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Claim of Temporary Insanity Insufficient to Toll Statute of Limitations for Claims of Patient Who Bit Security Guard's Ear Off

Al Montano of Hardin, Kundla McKeon & Poletto successfully achieved an order of dismissal with prejudice of a lawsuit filed on behalf of a patient of Bergen Regional Medical Center (BRMC) who had been brought to the hospital by the local police after being found in a hotel lobby suffering from a psychotic episode. When the BRMC nursing staff attempted to interview plaintiff upon his arrival, he became agitated and attacked a security guard, biting off a piece of the guard's ear.

Following the incident, plaintiff was admitted to BRMC where he remained for treatment for approximately two and a half weeks. After discharge, he filed suit against BRMC and its security guard for battery, negligent supervision and violation of 42 U.S.C. §1395dd(d)(1)(A) (the Emergency Medical Treatment and Active Labor Act). All claims were governed by a two-year statute of limitations.

Plaintiff's claim was brought more than two years after the incident in the Emergency Room. As a consequence, a motion to dismiss was filed on behalf of BRMC seeking dismissal of the case with prejudice as untimely filed.

In opposition to BRMC's motion, plaintiff claimed that the statute of limitations should be tolled because he was unable to recall what had occurred on the alleged date of loss until over a month later, because of certain "legal and illegal" drugs in his system. Plaintiff also argued that he temporarily lost his memory of events due to an undefined psychological condition. He argued that, pursuant to *N.J.S.A. 2A:14-21*, his cause of action did not accrue until he regained his sanity and his memory of the relevant events. This section of the statute of limitations tolls the time for filing a lawsuit during periods of time an injured plaintiff is mentally incompetent.

After hearing oral argument on BRMC's motion to dismiss, Judge Rachelle L. Harz held that *N.J.S.A. 2A:14-21* did not apply and that there was insufficient evidence to support plaintiff's claim that he was mentally unable to appreciate the basis for his claim prior to February 22, 2008 (two years before he filed suit). In support of her ruling, the Judge noted that (1) the medical records from BRMC indicate plaintiff was able to recall the altercation he had with the Officer prior to his February 15, 2008 discharge; (2) plaintiff was an attorney himself, and (3) he had retained a criminal attorney before his discharge to defend against the charge of aggravated assault for biting off the security guard's ear. As a consequence she saw no basis for tolling the statute of limitations and ruled the complaint was untimely filed.

Plaintiff's counsel has advised that he will not be appealing the court's dismissal order.

New Jersey Consumer Fraud Act

Since 1960, New Jersey's Consumer Fraud Act ("NJCF") has been recognized as one of the most far-reaching in the nation. It currently boasts mandatory treble damages, coupled with attorney's fees and costs. A bill pending in the New Jersey Legislature, sponsored by Assemblyman John McKeon of HKMP, however, is designed to limit the reach of the Consumer Fraud Act and bring it within the

mainstream of most other states' consumer protection laws.

The amendment, A-3333, is targeted to impact almost every aspect of the current version of the NJCFA. The scope of claims covered by the Act including, which claims can be brought, who can bring them, and what must be shown to prove them, will all be dramatically affected by A-3333 if passed. The amendment would also serve to cap the legal fees that can be awarded to successful plaintiffs and make awards of treble damages discretionary rather than mandatory.

New Jersey's current Consumer Fraud Act creates a private right of action for "any person" who suffers an "ascertainable loss" as the result of the dishonest and deceptive practices banned by the Act. Successful plaintiffs are entitled to treble damages (three times the amount of their actual damages) plus reasonable attorney's fees and costs. The language of the Act states that these amounts "shall be awarded."

Under the proposed amendment, however, only individuals whose transactions occurred in New Jersey would be entitled to sue, eliminating the right of businesses to sue under the Act. Further, prevailing plaintiffs, would have to prove that they "relied to (their) detriment" on the defendant's unlawful practice. In addition, once a plaintiff has established a violation of the Act, the judge would have discretion in awarding treble damages. The phrase "shall...award threefold damages" would be replaced by "may...award up to threefold the actual damages." Further, attorney's fees could not exceed the greater of one-third of the judgment or \$150,000, thus capping legal fees at \$150,000.

