

IT'S  
ALMOST  
SPRING!

New York Medical Malpractice Attorney Gerry Oginski presents

# NY INJURY TIMES

MARCH, 2013

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"Beyond a Reasonable  
Doubt" v. "Preponderance of  
Evidence."

I am positive that after you watch a TV show or movie about a criminal trial you will know exactly what the prosecutor has to prove in order to have a criminal found guilty.

In a criminal case, the prosecutor has to show beyond a reasonable doubt that the accused committed the crime. That is a very significant burden.

In a civil lawsuit involving medical malpractice, a car accident, or even a wrongful death, the attorney who represents the injured victim or their family has very little to prove. That seems contradictory compared to what a prosecutor must prove a criminal case, doesn't it?

In fact, the attorney representing an injured victim only has to show that **we are more likely right than wrong**. That's it. That is known more commonly as a "**preponderance of evidence.**" We don't really have to "prove" anything. We do however have to show that our version of the events is more likely right than wrong.

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- MED MAL-WHAT'S IN THE NEWS?**
- WHILE THE JURY IS DELIBERATING...**
- PHOTO GALLERY-A TRIP TO COLORADO**
- NEW WORD SEARCH**

Woman demands that I start her  
New York medical malpractice  
lawsuit immediately!

**She called me late Friday afternoon.**

She told me she had a definite medical malpractice case. She told me that her doctor failed to diagnose a very significant problem. She told me she had a guaranteed winner of a case.

What she neglected to mention was that her time limit to file a lawsuit was running out on Wednesday. This was now late Friday afternoon.

**BAD TIMING...**

What made this phone call interesting is that no matter what I said, this woman was demanding and insistent that I file a lawsuit on her behalf before Wednesday. She "**knew**" that she had a great case and that it was guaranteed to get her compensation.

I told her very quickly that I could not help her.

"What do you mean you can't help me? I have seen your videos, I've read your blogs, I have read your articles, I want you to help me with my medical malpractice matter!"

*continued on page 2*

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Again, I apologized and told her I could not help her and then told her why.

Before I am permitted to file a lawsuit for medical malpractice on her behalf, I must do a full, complete and thorough investigation determine whether: (1) there was wrongdoing, (2) the wrongdoing caused injury and (3) the injury is significant and/or permanent. All those things must be confirmed by a medical expert who has reviewed all of your records.

She did not understand that.

She thought it was like a car accident case where I could simply prepare the lawsuit papers and have it filed the same day.

**I told her that in a medical malpractice case** in New York, we must have confirmation by a qualified medical expert before we are permitted to file a lawsuit.

I explained that I must get copies of all her medical records going back many years. That takes months to get.

I then must go through each and every medical record to determine what exactly was done on each and every visit. Only after I have gathered all of her medical records can I then send it out to a qualified medical expert for review and evaluation.

The medical expert, assuming he is available, will take a considerable amount of time to review the records and then get back to me with his opinions and conclusions.

**When evaluating a medical malpractice case**, it can take 3-6 months just to do a complete investigation and determine whether there is a valid basis to proceed forward. This woman however who was calling on Friday evening, had only until Wednesday to file a lawsuit.

I told her that under no circumstances would I be able to help her since I knew at the outset that there was no way to gather all of her records within that time and send it out to medical experts for review and if positive, prepare the papers necessary to start her lawsuit.

She was still insistent. She was demanding. She did not accept my explanation.

Finally, I reminded her that I simply could not help her. When I asked her why she waited so long before consulting an attorney, she gave me excuses. I felt bad for her but there was no way that I could help her from a legal standpoint.

**What's the bottom line?**

continued on page 4



On the slopes in Colorado.  
Shari & Mia skiing.



## CAN YOU SETTLE YOUR CASE WHILE JURY IS DELIBERATING?

The answer is “Yes.”

You can settle your New York medical malpractice case at any time during the litigation process. However, you're playing a real game of chicken if you are trying to settle the case immediately before the jury comes back with a verdict. It's almost like playing high stakes roulette. You don't really know what the jury is going to do but you're taking a gamble and hoping that your settlement will be far in excess of whatever verdict the jury will come back with.

The defense, likewise, is taking a gamble that the jury will come back with much more than what they are currently willing to pay.

That's the inherent difficulty with deciding whether to settle your case while the jury is out deliberating.

There are some instances where the attorneys will agree on what is known as a “high-low” agreement as a hedge to protect all sides from an extreme verdict. For example, they may agree that if the jury returns a verdict of zero or a defense verdict, the injured victim will receive, let's say, \$100,000. If the jury awards an outrageous verdict of let's say \$200 million, they can agree that the maximum the insurance company will pay would be, for example, \$1 million.

This creates artificial limits and reduces the risk to both sides in the event a jury either refuses to award money or awards a significantly higher amount than all sides were considering.



