

# 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