

Hardin Kundla McKeon & Poletto, PA

A Full Service Litigation Law Firm

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HKMP Obtains Defense Verdict for Physical Therapist

HKMP's **Mark S. Kundla** and **Eileen Rudd** successfully tried a malpractice claim against a Physical Therapist arising from an alleged improper procedure which caused plaintiff to suffer a recurrence of her initial injury requiring further surgery and resulting in significant disability.

Plaintiff was a 28 year old female nurse who had a history of a right split pectoralis tendon transfer. Plaintiff injured her shoulder in a work related incident while attempting to move a patient. After the surgery, plaintiff reported to the defendant physical therapist pursuant to a prescription from her surgeon. Plaintiff underwent nine treatment sessions without incident, showing gradual improvement through this time. Plaintiff alleged that during the tenth visit, defendant failed to manually stabilize her shoulder during a strengthening exercise. She alleged that she felt an immediate pain in her shoulder and reported it to the defendant. Defendant denied that he failed to stabilize the plaintiff's shoulder and, more significantly, denied that plaintiff complained of any pain.

The case largely turned on the credibility of the witnesses. In this regard, the defense highlighted the fact that plaintiff did not seek medical attention for four days after the alleged incident, despite the fact that she said her pain was excruciating. Similarly, there was significant evidence that plaintiff was exaggerating her symptoms in the form of testimony from her own occupational therapist, who indicated that plaintiff essentially had no use of her right arm, notwithstanding evidence to the contrary.

Another critical issue in the matter was the failure rate of the surgery plaintiff underwent. The jury heard substantial testimony that the surgery plaintiff underwent has a high incidence of failure, irrespective of the quality of the physical therapy.

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The Passaic County jury returned a defense verdict after a short period of deliberation. The matter is now the subject of an appeal.

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HKMP Obtains Dismissal of Wrongful Death and Survivorship Claims: Successfully Argues Alleged Incapacity Does Not Equitably Toll Statute of Limitations

HKMP partner **John R. Scott** obtained summary judgment dismissing claims brought by an Estate and the spouse of the decedent following a motorcycle accident. On June 11, 2012, the decedent was operating a motorcycle in the right lane of westbound Route 22 in Hillside, New Jersey. It was alleged that a tractor trailer in the left lane of Route 22 westbound negligently changed lanes and that, as a result of that negligence, plaintiff fell under the trailer where she was run over and crushed to death. A complaint asserting claims under New Jersey's Wrongful Death Act statute, N.J.S.A. 2A:31-1 et seq.; New Jersey's Survivorship statute, N.J.S.A. 2A:15-3; and various common law claims was filed on behalf of the Estate, her husband, and her minor daughter on July 2, 2015, more than three years after her death. HKMP moved to dismiss the Estate's claims and the husband's per quod claims in lieu of filing an answer, asserting that those claims were barred by the statute of limitations. The plaintiff argued that the statute of limitations should be "equitably tolled" because the Estate Representative, her husband, was incapacitated due to the emotional distress he suffered as a result of the loss of his wife and subsequent drug and alcohol abuse that rendered him incapable of prosecuting the claims in a timely manner.

HKMP successfully argued that the doctrine of equitable tolling did not apply because the defendant did not contribute to plaintiffs' failure to timely file a complaint. Accepting HKMP's argument, the court determined that equitable tolling required some act or omission on the part of the defendant that interfered with the timely filing of a complaint. The court reasoned that fairness dictated that equitable tolling should apply only where the defendant contributed to the plaintiff failing to file a timely complaint. The court also agreed that a "mini-trial" to assess whether

or not the representative was "incapacitated" was not warranted because equitable tolling did not apply absent some act, omission or concealment on the part of a defendant.

The holding is significant in that it recognizes that while equitable tolling can be used to toll the statute of limitations under the Wrongful Death and Survivorship statutes, it is to be invoked in the rarest of circumstances and that equitable tolling principles do not apply in the absence of some fact demonstrating that the defendant caused or contributed to the delay in the filing of a complaint. In the absence of some act or omission on the part of the defendant the applicable statute of limitation should not be tolled. The court also recognized that the alleged emotional distress, depression, intoxication and drug use were not sufficient, as a matter of law, to equitably toll the statute of limitations because those circumstances had nothing to do with the defendants.

