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NY Trial Court Exonerates HKMP clients, John Deere and Nortrax, in Dump Truck Accident which Caused Traumatic Brain Injury

HKMP partner Mark S. Kundla successfully defended John Deere and Northrax, Inc. in a Westchester County, New York trial of a case involving serious orthopedic injuries in a dump truck accident. The product liability claims against John Deere were dismissed at the close of plaintiff's case. The jury later returned a defense verdict in favor of Nortrax.

The lawsuit involved an accident which occurred while plaintiff Joseph Simon was operating a John Deere 300C Articulated Dump Truck at the Sprout Brook landfill in Westchester County, New York. While near the top of the landfill, Simon attempted to make a three-point turn. After Simon put the vehicle into reverse, it began to roll backwards. Simon claimed he could not stop the vehicle as it proceeded over a berm and rolled down the side of the landfill, resulting in his injuries. Simon sustained traumatic brain injury with cognitive impairment, a broken left ankle and ribs, scalp lacerations, scarring, and alleged post traumatic stress disorder and depression. He was never able to return to work after the accident.

Simon alleged various theories of product liability against the manufacturer, John Deere. Simon also alleged that

Nortrax was negligent for having failed to detect and fix the problem when it serviced the vehicle one business day prior to the accident. Simon testified that he and a co-worker had both complained of problems with the brakes, and that the brake problem was intermittent. His attorney argued that Deere and Nortrax had a heightened duty of care because the terrain, elevated height of the vehicle and purpose for which the truck was being used created a hazardous condition.

Plaintiff's final settlement demand prior to trial was \$4.5M. Defendants John Deere and Nortrax made no offer of settlement, maintaining that the accident was solely the result of driver error.

During the presentation of plaintiff's case, Mr. Kundla demonstrated that plaintiff's product liability theories against John Deere were premised on the happening of multiple simultaneous failures which, under the circumstances, were an engineering impossibility. As a consequence, the Judge dismissed the case against them.

The case against Nortrax proceeded and ultimately went to the jury. In defending Nortrax, Mr. Kundla argued that operator error alone caused the accident, presenting evidence that plaintiff was unfamiliar with the truck and its handling characteristics and was uncomfortable operating it on the terrain at hand. Nortrax also put on evidence establishing that the vehicle was properly serviced and maintained and that the brakes worked before and even after the accident.

The jury unanimously rejected plaintiff's theory as to Nortrax.

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NJ Supreme Court Considers Application of Dram Shop Act where Plaintiff is a Drunk Driver

The New Jersey Supreme Court recently granted certification to *Voss v. Tranquillino*, 413 N.J. Super. 82 (App. Div. 2010) to decide whether a drunk driver injured in an accident can

sue the establishment that served him alcohol.

In *Voss*, plaintiff was injured when his motorcycle collided with another vehicle. Plaintiff plead guilty to DWI. Plaintiff then sued Tiffany's Restaurant alleging Tiffany's served him while he was visibly intoxicated. The Licensed Alcoholic Beverage Server Fair Liability Act, *N.J.S.A. 2A:22A-1, et seq.* (the "Dram Shop Act") is the exclusive remedy for injury or property damage resulting from the negligent service of alcoholic beverages by a licensee. The Act imposes liability where a licensee serves a visibly intoxicated patron.

Tiffany moved for summary judgment, relying upon *N.J.S.A. 39:6A-4.5(b)* which states that a driver pleading guilty to DWI in connection with an accident shall have no cause of action for recovery of damages sustained as a result of the accident. The trial Court denied the motion.

The Appellate Division affirmed the decision, ruling that the Dram Shop Act does not forbid suits by drunken drivers for their own injuries. The Court pointed to the Legislative history of the Dram Shop Act in support of its ruling. As originally drafted in 1987, the Dram Shop Act, in fact, barred such claims. However, Gov. Thomas Kean conditionally vetoed it, believing such a restriction contravened alcoholic beverage control policy. The Legislature then removed the bar. The Court viewed this as evidence of a clear decision on the part of the Legislature to permit such suits as a "critical pillar in the Dram Shop framework." The Court also determined the 1997 enactment of *N.J.S.A. 39:6A-4.5(b)* was not intended to bar such suits.

The Appellate Panel also reasoned that precluding such suits would contravene public policy. The court stated that a ban on such suits would provide "a disincentive to the licensees, who possess the expertise and the statutory and regulatory responsibility to avoid serving visibly intoxicated patrons." This disincentive would result in greater potential for drunken driving accidents.

The Supreme Court's review of this matter will have a major impact on these types of suits. If the Court sides with Tiffany's, an entire class of lawsuits will be foreclosed. However, should the Court affirm the Appellate Division,

liquor licensees will be exposed to greater liability for serving intoxicated patrons.

