

Client Alert **Product Liability Law**

Dispositive Motions in Sheep's Clothing: A Decision Every New Jersey Practitioner Needs to Know

In *Cho v. Trinitas Reg'l Med. Ctr.*, 2015 N.J. Super. LEXIS 214 (App. Div. Dec. 30, 2015), the New Jersey Appellate Division addressed the practice of filing dispositive motions in the form of *in limine* motions on the eve of trial (or even during trial). Recognizing the inherent unfairness in this practice, the Court made clear that all dispositive motions must be filed before trial to allow the opposing party an adequate opportunity to respond, to give the court time to rule, and to conserve judicial resources. Regardless of how a dispositive motion is labeled, it must be filed in advance of trial, and in most instances, early enough so that it can be heard 30 days before trial. Failure to follow this rule violates the New Jersey Court Rules (Rules) and will likely constitute a due process violation, resulting in dismissal of the motion regardless of its merits.

In *Cho*, the sister, brother and fiancée of Decedent Seoung Ouk Cho (Plaintiffs) brought suit against various physicians, their practice group, and two healthcare facilities (Defendants), alleging wrongful death, medical negligence and breach of contract. Over the course of approximately two years, Defendants filed various summary judgment motions, resulting in the dismissal of claims against all Defendants with the exception of Decedent's primary care cardiologist, Hyuen Park, M.D. (Park). An order barring the testimony of Plaintiffs' economic expert on the ground that his opinion constituted a net opinion precluded Plaintiffs from presenting expert testimony regarding economic loss.

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The case was listed for trial on a Monday, four weeks after the first trial call, with the trial judge noting that the parties had pending *in limine* motions and that a jury would be selected in two days. When the judge began to address the pending *in limine* motions, counsel for Park advised that he was considering filing a motion to dismiss. The trial judge asked Park to file and serve his motion by the following day, without asking Plaintiffs to consent.

The following day, Park filed a motion to dismiss fashioned as an *in limine* motion. Park's motion sought to dismiss Plaintiffs' wrongful death and punitive damages claims on the grounds that their proofs of economic loss were "too speculative to present to a jury," and sought to bar Plaintiffs from presenting any evidence of pain and suffering by Cho because no survival claim had been pled. Park argued that if the requested relief was granted, no viable claim against him remained, and the Complaint should be dismissed in its entirety with prejudice. With exhibits, Park's submission was 260 pages long and did not include a statement of material facts, as required by *R. 4:46-2(a)*.

Plaintiffs had less than one day to prepare and submit an opposition. Plaintiffs argued that the Complaint should not be dismissed because a survival claim could be implied by the fact that Cho's sister, brother and fiancée were named as individual parties, and there was testimony showing survival damages in the form of funeral expenses. See *N.J.S.A. 2A:31-5* (authorizing a jury to award "such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death . . . [including] funeral expenses incurred for the deceased").

The trial judge expressed reluctance in ruling on Park's motion, noting that it was not a true *in limine* motion and that it could have been made as a summary judgment motion at any point during the case, which had been pending for three years. Nonetheless, the trial judge considered the motion and after hearing oral argument, granted the motion, dismissing all claims with prejudice. He denied the motion for reconsideration, and Plaintiffs filed an appeal.

At oral argument on appeal, Park's counsel advised the Court that the motion to dismiss was filed late because the attorney who filed Park's earlier motion to bar the testimony of the economic expert left the law firm and trial counsel received the file the weekend before trial. Park's counsel argued that even though his late filing violated the Rules, he was entitled to file the motion at any time and in any event, the order dismissing the complaint should be affirmed because the Complaint lacked merit.