HKMP successfully defended Plaintiffs' motion seeking leave to appeal. The claims brought on behalf of an infant daughter remain pending, but the trucking company's exposure is significantly reduced given the dismissal of the claims held by the Estate and the spouse.

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HKMPP Successfully Defends Spoliation Claims, Obtains Summary Judgment for Insurer

HKMP partners **George Hardin** and **Nicea D'Annunzio** successfully obtained summary judgment on behalf of an insurance company sued for spoliation of evidence in a products liability fatality action. Plaintiffs' counsel alleged that since the machine had been moved, more than a year after the accident by the insurance carrier for a product manufacturer, his expert could not re-create the accident. There was also a plaintiff allegation that a computer download shortly after the accident may have spoliated evidence. On behalf of the defendant insurance carrier, HKMP argued that plaintiffs' counsel and experts had multiple opportunities to examine the large industrial equipment involved in the fatal accident and plaintiffs' counsel had multiple opportunities to purchase the equipment before the insurance carrier for the product manufacturer purchased the equipment from decedent's employer more than a year after the accident.

In defense of the insurance carrier, HKMP argued before the Hon. Frank Covello of the Superior Court of New Jersey, Essex County, that this was a case of preservation not spoliation of evidence, and that the insurance company should be commended for its preservation of the equipment long after the accident and after plaintiffs' multiple experts had already previously had an opportunity to inspect it. But for the insurance company preservation of this large piece of industrial equipment, plaintiffs' fourth expert would not have even had an opportunity to examine it. As for the computer download allegations, it was the insurance company's position that it had nothing to do with the actual downloading of the computer and that at the time of the download the industrial equipment including the computer was still at the accident site and the legal property of the decedent's employer.

Detailed Demands For Admissions were propounded upon plaintiffs' counsel prior to the filing of the summary judgment motion. Based upon plaintiffs' responses to the

Demand For Admissions as well as spoliation case law in New Jersey, it was successfully argued that there was no issue of fact and that any duty to preserve evidence is a question of law; appropriately decided on a summary judgment motion. The New Jersey Court has adopted a balanced approach to spoliation claims. Weighing all of the undisputed evidence in the case, Judge Covello found that there was no spoliation of evidence and that the insurance company had no duty to do anything above or beyond what it had already done. Accordingly the insurance carrier was dismissed from the lawsuit prior to the completion of discovery in the products liability action and notwithstanding plaintiffs' claims proceeding against the product liability defendants.

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HKMP Motion Establishes "Exceptional Circumstances" Standard For Plaintiff's Motion to Restore

HKMP Associate **Brian Alfson**, in what is possibly a case of first impression, successfully cross-moved to dismiss an action with prejudice after plaintiff failed to make a timely motion to cure a discovery default. Plaintiff waited more than sixteen months to seek to vacate the prior order, but then moved to restore the complaint. Because there was no specific rule or case law identifying when such motions need to be made, HKMP opposed the motion and cross-moved to dismiss with prejudice. The court denied plaintiffs' motion to vacate and granted HKMP's cross-motion to dismiss the matter with prejudice.

Plaintiffs alleged that they were injured during an altercation at a professional sports stadium located in East Rutherford, New Jersey. HKMP initially obtained a dismissal without prejudice for plaintiff's failure to provide discovery. On the eve of the matter being dismissed with prejudice based upon plaintiffs' continued failure to provide discovery, plaintiffs provided discovery and the motion to dismiss the action with prejudice was withdrawn, consistent with the New Jersey Court Rules. But, the matter remained dismissed without prejudice because plaintiff failed to move to reinstate the complaint and pay the court imposed sanction.

