

MASSACHUSETTS

- Massachusetts Supreme Judicial Court Holds In Sequential Opinions That Wrongful Death Claims Are Derivative Of Decedent's Own Claims And Therefore Subject To Arbitration Covenant And Liability Release Agreed To By Decedent
- Massachusetts Superior Court Holds Renewal Statute, Permitting Suit Beyond Normal Limitations Period If Commenced Within One Year Of Dismissal Of Prior Timely Action For Matter Of Form, Applies Even To Claims Not Included In Original Action So Long As Based On Same Events
- Massachusetts Federal Court Holds Due Process Permits Personal Jurisdiction Over Out-of-State Manufacturer Based On In-State Sale Of Car By Predecessor Whose Liabilities Manufacturer Expressly Assumed, Joinder Of In-State Dealer Defeats Diversity Jurisdiction Where Statute Of Limitations May Not Have Expired Due To Tolling By Injured Party's Mental Incapacity And Lack Of Evidence Joinder Was Fraudulent
- Massachusetts Superior Court Holds SEC Filings Describing Foreign Parent And Domestic Subsidiary Collectively, And Shared Office, Insufficient To Support Personal Jurisdiction Over Parent For Subsidiary's In-State Conduct, And No Evidence Established Parent's Control Or Agency Relationship Regarding Conduct
- Massachusetts Federal Court Holds No Evidence Revolving Door Malfunction Caused Injuries, As Plaintiff's Testimony She Was Alone In Door Was Inadmissible As Not Based On Direct Perception And Expert's Opinion Door Must Have Malfunctioned Despite No Defects On Inspection Was Based On Improper *Res Ipsa Loquitur* Assertion

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Foley Hoag LLP publishes this quarterly Update primarily concerning developments in product liability and related law from federal and state courts applicable to Massachusetts, but also featuring selected developments for New York and New Jersey.

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Massachusetts Supreme Judicial Court Holds In Sequential Opinions That Wrongful Death Claims Are Derivative Of Decedent's Own Claims And Therefore Subject To Arbitration Covenant And Liability Release Agreed To By Decedent

In *GGNSC Administrative Services, LLC v. Schrader*, 484 Mass. 181 (2020), a decedent's daughter and executor brought a wrongful death claim in Massachusetts Superior Court alleging that a nursing home's negligence caused her mother's death. The nursing home sued the daughter in the United States District Court for the District of Massachusetts to compel arbitration of the death claim based on an agreement signed by the daughter on her mother's behalf upon nursing home admission to arbitrate any claims against the facility. The nursing home argued that because the daughter's death claim was derivative of any claims the mother could have brought herself, it was subject to the arbitration agreement.

The federal court then certified two questions to the Massachusetts Supreme Judicial Court ("SJC"): (1) "Is the wrongful death claim of [decedent's] statutory heirs derivative or independent of [decedent's] own cause of action?"; and (2) "If the answer to the first question does not resolve the issue presented to the federal court, is [the daughter's] wrongful death claim nonetheless subject to [decedent's] Agreement that her 'next of kin, guardian, executor, administrator, legal representative, or heir' would arbitrate claims against [the nursing home]?"

Simultaneously, in *Doherty v. Diving Unlimited International, Inc.*, 484 Mass. 193 (2020), the SJC faced the same question, albeit in a different factual context. There, representatives of a decedent's estate brought a wrongful death action in Massachusetts Superior Court against a SCUBA dive leader, alleging his negligence caused decedent's death. After defendant obtained summary judgment on the ground that decedent had signed a release and covenant not to sue for injuries or death arising from the dive before participating in it, the estate representatives appealed to the Massachusetts Appeals Court. The SJC then granted direct appellate review on its own motion.

To decide both cases, the SJC looked to the language of the Massachusetts wrongful death statute, Mass. Gen. L. ch. 229, § 2, which allows a decedent's executor or administrator to recover against defendants who negligently, willfully, wantonly or recklessly cause decedent's death only "under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted." The daughter in *Schrader* argued the common law basis for wrongful death claims meant

the court could recognize an independent right to recovery. Although for many years Massachusetts, like most jurisdictions, had not recognized a common law right to bring a wrongful death claim, in 1972 the SJC followed the United States Supreme Court's ruling in *Moragna v. States Marine Lines, Inc.*, 298 U.S. 375 (1970), and acknowledged a common law origin for such claims. In *Schrader*, however, the SJC held the common law would only provide guidance if the statutory language did not resolve the question.

