT'L ABORTION FED'N, THE ROLE OF PHYSICIAN ASSISTANTS, NURSE PRACTITIONERS, AND NURSE-MIDWIVES IN PROVIDING ABORTIONS: STRATEGIES FOR EXPANDING ABORTION ACCESS 21 (1997).

127. Reproductive Health Act, at 2.

128. PENAL LAW §§ 125.05; 125.40–125.60.

129. *Id.* § 125.05.

130. *See id.*

131. *Id.* §§ 125.05, 125.40–125.60.

132. *Id.* §§ 125.50, 125.55.

In enacting the RHA, the legislature indicated that comprehensive reproductive health care is a fundamental component of a woman's health, privacy, and equality, protected by the Constitutions of New York and the United States.[133] The legislature noted that medical regulation should be used to improve the quality and availability of health care services.[134] New York public policy, the legislature declared, assures that "every individual possesses a fundamental right of privacy and equality with respect to their personal reproductive decisions and should be able to safely effectuate those decisions, including by seeking and obtaining abortion care, free from discrimination in the provision of health care."[135] Therefore, the intent of the legislature was "to prevent the enforcement of laws or regulations that are not in furtherance of a legitimate state interest in protecting a woman's health that burden abortion access."[136]

The Reproductive Health Act created Public Health Law Article 25-A, establishing the fundamental right to comprehensive reproductive health care including the right to choose whether to carry a pregnancy to term or have an abortion.[137] The statute also prohibits state discrimination based on the exercise of such rights.[138] In addition, as noted above, the Article allowed health care practitioners acting within their lawful scope of practice to perform abortions.[139] This expanded the right to perform abortions to mid-level providers, including mid-wives.[140]

The new provisions established that abortions may be performed "according to the practitioner's reasonable and good faith professional judgment based on the facts of the patient's case" for pregnancies within twenty-four weeks of commencement.[141] Of course, New York State law previously allowed abortions up to twenty-four weeks.[142] Article 25-A expanded abortion beyond twenty-four weeks to not only preserve the patient's life but also where there is an absence of fetal viability or the abortion is necessary to protect the patient's life *or*

133. Reproductive Health Act, 2019 McKinney's Sess. Laws of N.Y., ch. 1, at 1 (codified at N.Y. PUB. HEALTH LAW § 2599-aa (McKinney 2019)).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 2.

138. Reproductive Health Act, at 2.

139. *Id.*

140. *Id.*; *see* N.Y. EDUC. LAW § 6950 (McKinney 2016).

141. Reproductive Health Act, at 2.

142. N.Y. PENAL LAW § 125.05 (McKinney 2019) (repealed 2019).

health.[143] This provision brought New York law in line with Supreme Court precedent, including *Roe v. Wade*, requiring exceptions to anti-abortion laws to permit termination of pregnancies where necessary to protect the mother's health as well as her life.[144] Allowing for abortions based on an absence of fetal viability avoids requiring a patient to carry to term a fetus with no chance of survival.

In enacting the RHA, the New York Legislature ensured access to reproductive health care, protected those providing the care, and acknowledged the fundamental right of access to such care and decision-making.[145] The RHA ensures that medical providers and patients making difficult decisions will not be hindered by a potential criminal conviction.[146] It allows providers to make decisions based on the best interests of their patients.[147] At a time when other states are challenging *Roe v. Wade* with unconstitutional laws restricting access to safe abortions and necessary health care—threatening the careers and freedoms of medical providers and the lives and freedoms of patients[148]—New York State made strides to ensure the safety of all who seek essential care.

B. Gender Identity Protections

In January 2019, the New York State Department of Health adopted amendments to 10 NYCRR 405.7 and 10 NYCRR 751.9, regulations setting out patients' rights in New York State hospitals.[149] The provisions were amended to include gender identity in the list of groups protected from discrimination.[150] These changes will ensure

143. Reproductive Health Act, at 2 (emphasis added).

144. 410 U.S. 113, 163–64 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992); Ayotte v. Planned Parenthood, 546 U.S. 320, 327–28 (2006).

145. N.Y. PUB. HEALTH LAW § 2599-aa (McKinney 2019).

146. *Id.*

147. *Id.*

148. H.B. 481, 151th Sess. (Ga. 2019) (recognizing unborn children as natural persons and prohibiting abortions after detection of cardiac activity, acknowledging that a heartbeat may be found as early as six weeks, making the patient and physician subject to murder charges); H.B. 314, 201th Sess. (Ala. 2019) (comparing abortion to the Holocaust and making any abortion a felony except where performed to avoid a serious health risk to the mother or for a fetus's "lethal anomaly"); S.B. 23, 216th Sess. (Ohio 2019) (establishing that intentionally performing or inducing an abortion where a fetal heartbeat has been detected is punishable as a felony); S.B. 9, 227th Sess. (Ky. 2019) (establishing that intentionally performing or inducing an abortion where a fetal heartbeat has been detected is punishable as a felony).

149. 10 N.Y.C.R.R. §§ 405.7(b)(2), (c)(2), 751.9(a) (2019).