More than sixteen months after the dismissal, plaintiffs finally moved to vacate the dismissal and sought to reinstate the complaint. HKMP cross-moved to dismiss the complaint with prejudice as plaintiff failed to provide a valid explanation for the excessive delay and argued that plaintiff could not seek to have the complaint reinstate simply by reciting that they had now filed the appropriate motion and paid the sanction but rather, that plaintiff should be required to demonstrate "exceptional circumstances" for not seeking relief in a timely fashion.

Following oral argument in which plaintiffs' counsel argued that the basis for the delay was the attorney's lack of access to the file and the fact that one of the plaintiffs was undergoing surgery which required obtaining new medical records, the court held that the plaintiffs' did not satisfy the requirements of R. 4:50-1 and R. 4:50-2 as plaintiffs motion was brought more than one year after the dismissal order had been entered. The court also held that plaintiff failed to demonstrate "excusable neglect", as required pursuant to R. 4:50-1(a), as plaintiffs' counsel was aware that the matter had been dismissed and there was no surprise or

mistake with regard to the dismissal. Accepting HKMP's argument, the court went on to hold that plaintiffs' reliance on R. 4:50-1(f) was unavailing as the plaintiffs failed to demonstrate "exceptional circumstances" and that enforcement of the dismissal order would be unjust.

This case creates an avenue for defendants to oppose motions to restore complaints where significant amounts of time have passed, even without a showing of prejudice. The court imposed the "exceptional circumstances" standard in order to protect defendants against stale claims.

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Appellate Court Re-Affirms Plaintiff's Need to Establish Notice in Premises Liability Actions, and Rejects Mode of Operation Argument

In *Troupe v. Burlington Coat Factory*, ___ N.J. Super. ___ (App. Div. Jan. 26, 2016), the Appellate Division affirmed dismissal of a complaint following a fall at a Burlington Coat Factory and rejected plaintiff's attempted expansion of the "mode of operation" rule. Citing the Supreme Court's decision in *Prioleau v. Kentucky Fried Chicken, Inc.*, 223 N.J. 245 (2015), the court rejected plaintiff's effort to use the "mode of operation" argument to negate the necessity for it to prove notice of a dangerous condition. This decision makes recovery in premises liability actions more difficult by requiring that plaintiff actually prove that the defendant had actual or constructive notice of an alleged dangerous condition, and continues to limit the "mode of operation" rule to self-service settings.

In this case, the plaintiff slipped on a berry while shopping in the baby department. She claimed that Burlington Coat Factory ("defendant") should have foreseen that children would drop food onto the floor, and that a failure to regularly inspect the floor caused the plaintiff's fall.

Discovery revealed three critical facts. First, no other fruit appeared in the area near the berry. Second, no one who had eaten berries in the area of the fall was located. Third, the defendant used an outside service to clean the store every morning, but did not otherwise sweep the floors.

Plaintiff, perhaps recognizing the deficiency in the evidence, argued that the "mode of operation" was the inadequate floor inspection protocol. The trial court found no evidence that the defendant had either actual or constructive notice and granted summary judgment in its favor. The trial court also rejected plaintiff's effort to apply

the "mode of operation" exception, noting that it is a special application of foreseeability principles invoked in self-service settings because of unique risks presented in such settings. The appellate court affirmed finding that in the absence of any evidence of actual or constructive notice of the dangerous condition, Burlington did not breach any duty of care owed to the plaintiff invitee.

The Appellate Division reviewed the general standard that protects business owners from liability for defects of which they had no actual or constructive notice. Noting that nothing here suggested Burlington had actual or constructive notice of the unseen berry and, in particular, that the record included no evidence on how long the berry condition existed before the plaintiff's fall, the court rejected the plaintiff's argument that notice was not required based on the "mode-of-operation" exception. It held that "mode of operation" does not apply where the condition that caused the fall was not significantly connected with any self-service component of the defendant's business. This exception will apply only where a plaintiff can show a link to the fall and the self-service aspect of a business.

The court's focus on notice instead of foreseeability, and refusal to expand the "mode of operation" beyond a specific setting following the Supreme Court lead should encourage trial courts to dispose of premises cases on motion in the proper context, and prevent plaintiffs from averting summary judgment by relying, improperly, on the "mode of operation" exception to general negligence principles in a premises liability context.