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HKMP Thwarts Repeated Attempts to Tap Excess Policy Where Other Primary Coverage Available

HKMP attorneys Mark S. Kundla, Stephen J. Donahue, and Stephen P. Murray recently prevailed on an appeal related to a motion and cross motion for summary judgment in a complex labor law personal injury and declaratory judgment action pending in the Supreme Court of New York, New York County in the matter of *Tishman Construction v. Great Amer. Ins. Co.* This matter has been to the Appellate Division on three separate occasions and each time HKMP obtained a decision favorable to its client.

HKMP represents an excess insurer who, along with its named insured, was named as a defendant by the owner, construction manager and the named insured's primary insurance carrier seeking indemnification as a result of a settlement and jury verdict for damages to two construction workers injured when a construction hoist collapsed in August 2000. The primary insurer for the named insured and the construction manager were the same company. The jury verdict and the settlement exceeded the limits of the primary policy for the construction manager.

Plaintiffs asserted that the accident arose out of the named insured's work and therefore, it and its excess insurer were responsible for any amounts above the primary policy. Plaintiffs also asserted that only one primary insurance policy was obligated to respond because of the nature of the accident. The jury trial did not include the named insured as a party and as such its result was inadmissible against it in a separate action.

The Appellate Division recently held that all primary policies available for a claim must be exhausted before tapping an

excess policy, and that a trade contract does not alter the terms of an insurance policy. As a result, the Appellate Court denied plaintiff's efforts to obtain the proceeds from HKMP's client.

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NJ Appellate Division Rules on Sidewalk Liability for Condominiums

The Appellate Division recently issued an opinion that addressed the issue of whether, for sidewalk liability purposes, a condominium association has a duty to maintain an abutting public sidewalk as if it were a commercial landowner in the matter of *Luchejko v. City of Hoboken*, 414 N.J. Super. 302 (App. Div. 2010). The court held that a condominium association does not bear such a duty. The court also rejected other theories of liability for the sidewalk at issue as to the City based upon common law snow removal immunities and immunities contained in the Tort Claims Act.

Plaintiff Luchejko slipped and fell on ice on a public sidewalk abutting a 104 unit condominium complex. Plaintiff filed suit against the City of Hoboken, the condominium association, the property manager and a snow removal contractor. The trial judge granted all of the defendants' motions for summary judgment, with the exception of the motion filed on behalf of the snow removal contractor. Plaintiff later settled with the snow removal contractor and appealed the rulings in favor of the other defendants.

In examining whether the condo association had a duty with respect to the sidewalk, the Appellate Division noted the Supreme Court of New Jersey's ruling in *Stewart v. 104 Wallace St., Inc.*, 87 N.J. 146, 149 (1981), which imposed a

duty upon commercial landowners to maintain abutting public sidewalks. The court further noted that *Stewart* was expanded to include snow and ice removal in *Mizra v. Filmore Corp.*, 92 N.J. 390, 395-96 (1983). Notably, the court observed that the basic reasoning behind the imposition of a duty in those cases included the fact that a commercial landowner has the ability to generate income from its property and spread the risk of loss through the purchase of insurance or higher charges for its goods and services.

The Appellate Division then proceeded to analyze whether the condo association could be viewed as a commercial enterprise so as to require imposition of a duty. It noted that no commercial space was located in the development. It further found pertinent the fact that the association was organized as a non-profit corporation. The court applied the balancing approach set forth in *Stewart* and held that property cannot be considered commercial if it is predominantly owner-occupied. "It is not the use to which the property is put that is determinative, but rather the nature of the ownership." *Luczejko*, 414 N.J. Super. at 313 (citing *Hambright v. Yglesias*, 200 N.J. Super. 392, 395 (App. Div. 1985)).

The court held that the property at issue was residential, as opposed to commercial, for the following reasons: 1) the association was a non-profit corporation; 2) members of the association were owners of units; 3) fees collected were solely for upkeep of the property; 4) the association did not provide the public with goods or services and therefore could not spread the risk of loss through higher prices; and, 5) the sidewalk was not within the complex and thus not considered a common element by the association's insurance carrier.

Accordingly, the court held that there was no basis to conclude that the association was a commercial entity and, therefore, had no duty relative to the abutting sidewalk. The Appellate Court also affirmed the dismissal of plaintiff's claims against the City of Hoboken based upon common law snow removal immunity and immunity provided by the Tort Claims Act, *N.J.S.A. 59:2-4*, for failure to enforce a snow removal ordinance.

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NJ Supreme Court Rejects Rule of Per Se Extra-Contractual Liability

The New Jersey Supreme Court has long recognized the right of insurers to control the defense of matters they may be asked to pay. However, if the insurer's decision to decline to settle a case within the coverage limits is found to be unreasonable, the insurer may face responsibility for an ultimate verdict above the policy limits. *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474 (1974).

