Garden State CLE Presents:

New Jersey Personal Injury Review - 2021

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Lesson Plan

Introductory Issues

Summary Judgment motions under *Brill* [Brill v. Guardian Life, 142 N.J. 520 (1995)]

What is a *Ferreira* Conference? [Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003).]

What is the affidavit of merit statute and its purpose? [N.J.S.A. 2A:53A-27.]

What is the Comparative Negligence Act, [N.J.S.A. 2A:15–5.1 to –5.8.]

What is AICRA [*N.J.S.A.* 39:6A–1.1 to –35 – DiProspero v. Penn, 183 N.J. 477 (2005).]

Statute of limitations under N.J.S.A. 2A:14-2.

Impact of COVID restrictions on new cases, settlement & trials

New Jersey Transit v. Sanchez, 242 N.J. 78 (2021)

Subrogation: Workers comp. vs. ACIRA

[This opinion affirms an Appellate Division decision based upon an equally divided Supreme Court. The Appellate Division decision is reported as N.J. Transit Corp. v. Sanchez, 457 N.J. Super. 98 (App. Div. 2018).]

This appeal arises from an action brought by plaintiff New Jersey Transit Corporation (New Jersey Transit) pursuant to N.J.S.A. 34:15-40, a provision of the Workers' Compensation Act that authorizes employers and workers' compensation carriers that have paid workers' compensation benefits to injured employees to assert subrogation claims. New Jersey Transit sought to recover workers' compensation benefits paid to an employee who sustained injuries in a work-related motor vehicle accident. It sued the individuals allegedly at fault in the accident, defendants Sandra Sanchez and Chad Smith. Defendants argued that New Jersey Transit's subrogation action was barred by the Auto Insurance Cost Reduction Act (AICRA). Defendants asserted that because the employee had elected the limitation-on-lawsuit option permitted by N.J.S.A. 39:6A-8(a), and sustained no permanent injury, AICRA barred New Jersey Transit's claim.
The trial court granted summary judgment in favor of defendants and denied New Jersey Transit's cross-motion for partial summary judgment. It barred New Jersey Transit's subrogation action on the grounds that the employee sustained no economic loss as defined in AICRA and that New Jersey Transit's subrogation claim would subvert AICRA's goals.

The Appellate Division agreed with New Jersey Transit that the workers' compensation benefits paid to the employee related only to economic loss. It concluded that New Jersey Transit's subrogation action did not implicate the limitation-on-lawsuit threshold imposed by N.J.S.A. 39:6A-8(a). The Appellate Division held that because the employee's economic loss was covered by his workers' compensation benefits -- not by personal injury protection (PIP) benefits under his automobile insurance policy -- New Jersey Transit's subrogation action did not run afoul of AICRA. It reversed the trial court's judgment and remanded for further proceedings.

In its concurring opinion, the Justices stated there is no evidence to suggest that when the Legislature enacted AICRA, it intended to bar employers and insurers that have paid workers' compensation benefits for economic loss from seeking reimbursement from third-party tortfeasors in cases such as this, in which the employee's losses were covered by workers' compensation benefits and he neither sought nor received PIP benefits. We do not view New Jersey Transit's subrogation action -- limited to workers' compensation benefits paid for economic losses -- to contravene AICRA's provisions or to undermine its goals.

Pannucci v. Edgewood Park Senior Housing, 465 N.J.Super. 403 (App. Div. 2020)

Res Ipsa Loquitur

Kathleen Pannucci was injured while boarding an elevator in her apartment building. She sued her landlord, its manager, and the company that serviced the elevator. For lack of proof of negligence, the court later dismissed her suit on defendants' motion for summary judgment. To salvage her claims, Pannucci asks us to revise the settled doctrine of *res ipsa loquitur* — "the thing speaks for itself."

The doctrine permits a jury to infer a defendant's negligence, enabling a plaintiff to make a prima facie case. To employ the doctrine, a personal-injury plaintiff must show three things: first, the accident was one that "ordinarily bespeaks negligence," that is, someone's negligence more likely than not caused the accident; second, the defendant exclusively controlled the thing that caused the injury; and third, the injury did not result from the plaintiff's "own voluntary act or neglect."

