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HKMP Obtains "No-Cause" Verdicts In Two Auto Liability Cases

Two HKMP associates, Matt Panas and Toni DeGennaro were each successful in jury trials in February. Panas prevailed in an automobile liability action in Union County, New Jersey and DeGennaro obtained a defense verdict in Middlesex County, New Jersey.

In Panas' case, plaintiff Emmanuella Charles filed a lawsuit arising from a motor vehicle accident on October 23, 2007 on North Burnett Ave in Union Township with defendant Tara Joyner. Plaintiff alleged that the defendant was negligent for attempting to go around a third vehicle that was making a left turn and, in doing so, sideswiped plaintiff's vehicle. Defendant contended that plaintiff was negligent for not making reasonable observations prior to attempting to pass defendant's vehicle on the right hand side at a high rate of speed. Plaintiff was subject to the tort threshold and alleged two lumbar disc herniations with approximately one year of conservative treatment. Plaintiff also alleged an aggravation of pre-existing conditions from a prior motor vehicle accident in 2004. Defendant argued that plaintiff did not sustain a permanent injury proximately caused by the

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2007 accident and all of her alleged injuries were degenerative in nature.

At trial, plaintiff presented four witnesses, which included plaintiff, police officer Michael Ferraro, Dr. Steven Brownstein and Dr. Vijaykumar Kulkarni. Defendant presented two witnesses, which included defendant and Dr. Edward Decter. On February 22, 2012, the jury rendered a "no-cause" verdict in favor of the defendant on the issue of liability. The jury deliberated for less than fifteen minutes.

In DeGennaro's matter, plaintiff, Reynaldo Arocho, filed a lawsuit arising from a three-car motor vehicle accident on March 22, 2009 on Route 1 South in New Brunswick, New Jersey. Plaintiff alleged negligence on behalf of defendant, Steven J. Mancuso-Haitz, and HKMP's client, Timothy J. Rudolph, in connection with the operation of their respective vehicles. As a result of the motor vehicle accident, plaintiff alleged personal injuries including three (3) bulging discs. Plaintiff was subject to the tort threshold.

Plaintiff alleged that Mancuso-Haitz crossed over the median on Route 1 South in attempting to make a right-hand turn into a nursing home facility, which caused him to collide with the rear of his vehicle. This sudden and unexpected stop caused HKMP's client to rear-end plaintiff. Several hours after the accident, plaintiff was treated and released at a hospital in Perth Amboy. Plaintiff did not seek any other medical treatment for five and half months before he began treatment with a chiropractor.

On February 21, 2012, trial commenced before the Honorable Joseph L. Rea, J.S.C. Plaintiff testified that the second accident was more severe. Plaintiff called an eye-witness who observed Mancuso-Haitz travel cross several lanes of traffic and cut plaintiff off. This witness testified that the first accident appeared to be more significant than the second. HKMP's client testified that he did not observe the first accident, but admitted that plaintiff's vehicle was completely stopped when he came around the turn. As a result, the court granted plaintiff's motion for a directed verdict as to HKMP's client.

Defendants relied upon opinions of their joint expert Kevin J. Egan, M.D., F.A.A.O.S., who rendered a report after examining plaintiff and his medical records and opined that plaintiff did not sustain a permanent injury.

On February 23, 2012, the jury rendered a "no-cause" verdict in favor of defendants since the jury did not believe that plaintiff sustained a permanent injury established by

objective, credible medical evidence to vault the tort threshold. The jury deliberated for less than an hour.

HKMP Succeeds in Barring the Testimony of Plaintiff's Expert as Net Opinion Leading to Dismissal of Environmental Case

In a recent environmental contamination claim, Janet L. Poletto of HKMP successfully obtained summary judgment after having plaintiff's expert report barred as a net opinion.

HKMP's client, a condominium owner, retained a company to remove his underground storage tank (UST) which was accomplished without incident or evidence of leakage. A number of years later the adjacent condominium owner removed her UST and found contamination on the property. She then (through the carrier conducting the clean-up) asserted a claim for contribution against HKMP's client on a theory that his previously-removed UST leaked and contributed to the contamination on the property.

In support of this theory plaintiff produced an expert report which essentially asserted that because the two nearby tanks were similar and likely installed around the same time, and because other similar pairs of tanks in the same complex had exhibited tandem leakage, it was likely HKMP's client's tank leaked as well.

