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New Jersey Personal Injury Law Annual Review - 2013

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An expert may be asked hypothetical questions at trial, "provided that the questions include facts admitted or supported by the evidence.

We recognize that a testifying expert does not have a prerogative to invent facts that are not credibility-dependent and that are flatly contrary to indisputable evidence. For example, an expert could not offer hypothetical opinions that are based upon factual assumptions that are in conflict with unrebutted physical evidence, such as the measured distance of skid marks or the calculated height of shrubbery. But where, as here, there is a reasonable basis for a jury to reject a credibility-based recollection of a fact witness, the expert can properly comment about alternative factual possibilities in a hypothetical manner.

Henkle v. Hill, ___ NJ Super. ___ (App. Div. 2013)

Evidence of intoxication can be relevant to the issue of negligence. When considering the negligence of an individual who has consumed alcohol, the trier of fact must decide whether the individual was conducting himself or herself in a manner which created a heightened risk of physical injury.

However, the jury must be given a "roadmap" to assist it in making this determination. The jury must be carefully instructed that the mere fact that an individual has consumed some alcohol is by itself insufficient to warrant an inference that the individual was intoxicated and that the intoxication was of such a degree as to render the individual negligent. Negligence need not be inferred merely from proof that an individual has consumed alcohol because even [a] drunken man *may* be careful.

Thomas v. Princeton Pike, ___ NJ Super. ___ (App. Div. 2013)

In her current appeal, plaintiff seeks to vacate the "procedural" dismissal of her complaint and to confirm the arbitration award pursuant to *Rule* 4:50–1. The only provisions of the latter rule that might apply to these circumstances are subsections (a) and (f). Subsection (a) would theoretically permit our vacating the dismissal because of the "mistake, inadvertence ... or excusable neglect" of plaintiff or her attorney in that the check for the $200 fee was dishonored and not timely resubmitted with sufficient funds. But subsection (a) is not available to plaintiff because a motion under that subsection must be brought within one year of the judgment or order that is to be vacated. *R.* 4:50–2. Here, plaintiff's motion was filed on December 1, 2011, more than three years after her lawsuit was dismissed on October 1, 2008.

Subsection (f) of *Rule* 4:50–1 is not subject to a one-year time limitation, and it may permit a court to vacate an administrative dismissal, such as in this case, for "any other reason justifying relief from the operation of the judgment or order." A motion under subsection (f), however, must be made "within a reasonable time," *R.* 4:50–2, and such a motion is granted "sparingly, in exceptional

situations,". The Supreme Court has stated that relief under subsection (f) "is available only when truly exceptional circumstances are present and only when the court is presented with a reason not included among any of the reasons subject to the one year limitation."

Here, even if view plaintiff's circumstances "with great liberality" because she now seeks confirmation of the arbitration award rather than a trial de novo, plaintiff has not shown "exceptional" reasons to set aside the dismissal three years later. Unlike the factual circumstances present in *Allen, Sprowl,* and several unpublished opinions of this court that permitted late confirmation of an arbitration award, plaintiff's delay was not a matter of only several weeks or months; it was several years. Moreover, the delay was not caused by any conduct of defendants, such as settlement proposals that lulled plaintiff into missing a deadline. In contrast to those cases, plaintiff prolonged this litigation through duplicate motions and appeals in an initial effort to overcome the strict thirty-day time period for demanding a trial de novo and, when that effort failed, confirmation of the award that she had rejected earlier. Plaintiff's reasons for failing to meet the deadline are not balanced by circumstances that "further the stated aims of the compulsory arbitration program, which is to bring about inexpensive, speedy adjudication of disputes and to ease the caseload of state courts."

We conclude that plaintiff has not shown exceptional circumstances that justify vacating the October 2008 dismissal of her lawsuit and permitting her to confirm the arbitration award.

Mayer v. Once Upon A Rose, NJ Super. ___ (App. Div. 2013)

A motion for involuntary dismissal at the end of a plaintiff's case is governed by *Rule* 4:37–2(b). The rule instructs that "such [a] motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied." "[T]he judicial function [in evaluating a motion for a directed verdict] is quite a mechanical one." "The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the

party opposing the motion." (noting that "the appropriate focus for the trial court and the Appellate Division [is] not whether there was some contrary evidence; instead the focus [should be] on whether there [is] too little evidence ... presented by plaintiff to get to the jury on the issue at all".

Defendants' motion for a directed verdict in the present case challenged plaintiff's invocation of the doctrine of *res ipsa loquitur*. Our Supreme Court has described that doctrine as follows:

In any case founded upon negligence, the proofs ultimately must establish that defendant breached a duty of reasonable care, which constituted a proximate cause of the plaintiff's injuries. *Res ipsa loquitur,* a Latin phrase meaning "the thing speaks for itself," is a rule that governs the availability and adequacy of evidence of negligence in special circumstances. The rule creates an allowable inference of the defendant's want of due care when the following conditions have been shown: (a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality [causing the injury] was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect.