Here, before a 1958 amendment adding the statute's "under such circumstances" clause, Massachusetts courts had interpreted death claims as independent from the decedent's. Although after the amendment no court had directly addressed the issue, the combination of the statute's current language and the legislative intent apparent from the 1958 amendment clearly indicated that Massachusetts wrongful death claims are now considered derivative of decedents' claims. Accordingly, the decedents' arbitration agreement and liability release bound plaintiffs in the respective cases.

Massachusetts Superior Court Holds Renewal Statute, Permitting Suit Beyond Normal Limitations Period If Commenced Within One Year Of Dismissal Of Prior Timely Action For Matter Of Form, Applies Even To Claims Not Included in Original Action So Long As Based On Same Events

In *Harding v. Plante*, No. 1877CV00010 (Sup. Ct., Essex Cty., Feb. 11, 2020), a mother brought claims on behalf of herself and her daughter in the United States District Court for the District of Massachusetts against the daughter's father, his wife and various state agencies and employees relating to allegations of abuse by the father and the government's allegedly inadequate investigation into those allegations. After dismissing the federal law claims against the state actors, the federal court declined jurisdiction over the remaining state law claims against the father and his wife and dismissed the action. Six months later, the mother brought a new suit against the father and his wife in Massachusetts Superior Court, and defendants moved to dismiss plaintiff's individual claims based on the normal three-year statute of limitations.

In response, plaintiff relied on the state "renewal statute," Mass. Gen. L. ch. 260, § 32, which provides that when "an action duly commenced within the [applicable statute of limitations] is dismissed . . . for any matter of form . . . [the plaintiff] may commence a new action for the same cause within one year after the dismissal." The court noted that a touchstone for what constitutes dismissal for a matter of form is whether defendants had actual notice within the original limitations period that a court action had been initiated.

Here, plaintiff had included claims for negligent and intentional infliction of emotional distress, conspiracy and loss of consortium in her original federal suit, making those claims clearly timely under the renewal statute. While some of plaintiff's other legal theories, such as for assault and battery, fraud, defamation and abuse of process, were new, defendants cited no legal authority for the proposition that new claims based on the same conduct should be precluded. Accordingly, the court declined to dismiss any of the claims except for intentional infliction of emotional distress, and that only on the ground that it failed to allege extreme or outrageous conduct as required by Massachusetts law.

Massachusetts Federal Court Holds Due Process Permits Personal Jurisdiction Over Out-of-State Manufacturer Based On In-State Sale of Car By Predecessor Whose Liabilities Manufacturer Expressly Assumed, Joinder Of In-State Dealer Defeats Diversity Jurisdiction Where Statute Of Limitations May Not Have Expired Due To Tolling By Injured Party's Mental Incapacity And Lack Of Evidence Joinder Was Fraudulent

In *Doucet v. FCA US LLC*, 2020 U.S. Dist. LEXIS 4330 (D. Mass., Jan. 10, 2020), court-appointed guardians sued an automobile manufacturer in Massachusetts Superior Court, alleging their mentally incapacitated adult family member's injuries in a car accident were due to design and manufacturing defects. The car was manufactured by a different corporate entity in 2003 and sold to a dealership in Rhode Island, which transferred it to a dealership in Massachusetts where it was sold to a Massachusetts

resident; the car later changed hands through private sale before plaintiffs, New Hampshire residents, purchased it in 2013. Meanwhile, after the car's original manufacturer filed for bankruptcy in 2009, defendant purchased some of its assets and in connection with that purchase assumed liability for previously sold products.

After plaintiffs sued, defendant, a Delaware corporation headquartered in Michigan, removed the action to the United States District Court for the District of Massachusetts, claiming subject matter jurisdiction under both 28 U.S.C. § 1332, based on diversity of citizenship of the parties, and 28 U.S.C. § 1334, for cases arising in or under, or relating to, cases under the Bankruptcy Code. Defendant moved to dismiss for lack of personal jurisdiction, and plaintiffs moved to remand the action to state court for lack of subject matter jurisdiction.