A motion to bar plaintiff's expert report as a net opinion and for summary judgment was filed and joined by all defendants. The motion highlighted the lack of reliable scientific support for the expert's opinions. It further noted contradictory undisputed facts left unexplained by the expert's assertions, such as the fact there was no evidence of leakage when the UST was originally removed, and the fact that other pairs of tanks in the condominium complex had been removed with only one of the two tanks having leaked.

After briefs and argument Camden County Judge John Kelly barred the report as a net opinion for the reasons stated above; and as plaintiff was left without an expert report, summary judgment was entered dismissing the claim.

NJ Court Holds Prior Settlement Does Not Preclude Legal Malpractice Claim

In the recent case of *Gere v. Louis* (decided March 6, 2012), the New Jersey Supreme Court noted the narrow applicability of *Puder v. Buechel*, 183 N.J. 428 (2005) in allowing a legal malpractice claim to proceed despite an earlier settlement entered into by the Plaintiff. *Puder* holds that a client, after entering into a settlement for less than a claim is purportedly worth, may not attempt to recoup the difference by filing a legal malpractice action against the attorney on the theory that the attorney's malpractice resulted in a less favorable settlement, especially when the client acknowledged at the time that the settlement was fair and adequate.

In *Gere*, plaintiff was a party to an underlying divorce and property settlement agreement and was represented by counsel. Following the finalization of the settlement in 2007, plaintiff filed suit against her former counsel contending she received less than what she was entitled to. During the 2007 proceedings, when asked by the trial court if she thought the settlement agreement was fair and reasonable, plaintiff said "Yes, I'm signing it. It's the best I could do."

The defense in *Gere* argued that *Puder* precluded suit and obtained summary judgment. The New Jersey Appellate Division affirmed. The Supreme Court, however, reversed, noting that *Puder* "did not erect an absolute bar to a claim of malpractice." The Court emphasized that while New Jersey has a strong public policy favoring settlements, *Puder* requires a fact-specific inquiry into the circumstances of an earlier settlement and how those circumstances may serve to preclude a subsequent malpractice claim. Further, the Court indicated that whether the settlement was fair and reasonable is dependent on whether and to the extent her attorney engaged in any meaningful discovery to reach the point of settlement. In *Gere*, as the Court was reviewing a grant of summary judgment, it was required to give all favorable inferences to the plaintiff, who alleged various discovery deficiencies by her former attorney which led to the settlement.

Gere cautions defendant-attorneys from raising *Puder* simply because the plaintiff had an earlier settlement arising out of similar transactional facts. Notwithstanding, *Puder* can still be applied with the appropriate set of facts and should be employed as often as practicable whenever malpractice plaintiffs lawsuit arises out of a prior settlement.



HKMP Obtains Order for Summary Judgment Dismissing a Physician's Credentialing Claim Against a New Jersey Hospital

HKMP partner Patrick Clare and associate attorney Rosa Marques were successful in defeating a claim that its client, a hospital, was liable for allowing an unqualified doctor treat the plaintiff. The plaintiffs alleged that their son had sustained a right upper extremity injury (i.e., an Erb's Palsy) during delivery. The plaintiffs sued the obstetrician who performed the delivery and the Hospital. Plaintiffs' theories of liability against the hospital included the propriety of renewing the doctor's privileges to practice obstetrics at the facility. (Note that a qualified immunity is available to individual members on the hospital committees responsible for making such decisions under N.J.S.A. § 2A:84A-22.10.)

Plaintiffs' credentialing claim was based upon the co-defendant obstetrician's lack of board-certification; attendance records at departmental and business meetings; and alleged lack of proofs of continuing medical education credits. Earlier in the case, plaintiffs attempted to obtain the obstetrician's Quality Improvement file, and HKMP successfully defeated the motion on the grounds of relevance and statutory and case law addressing peer review materials. Ultimately, plaintiffs' credentialing expert was unable to testify that the standard of care mandated that the defendant obstetrician's privileges be suspended or revoked on the basis of one or more of the three grounds articulated above. The expert also failed to causally relate the "credentialing deficiencies" to the infant's Erb's Palsy. Consequently, HKMP was able to defeat the claim.