The *res ipsa loquitur* doctrine is based upon considerations of public policy, allowing a blameless injured plaintiff to obtain an inference of negligence where certain required factors are present. In essence, the doctrine "plac[es] the duty of producing evidence on the party who has superior knowledge or opportunity for explanation of the causative circumstances.". Res ipsa loquitur "in effect creates a permissive presumption that a set of facts furnish reasonable grounds for the inference that if due care had been exercised by the person having control of the instrumentality causing the injury, the mishap would not have occurred." The jury is free to accept or reject that permissible inference.

An important aspect of the *res ipsa loquitur* doctrine is its role at trial in repelling a defendant's motion for a directed verdict. "Once *res ipsa loquitur* is established, the case should go to the jury *unless defendant's countervailing proof is so strong as to admit of no reasonable doubt as to the absence of negligence.*" "In a case in which *res ipsa loquitur* applies, a directed verdict against the plaintiff can occur *only if the defendant produces evidence which will destroy any reasonable inference of negligence, or so completely contradict it that reasonable men could no longer accept it.*" The *res ipsa loquitur* doctrine has been successfully applied on several occasions to cases involving exploding glass bottles Although those bottling cases are somewhat distinguishable from the present case because they involved pressurized glass, they do illustrate the fundamental proposition that the *res ipsa* doctrine can apply to accidents involving a glass Here, the trial court declined to allow the jury to consider any inference of negligence on the part of defendants. A focal point of the court's decision was its belief that plaintiff was obligated to present a liability expert to explain why the glass vase shattered. We disagree that such an expert witness was required.

McDougall v. Lamm, 211 NJ 203 (2012)

In this appeal, we are asked to consider whether a pet owner should be permitted to recover for emotional distress caused by observing the traumatic death of that pet. Asserting that pets have achieved an elevated status that makes them companions in the lives of human beings, plaintiff Joyce McDougall asks this Court to hold that pets should no longer be considered to be mere personal property. With that fundamental shift in the way that pets are seen in the eyes of the

law as her backdrop, plaintiff asks *207 us to permit her to recover for the emotional distress she endured after she watched her dog as it was shaken to death by a larger dog.

The basis in our law for recovering emotional distress damages arising out of observing the traumatic death of another was first expressed by this Court in *Portee v. Jaffee*, 84 *N.J.* 88, 417 *A.*2d 521 (1980). Since that time, the doctrine has been narrowly applied and we have carefully limited the circumstances in which such relief is available. In considering potential expansions of the relief permitted under *Portee*, we have never concluded that it can be applied to the observation of a death, however traumatic, by one who did not share a close familial relationship or intimate, marital-like bond with the victim.

The question that we confront today is whether a bond with a pet meets that carefully circumscribed criteria. Although we recognize that many people form close bonds with their pets, we conclude that those bonds do not rise to the level of a close familial relationship or intimate, marital-like bond. We therefore decline to expand the traditionally and intentionally narrow grounds established in *Portee* to include claims arising from the death of a pet.

We reach this conclusion for three essential reasons. First, we do so because expanding the cause of action recognized in *Portee* to include

pets would be inconsistent with the essential foundation of the *Portee* claim itself. Second, creating a cause of action based on observing the death of a pet would result in an ill-defined and amorphous cause of action that would elevate the loss of pets to a status that exceeds the loss of all but a few human beings. Third, creating a new common law cause of action of this type would conflict with expressions of our Legislature found in both the statutory cause of action designed to address wrongful death of humans and in the statutes that govern rights and responsibilities of dog owners.

The bond shared between humans and animals is often an emotional and enduring one. Permitting it to support a recovery *208 for emotional distress, however, would require either that we vastly expand the classes of human relationships that would qualify for *Portee* damages or that we elevate relationships with animals above those we share with other human beings. We conclude that neither response to the question presented would be sound.