Pannucci urges us to jettison the third requirement. She claims that it defeats the purpose of the Comparative Negligence Act, N.J.S.A. 2A:15–5.1 to –5.8, which discarded the rule that a personal-injury plaintiff must be free of contributory negligence.

We decline Pannucci's invitation. We acknowledge that other states have gone where she asks us to go. Yet, altering the *res ipsa loquitur* doctrine's third prong would undo settled Supreme Court precedent, and there is no hint that the Court would endorse the change. Furthermore, there is still good reason to require a plaintiff to show that his or her conduct is not an alternative explanation for the accident. Absent that showing, it may be unreasonable to infer that a defendant probably acted negligently. Because Pannucci failed to satisfy the *res ipsa loquitur* rule's third prong, we affirm summary judgment.

Goulding v. Friendship House, N.J. , 244 A.3d 725 (2021)

The "Fun and Games" exception to workers' compensation

Under New Jersey's Worker's Compensation Act, an employee injured during a social or recreational activity generally cannot receive compensation for those injuries. However, the Act provides an exception to that general rule and expressly permits compensation "when such recreational or social activities [(1)] are a regular incident of employment and [(2)] produce a benefit to the employer beyond improvement in employee health and morale."

Goulding was an employee of North Jersey Friendship House, Inc. (Friendship House), a non-profit organization that assists individuals with developmental disabilities. She worked for Friendship House as a cook, and she taught cooking classes to Friendship House's clients. Goulding was injured when she fell while volunteering as a cook at "Family Fun Day," an event Friendship House held for its clients.

Whether an activity is social or recreational should turn on the employee's role in the activity -- whether she is participating as a guest or providing services for her employer at the event. If the employee is helping to facilitate the activity in the manner that occurred here, the event cannot be deemed a social or recreational activity as to that employee, and any injuries sustained by the employee while acting in that capacity should be compensated. That result accords with the liberal construction due the Act as "humane social legislation."

We also disagree with the determination that Goulding does not meet the two-prong exception established in N.J.S.A. 34:15-7. Her role at the event, which was planned to be held annually, was the same as her role as an employee; but for her employment at Friendship House, she would not have been asked to volunteer and would not have been injured. Viewed in that light, Goulding's injury was "a regular incident of employment." Additionally, Friendship House received a benefit from Family Fun Day beyond an improvement to employee health and morale. The event was not a closed, internal event for the Friendship House team. Rather, it was an outreach event designed to celebrate and benefit Friendship House's clients, thereby creating goodwill for Friendship House in the community that could expand its fundraising opportunities in the future. Goulding was therefore eligible for compensation for her injuries under N.J.S.A. 34:15-7.
We conclude that Goulding's injuries were compensable.

Hocutt v. Minda Supply, 464 N.J.Super. 361 (App. Div. 2020)

Workers' Comp and the "Special Employee"

Plaintiff was injured in a forklift accident while working at the defendant's warehouse. He sued defendant claiming the company was negligent in directing him to ride as a passenger on a forklift in violation of federal workplace safety regulations. The trial court dismissed the complaint, ruling that the plaintiff's exclusive remedy rests in workers' compensation.

The plaintiff contends the trial court erred in applying the New Jersey Workers' Compensation Act. He asserts that he was not employed by the defendant but rather by an employee leasing agency. He further contends that even if he were deemed to be an employee of the defendant for purposes of the Workers' Comp Act, he is not barred under the statute from suing the defendant because the company committed intentional wrong.

The defendant operates a warehouse that stores goods for the dry-cleaning industry. Forklifts are used at the warehouse to move pallets of supplies. It was a common practice at the warehouse for a worker to ride on the forklift, standing on either the front or back of the forklift while it was moving. This practice violates federal workplace safety regulations.