Regarding personal jurisdiction, the court noted that a corporation's forum contacts can be imputed to its successor for jurisdictional purposes if forum law would hold the successor liable for the predecessor's actions. Although generally the purchaser of a corporation's assets does not assume its liabilities, here defendant had expressly assumed liability for the original manufacturer's products and therefore was its legally liable successor.

The court then turned to whether the original manufacturer's forum activities justified personal jurisdiction over defendant under both Massachusetts' long-arm statute, Mass. Gen. L. ch. 223A, § 3, and the requirements of due process. Under the long-arm statute, defendant must have transacted business in the state and plaintiffs' claim must have arisen from that conduct, while due process requires that plaintiffs' claims be sufficiently related to defendant's in-state actions, defendant have by those activities purposefully availed itself of the privilege of conducting business in the state, and maintaining the action in the forum be reasonable.

Here, both the original manufacturer and defendant itself sold vehicles in Massachusetts through the Massachusetts dealership that sold the car at issue, so defendant had transacted business in Massachusetts and purposefully availed itself of the privilege of doing so. Moreover, plaintiffs' claims arose out of, and were sufficiently related to, the car's sale by the Massachusetts dealer, and it was of no consequence that the manufacturer originally shipped the vehicle to Rhode Island before its transfer to Massachusetts for the sale. Lastly, exercising jurisdiction in Massachusetts

was reasonable, as it imposed no "special or unusual burden" on defendant and the state had an interest in ensuring products sold within its borders were safe.

Regarding subject matter jurisdiction, defendant argued plaintiffs had improperly joined the Massachusetts dealership after the normal three-year statute of limitations under Mass. Gen. L. ch. 260, § 2A had expired, but plaintiffs countered their family member had been mentally incapacitated so under Massachusetts law the statute should be tolled, rendering the action timely. In light of the tolling, and the lack of evidence plaintiffs had fraudulently joined the distributor to defeat jurisdiction, the court held the case could not be removed based on diversity jurisdiction. In addition, plaintiffs' tort claims were not related to a bankruptcy proceeding, as the claims could not affect administration of the bankruptcy estate which had terminated in 2016. Accordingly, the court remanded the action.

Massachusetts Superior Court Holds SEC Filings Describing Foreign Parent And Domestic Subsidiary Collectively, And Shared Office, Insufficient To Support Personal Jurisdiction Over Parent For Subsidiary's In-State Conduct, And No Evidence Established Parent's Control Or Agency Relationship Regarding Conduct

In *City of Boston v. Purdue Pharma L.P.*, Nos. 1884CV02860 and 1984CV01733 (Sup. Ct. Suffolk Cty., Feb. 24, 2020), a city and certain of its agencies sued a number of pharmaceutical companies in Massachusetts Superior Court to recover public costs incurred in combating the opioid crisis, asserting negligence, fraudulent misrepresentation and unjust enrichment claims, among others. The defendants included an Irish company headquartered in the United Kingdom and its American manufacturing subsidiary headquartered in St. Louis, Missouri. The Irish parent moved to dismiss for lack of personal jurisdiction, supported by an employee affidavit stating the company had "never marketed, sold, manufactured, or distributed prescription opiates in Massachusetts, the United States, or anywhere else," and did not direct its subsidiary's marketing or sales strategies or Massachusetts activities.

Plaintiffs argued for personal jurisdiction on the grounds that the parent exercised control over its subsidiary, which had marketed opioids in Massachusetts, and the subsidiary operated as the parent's agent. The court noted, however, that plaintiffs' complaints contained only conclusory allegations, and their sole evidence was the Irish entity's Form 10-K annual report to the United States Securities and Exchange Commission which referred to the companies collectively and described a shared office in St. Louis. But a company "does not waive any claim of corporate independence . . . simply by describing itself and its subsidiaries collectively in its public filings." Rather, the court could only exercise personal jurisdiction if facts supported an inference that the parent exercised significant control over the subsidiary, an analysis equivalent to piercing the corporate veil. Because plaintiffs had no actual evidence the subsidiary acted at the parent's behest, shared officers and directors, or otherwise disregarded the corporate form, there was no basis for jurisdiction.