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"Never Event" Statute Trumped by Federal Law and Bankruptcy Order

In *N.R. v. ABC Hospital*, it was alleged that 28 inches of catheter tubing was left in the plaintiff by the co-defendant anesthesiologist during the performance of a cesarean section. The plaintiff returned to ABC Hospital one month later in septic shock at which time the catheter tubing was removed. In addition to compensatory damages for pain and suffering, the plaintiff asserted that ABC Hospital should refund the \$82,000 hospital bill (which was the subject of a lien) in accordance with the N.J.S.A. 26:2H-12.25(c), commonly referred to as the "Never Event" statute, which mandates that a hospital shall not seek payment from a patient or third party payer for costs associated with certain medical procedures, including but not limited to, the removal of a foreign body.

ABC Hospital was sold in bankruptcy after the performance of the cesarean section. The entity that purchased ABC Hospital did not purchase ABC Hospital's liabilities. The federal bankruptcy orders associated with the bankruptcy sale required that all entities were permanently enjoined and restrained from commencing or continuing any action with respect to any such Claim outside the claims allowance procedure set forth in the bankruptcy plan and federal Bankruptcy Code.

Plaintiff filed a motion to compel ABC Hospital to repay the \$82,000 hospital bill associated with the surgical removal of the catheter tubing, citing N.J.S.A. 26:2H-12.25(c), and arguing that it was illegal for the hospital to have charged for the removal of the catheter. HKMP partner **Patrick J. Clare** opposed the motion arguing that plaintiff's failure to

comply with the federal bankruptcy orders which set forth a specific claims allowance procedure barred the plaintiff from recovering the \$82,000 hospital bill. It was further argued in opposition that N.J.S.A. 2A:2H-12.25(c) did not apply because at the time that the catheter was removed, ABC Hospital, as a legal entity, ceased to exist having been sold in bankruptcy to an entirely new entity before the catheter was removed.

The trial court denied plaintiff's motion to compel, relying on the arguments asserted by the defense. This motion demonstrates the value in always asserting federal bankruptcy procedural defenses in connection with a defendant which has either reorganized or been sold in a federal bankruptcy proceeding.

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Appellate Division Rules "Discovery Rule" Tolls Statute of Limitations for Condominium Association

On February 1, 2016, the Superior Court of New Jersey, Appellate Division, issued a decision in *The Palisades at Fort Lee Condominium Association, Inc. v. 100 Old Palisade, LLC, et al.* The Court reversed a March 28, 2014 trial court ruling that had dismissed the Association's claims as time barred under N.J.S.A. 2A:14-1, the six year statute of limitations applicable to construction defect claims. The trial court had ruled that the statute of limitations began to run upon substantial completion and that because the Association learned of the defects within the six year statute, it refused to apply the discovery rule to extend the period of time for the Association to file its complaint.

The Appellate Division reversed, ruling that the statute of limitations did not begin to run upon substantial completion but rather, that the Association's claims accrued only after the Association took control following transition and had obtained sufficient facts concerning the existence of defects after receipt of a transition study from an engineering firm.

The Palisades is a 30 story, 538 unit condominium tower. Its construction is somewhat unique in that the property was acquired in 1998 with a partially completed parking structure. The residential tower and other facilities were not substantially complete until May 2002. While transition in traditional condominiums will often occur within 1 to 2 years following substantial completion, in this instance the building was initially operated as an apartment building, and later converted to condominiums. Following conversion to a condominium form of ownership, "transition" occurred in July 2006. "Transition" is the process whereby the unit owners assume control over the Board from the developer and, in this instance, it occurred when 75% of the units had been sold. In May 2007, the association received a Transition Report from an engineering firm identifying various construction defects in the property. On March 12, 2009, the association filed its complaint based upon the alleged construction defects. It later amended the complaint multiple times.