A-3333 would amend the Consumer Fraud Act by making it inapplicable to "actions or transactions permitted or regulated by the Federal Trade Commission or any other regulatory body or officer acting under the statutory authority of this State or the United States." The amendment would replace the current pre-emption analysis of inconsistency between the laws, with an over-riding exclusion of claims in the face of any regulation.

The bill but will likely be the subject of committee hearings this March. Its passage would benefit defendants and their

insurers.

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HKMP Prevails on Appeal Relating to PIP Benefits for Church Van

Jeffrey A. Oshin of HKMP recently obtained a judgment from the New Jersey Superior Court, Appellate Division, reversing a trial court ruling requiring Encompass to pay PIP benefits to a plaintiff who had been injured in an accident involving a vehicle owned by a Church.

Plaintiff Jose Perez, whose personal/household insurance was with Encompass, was the van's driver. Farmers Insurance Company insured the van and Jose Perez was a named insured on the Church's policy with Farmers. The Encompass policy had no relationship to the Church van.

As a commercial policy, Farmers did not provide PIP coverage. Farmers therefore denied coverage, while Encompass only provided its \$10,000 Med Pay toward the plaintiffs' medical expenses. As a consequence, plaintiff filed an action seeking PIP benefits from either or both the Farmers and Encompass policy.

The trial judge ruled that the Church van was a private passenger automobile, and that Encompass owed PIP coverage. The court dismissed the claims against Farmers.

HKMP appealed this decision and argued that the Church van was not a private passenger automobile as contemplated by the PIP statute by virtue of the type of vehicle it was and how it was used. Alternatively, HKMP argued that if it was determined to be a private passenger automobile, Farmers was statutorily required to provide PIP and that its policy should be reformed to include PIP.

The Appellate Division, in an opinion approved for

publication, concurred with HKMP's primary position that there is no PIP coverage in this instance. The Court held that while the 15-seat, four row van could theoretically be equated with a mini-van or station wagon type vehicle when used in the proper household manner as contemplated by the PIP statute, this was not the usual course and was not the situation at issue. In this instance, the vehicle was used by the Church for purposes of public conveyance, much in the same manner as a vehicle such as an airport shuttle. In this circumstance, the Appellate Division was unwilling to vest it with the status of "private passenger automobile" for PIP purposes. Accordingly, the Appellate Division reversed the trial court's ruling that Encompass owed PIP coverage, and affirmed the dismissal against Farmers.

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Appellate Division Addresses Standards for Invoking Self- Critical Analysis

The January 5, 2011 unreported Appellate Division decision in *Applegrad v. Bentolila*, A-3747-09T2 addresses the relationship between the self-critical analysis privilege as discussed in *Christy v. Salem*, 366 N.J. Super. 535 (App. Div.2004) and the New Jersey Patient Safety Act, *N.J.S.A. 26:2H-12.23 et. seq.* ("PSA"). In *Applegrad*, the plaintiff sought documents that were prepared after an internal investigation was conducted by Valley Hospital with respect to the delivery of the infant plaintiff. Valley Hospital objected to the disclosure of its PSA investigative reports on the basis that all the PSA documents, including factual portions of the documents, were protected under the PSA. The plaintiff argued that the self critical analysis principles set forth by the Christy case were not abrogated by the PSA and that the trial court should perform an *in camera* review of the documents. Ultimately, the trial court noted that the legislative intent of the PSA was aimed at "the overall good

of society" and recognized that the PSA sought to reduce future instances of medical mishaps and issued an order fully protecting all of the documents from disclosure.