150. *Id.*

protections for transgender individuals seeking treatment at New York hospitals.[151]

This action was taken in light of the current federal administration's failure to defend federal protections for healthcare discrimination against transgender people.[152] The Health Care Rights Law, Section 1557 of the Affordable Care Act (ACA), prohibits discrimination in health coverage and care on the basis of race, color, national origin, sex, age, and disability.[153] The U.S. Department of Health and Human Services adopted a regulation in 2016 stating that the prohibition of sex discrimination included anti-transgender discrimination.[154] The regulation clarified that "on the basis of sex" included discrimination based on gender identity.[155] It defined gender identity as including transgender individuals: those whose gender identity differs from the sex assigned to that person at birth.[156]

In 2016, the Texas Attorney General's Office pursued a case on behalf of Catholic healthcare providers and eight states challenging the regulations prohibiting discrimination on the basis of gender identity and termination of pregnancy.[157] In December 2016, the Northern District of Texas issued a preliminary injunction prohibiting enforcement of the regulation in part based on a likelihood of success due to violations of the Religious Freedom Restoration Act as applied to the medical providers.[158] As a result, the federal Department of Health and Human Services refused to investigate complaints of anti-transgender discrimination and enforce prohibitions of such discrimination until the injunction is lifted.[159]

In July 2017, the action was stayed at the request of the U.S. Department of Health and Human Services to allow reassessment of the rule.[160] On June 14, 2019, the Department of Health and Human Services proposed a revision of ACA Section 1557 to eliminate the

151. *Id.*

152. Affordable Care Act, 42 U.S.C. § 18116 (2012).

153. *Id.*

154. 45 C.F.R. § 92.1 (2018).

155. *Id.* § 92.4.

156. *Id.*

157. Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 669–70 (N.D. Tex. 2016).

158. *Id*. at 691–95.

159. *Section 1557 of the Patient Protection and Affordable Care Act*, U.S. DEPT. OF HEALTH & HUMAN SERVICES, OFFICE FOR CIVIL RIGHTS (last reviewed Apr. 25, 2018), http://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html.

160. Franciscan All., Inc. v. Price, No. 7:16-CV-00108-O, 2017 U.S. Dist. LEXIS 145416, at *8–12 (N.D. Tex., July 10, 2017).

"novel" definition of sex discrimination that included gender identity.[161] In explaining the need for the revision, the Department claimed different definitions of "sex" in different regulations within the Department and other federal agencies "resulted in substantial confusion and inconsistency."[162] The Department also noted that cases regarding gender identity discrimination are pending in a number of federal courts as well as before the Supreme Court.[163] It did not indicate why these pending decisions required a change in the regulation before any Supreme Court decision.[164]

Courts considering cases of discrimination against transgender individuals have found that such persons are protected under federal law.[165] Protections of transgender individuals under federal law in the future will obviously depend greatly on the outcome of the cases granted *certiorari* by the Supreme Court.[166] Regardless, however, the current administration clearly does not support protections for transgendered individuals.[167] In reaction, New York has strengthened its own laws to ensure all peoples are protected from discrimination

161. Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846, 27,852–53 (June 14, 2019) (to be codified at 45 CFR pt. 92).

162. *Id.* at 27,853, 27,856.

163. *Id.* at 27,855.

164. *See generally id.* (proposing changing definition of "sex" under ACA Section 1557 while several cases on the issue are pending in federal district courts).

165. *See generally* Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213 (1st Cir. 2000) (holding that trial court erred in dismissing a complaint where business refused to serve transgender customer, because it may present a viable theory of sex-based discrimination under the Equal Credit Opportunity Act); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (holding that the Gender Motivated Violence Act applies to targeting of a transgender person); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (holding that school's discrimination against transgender student may constitute sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 18-107) (holding that termination of employee on the basis of transitioning or transgender status violates Title VII of the 1964 Civil Rights Act).

166. *See generally R.G.& G.R. Harris Funeral Homes, Inc.*, *cert. granted*, 139 S. Ct. 1599 (granting *certiorari* to review whether termination of employee on the basis of transitioning or transgender status violates Title VII of the 1964 Civil Rights Act); Bostock v. Clayton Cty. Bd. of Comm'rs, 723 Fed. Appx. 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 17-1618) (granting *certiorari* to review whether termination of employee on the basis of sexual orientation violates Title VII of the 1964 Civil Rights Act); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 17-1623) (granting *certiorari* to review whether sexual orientation discrimination constitutes a form of sex discrimination in violation of Title VII of the 1964 Civil Rights Act).

167. *See* Brendan Williams, *President Trump's Crusade Against the Transgender Community*, 27 AM. U.J. GENDER SOC. POL'Y & L. 525, 527, 531 (2019).

regardless of their gender identity, provided with necessary health care, and treated with the respect they deserve.[168]

CONCLUSION

Look for future clarification about the split between departments on the extent of discoverability of prior medical records. Additional decisions on audit trail discoverability will likely be forthcoming as other departments weigh in on the issue. Continuous treatment, with its fact-heavy analysis, will always be a reliable source for new and interesting case law. Continued attempts by the current federal administration and other states to strip rights from women and minority groups, including in the area of healthcare access, may lead to additional protective legislation in New York State.

168. 10 N.Y.C.R.R. § 405.7(b)(2), (c)(2) (2019); 10 N.Y.C.R.R. § 751.9(a) (2019). Note that in addition to the Department of Health amendments, New York previously passed the Reproductive Health Act which contained NY PHL § 2599-aa (3), a provision protecting against discrimination based on the exercise of reproductive health rights. N.Y. PUB. HEALTH LAW § 2599-aa (McKinney 2019).