Garden State CLE Presents:

New Jersey Personal Injury Review - 2022

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Lesson Plan

Jeter vs. Sam's Club, ___ N.J. ___ (2022)
The Mode of Operation Rule

Under the "mode of operation" rule, plaintiffs who bring premises liability claims against businesses that employ self-service models do not need to show that the business owner had actual or constructive knowledge of a dangerous condition to establish negligence. In this appeal, the Court considers whether the rule applies to the sale of grapes in closed clamshell containers.

Plaintiff brought suit against Sam's Club after sustaining injuries when she slipped on one or more grapes in the Linden, New Jersey store. At Sam's Club, grapes are sold in closed clamshell containers secured with tape; accordingly, Sam's Club filed a motion *in limine* on the eve of trial to bar plaintiff from requesting a mode of operation jury instruction.

We agree with the trial and appellate courts that the mode of operation rule does not apply to the sale of grapes in closed clamshell containers. Selling grapes in this manner does not create a reasonably foreseeable risk that grapes will fall to the ground in the process of ordinary customer handling.

We stress, however, that the procedure followed by the trial court is troubling and should not be repeated. Dispositive motions should not be made or decided on the eve of trial, without providing the parties with a reasonable opportunity to present their cases through testimony and argument. The trial court should not have reached the merits of plaintiff's traditional negligence claim on its own and without giving the parties any further opportunity to present evidence in support of their positions.

Stewart vs. N.J. Turnpike Authority, 249 N.J. 642(2022)
TCA; Summary judgment; Premises liability

In this appeal, the Court considers whether plaintiffs' premises liability claim under N.J.S.A. 59:4-2 of the New Jersey Tort Claims Act (TCA) should survive summary judgment after plaintiffs belatedly altered their factual theory of liability.

In Spring 2015, plaintiffs Thomas and Julie Stewart were injured when they lost control of their motorcycle while riding over a Garden State Parkway overpass. Thomas testified that, after he and his wife passed through the Toms River toll plaza, their bike began to "shimmy," and Thomas suspected that he had suffered a flat tire. As they tried to pull over, they crossed the expansion joint between the roadway and the bridge, and the bike's back end bounced up and ejected Julie. Thomas then let go of the bike, slid to the ground, and both he and Julie suffered serious injuries. A friend who had been riding with plaintiffs claimed in a deposition to have observed a "piece of metal between the asphalt and concrete bridge, which is where the accident occurred. Plaintiffs filed a complaint against defendants, the New Jersey Turnpike Authority (the Authority) and Earle Asphalt (Earle), one of the Authority's paving and roadwork contractors, for their alleged negligence in reconstructing the overpass, which had recently reopened. Plaintiffs alleged that they lost control of the motorcycle when they struck a piece of metal in the bridge's expansion joint that jutted out of the roadway (the joint theory).

The parties engaged in over two years of discovery, with plaintiffs requesting extensions seven times. During argument before the trial court on defendants' joint motion for summary judgment, plaintiffs changed their theory of liability. They argued, for the first time, that defendants failed to properly pave a portion of roadway on the overpass, leaving a height differential in the pavement (the asphalt theory). Under the newly asserted asphalt theory, plaintiffs alleged that it was the height differential in the roadway, rather than the joint, which caused them to lose control of the motorcycle. The trial court distinguished the joint theory from the asphalt theory and considered only the joint theory. The trial court found that plaintiffs failed to allege a disputed fact as to any of the required elements for negligence under N.J.S.A. 59:4-2.

Accordingly, the trial court found that the Authority was entitled to immunity under the TCA and that Earle was entitled to derivative immunity.
The Appellate Division reversed. Conflating the joint and asphalt theories and relying on the friend's testimony about the protruding object, the appellate court found disputed issues of fact as to whether the alleged height differential created a dangerous condition under the TCA. The court also concluded that Earle had not demonstrated that it was entitled to claim derivative immunity.

The Court agrees with the trial court that plaintiffs' new theory should not have been considered given its late presentation. The Court nonetheless holds, for completeness, that plaintiffs' new theory did not raise an issue of material fact. The Court reinstates summary judgment in favor of defendants and dismisses the complaint with prejudice. The Court also finds that Earle is entitled to derivative immunity.

1) Application of the summary judgment standard here must account for the fact that under the TCA, immunity of public entities from tort liability is the general rule and liability is the exception. A public entity's liability for injuries to those traveling on its roadways depends upon several elements; if one or more of those elements is not satisfied, a claim of liability must fail. The element at issue in this appeal is whether plaintiffs established the existence of an issue of material fact regarding whether there was a dangerous condition on the overpass.