The plaintiff appealed the order. While the Appellate Division, at least temporarily, sidestepped the important question of whether the PSA "trumps" the self critical analysis privilege and protects all PSA generated documents, it remanded the matter to the trial court for development of the record regarding the PSA materials. The Appellate Division provided guidance to the trial court and the attorneys relative to how the record must be amplified. It suggested that a detailed certification, which could be filed under seal, may be necessary that addresses on a document by document basis the origins and purposes of each document, a description of the internal processes within the hospital that generated each document, and how these processes relate to pertinent statutes (i.e. the PSA).

Based on the *Applegard* decision, hospitals and their attorneys should be aware that the mere assertion of the protection of the PSA is not enough to prevent disclosure of the PSA created investigative reports and documents. A certification from a knowledgeable hospital representative must be served which provides background information about each document that justifies protection under the PSA.

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Middlesex County Judge Upholds Charitable Immunity Statute in Fall Down Case

The Honorable Jamie D. Happs, P.J.S.C. recently granted summary judgment to HKMP client, Hunterdon County YMCA ("YMCA"). The motion was premised upon the immunities provided under the Charitable Immunity Statute,

N.J.S.A. 2A:56A-7, et seq. (the “Statute”). Toni A. DeGennaro of HKMP argued the cause on behalf of the defendant.

The litigation arose from a fall-down incident that occurred on the YMCA’s premises while the plaintiff was accompanying her parents on a tour of the facility. Plaintiff’s parents, who were interested in joining the YMCA, primarily spoke Spanish and asked their daughter to go with them to translate. During the tour, plaintiff allegedly slipped and fell on a puddle of water in a hallway near a water fountain. As a result of the incident, plaintiff allegedly suffered a comminuted fracture of the left patella, requiring open reduction and internal fixation surgery.

The statute extends tort immunity from negligence claims to nonprofit charitable organizations, their agents and employees, where the organization was (1) formed for non-profit purposes; (2) organized exclusively for religious, charitable or educational purposes; and (3) promoting such objectives and purposes at the time of the injury to a plaintiff who was a beneficiary of the charitable works. *Bieker v. Community House of Moorestown*, 169 N.J. 167 (2001). The statute does not apply when an injury occurs due to intentional torts, such as willful, wanton or grossly negligent behavior. *Hardwicke v. American Boy choir School*, 188 N.J. 69 (2006).

Beneficiary status has been interpreted broadly in New Jersey. *Anasiewicz v. Sacred Heart Church*, 74 N.J. Super. 532, (App. Div.), *certif. den.*, 38 N.J. 305 (1962) (holding that a guest attending a wedding ceremony was a beneficiary of the works of the church within the meaning of the statute and entitled to complete immunity from tort liability); *see also Gray v. St. Cecilia’s School*, 217 N.J. Super. 492 (App. Div. 1997)(holding that a mother who was injured picking up her child from school was a beneficiary of the charitable enterprise); *see also Boeckel v. Orange Memorial Hosp.*, 108 N.J. L. 453 (Sup. Ct. 1932)(holding that a mother who slipped and fell in a stairwell while visiting her daughter in the hospital was a beneficiary); *see also Peacock v. Burlington County Historical Society*, 95 N.J. Super. 205 (App. Div. 1967)(holding that a wife who was injured while accompanying her husband “to keep him company” and had

no interest in the non-profit corporation was a beneficiary).

In rendering her decision, Judge Happas recognized that the statute was remedial in nature and should be liberally construed. She further found that the YMCA met its burden by proving it was a non-profit, charitable organization. The main issue of contention was whether the plaintiff was a beneficiary of the YMCA since she was not a member of the YMCA and had no interest in joining: she merely participated in the tour to translate for her parents.

After hearing lengthy oral argument and considering the evidence before her, Judge Happas found plaintiff to be a beneficiary and not a stranger to the organization. The critical factor was that plaintiff was on a tour that promoted the activities the charitable organization was created to advance. Plaintiff's subjective reasoning for being on the YMCA's premises was deemed irrelevant. Accordingly, Judge Happas ruled that defendant had satisfied its burden under the statute and granted summary judgment to defendant.