While some defendants settled, other defendants moved for summary judgment following completion of discovery. These defendants argued that the Association's claims were barred by the statute of limitations, and specifically, asserted the statute of limitations lapsed in 2008-six years after substantial completion. Plaintiff argued that the "Discovery Rule" should apply and thus, its cause of action did not accrue until it came into existence and until it discovered the

defects (or should have reasonably discovered the defects). In this instance, the association argued that the cause of action did not accrue until after it took control and even then, only after it had received the Transition Report in June 2007.

The Appellate Division, focusing on the accrual date, noted that generally the statute of limitations will begin upon substantial completion of the work; however, "the date of accrual may be delayed by application of the discovery rule or other equitable considerations." It then ruled that the causes of action asserted by The Palisades "did not accrue until the unit owners took full control of the Associations governing Board, and the Board had sufficient facts upon which to assert actionable claims against defendant contractors." Critically important is the ruling that the cause of action did not accrue until the Board had such information and thus, the time for filing a complaint extended six years from that date and The Palisades would thus have the "benefit of the full limitations period to file its complaint after the cause of action accrued."

Where a potential statute of limitations defense exists, discovery will be required to demonstrate that the plaintiff knew or should have known of defects. For example, discovery into home inspections conducted by unit owners; communications with local municipal officials, particularly construction officials; and other communications by unit owners may yield information about what the association "should have known." Additionally, with the application of the "Discovery Rule" to the statute of limitations, it is now more important to assert both the statute of limitations and the statute of repose as affirmative defenses. The court noted that the Statute of Repose would still protect against limitless liability because N.J.S.A. 2A:14-1.1(a) imposed a ten year statute of repose commencing with substantial completion. For subcontractors, the statute of repose will run from the date it completes its portion of the work, and thus, it remains a viable defense under the right set of facts and circumstances. It is, therefore, critically important to investigate and establish exactly when the subcontractor's work was substantially complete (as opposed to the substantial completion date of the whole project).

HKMP Enforces Insurer's Right to Audit Claims Paid By Asbestos Trust

HKMP partner **John Favate** and associate **Henry LeFevre-Snee** successfully obtained a determination from a Delaware Chancery Court that certain insurers are entitled to receive certain information regarding cancer claims paid to date by The T.H. Agriculture & Nutrition L.L.C. Asbestos Personal Injury Trust ("Trust") in furtherance of the right to audit such payments granted to those insurers in a 2009 Settlement Agreement with TH Agriculture & Nutrition, L.L.C. ("THAN") and Philips Electronics North America Corporation ("PENAC").

The settlement was approved by the Bankruptcy Court as part of the THAN pre-packaged bankruptcy pursuant to Section 524(g) of the Bankruptcy Code. The settlement called for certain installment payments to be made by the insurers and provided them with certain rights to audit payments made by the Trust. Following confirmation of the plan, the insurers attempted to exercise their audit rights. A dispute arose concerning the scope of the insurers' audit rights. PENAC, THAN and the Trust maintained that the insurers' audit rights were limited to verifying that payments were made. The insurers maintained that their audit rights were much broader and permitted them to examine

information that was material to the allowance of the claims subject to the audit to determine, among other things, whether there were payment miscalculations and/or fraudulent claims.

After the Bankruptcy Court abstained from exercising its retained jurisdiction, the insurers initiated an action against THAN, PENAC and the Trust in the Delaware Chancery Court. Resolving motions to dismiss, summary judgment and cross-motions for summary judgment filed by the parties, the Chancery Court granted declaratory judgment to the insurers, agreeing with the insurers' position concerning the broad scope of their rights to audit payments made by the Trust.

In the wake of that declaratory judgment ruling, the insurers sought from the Trust certain claimant-specific information (including the claimant's identity, date of birth, partial social security number, claim category, type of cancer, claimant law firm and exposure period) in order to allow them to identify the claims to be audited. When the parties were unable to reach agreement, certain insurers filed a motion to compel the disclosure of the information and to enter a confidentiality order applicable to the claimant information. The Trust opposed the motion, and the Trust Advisory Committee ("TAC") sought to intervene in the case in order to oppose the motion as well. The Court allowed the TAC to intervene and, over its opposition (and that of the Trust), ordered disclosure of the claimant information to certain insurers and entered a confidentiality order. The orders specify the uses to which the information may be put and establish confidentiality protections.

