THE LAW FIRM OF
hfpm
HANNUM FERETIC PRENDERGAST & MERLINO, LLC

First Department Limits Discovery for Prior Injuries

By Jessica G. Price

In this week's decision of *Gumbs v. Flushing Town Ctr.III, L.P.*, 2014 NY Slip Op 01267, the First Department upheld a decision denying the defendants' motion to compel authorizations based on the plaintiff's claims for "loss of enjoyment of life" and past pain and suffering. The First Department found that the defendants had not shown that the records sought were related to the claimed injuries. In *Gumbs*, the plaintiff sustained a torn rotator cuff, a fractured ankle and other orthopedic injuries. The defendants served demands for the plaintiff's cardiologist as well as his primary care physician based on the plaintiff's allegations in his Bill of Particulars that he was unable to work as well as alleged "loss of enjoyment of life."

The Court held that the plaintiff did not place his entire medical condition in controversy by suing to recover damages for orthopedic injuries, citing the Second Department case of *Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916 [2d Dept 2011]. The holding in *Schiavone* is inappropriately relied upon by the First Department. In *Schiavone*, the injured plaintiff did not place his entire medical condition in controversy with broad allegations of physical injury and mental anguish in the Bill of Particulars. Instead, the Bill of Particulars alleged only specific injuries to the injured plaintiff's left knee, and the plaintiff provided authorizations for the release of the pertinent medical files. As the plaintiff did not allege "loss of enjoyment of life" in his Bill of Particulars, the additional discovery was deemed overbroad and unduly burdensome.

Schiavone is clearly distinguishable from *Gumbs*, where the plaintiff did in fact allege loss of enjoyment of life. The Court's decision in *Gumbs* is in direct opposition with the Second Department, which freely allows discovery concerning the nature and extent of the injuries claimed in cases where "loss of enjoyment of life" is alleged.

Should the plaintiff allege "loss of enjoyment of life" in the Bill of Particulars, the defendants are entitled to the plaintiff's primary care physician's records, as this claim places the entirety of the plaintiff's condition in question. The primary care physician's records should include a general history of the plaintiff's health and any pre-existing medical conditions. In that scenario, even if plaintiff alleges only a knee injury, the plaintiff's prior back injury is also discoverable as this goes to the issue of damages and the enjoyment of life the plaintiff had before the subject accident. The Second Department held that "the nature and severity of the plaintiff's previous injuries and medical conditions are material and necessary to his claims of having sustained a serious injury within the meaning of Insurance Law § 5102(d), as well as to any claims of loss of enjoyment of life." *Bravo v Vargas*, 113 AD3d 577 [2d Dept 2014].

Continued on Page 2

First Department Limits Discovery for Prior Injuries

In the matter of *Vanalst v. City of New* York, the Second Department held that defendants were entitled to discovery concerning a prior back injury, even though the plaintiff was claiming a knee injury. Specifically, the Court held that "the nature and severity of the plaintiff's previous back injuries may have an impact upon the amount of damages, if any, recoverable for a claimed loss of enjoyment of life because of his current knee injury. They are pertinent to the nature and extent of the injuries claimed and are clearly relevant on the issue of damages." *Vanalst v City of New York*, 276 AD2d 789 [2d Dept 2000].

According to CPLR 3101(a), "full disclosure of all matter material and necessary in the prosecution or defense of an action" is required. In *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 405 [1968], the Court of Appeals interpreted the CPLR phrase "material and necessary" to mean nothing more or less than "relevant." *Id.* The Court stated that the phrase must be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Osowski v AMEC Const. Mgt., Inc.*, 69 AD3d 99, 102 [1st Dept 2009].

The dissent in *Gumbs* articulates that the plaintiff's claims for damages, including permanent loss of his ability to enjoy life as well as future lost earnings, directly bears on the question of how many years the plaintiff realistically could have continued to live or work given his condition prior to the subject accident. In order to determine the plaintiff's future lost earnings and future loss of enjoyment of life, it is argued that the defendant should be entitled to submit evidence of the plaintiff's actual health condition, habits and activities. Specifically, the dissent argues that plaintiff's medical records shed light on whether he suffered from other conditions, having nothing to do with this accident, which may have impacted upon his ability to enjoy life and/or life expectancy.

The First Department in its recent decisions has been limiting the ability of the defendants to obtain discovery of plaintiffs' prior injuries and medical records. The Second Department allows for full and fair discovery as long as the plaintiff makes a claim for "loss of enjoyment of life." The First Department governs New York County and Bronx County while the Second Department is made up of Queens County, Kings County, Richmond County, Westchester County, Nassau County, Suffolk County and Orange County. This split in Departments may well require the Court of Appeals to rule on what is relevant and discoverable when loss of enjoyment of life is plead as well as loss of ability to work. As defendants, we hope that the Second Department rationale carries the day and the intent of the CPLR is followed with open and full disclosure.

THE LAW FIRM OF
HANNUM FERETIC PRENDERGAST & MERLINO, LLC
ONE EXCHANGE PLAZA
55 BROADWAY, SUITE 202
NEW YORK, NY 10006
(212) 530-3900
TELEFAX: (212) 530-3910