Scenes from Boulder, Colorado



## STUFF YOU NEED TO KNOW ABOUT MEDICAL MALPRACTICE CASES

### WHAT IS THE BURDEN OF PROOF IN A CIVIL CASE IN NY?

*continued from p. 1*

**What** this really means is that when the jury goes back to deliberate and decide your case, they don't have to sit there for days and weeks trying to make absolutely sure that what we are saying is 100% correct. Nor do they have to be 100% sure that the doctor did something wrong in a medical malpractice case. Nor do we have to show with 100% certainty that the careless driver went through a red light.

Instead, we merely have to show that we are more likely right than wrong that the doctor was careless. We only have to show that we are more likely right than wrong that the driver of the other car went through a red light. The jury does not have to sit there and continue being frustrated trying to figure out whether they are actually 100% that what we are saying is true.

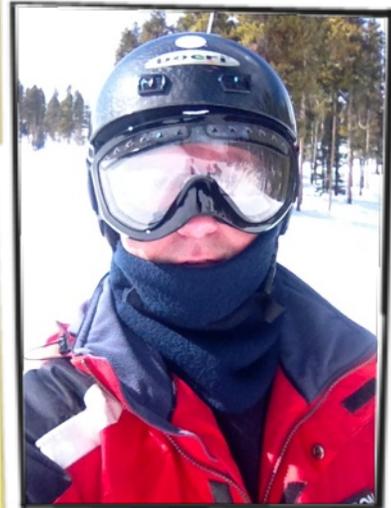
If the jury finds that the injured victim and the defendant (the person being sued) is equally responsible, then they will be required to return a verdict in favor of the defense. That means they will not award any money to the injured victim. However, if they determine that the injured victim has shown that they are more likely right than wrong, then they are required by law to award a verdict in favor of the injured victim or his family.

Many people mistakenly believe that the injured victim has to show beyond a reasonable doubt that they are entitled to compensation. This is not true.

Instead, we need only show that we are more likely right than wrong.

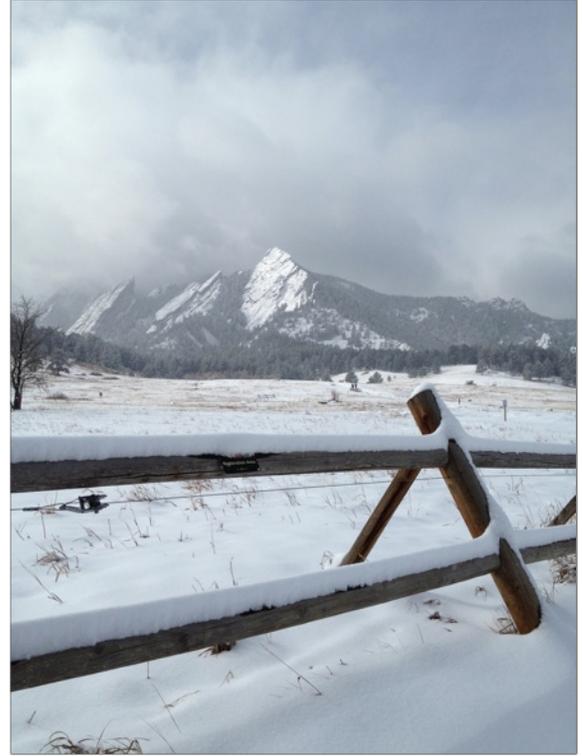
*Continued from page 4*

The moral of the story is don't wait until the last minute to file a lawsuit on your behalf. If you feel you have a basis to proceed forward with a possible medical malpractice matter, it is in your best interests to have an experienced trial attorney begin to investigate your matter as soon as possible. You never want to be in the situation like this woman was in where your time is running out and you have no other alternatives.



Skiing in Colorado. That's me above, all bundled up. The photo below is absolutely remarkable. Blind skier w/ guide.



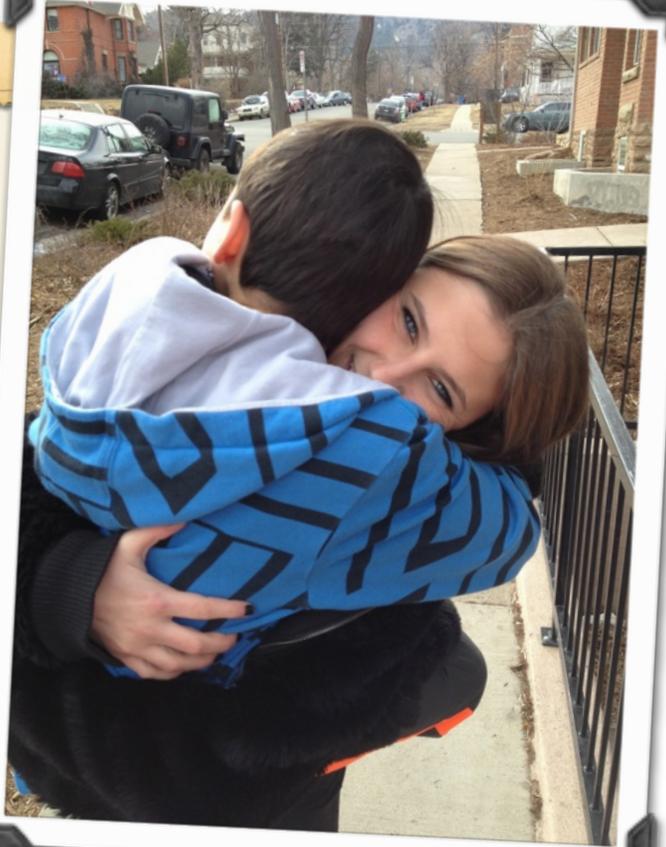


Seeking enlightenment at the top of the mountain.