Court Holds Insured Is Responsible For Insolvent Share

On January 12, 2016, the New Jersey Appellate Division issued an unpublished opinion in an environmental insurance coverage case entitled *Ward Sand & Materials Co. v. Transamerica Ins. Co.* The Court affirmed a lower court's summary judgment orders allocating the loss among primary and excess policies, which orders also addressed the impact on the allocation of certain insolvent insurers. The effect of the lower court rulings was to hold the insured responsible for the shares that otherwise would have been allocated to the policies issued by the insolvent insurers. The opinion also affirmed the denial of the insured's motion for reconsideration.

Ward involved costs to investigate and remediate contamination at landfill which the insured owned and operated for a period of time. The insured sought to exclude from the allocation any policies issued by insolvent insurers. Doing so would have enabled the insured to allocate to solvent umbrella insurers shares that would otherwise have been allocable to the insolvent insurers. The solvent insurers maintained that the insured is responsible for the insolvent shares at issue. The lower court sided with the insurers, rejecting the insured's attempt to assign to the solvent insurers the shares of the insolvent insurers. Instead, the lower court found that the insured must absorb the shares of the insolvent insurers. The result was that umbrella policies issued by solvent insurers were not reached.

On appeal, the insured argued that a 2004 amendment to the New Jersey Property Liability Guarantee Act ("PLIGA") that modified the definition of the word "exhaust" as used in PLIGA should be applied so as to exclude the insolvent policies from the allocation. The 2004 amendment to PLIGA modified the definition of "exhaust" so that in a progressive injury or damage case the Guarantee Association could not

be called upon to pay on behalf of an insolvent insurer unless and until all other solvent insurance was exhausted.

Because the amendment expressly provided that it applied only to insurer insolvencies taking place on and after the effective date of the amendment, December 22, 2004, and because the insurer insolvencies in Ward all took place before the effective date of the amendment, the insurers argued that the amendment was inapplicable and that the allocation should include the insolvent insurers' full policy limits, with the insured paying the shares allocable to the insolvent insurers. In making this argument, the insurers distinguished the 2013 New Jersey Supreme Court ruling in *Farmers Mutual Ins. Co. v. New Jersey Property Liability Guarantee Association* in which the court held that by virtue of the modified definition of "exhaust" in the amendment, the Guarantee Association could not be called upon to pay on behalf of an insolvent insurer in a progressive injury/damage case unless all other solvent insurance was exhausted.

Farmers, however, involved an insurer that became insolvent after the 2004 amendment.

The Appellate Division in Ward agreed with the insurers finding that the PLIGA amendment, by its own terms, did not apply retroactively to insurer insolvencies taking place before its effective date. The court also rejected the insured's argument that allocating to it the shares of the insolvent insurers is inconsistent with existing allocation law, instead noting that the established case law allows for allocation of insolvent shares to the insured as opposed to the solvent insurers.

The Appellate Division opinion in Ward is not published and, therefore, it is not binding on any other New Jersey court. However, it recognizes an important point regarding the effect of certain insurer insolvencies in progressive injury or damage cases in New Jersey. The 2004 PLIGA amendment that modified the definition of "exhaust" applies only to the insurer insolvencies taking place on or after its effective date. Thus, the amendment, and the Farmers case interpreting the amendment should not apply to insurer insolvencies taking place before December 22, 2004, and the insured, not the solvent insurers, should pay the allocated share of insurers that became insolvent before December 22, 2004. Accordingly, in progressive injury or damage cases in New Jersey where loss is to be allocated across multiple policy periods, any insurer insolvencies should be carefully examined to ascertain the date of the insolvency.



For over twenty five years, Hardin, Kundla, McKeon & Poletto has provided an integrated association of professionals committed to attaining clients' goals through quality service, pragmatic guidance and thoughtful planning. The proficiency, expertise and experience of its attorneys creates achievable goals and practical results for its clients through communication and teamwork.

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