2) As to derivative liability, where a public entity provides plans and specifications to an independent contractor, the public contractor will not be held liable for work performed in accordance with those plans and specifications.

3) The Court agrees with the trial court that the asphalt theory was not properly raised and finds that summary judgment was appropriate on that ground alone.

4) Nevertheless, for completeness, the Court notes that it does not find that either of the two items of evidence to which plaintiffs point establishes the existence of an issue of material fact on the asphalt theory.

Glassman vs. Friedel, 249 N.J. 199(2021)
New Process for Allocation of Damages; *Pro tanto* Credit

In this appeal, we address the allocation of damages in cases in which a plaintiff asserts claims against successive tortfeasors and settles with the initial tortfeasors before trial.

Plaintiff Todd B. Glassman, as Executor of the Estate of Jennifer K. Collum-Glassman, his wife, filed a wrongful death and survival action against the owners of a restaurant where Collum-Glassman fractured her ankle. He alleged that the property owners' negligence caused Collum-Glassman's accident, which in turn caused **90 her pulmonary embolism and death a month later. Plaintiff also asserted wrongful death and survival claims against physicians and nurses who treated Collum-Glassman for her ankle injury and the hospital that employed them, contending that Collum-Glassman's pulmonary embolism and death resulted from medical malpractice. Plaintiff thus claimed that Collum-Glassman's injuries and death resulted from two independent events that occurred at different times and were caused by distinct groups of tortfeasors.

After plaintiff settled his claims against the property owners, the trial court granted the non-settling medical malpractice defendants' pretrial motion for a pro tanto credit based on the amount plaintiff received in his settlement,

We agree with the Appellate Division that the Ciluffo pro tanto credit does not further the legislative intent expressed in the Comparative Negligence Act and does not reflect developments in our case law over the past four decades. In its stead, we set forth a procedure to apportion any damages assessed in the trial of this case and future successive-tortfeasor cases in which the plaintiff settles with the initial tortfeasors prior to trial.

Our law governing allocation of damages to non-settling joint tortfeasors provides the following core principles.

First, when the Legislature enacted the Comparative Negligence Act, it abandoned common-law pro rata allocation of damages in favor of the fact-finder's assessment of the percentage of fault attributable to the alleged joint tortfeasors and, if contributory negligence is proven, to the plaintiff.

Second, under the Joint Tortfeasors Contribution Law and the Comparative Negligence Act, the plaintiff's settlement with a joint tortfeasor does not afford to the remaining tortfeasors a pro rata credit premised on the number of defendants or a pro tanto credit based on the amount of the settlement. Instead, the non-settling defendant must provide timely notice and prove the fault of a settling defendant in order to obtain a credit against the total verdict based on the factfinder's assignment of a percentage of fault to the settling defendant

Third, in joint tortfeasor cases decided under the Comparative Negligence Act, neither the court nor the jury considers the terms of the settlement agreement, and the settling defendant has no further exposure beyond the terms of that agreement.

Goldhagen vs. Pasmowitz, 247 N.J. 580(2021)
Dog Bites: Strict Liability and Comparative Negligence

The Dog Bite Statute, N.J.S.A. 4:19-16, imposes liability on dog owners in personal injury actions arising from dog bites in certain settings, "regardless of the former viciousness of such dog or the owner's knowledge of such viciousness." It establishes a strict liability cause of action that a plaintiff injured by a dog bite may assert against the dog's owner if the plaintiff proves the elements set forth in the statute.

This appeal arose from an incident in which a dog owned by defendant Susan Pasmowitz bit plaintiff Bonay Goldhagen, causing a severe facial injury. At the time of the incident, plaintiff was a groomer and kennel assistant employed at a pet care facility where defendant boarded her dogs. It is undisputed that defendant told plaintiff and the facility's manager that the dog "nipped" or "bit" her son and that she urged caution in handling the dog. Nevertheless, plaintiff contends that defendant concealed the fact that the dog had previously bitten defendant in the face and downplayed the risk that the dog presented.

Plaintiff asserted a claim based on the Dog Bite Statute, as well as common-law claims for absolute liability and negligence. Granting summary judgment in favor of defendant, the trial court relied on the Appellate Division's decision in Reynolds vs. Lancaster County Prison, 325 N.J.Super 298, 323-26, 739 A.2d 413(App.Div. 1999). In Reynolds, the Appellate Division recognized an exception to statutory liability under the Dog Bite Statute. Applying principles of primary assumption of the risk, the court held that when the plaintiff is an independent contractor who agrees to care for the defendant's dog, the plaintiff must show that the owner "purposefully or negligently conceal[ed] a particular known hazard" for liability to attach. The trial court in this matter viewed Reynolds to bar plaintiff's claims, given her status as a professional employed by a kennel to care for the dog, and dismissed her claims.