The court similarly rejected plaintiffs' arguments that the subsidiary acted as its parent's agent, citing case law holding that the existence of common management personnel and shareholders does not in and of itself establish an agency relationship. Rather, that would require "mutual consent, express or implied, that the agent is to act on behalf and for the benefit of the principal, and subject to the principal's control," which was not present here. Finally, while plaintiffs noted that a federal district court in Ohio presiding over a multi-district litigation involving similar claims had declined to dismiss the Irish company, the court observed that the federal court had not affirmatively found personal jurisdiction but rather simply deferred ruling on the issue. Accordingly, the court granted defendant's motion.

Massachusetts Federal Court Holds No Evidence Revolving Door Malfunction Caused Injuries, As Plaintiff's Testimony She Was Alone In Door Was Inadmissible As Not Based On Direct Perception And Expert's Opinion Door Must Have Malfunctioned Despite No Defects On Inspection Was Based On Improper *Res Ipsa Loquitur* Assertion

In *Donahoe v. Maggiano's Holding Corp.*, No. 1:18-CV-10230-DPW, 2020 U.S. Dist. LEXIS 25153 (D. Mass. Feb. 13, 2020), a woman sued a restaurant for negligence in the United States District Court for the District of Massachusetts after suffering an injury while exiting the restaurant's revolving door. Plaintiff alleged the door malfunctioned, pushing against her back and throwing her onto the sidewalk where she sustained serious injuries. Defendant moved for summary judgment, arguing that neither plaintiff's testimony nor that of her expert could support a verdict in her favor.

Because plaintiff established defendant had failed to inspect the door regularly, which a jury could find negligent, the court focused on whether plaintiff had evidence to support a finding of causation. Plaintiff alleged she was alone in the revolving door when it pushed her onto the street, so her injury must have been caused by the door's malfunction, but her statements to medical personnel and family members after the accident as well as first-hand observations of her grandson indicated a child had entered another section of the door and pushed it into her. Although plaintiff testified she was confident she was alone in the door, she admitted she did not look behind her after entering. Accordingly, the court found her statement that she was alone inadmissible, as it was not based on actual sensory perception.

In addition, plaintiff's expert had examined the door sometime after the accident and found it in compliance with national best practices for the number of revolutions per minute. Nevertheless, he opined it was more likely than not that the door's rotational speed had exceeded that suggested by national practices at the time of the accident, even though there was no evidence the door had been repaired or adjusted, or even inspected, between the accident and the expert's inspection. The court held this opinion inadmissible, as it was "based solely on an unsupported *res ipsa loquitur* assertion that, if the door were working properly, it would not have expelled [plaintiff]." As plaintiff had no admissible evidence the door had indeed malfunctioned, the court granted summary judgment.

NEW YORK/NEW JERSEY SUPPLEMENT

New York Federal Court Holds Plaintiff Lacked Evidence Defendant Should Have Known Of Risk Of Chemical Burns Where Plaintiff Produced No Direct Evidence Of Such Knowledge, Such As Medical Studies, Prior Incidents Or Manufacturer Testing Results, And Expert’s Hindsight Opinion That Product Caused Plaintiff’s Burns Due To Individual Sensitivity Was Irrelevant To Defendant’s Knowledge At Relevant Time

In *De La Cruz v. Echolab Inc.*, No. 1:18-cv-06983-GHW, 2020 U.S. Dist. LEXIS 7948 (S.D.N.Y. Jan. 16, 2020), a hotel employee sued a dishwashing product manufacturer in the United States District Court for the Southern District of New York, alleging the product caused severe chemical burns that ultimately required amputating his right foot. The product was intended to be diluted in specified proportions and used to soak silverware before machine washing, but plaintiff diluted it differently and used it to hand wash a number of large trays that would not fit in the dishwashers. In the process, he saturated his pants and socks with the product, and only discovered his burns later at home.

Defendant had provided warnings and instructions for the product, including through both representative-led trainings and a data sheet affixed near the product’s wall-mounted dispenser. Defendant instructed users how to dilute the product, classified it as “Eye Irritation, Category 2A” and warned users to wash their skin after coming in contact with the product; the data sheet also stated that the product, if properly diluted, was “not a hazardous substance or mixture.” Plaintiff argued the data sheet failed to specifically warn that the product could cause chemical burns, and this lack of warning caused his injuries.