In reversing the dismissal of the Complaint and remanding for further proceedings, the Court first addressed the definition of an *in limine* motion. As the Court explained, an

in limine motion is a “pretrial request that certain inadmissible evidence not be referred to or offered at trial.” *Id.* at *11 (quoting *Black’s Law Dictionary* 791, 1109 (9th ed. 2009)). “[A]s a general rule, a motion in limine will not have a dispositive impact on a litigant’s entire case.” *Id.* at *12. Moreover, even when a limited issue is presented, “courts generally disfavor in limine rulings on evidence questions,’ because the trial provides a superior context for the consideration of such issues.” *Id.* at * 12 (quoting *State v. Cordero*, 483 N.J. Super. 472, 484-85 (App. Div. 2014), *certif. denied*, 221 N.J. 287 (2015)). The Court went on to state, in no uncertain terms, that an *in limine* motion “is not a summary judgment motion that happens to be filed on the eve of trial.” *Id.* at *12. “When granting a motion will result in the dismissal of a plaintiff’s case or the suppression of a defendant’s defenses, the motion is subject to Rule 4:46, the rule that governs summary judgment motions.” *Id.* at * 13.

The Court next discussed the requirements of *R.* 4:46-1, which provides that “[a] motion for summary judgment shall be returnable no later than 30 days before the scheduled trial date, unless the court otherwise orders for good cause shown” *Id.* at *13. The Court observed that although *R.* 4:46-1 gives a trial court discretion to modify the 30-day time frame upon a showing of good cause, the motion must still be filed early enough so that it can be heard prior to trial.¹ *Id.* at *13. The Court concluded nonetheless that even if the rule allowed a dispositive motion to be heard during trial upon a showing of good cause, there was no such showing in the case at hand because the documents relied upon by Park were available for review long before the time to file a summary judgment motion expired. *Id.* at *14.

The Court also considered *R.* 1:1-2, which generally permits the relaxation of a rule if “adherence to it would result in an injustice.” This rule, the Court held, is the exception rather than the norm and should be sparingly used. Since *R.* 4:46 already addresses the appropriate timing of dispositive motions, “recognizing the ‘obvious’ desirability of deciding such motions prior to trial and establishing requirements to accomplish that goal,” *id.* at *14-15, there is no basis to invoke *R.* 1:1-2 to circumvent this clear requirement. *Id.* at *15 (The Rules of Court “offer no legitimate path for the consideration of defendant’s motions on the day before jury selection.”).

Finally, the Court addressed whether the dismissal of the Complaint deprived Plaintiffs of due process. *Id.* at *15. In 1986, the summary judgment rules were amended to increase the time to respond to a motion for summary judgment from 8 days to almost 3 weeks in order to address due process concerns. This amendment also required that summary judgment motions be returnable no later than 30 days before trial, and provided that adjournment requests should be “liberally granted” if the motion is not ruled on within 10 days of trial.

1. Under *R.* 4:46-1, summary judgment motions must be filed 28 days prior to the return date.

The Court concluded that in this case, “the timing requirements of Rule 4:46-1 were violated in every respect.” *Id.* at *17. Park’s motion was not filed so that it would be returnable 30 days before trial; it was filed during trial (after the second day of trial) and Plaintiffs had less than one full day to file their opposition. Moreover, the trial court’s decision was rendered the day before jury selection, after Plaintiffs had expended effort and expense preparing for trial, rather than the 10 days before trial anticipated by the rule.

The Court “utterly rejected” the argument that the dismissal should be affirmed despite this due process violation on the grounds that Plaintiffs’ claims lacked merit, stating that “[t]he right to due process of law is not limited to worthy causes.” *Id.* at *19. In conclusion, the Court held that “absent extraordinary circumstances or the opposing party’s consent, the consideration of an untimely summary judgment motion at trial and resulting dismissal of a complaint deprives a plaintiff of due process of law.” *Id.* at *19.

What Does This Ruling Mean?

The New Jersey Appellate Division’s reversal of the dismissal of the Complaint in this case highlights the fact that dispositive motions must always be made in advance of trial—and in most cases they must be returnable 30 days before trial—regardless of the merits. The practice of labeling a dispositive motion as an *in limine* motion will not take the motion outside the ambit of *R. 4:46-1*. In the wake of *Cho*, it is unlikely that any New Jersey trial court will entertain a dispositive motion during trial, and if it does, any ruling it makes granting such a motion will almost certainly be reversed on appeal as a violation of the Rules and of due process. Accordingly, it is imperative that practitioners file all dispositive motions well before trial to ensure that they will be heard and decided on the merits.

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