Plaintiff appealed. The Appellate Division applied the independent contractor exception to the Dog Bite Statute under Reynolds and affirmed the grant of summary judgment.

We granted certification. We affirm in part and reverse in part the Appellate Division's judgment and remand the matter to the trial court for further proceedings. We disagree with the Appellate Division's holding in Reynolds that the Dog Bite Statute's strict liability standard does not apply to the claim of an independent contractor who agrees to care for a dog. The statute's plain language reveals no legislative intent to recognize an exception to strict liability under the Dog Bite Statute for any category of injured plaintiffs. See N.J.S.A. 4:19-16. Accordingly, we reverse the Appellate Division's judgment affirming the trial court's grant of summary judgment to defendant based on the Reynolds independent contractor exception.

We hold, however, that the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8, applies to plaintiff's strict liability claim under the Dog Bite Statute, and that plaintiff's status as a professional experienced in the care of dogs is relevant to an allocation of fault under the Act. Our decision reversing the grant of summary judgment based on Reynolds is without prejudice to the parties' right to file additional motions for summary judgment addressing plaintiff's statutory claim based on comparative negligence or other grounds. If the case proceeds to trial, defendant may present evidence regarding plaintiff's alleged negligence to the jury and seek an allocation of fault to plaintiff.

Franco vs. Fairleigh Dickinson University, 467 N.J. Super 8 (App.Div.2021)
DWI Case #1 - Charitable Immunities

This appeal raises novel questions concerning the scope of the duty owed to an adult who is not old enough to drink legally but who nonetheless drinks alcohol to excess and injures himself in a motor-vehicle accident. Plaintiff, when he was a twenty-year-old college student, attended a social gathering in a suite in a university's residential hall. He had planned to spend the night in the suite and fell asleep after becoming visibly intoxicated. He later awoke, left the suite, and was injured when a car he was driving went off the road. No one saw plaintiff leave the suite

Plaintiff and his parents appeal from a series of orders that granted summary judgment to the University, four student residential assistants (RAs), four student suitemates (the Suitemates), and three other students who attended the gathering as guests. Plaintiff contends that the University and the students had a duty to take action that would have prevented him from driving while drunk. The court holds that certain defendants had no duty, while the duty of other defendants, and a related causation issue, present questions of fact for a jury to resolve.

The three student guests had no duty to monitor the actions of plaintiff. Any duty of the Suitemates ended when plaintiff fell asleep with the plan to spend the night in the suite. The University and its student RAs are protected by the Charitable Immunity Act (CI Act), N.J.S.A. 2A:53A-7 to -11, which shields them from claims based on simple negligence. There are disputed issues of material fact concerning whether the RAs were grossly negligent or acted with willful or wanton indifference in failing to enforce the University's policies prohibiting underage drinking. There is also a related disputed issue of material fact concerning whether any breach by the RAs caused plaintiff's injuries. Accordingly, the court affirmed in part, reversed in part, and remanded for further proceedings.

Diaz vs. Reynoso, 468 N.J. Super 73(App.Div.2021)
DWI Case #2 - Duty of Care Toward Intoxicated Drivers

This appeal from a Rule 4:6-2(e) dismissal order raises novel issues of legal duty and tort liability in a drunk driving context. The issues concern whether a volunteer who assures police officers at a roadside stop of an apparently inebriated driver that he will take the driver and his car safely to a residence—but thereafter relinquishes the car to the driver before reaching that destination—can be civilly liable as a joint tortfeasor if the driver then collides with and injures another motorist

In the present case, police officers stopped a driver who was traveling in the wrong direction on a one-way street. Perceiving the motorist was unfit to drive, the officers asked him if he could arrange for someone to pick him up. The motorist called a friend, who quickly arrived and assured the officers that he would drive the motorist and his car to another location. Relying on this assurance, the police issued a moving violation traffic ticket to the motorist and allowed the friend to drive him away. Minutes later, the friend returned the car to the motorist at a railroad crossing and separated from him. The motorist, who was intoxicated well over the legal limit, resumed driving and crashed his car into the plaintiff's vehicle. He later pled guilty to committing assault by auto while under the influence of alcohol. The severely injured plaintiff sued the driver, a bar where the driver had been drinking that night, the police officers and their city employer, and the volunteer. The volunteer moved to dismiss the claims against him, arguing he owed no legal duty that could make him civilly liable to any extent for this accident.