The defendant uses the services of an employee leasing agency, Express. The staffing agreement between defendant and Express provides that Express is responsible for paying the loaned workers. Defendant reimburses Express for those wage payments by agreeing "to pay the charges based on the time card or other mutually acceptable recording method."

For purposes of workers' compensation, a special employee is an employee based upon the following 5-part test:

> (1) the employee has made a contract of hire, express or implied, with the special employer;
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> (2) the work being done by the employee is essentially that of the special employer;
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> (3) the special employer has the right to control the details of the work;
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> (4) the special employer pays the employee's wages; and
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> (5) the special employer has the power to hire, discharge or recall the employee.

The plaintiff's status as a special employee thus subjects him to the exclusive remedy of workers' compensation.

S.H. and L.H v. K & H Transport, 465 N.J.Super. 201 (App. Div. 2020)

Foreseeability and proximate cause

The plaintiff, Stephanie, then seventeen-years-old attended the eleventh grade at Palisades Academy, an out-of-district, State-approved school for students with disabilities. Stephanie was deemed eligible for continued special education due to a learning disability and social and communication deficits. She operated generally on a 6th grade level. Stephanie has been diagnosed with cerebral palsy and had a full-scale IQ of 77. Transportation to and from Palisades was part of Stephanie's Individualized Education Program (IEP).

On the date of the incident, the school bus driver acceded to Stephanie's request and dropped her off several blocks from her home rather than in front of her house. This action ultimately resulted in a claim by her that she was sexually assaulted by several boys.

Stephanie's resident school district, which was responsible for her safe transportation to and from school in accordance with the administrative code, breached the standard of care by failing to provide specific information or training, as per its own policies and New Jersey regulations, regarding Stephanie's needs and disabilities, recognizing that she was a vulnerable student with a disability and an IEP, who required a higher level of care and supervision based upon her disability and deficits in the areas of communication and social skill development.

In granting the defense summary judgment motion, the trial judge reasoned that while reasonably foreseeable consequences might include a child getting lost, walking in front of traffic, or going to a friend's house, it is an extreme circumstance where a seventeen-year-old would be subjected to multiple rapes perpetrated by her peers and older men. A student's being dropped off by a school bus two blocks away from her house does not ordinarily result in a series of sexual assaults. Accordingly, the court concluded those injuries could not have been reasonably within the apprehension of defendant, and thus the crucial element of foreseeability was missing.

Foreseeability relates not only to the likelihood of the event occurring, but to proximate cause as well.

The Appellate Division reversed, reasoning that the plaintiff could point to enough facts in the record to put the extent of Stephanie's disability in issue on the motion. Because the scope of the duty defendants owed to Stephanie could not be established on the motion, because the parties disputed facts material to its determination, any discussion of whether breach of the duty was a proximate cause of Stephanie's injuries was premature.

Haviland v. Lourdes Med Ctr, ___ N.J. Super. ___ (App. Div. 2021) 2021 WL 262363

An affidavit of merit is not required for vicarious liability of employee who did not meet definition of licensed person.

[What is a *Ferreira* Conference?]

This appeal presents a discrete yet novel issue, requiring us to determine whether an affidavit of merit (AOM) is mandated under the Affidavit of Merit Statute when a plaintiff's sole claim against a health care facility, which is defined as a licensed person under the AMS, is vicarious based on the alleged medical negligence of an employee, who is not a licensed person within the meaning of the AMS and as to whom no AOM is required. We hold an AOM is not required in those specific circumstances.

During a radiological examination of plaintiff's left shoulder an unidentified technician asked plaintiff to "hold weights contrary to the ordering physician's instructions, causing injuries that thereafter required surgical repair of plaintiff's shoulder. Plaintiff's complaint alleged John Doe and Lourdes failed to properly perform imaging and otherwise deviated from accepted standards of medical care, thereby proximately causing plaintiff to suffer serious personal injuries. Plaintiff also claimed Lourdes was vicariously liable for Doe's negligent acts, as its agent, servant and/or employee.

AOM is not required for a health care facility when the plaintiff's claims in a medical negligence action are limited to vicarious liability for the alleged negligence of its employee, who does not meet the definition of a licensed person under the AMS.