Mangual v. Berezinsky, 428 N.J.Super. 299 (App. Div. 2012)

New Jersey has adopted section 220 of the *Restatement (Second) of Agency* "as the touchstone" for determining whether one acting for

another acts as a servant or agent, or as an independent contractor. Section 220 provides:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one who is acting for another is a servant or an independent contractor, the following matters of facts, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Selective v. Hudson East Pain, 210 N.J. 597 (2012)

In reviewing the claims submitted, Selective detected what it considered to be suspicious patterns in both the treatments defendants had provided and the corporate links among the treating entities. Wanting to pursue the questions generated by those perceived patterns, Selective requested that defendants supply to it a variety of data with respect to their ownership structure, billing practices, and compliance with certain regulations. In support of its request, Selective cited the provision within the insureds' insurance policies requiring the insureds to cooperate with Selective in the investigation of any claim under the policy. When defendants did not agree to supply the material Selective sought, Selective filed a verified complaint in which it alleged that defendants' failure to supply the information was a breach of the duty to cooperate and a violation of the PIP discovery statute, *N.J.S.A.* 39:6A–13(b). Selective sought a declaratory judgment that defendants were obligated to provide the information and documents it sought and that if they failed to do so, they would be ineligible to receive PIP reimbursement. Selective attached to its complaint a "Demand for Discovery" that included a set of interrogatories and a notice to produce documents.

This matter calls for us to interpret the language in an insurance policy issued by plaintiff. An insurance policy is a form of contract, , and the interpretation of contract language is a question of law. We note for the sake of completeness that certain general principles guide us as we consider the proper interpretation to be given to the policy language at issue. That is, coverage provisions are to be read broadly, exclusions are to be read narrowly, potential ambiguities must be resolved in favor of the insured, and the policy is to be read in a manner that fulfills the insured's reasonable expectations..

The material sought by Selective in this matter far exceeds the statutory limitations of a patient's "history, condition, treatment, dates and cost of such treatment." *N.J.S.A.* 39:6A–13(g). We may not, under the guise of statutory construction, expand its scope in the boundless fashion plaintiff seeks merely because plaintiff has formed the belief that defendants may not have complied with the requirements of other statutes or regulations.

The goal of PIP is to provide prompt medical treatment for those who have been injured in automobile accidents without having that treatment delayed because of payment disputes. We recognize that Selective asserts that it has paid all the statements submitted to it and has not sought to deny treatment to any patients. We decline, however, to interpret this discovery statute in such a manner as to create a possibility that future patients might be subjected to such delay. The Legislature set clear parameters on the scope of permissible PIP discovery under *N.J.S.A.* 39:6A–13. We are not free to disregard the framework it put in place.

Sa v. Division of Taxation, 26 N.J.Tax 377 (2012)

The analysis begins with a few established principles that prevail in the area of New Jersey's GIT scheme. First, exclusions from the GIT are "strictly" construed against a taxpayer claiming the same. Second, the Director's interpretation of the GIT statute is entitled to deference due to his acknowledged expertise in the area of taxation. Third, despite such deference "courts remain the final authorities on issues of statutory construction and [need not] stamp their approval of the administrative interpretation."

The wording of *I.R.C.* § 104(a)(1) is identical to *N.J.S.A.* 54A:6–6(a). Thus, the federal statute excludes from income, all "amounts received under workmen's compensation acts as compensation for personal injuries or sickness." The implementing regulation states that " *I.R.C.* § 104(a)(1) excludes from gross income amounts which are received by an employee under a workmen's compensation act ... or under a statute in the nature of a workmen's compensation act which provides compensation to employees for personal injuries or sickness incurred in the course of employment." *Treas. Reg.* § 1.104–1(b). However, "amounts received as compensation for an occupational injury or sickness" which exceed "the amount provided in the applicable workmen's compensation act or acts" are not excluded from taxation.

In re Pelvic Mesh, 426 N.J.Super. 167 (App. Div. 2012)

The key issue in this appeal is not whether the physician-patient privilege prevents engagement of a treating physician as an expert for the defense. The issue is whether some other rule or judicial or public policy categorically bars a treating physician from serving as an expert witness against the "litigation interests" of his or her patient, although in a different plaintiff's case.

The trial court held that jointly coordinated litigation requires an exception from the reasoning of *Stempler,* which allows defense access to treating physicians. The court agreed with plaintiffs that the defense may not privately consult and may not engage the services of any physician if the physician has at any time treated any plaintiff in this litigation. Although the trial court's order made reference only to treating physicians, its ruling disqualifying Dr. Zyczynski indicates that even a single consultation with a plaintiff will prevent the defense from consulting with or engaging a physician as an expert against the claims of other plaintiffs.

We conclude that the court's ruling was a mistaken exercise of authority to manage this litigation. It inappropriately equated a plaintiff's "litigation interests" with a patient's "medical interests," and it elevated those "litigation interests" to a preemptive level not previously recognized by binding authority. It imposed sweeping restrictions upon physicians that allow litigation instituted by a current or former patient to interfere with the physician's professional judgment about the medical interests of *all* the physician's patients. Moreover, it deprived defendants of fair access to physicians who could be among the best-qualified experts in these cases.

The trial court expressed a belief that a physician is ethically or legally obligated to ensure the continuing trust of a patient who has brought a lawsuit. The court stated that defense employment of physicians who have treated any plaintiffs in this coordinated litigation might impede effective medical treatment and erode trust between patients and their doctors.