David is sampling Colorado's finest, freshest snow. I told him it was Ok after I ate it first :-)

# GERRY'S PHOTO GALLERY



These two photos above don't even need words to describe them. We were seeing Shari for the first time this Spring semester in Colorado.



Having a great breakfast with Shari, Jake, Mia & David at Snooze restaurant in Boulder, Colorado.

Skiing with Shari, Mia & David. Awesome views at an elevation of 11,000 feet above sea level.

# Gerry's Trivia Game

# New Word Search!

TEST YOUR KNOWLEDGE OF NY LAW

FIND ALL WORDS AND WIN A GIFT CARD!

## TRUE OR FALSE?

1. A law clerk is someone who does the judge's legal research.
2. If the jury is deliberating, you cannot settle your case at that time.
3. If your injuries are gone by the time you reach trial, you can still proceed forward with trial.
4. If the defense catches you on video, you might be able to use that video to win your trial.
5. When your treating doctor refuses to come to court as your expert, we must hire a qualified medical expert to come into court and testify.
6. If the judge gives wrong legal instructions to the jury at the end of your trial, you might be entitled to a do-over on appeal.
7. If your jury is deadlocked, the judge will give them only three hours to continue deliberating before declaring a mistrial.
8. In order to proceed forward with a wrongful death lawsuit, we must have an autopsy to show the cause of death.
9. The defense attorney keeps asking the same question over and over again. Judge admonishes him to stop. He refuses. The judge can sanction the attorney for refusing to comply.
10. In a medical malpractice trial, the defense doctor will almost always be our first witness.

D B C R J G N A L O N E N E A  
 E E Y A D U D I B X C P E C T  
 C H N A T J D J A N C I G O W  
 N Z U I U A E G A P Y N L N Y  
 W V N S A C S L M R R U I O G  
 E L T J T T L T A E S T G M N  
 Y E F I B I S I R C N D E I I  
 R J O O E S N U X O M T N C R  
 L N A V Q U O M S F P G C H E  
 W Q R I C F X G O O B H E K F  
 M U D E L U R R E V O Z I K F  
 S U P I N S U R A N C E L C U  
 S E G A M A D V Z X T K Y G S  
 F S J L S G Q Y I I E N I E A  
 I N V E S T I G A T O R R W Y

ADJUSTER	OBJECTION
CATASTROPHIC	OVERRULED
DAMAGES	PAIN
ECONOMIC	PECUNIARY
INSURANCE	SUFFERING
INVESTIGATOR	SURVEILLANCE
JUDGMENT	SUSTAINED
NEGLIGENCE	

**Word search challenge: Find all 15 words correctly, and fax it in with your name & address filled out for a \$10 gift card to Dunkin Donuts. ONLY 15 GIFT CARDS AVAILABLE...so fax it in quickly!**

NAME: \_\_\_\_\_  
 ADDRESS: \_\_\_\_\_  
 CITY: \_\_\_\_\_ STATE: \_\_\_\_\_  
 ZIP: \_\_\_\_\_  
 EMAIL: \_\_\_\_\_  
 PHONE: \_\_\_\_\_  
 FAX TO: 516-487-8472



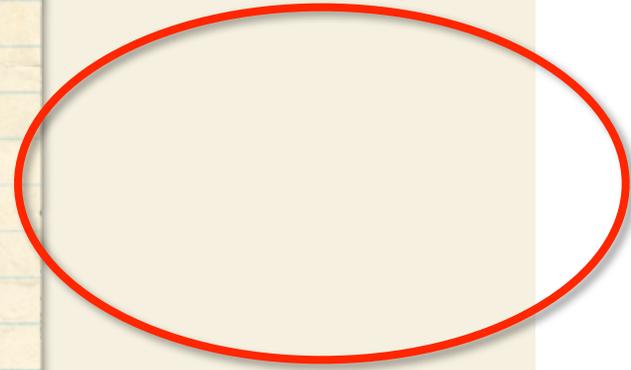
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**NEED ANSWERS TO YOUR LEGAL QUESTIONS?  
PICK UP THE PHONE AND CALL. IT'S THAT SIMPLE.  
516-487-8207 OR BY EMAIL: [LAWMED10@YAHOO.COM](mailto:LAWMED10@YAHOO.COM)**



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MARCH 2013

Give this newsletter to your best friend.  
They'll thank you for it, and so will I.

----- *Answers to Trivia Game* -----

1. True, 2. False, 3. True, 4. True, 5. True, 6. True, 7. False, 8. False, 9. True, 10. True

**Call me right now with any legal questions about injuries from any accident or medical care.  
I promise to give you a straightforward and honest answer. That's my guarantee.**

**516-487-8207**