Judge Happas' ruling lends support for the proposition that the defense of charitable immunity remains viable and strong in New Jersey. The long-standing intent of the statute is to protect nonprofit organizations from tort liability, so as to allow greater ability to achieve charitable missions and provide charitable services. The statute protects volunteers by shielding them from liability for large awards and settlements. The protection of the statute, however, is not extended to board members, staff, or volunteers for acts which are intentional, or in cases of gross negligence or reckless behavior, including sexual crimes.

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Court Finds No Duty to Investigate Driver's License Status Before Renting Vehicle

Joshua Dill of HKMP recently obtained summary judgment for Hertz Vehicles, LLC in a case where plaintiff claimed that Hertz negligently entrusted a vehicle to its renter by

failing to do a background check. Plaintiff was in an accident with the Hertz renter, who had a suspended New Jersey driver's license at the time of the accident. Discovery showed that the renter produced a valid Florida driver's license at the time of her rental but it was claimed that a background check would have revealed his suspended New Jersey license.

Plaintiff, who suffered extensive injuries in the accident, pursued a claim against Hertz claiming it was negligent in failing to run electronic DMV checks of its renters. HKMP moved for summary judgment, arguing that Hertz had no legal duty to determine whether a renter's driver's license was in good standing. It was alternatively argued that even if such a duty existed, that duty was met by the fact the renter produced a valid Florida license at the time of rental.

In opposition to the motion, plaintiff retained an expert witness to establish that a reasonably prudent vehicle rental company would not have leased a vehicle to this renter. The expert based his opinion on information from the websites of Avis, Budget, Thrifty, and Dollar, all of which stated that they *may* or *might* run searches on customers. Plaintiff's opposition to the motion centered around this expert report and the argument that Hertz violated its own internal policies by not getting a New Jersey license from the renter when she gave a New Jersey home address.

In response, HKMP argued that the expert's report did not establish what the industry standard actually was. While he cited the websites of other national car rental companies, he did not provide any factual support for what those companies actually do in practice. In addition, the websites merely indicated what those companies *might* do, not what was actually done.

Judge Barry Sarkisian heard oral argument on the motion, and it was apparent that our briefs had influenced his opinion. After extensive oral argument, Judge Sarkisian granted our motion on the negligent entrustment claim against Hertz. The New Jersey Appellate Division denied plaintiff's motion to for leave to file an interlocutory appeal of the order.

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Appellate Court Upholds Application of Charitable Immunity Act to Off-Site Accidents

In a recent decision, an Appellate Division panel held that the scope of New Jersey's Charitable Immunity Act extends even to injuries that happen off the premises of the charitable organization.

In *Estate of Stephen J. Komninos v. Bancroft Neurohealth Inc.*, the plaintiff was a disabled resident of a Bancroft Neurohealth group home. On October 4, 2007, plaintiff was transported from the group home to a Cherry Hill 7-Eleven store where he bought a bagel. He returned to the home's van, where he was left unattended for a short time. Plaintiff took a bite from his bagel, which became lodged in his throat causing him to suffocate. Plaintiff later died in the hospital. His parents, on behalf of his estate, filed suit against the group home.

The Charitable Immunity Act provides that a non-profit corporation, society or association organized exclusively for not-for-profit purposes shall not be liable for damages to any person resulting from the negligence of any agent or servant of the corporation, society, or association where such person was a beneficiary of its works. The Act further provides that its provisions should be broadly construed.

The group home filed for partial summary judgment based on the Charitable Immunity Act. That motion was denied at the trial level. The group home appealed the decision, and the Appellate Division panel unanimously reversed the lower court ruling. Judge Jack Sabatino, writing for the majority, stated that the home served an ongoing educational purpose for the plaintiff, who was a beneficiary of the charitable program. The Court held that the plaintiff was a beneficiary of the charity even on trips off-site because his care plan provided for such outings into the community.

This recent ruling shows a continued willingness on the part

of New Jersey courts to broadly construe the Charitable Immunity Act.

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