Plaintiffs also sought to hold the Hospital vicariously liable for the alleged negligence of the defendant obstetrician who worked at the Hospital's OB Clinic. HKMP was successful in obtaining an order limiting the Hospital's damages exposure to no more than \$250,000 – the statutory cap set by N.J.S.A. §2A:53A-7 & 8.

NJ Supreme Court Limits Accountants' Liability to Non-Clients

The New Jersey Supreme Court recently held that under the Accountant Liability Act, the test for when an accountant can be held liable for damages resulting from non-client third party reliance on their report is whether the accountant had specific knowledge, **at the time the client relationship begins**, that third parties will rely on its reports; as opposed to whether they had knowledge **any time during their "engagement" with their client**.

In *Cast Art v. KPMG*, an accounting malpractice action, Cast Art was to merge with Papel in late 2000. As a condition of the merger, Cast Art required an audit of Papel's financial statements. KPMG had previously audited Papel's financial statements since 1997, and Papel submitted the audits for the years 1998 and 1999 to Cast Art. After receiving the audits, the merger was consummated.

After the merger, Cast Art discovered Papel had engaged in questionable accounting practices which allegedly caused the new company to fail. Cast Art thereafter brought suit against KPMG alleging KPMG negligently failed to disclose Papel's accounting irregularities, and had they done so, Cast Art would not have proceeded with the merger. KPMG's defense was primarily based on the Accountant Liability Act, *N.J.S.A. 2A:53A-25*; namely, that KPMG was a client of Papel, not Cast Art, and Cast Art could not rely on KPMG's opinions. Cast Art prevailed in the trial court and on appeal.

The New Jersey Supreme Court focused its discussion on the extent to which non-client third party liability extends under the Accountant Liability Act. The Act holds that an accountant will not be held liable to a non-client third party unless the accountant "knew at the time of the engagement by the client, or agreed with the client after the time of the engagement, that the professional accounting service rendered to the client would be made available to the claimant."

Based partially on KPMG's engagement letter, the Court held that KPMG did not know **at the outset of the audit** that it would be used in the merger. The Court further held that although KPMG later became aware that Papel might use the audit documents in the merger, the test for agreement after

the time of engagement is "agreement, not mere awareness" and there was nothing in the record that KPMG agreed that the audit would be used for such purpose. The Court reversed the Appellate Division's holding, and remanded to the trial court for dismissal.

For clients in the accounting field, the take home message from the *Cast Art* case is that you must take a defensive position at the outset of your engagement by the client to avoid unintended third party reliance on your opinions. An example is boilerplate language in your engagement letter that your opinions are for reliance by the specified client only. Additionally, accounting professionals should be aware that "agreement, not mere awareness" is the standard for subsequent agreement to allow non-client third party reliance on accounting opinions.

Recent Developments In NY Scaffolding Law

New York Labor Law §240(1) imposes absolute liability on owners and general contractors for injuries to workers caused by elevation related risks during the construction, renovation or repair of buildings and other structures. In *Ross v. Curtis-Palmer*, 81 N.Y.2d 494 (1993) the Court of Appeals stated that the "special hazards" addressed by section 240(1) are "limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured". However, recent Court of Appeals decisions suggest that the scope of section 240(1)'s protection is not quite so "limited", and have arguably expanded the statute's protection.

In *Runner v. New York Stock Exchange, Inc.*, 13 N.Y.3d 599 (2009) the plaintiff and some co-workers were moving a reel of wire (weighing approximately 800 pounds) down a flight of four stairs. In an attempt to control its descent, the workers tied one end of a rope around the reel. The rope was then wrapped around a metal bar placed horizontally across a door jamb. Plaintiff and a co-worker held the loose end of the rope and acted as counterweights as the other workers pushed the reel down the stairs. Notably, before the reel began its descent, it, the plaintiff and the metal bar were all situated on the same level at the top of the stairs. This improvised pulley was unsuccessful in regulating the rate of the reel's descent down the stairs, and plaintiff was injured when his hands were pulled horizontally into the bar. Plaintiff's expert opined that a different type of pulley or hoist was required to safely move the reel down the stairs.

The Court of Appeals held that section 240(1) applied to plaintiff's accident despite the fact that he did not come in contact with the falling object. The Court described as decisive the fact that plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. It noted that the harm to plaintiff flowed "directly" from the application of the force of gravity to the object. It also noted that the elevation differential between the plaintiff and the object could not be considered de minimis given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent.