Defendant moved for summary judgment, arguing plaintiff had no evidence it knew or should have known the product could actually cause chemical burns. The court first observed that plaintiff had failed to present any direct evidence, such as medical studies, prior lawsuits, reports of similar incidents or results of the manufacturer’s own testing, indicating the manufacturer knew or should have known of the risk.

The only evidence even arguably relevant to defendant’s knowledge was testimony of plaintiff’s expert toxicologist, who opined that plaintiff’s exposure to the product had caused his burns. Yet the expert acknowledged his opinion applied to plaintiff only, as his underlying diabetes and peripheral vascular issues made him particularly susceptible to chemical burns, so this hindsight analysis had no actual relevance to defendant’s knowledge at the time plaintiff used the product. As “a manufacturer does not . . . have an unqualified duty to uncover all dangers that are scientifically discoverable,” the court granted summary judgment.

New York Federal Court Excludes Testimony Of Plaintiffs’ Specific Causation Expert On Pelvic Mesh Design Defect Claims As Expert Did Not Explain Relationship Of Injuries To Any Alleged Defect But Rather Only To Mesh Itself, But Testimony Admissible On Claim For Failure To Warn Of Mesh Risks

In *Lancaster v. Ethicon, Inc.*, 2020 U.S. Dist. LEXIS 27851 (N.D.N.Y, Feb. 19, 2020), a husband and wife sued a pelvic mesh product manufacturer and its parent company in an action consolidated for pretrial purposes in a multi-district litigation (“MDL”) in the United States District Court for the Southern District of West Virginia. Among other claims, plaintiffs asserted the mesh was defectively designed based on its polypropylene material, insufficient porosity and anchoring features, and that defendants failed to warn it could cause tissue erosion. Plaintiffs alleged that after doctors implanted the mesh in the wife, she experienced pain and bleeding and, when a doctor found “mesh extrusion or erosion,” eventually had portions of the mesh surgically removed. Later, she had yet another surgery to implant a new mesh product from a different manufacturer.

Defendants moved in limine to exclude the testimony of one of plaintiffs’ experts, a medical doctor who had reviewed the wife’s medical records and deposition testimony and opined that her injuries were due to scarring and erosion caused by defendants’ mesh, and that she was “at risk of recurrence of erosion in the near future.” The judge overseeing the MDL

then transferred the action to the United States District Court for the Northern District of New York, the venue in which the suit had arisen, for resolution.

Under Federal Rule of Evidence 702, experts must apply reliable principles and methods to sufficient facts or data, and their knowledge must “help the trier of fact to understand the evidence or to determine a fact in issue.” Defendants argued the expert’s causation opinion would not be helpful to the jury because he failed to connect the wife’s injuries to any defect in the mesh. Although plaintiffs responded that the opinion was supported by the reports of four other experts whom plaintiffs had designated to prove general causation, *i.e.*, that the products’ design defects caused erosion or scarring in some individuals, the court noted that the expert at issue made no mention of the other experts in his report or gave any indication he had relied on their opinions. Accordingly, without relying on other experts’ opinions or any reliable methodology of his own to connect plaintiff’s injuries to a defect in the mesh, the expert’s claims were inadmissible on plaintiffs’ design defect claims.

On the other hand, the expert’s testimony was admissible on plaintiffs’ other claims, including for failure to warn, since by reviewing the wife’s medical records the expert had performed what the court termed a reliable “differential diagnosis”—more properly, a differential causation or etiology analysis—in which he ruled out potential non-mesh causes for her injuries. Accordingly, the expert could opine that the mesh itself was the cause of these injuries, even if he could not say that any defect in the mesh was the cause.

Finally, the court excluded as irrelevant and speculative the expert’s opinion that plaintiff was at risk for a recurrence of tissue erosion. The expert did not identify any facts, data or scientific principles to support his conclusion, especially since plaintiff had suffered no symptoms since defendants’ mesh was removed. In addition, he did not explain why any future erosion would be attributable to the pieces of defendants’ mesh that remained in plaintiff as opposed to the replacement mesh that had been implanted, and hence why any risk was relevant to plaintiff’s claims against these defendants.

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