Rafanello v. Taylor-Esquival, 465 N.J.Super. 304 (App. Div. 2020)

Commercial Vehicle Insurance Coverage

Defendant and third-party plaintiff Encompass Property & Casualty Insurance Company of America (Encompass) appeal from a January 18, 2019 order granting summary judgment to third-party defendant American Millennium Insurance Company (AMIC) and denying Encompass's cross-motion for summary judgment as to AMIC. The trial court found that in this multi-vehicle accident involving a commercial dump truck, the step-down provision in the AMIC policy was triggered because defendant Jorge S. Taylor-Esquivel, the dump truck driver, was not listed in the Covered Driver's section of the policy procured by his employer, NAB Trucking, LLC (NAB). The trial court determined that NAB's exposure was capped at $35,000.

The issue on appeal is whether New Jersey law requires a commercial motor vehicle carrier, such as NAB, to provide the minimum insurance coverage amount of $750,000, when engaged in interstate or intrastate commerce even in the event an individual is not listed as a covered driver on the policy. We answer in the affirmative and conclude, as a matter of law that the AMIC insurance policy issued to NAB requires a mandatory minimum insurance coverage amount of $750,000 and the step-down provision in the insured's combined single limit (CSL) policy is not triggered.

Combined single limit (CSL) commercial automobile insurance policy issued to dump truck lessee required mandatory minimum insurance coverage amount of $750,000, and thus policy's step-down provision, which provided for maximum coverage limit of $35,000 for liability arising from incidents involving an individual who was not listed as covered driver was not triggered, although dump truck operator was not listed as a covered driver on the policy; dump truck was engaged in interstate commerce, and accident in which dump truck operator rear-ended motorist occurred when dump truck operator was engaged in dump truck lessee's business of trucking and hauling dirt with permission of lessee's owner.

Glassman v. Friedel, 465 N.J.Super. 436 (App. Div. 2020)

Pro tanto credit

Generally speaking, where a plaintiff has settled with the first tortfeasor and claims that she was not paid for all of her injuries, she is entitled to have the injuries caused by the successive independent tortfeasor assessed and compared with the damages recoverable for all of her injuries. In other words, a plaintiff is entitled to have a fact-finder apportion the damages caused by the two events.

If the plaintiff has succeeded in proving the doctor's negligence and damages, the defendant-doctor will be entitled potentially to a *pro tanto* credit against any award based on the plaintiff's prior settlement with the owner of the premises.

If the settlement exceeds plaintiff's total provable damages she would be entitled to no further recovery from the doctor. If the settlement exceeds the amount of her provable damages minus the damages caused by the doctor, the amount of such excess should be credited against the damages assessed solely for the harm caused by the doctor. If the settlement is less than the amount of her total provable damages minus the damages caused solely by the doctor, plaintiff should recover the full amount of damages assessed against the doctor alone for the pain and suffering

Minelli v. Harrah's Resort Atlantic City, 463 N.J.Super. 539 (App. Div. 2020)

Statute of limitations & bankruptcy automatic stay

Casino patron who was injured in a slip and fall at casino brought personal-injury action against entity that operated the casino, that entity's parent company, and the parent company's parent company. After patron obtained relief from a bankruptcy court to allow her to go forward against casino operator's parent company, which had filed for bankruptcy, as a nominal defendant only, the Superior Court, Law Division, Mercer County, dismissed action with prejudice. Patron appealed.

The Appellate Division reversed in part, ruling that the statute of limitations on plaintiff's personal injury claim expired while the bankruptcy stay, at least as to Caesars Entertainment Operating Company, remained in place. Section 108(c)(2) of the Bankruptcy Code plainly permitted her to file an action against the debtor, or against an individual ... protected under section 1201 or 1301 [stays of action against a co-debtor], up until 30 days after notice of the termination or expiration of the stay under section 362. As plaintiffs filed their complaint well before that date, it would appear timely filed under Section 108(c)(2) as to those defendants protected by the automatic stay.