Wilinski v. 334 E. 92nd Housing Development, 18 N.Y.3d 1 (2011) is another "falling object" case decided by the Court of Appeals in October, 2011. In that case, plaintiff and his co-workers were demolishing the brick walls of a warehouse. They had previously demolished the ceiling above the floor they were working on, leaving two four inch vertical plumbing pipes still standing and otherwise unsecured. The top of the pipes were approximately four feet above plaintiff's head. However, the base of the pipes were located on the same level that plaintiff was working on. During the course of demolishing the wall, debris hit the pipes which toppled over and struck the plaintiff.

The Court held that plaintiff was not precluded from recovery under section 240(1) simply by virtue of the fact that the pipes and plaintiff were on the same level. Citing *Runner*, it noted that plaintiff's accident arose from a physically significant elevation differential because of the force the heavy metal pipes were able to generate even over a course of a short distance. Nevertheless, the Court of Appeals held that summary judgment to plaintiff or the defendant was unwarranted because neither party had demonstrated that protective devices contemplated by the statute, such as blocks or ropes, could have been used to secure the pipes or, alternatively, that no protective devices were called for under the circumstances. The Court implicitly overruled a line of Appellate Division decisions which ruled that a worker injured by a falling object has no claim under 240(1) where the worker and the base of the object stood on the same level.

The *Wilinski* decision's emphasis on the need to establish proximate cause between the accident and the lack or inadequacy of an enumerated safety device is illustrated by the Court of Appeals' even more recent decision in *Salazar v. Novalex Construction Corp.*, 18 N.Y.3d 134 (2011). In that case Plaintiff was laying a new concrete floor in the basement of a building. The existing floor of the basement

contained a four foot deep trench. As plaintiff was spreading the concrete he stepped backwards into the trench and sustained injury. In support of his Labor Law 240(1) claim, the plaintiff claimed that a railing, barricade or cover should have been erected around or over the trench. The court held that section 204(1) was inapplicable because a statutory protective device would have been contrary to the objective of the work being performed. In other words, it would be illogical to require a cover or barricade over or around the trench where the goal of the work was, in part, to fill that hole with the concrete.

The foregoing scenarios suggest that in falling object cases, an injured worker need not necessarily come in contact with the object and may be able to prevail on a 240(1) claim even when his or her injuries are arguably caused by the indirect effects of gravity. Further, there is really no de minimis height differential under Labor Law 240 cases, particularly when the object is of significant mass. Thus, 240(1) could be implicated by a concrete form that drops only a few inches and injures a worker's foot, even when one end of the form is resting on the ground. Further, these cases illustrate the importance, in many instances, of retaining a defense expert to address whether use of statutory protective devices were called for by the nature of the work being performed, and the adequacy of any such devices actually employed.

Property Owner Held Not Liable to Roofer Left in Vegetative State as a Result of Workplace Accident.

The New Jersey Appellate Division recently affirmed summary judgment in favor of the State of New Jersey, Department of Corrections, in the matter of *Budnik v. State of New Jersey*. The matter arose from a fall down that occurred at a warehouse which was part of a Department of Corrections facility. Plaintiff fell through the roof, 40 feet onto a concrete floor, and was in a persistent vegetative state as a result of brain damage from the fall.

The roof was known to be in an extremely bad condition. An inspection report from two years prior, determined that the roof was already in danger of collapse. As a result, all contractors bidding on the job were given extensive warnings about the dangerous condition of the roof.

On behalf of the State, HKMP moved for summary judgment relying on cases holding that where a property owner retains

a contractor to perform an inherently dangerous job, the owner is not liable for injuries arising from the very danger which is inherent to the job. See *Dawson v. Bunker Hill Associates*, 238 N.J. Super. 309 (App. Div. 1996).

Plaintiff opposed the motion arguing that the State's retention of a consultant to oversee the work and its "willful blindness" to numerous safety violations created liability for the State.

The Law Division rejected plaintiff's arguments and granted summary judgment on behalf of the State. The Appellate Division affirmed this decision, noting that plaintiff's arguments amount to an attempt to transform a general right to stop work if it is not being performed properly into an obligation to ensure safety on the jobsite. The Appellate Division rejected this argument and affirmed the motion for summary judgment.

Paul Daly handled the matter for HKMP.

About HKMP

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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@hkmp.com.

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