The New Jersey Appellate Division recently explored these issues in the case of *Caruso v. New Jersey Mfrs. Ins. Co.* In *Caruso*, the liability claim in question resulted in a nonbinding arbitration award in excess of the policy limits, and defense counsel and the claims adjuster requested settlement authority for the full amount of the policy.

However, the carrier's claim review committee declined to offer the policy limits even after the claimant made a demand within the policy limits. The committee based its determination in part on its evaluation of pre-existing injuries, even though there was no expert testimony on this point at trial. The jury returned a verdict well in excess of the insurer's policy limits.

The trial court granted summary judgment in favor of the policy holder and against the carrier finding the carrier responsible for the excess verdict. The Appellate Division reversed the trial court's ruling. The Appellate Division rejected a request to find that insurers are strictly liable to pay verdicts in excess of policy limits when an offer to settle within limits is rejected. The court applied New Jersey Supreme Court precedent to say that the decision to decline to settle must be unreasonable or in bad faith. In that light, although the Appellate Division questioned the insurer's settlement position, it determined that a jury could find that the decision not to settle needed to be evaluated through a trial or plenary hearing, and was not unreasonable or in bad faith as a matter of law.

The Appellate Division's ruling provided guidance on other aspects of the litigation as well. The court rejected the insurer's position that its internal claim review process was dispositive of its good faith, saying that the process potentially could "overlook significant factors that should warrant higher settlement authority," particularly given the recommendations of defense counsel and the claims adjuster. The Appellate Division also found that judges who preside over liability cases are not disqualified as a matter of law from presiding over subsequent bad faith litigation arising out of the case, although it remanded this particular case to be handled by a different judge in light of the opinions expressed in the trial court's bad faith ruling.

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NJ Appellate Division Decides "Bystander" Asbestos Matter

The New Jersey Appellate Division recently rendered an opinion in *Anderson v. A.J. Friedman Supply Co.*, 416 N.J. Super. 46 (App.Div. 2010) sustaining a \$7.5 million verdict in favor of a claimant with mesothelioma whose primary contact with asbestos was as a bystander. Although plaintiff, Bonnie Anderson, worked at the Exxon Bayway facility for a period of time (1974-1986), the primary allegation was that she was, for decades, exposed to "take-home" asbestos fibers as she washed work clothes worn by her husband, who was employed as a chemical process operator at a refinery which ExxonMobil (hereinafter "Exxon") formerly owned.

This case was originally tried and the jury returned a verdict against Exxon for \$500,000 in damages. Thereafter, Judge McCormick in Middlesex County, New Jersey granted plaintiffs a new trial on damages only. The second jury

returned a verdict of \$7.5 million against Exxon.

Exxon appealed following the damages only trial. Exxon advanced a number of arguments in support of its appeal, including arguments based on various evidentiary rulings Judge McCormick made during the course of the trial.

The most legally significant argument which Exxon advanced related to the application of the workers compensation bar. The Appellate Division viewed the case as one of first impression in that it was a “take home” asbestos case that involved a plaintiff who also worked with her husband at the jobsite. The appellate court agreed with the trial judge and found that based upon the decision in *Olivo v. Owens Illinois*, Exxon owed a duty to the plaintiff as a matter of tort law as a bystander and the case was not precluded by the workers compensation bar.

The court also affirmed the trial judge’s ruling with respect to the “dual persona doctrine,” finding that Exxon had a dual persona, serving in an employer capacity for an eight (8) year period, but also having a relationship to the plaintiff as a bystander.

Exxon also appealed the trial judge’s refusal to ask the jury to allocate liability between plaintiff’s direct asbestos exposure as an Exxon employee versus her bystander exposure through her husband. Exxon argued that the verdict sheet should have “list[ed] all potential tortfeasors,” especially after the judge determined on summary judgment that Exxon really had a dual persona.

The court also affirmed the trial court’s decision on this issue. The court relied upon *Brodsky v. Grinnell Haulers, Inc.*, which stated in *dicta* that “an employer cannot be a party to a negligence action and thus can never be considered a joint tortfeasor” for allocation of damages purposes.

The decision in *Anderson* demonstrates the court’s reluctance to overturn lower court asbestos verdicts and a willingness to engage in convoluted applications of existing legal principles to the facts so as to affirm these verdicts.

It is likely that Exxon will seek certification from the New Jersey Supreme Court. HKMP will keep continue to follow

this matter and report any developments in future newsletters.

About HKMP

For over twenty 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.

The articles in this newsletter are for informational purposes only and do not constitute legal advice.

For more information about any topic discussed in this newsletter, please contact Hardin, Kundla, McKeon & Poletto at 973-912-5222 or info@hkmpp.com.

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