After reviewing a video of the motor vehicle stop and a prosecutor's investigative report, the motion judge concluded the volunteer breached no legal duty to the injured plaintiff. The judge accordingly dismissed plaintiff's claims, as well as the police defendants related cross-claims for contribution, against the volunteer.

Applying statutory public policies, including John's Law, N.J.S.A. 39:4-50.22, and allied common law principles, the court reverses the motion judge's dismissal order.

The court holds that a volunteer who fails to discharge his commitment to the police in such a situation and who willingly allows a visibly intoxicated motorist to resume driving can bear a portion of the civil liability for an ensuing motor vehicle accident caused by that drunk driver. The presence of such a legal duty will hinge upon whether the volunteer is advised by the police, or objectively has reason to know from the surrounding circumstances, that his or her promise is an important obligation and that failing to carry it out could result in civil financial consequences.

In recognizing these legal duties that may have been assumed by the volunteer, the court does not absolve any other parties whose negligence, if proven, contributed to the harm, including the drunk driver himself, the police officials who failed to field test or arrest him, and the tavern that served him alcohol. Their own respective shares of fault would need to be determined and allocated, based upon customary rules of proximate causation and joint tortfeasor liability.

Gayles vs. Sky Zone Trampoline, 468 N.J. Super 17(App.Div. 2021)
Apparent Authority

Defendant owned a trampoline park and required that adults who brought minors to the facility electronically execute a waiver of rights that also included an arbitration agreement at a computer station prior to entry. The adult would necessarily have to certify he/she was the parent or legal guardian of the minor or had been granted power-of-attorney to execute the waiver on behalf of the child's parent. The third-party defendant listed plaintiff's child as one of the minor's seeking entry to the facility and executed the waiver. Plaintiff's child fractured his leg while using the trampolines.

Defendant sought summary judgment dismissing the complaint and compelling arbitration of plaintiff's negligence claims. Defendant argued that it reasonably believed in the third party's "apparent authority" to execute the waiver on plaintiff's behalf. The judge denied defendant's motion and defendant appealed as of rights.

The court affirmed, rejecting defendant's argument that it was entitled as a matter of law on the motion record to rely on the doctrine of apparent authority to enforce the waiver and compel arbitration. In particular, the court examined the provisions and commentary of the Restatement (Third) of Agency regarding the doctrine of apparent authority.

Pareja vs. Princeton International Properties, 246 N.J. 546(2021) Commercial Property Owners and the Duty to Remove Snow During an Ongoing Storm

This case calls on the Court to determine whether commercial landowners owe a duty to clear snow and ice from their property during a storm. For the first time, this Court considers the adoption of the ongoing storm rule, under which a landowner does not have a duty to remove snow or ice from public walkways until a reasonable time after the cessation of precipitation.

Considering our caselaw and balancing the concerns of commercial landowners with the need to provide redress for injured plaintiffs, we state today that, under the ongoing storm rule, commercial landowners do not have a duty to remove the accumulation of snow and ice until the conclusion of the storm, but that unusual circumstances may give rise to a duty before then.

Russi vs. City of Newark, ___ N.J. Super ___(App.Div.2022) Immunity Under TCA and Landowner's Liability Act

While plaintiff was driving his car on a road owned by Passaic County, a falling tree limb struck his car, causing him to suffer significant injuries. The tree with the broken limb was located in a 35,000-acre conservation easement owned by the City of Newark. The trial judge granted summary judgment to the City relying, in part, on the Landowner's Liability Act (LLA), N.J.S.A. 2A:42A-1 to -10. The judge also granted summary judgment to Passaic County, which had been sued under the Tort Claims Act.

The court held N.J.S.A. 2A:42A-8.1 of the LLA, entitled "[l]iability to persons injured on premises with conservation restriction," precluded the imposition of liability against the City. The statute provides immunity to an owner of premises on which "a conservation restriction is held by the State, [or] a local unit . . . and upon which premises subject to the conservation restriction public access is allowed, or of premises upon which public access is allowed pursuant to a public pathway or trail easement held by the State, [or] a local unit . . . ."

Because plaintiff's car travelled on a road providing public access and serving as a public pathway and the tree with the fallen limb stood within a conservation easement, the City was entitled to immunity under the LLA. The County likewise was properly granted summary judgment because the alleged dangerous condition was not on its property. N.J.S.A. 59:4-2.

