

## **The Affidavit of Merit Statute is Alive and Well in New Jersey**

Kosakoff & Cataldo LLP (K&C) attorneys David B. Kosakoff and Mark P. Bradley recently secured a complete dismissal of all claims against our client, a leading multi-disciplined engineering firm, in a wide-ranging, multi-million-dollar construction defect litigation in Hudson County, New Jersey.

This complex construction defect litigation was brought by a condominium homeowner's association and involved eight separate condominium buildings located in the Port Imperial section of Weehawken, New Jersey. The homeowner's association asserted various professional malpractice claims against our client who was originally retained to serve as the geotechnical engineer and subsequently served as structural engineer for discrete portions of the project. In accordance with N.J.S.A § 2A:53A-27, more commonly referred to as the Affidavit of Merit Statute, the Plaintiff was required to file an affidavit from an appropriately licensed engineer verifying that our client's work deviated from the accepted engineering standard of care. Significantly, after the Plaintiff failed to provide the duly demanded affidavit, K&C was able to secure a voluntary dismissal of Plaintiff's alleged claims with prejudice.

Thereafter, K&C moved to dismiss all cross-claims for contribution and indemnification asserted by the numerous Co-Defendants. K&C argued that pursuant to binding Appellate Division precedent, when a plaintiff fails to provide the statutorily required Affidavit of Merit against a defendant whom cross-claims have been asserted, that defendant is not subject to liability either to the plaintiff or to any remaining co-defendant who has asserted such a crossclaim. Burt v. West Jersey Health Systems, 339 N.J. Super 296, 307-308 (App. Div. 2001). In *Burt*, the Appellate Division was tasked with determining if a co-defendant could still seek contribution from and allocation over a defendant who was dismissed due to the plaintiff's failure to provide

an Affidavit of Merit. In its decision, the Appellate Division shielded the dismissed defendant from liability and held that the Affidavit of Merit Statute “was intended not only to insulate a licensed professional from the possibility of responding in damages unless an Affidavit of Merit is timely filed, but also to insulate them from the expense and inconvenience of trial.” Id. at 308.

In a subsequent decision, the Appellate Division ruled that “if the plaintiff fails to provide an Affidavit of Merit to a defendant against whom a cross-claim has been asserted, that defendant is not subject to liability either to the plaintiff or to a co-defendant who has asserted a cross-claim.” Charles A. Manganaro Consulting Engineers, Inc. v. Carneys Point Township Sewerage Authority, 344 N.J. Super 343, 348 (App. Div. 2001).

In this action, several Co-Defendants fatally argued in opposition, amongst other things, that the above binding Appellate Division cases were inapplicable since dismissal of Plaintiff’s claims was by way of a voluntary dismissal, and not by way of an order of dismissal by motion. Recognizing the speciousness of these arguments, the trial court rejected the Co-Defendants’ contentions, agreeing with K&C that a voluntary dismissal of a the Plaintiff’s claims was tantamount to a trial court order of dismissal. In its decision, the trial court not only dismissed all current cross-claims against our client, but also barred the assertion of any future cross-claims.

It is clear that while recent case law has softened the bite of the Affidavit of Merit Statute, as explained above, its teeth are still razor sharp in the right situation and with the right Counsel. Through its proactive strategy K&C was able to achieve an early resolution and secure peace of mind for its client, while avoiding the substantial cost associated with protracted litigation.