Dunmore vs. Pleasantville Board of Education, ___ N.J. Super __(App.Div.2022)
Portee Claims

In matters arising out of the tragic shooting of a minor during a football game and his subsequent death several days later, the Court considered whether the time for a minor's parent to file a notice of tort claim for her Portee[1] claim is tolled under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 59:12-3. In reading in *pari materia* N.J.S.A. 59:8-8, which extends the statute of limitations for an injured minor to institute a cause of action until two years after their eighteenth birthday, and N.J.S.A. 2A:14-2, which tolls a parent's claim for the duration of the child's tolling period, and because the parent's Portee claim essentially includes the elements of the minor's claim, the Court concludes it is only logical to toll the notice requirements under the TCA for the parent's *Portee* claim to coincide with the tolling period of the minor's claim. The Court's ruling is consistent with the purposes underlying the entire controversy doctrine and in promoting judicial economy.

Buddy vs. Knapp, 469 N.J. Super 168(App.Div.2021)
Duty of Care For Commercial Property Owners

These appeals arise from two motor vehicle accidents that occurred about a year apart in approximately the same location under similar circumstances. In both instances, a driver traveling westbound on Route 322 in Folsom Borough made an illegal left turn in the direction of one of two driveway entrances to a Wawa convenience store and struck a motorcycle traveling eastbound on the highway. In the first accident, the motorcycle driver was killed and his wife, who was a passenger, seriously injured. In the second accident, the motorcycle driver was seriously injured. The injured parties and the estate of the decedent filed suits against the entity that owns the convenience store and the State, which owns the highway and the land on which the store's driveway entrances are situated, alleging a number of claims sounding in negligence.

The court held that the commercial landowner who operates the convenience store did not owe a duty of care to plaintiffs to prevent drivers on the adjoining State highway from making an illegal left turn into the store's parking lot entrances. In addition, the court declined plaintiffs' invitation to impose on commercial property owners the obligation to warn business patrons of the obvious danger posed by driving over two sets of solid yellow lines to cross two lanes of opposing traffic on a highway with a fifty-five-mile-per-hour speed limit to enter a store parking lot. The court noted a nearby jug handle provided westbound drivers a safe alternative to access the store's parking lot through an intersection controlled by a traffic light.

The court also concluded the State is entitled to immunity for all claims asserted against it under three provisions of the Tort Claims Act: (1) law enforcement immunity, N.J.S.A. 59:2-4, for its alleged failure to enforce its regulations with respect to the design of the parking lot driveway entrances; (2) licensing immunity, N.J.S.A. 59:2-5, for any permitting decision, or alleged absence thereof, related to the construction and maintenance of the driveway entrances; and (3) inspection immunity, N.J.S.A. 59:2-6, for any alleged failure to inspect the driveway entrances during two highway improvement projects after their construction. In addition, the court found the statutory exception to immunity for dangerous conditions of public property did not apply because the driveway entrances, which were in the State's right-of-way, were not dangerous conditions and use of the driveway entrances with due care did not create a reasonably foreseeable risk of the injuries suffered by plaintiffs, which were caused by the illegal activity of the drivers who struck their motorcycles.

Yagnik vs. Premium Outlet Partners, 467 N.J. Super 91(App.Div.2021)
Affidavit of Merit

In this construction site accident case, the court addresses an unresolved question of New Jersey law: When is an Affidavit of Merit ("AOM") under N.J.S.A. 2A: 53A-27, supporting claims against a licensed professional, due in situations where a plaintiff's original complaint is later amended and additional answers or other pleadings are filed?

Plaintiffs served AOMs (one from an engineer and another from an architect) more than 120 days after the defendant engineering firm filed its answer to the original complaint, but before that firm answered an amended complaint naming another defendant.

Relying in part on several federal decisions interpreting New Jersey law, the motion judge ruled the deadline for an AOM "does not come into play until the pleadings are [all] settled." Based on that reasoning, the judge deemed timely the two AOMs tendered by plaintiffs more than a year after the engineering firm had filed its original answer and first amended answer.

Declining to adopt the federal approach, this court holds the AOM statute's text and legislative purposes require the affidavit to be served within 60 days (extendable for good cause to 120 days) from the date when the licensed professional files its answer, regardless of whether the pleadings are subsequently amended to name other defendants or assert additional claims. That deadline is subject, however, to the long established AOM exceptions for (1) substantial compliance or (2) extraordinary circumstances.