We note initially that the trial court's concerns about medical treatment and erosion of trust do not apply to a physician whose treatment of or consultation with a patient-plaintiff has ended, although that physician must continue to maintain the physician-patient privilege where required. The court disqualified Dr. Kavaler from serving as a defense expert although her surgical treatment of a plaintiff had ended some eight months before she was retained as a defense expert. Dr. Zyczynski was disqualified despite only one past consultation with a patient-plaintiff. Defense counsel represented that many treating physicians were no longer treating patient-plaintiffs in this litigation. We see no significant issue of impeding treatment or eroding patient trust in a doctor who is no longer treating a patient-plaintiff.

Second, in many types of personal injury cases, physicians who testify for the defense or consult with defense counsel provide those services contrary to the interests in litigation of other patients they have treated or continue to treat. For example, radiologists, orthopedists, and neurologists who routinely testify as experts for the defense in numerous personal injury cases in our courts are likely to be treating or consulting physicians for other patients with similar injuries, and some of those patients may also have filed lawsuits or may do so in the future. Our system of civil justice does not bar a physician from expressing a position in litigation of one plaintiff that is contrary to the "litigation interests" of a current or past patient in another case. In fact, it is the physician's experience

with similar injuries or conditions that qualifies him or her to provide expert opinions for the defense in a personal injury case.

Defendants committed to using their experts only as witnesses against plaintiffs that they had never treated and generally as consultants with respect to the nature and use of defendants' products. With appropriate sensitivity to physician-patient confidentiality, defendants proposed a protocol and protective order that barred the expert from assisting the defense regarding a patient-plaintiff's specific medical condition. The trial court, however, accorded little weight to defendants' commitment and proposal because this litigation involves joint case management.

The court agreed with plaintiffs that, in mass tort or coordinated litigation assigned for centralized case management under *Rule* 4:38A, the expert's ability to consult with defendants provides an unfair litigation advantage to the defense. Plaintiffs argue that the same issues of alleged product defect and causation will be disputed in all plaintiffs' cases. They also argue that information revealed to defense counsel about the expert's treatment practices and methods will also apply to the treatment of plaintiffs who were the expert's own patients.

Issues of product defect or safety, however, or the causes of common injuries and conditions of plaintiffs are not dependent upon the physician's knowledge of a particular patient's medical history or condition. Defendants seek to use the most qualified specialists to testify about their products and their experience with a multitude of patients, not about the medical condition of any particular plaintiff they have treated. Furthermore, a physician's practices or methods in treating a patient-plaintiff are not privileged information and are accessible to the defense.

Beim v. Hulfish, 427 N.J.Super. 560 (App. Div. 2012)

This appeal arises in connection with the Wrongful Death Act, *N.J.S.A.* 2A:31–1 to –6. The novel issue presented is whether an heir's loss of a prospective inheritance resulting from the imposition of increased estate taxes—incurred due to the premature death of a decedent—is recoverable in a wrongful death action. Because such a tangible, readily-calculable diminishment in an heir's expectancy is in the nature of "pecuniary injuries resulting from such death," *N.J.S.A.* 2A:31–5, we conclude that it is an element of damages for the jury to consider in this case, subject to appropriate expert evidence.

In the Law Division, plaintiffs sought to recover the difference in estate tax consequences between 2008 and a later year with reduced estate taxes (depending upon what year the jury determined was the appropriate date of death), as damages under the Wrongful Death Act. Their theory was that Mr. Kellogg's heirs suffered a lost inheritance—or at least the loss of a substantial portion of an inheritance—by the early imposition of greater estate taxes, and that such loss is recoverable as "pecuniary injuries" under *N.J.S.A.*

2A:31–5 since it was the fault of defendants' tortious conduct.

The goal of the Wrongful Death Act is to compensate survivors of those wrongfully killed for their pecuniary losses. It "provides to decedent's heirs a right of recovery for pecuniary damages for their direct losses as a result of their relative's death due to the tortious conduct of another.". More than fifty years ago the Wrongful Death Act was recognized as remedial legislation, but was limited to "pecuniary injuries" sustained by qualified beneficiaries. The legislative remedy "permits recovery only of a survivor's calculable economic loss." A common form of pecuniary loss is future earnings that the "decedent would have contributed to his ... survivors had he lived.". However, pecuniary loss encompasses other forms of damages as well, including "the 'lost' value of services such as companionship and care ... and the loss of advice, guidance and counsel." The proper measure of damages in a wrongful death action is the deprivation of a reasonable expectation of a pecuniary advantage that would have resulted by a continuance of the life of the deceased. A wrongful death action can only be brought for the benefit of a decedent's heirs. *N.J.S.A.* 2A:31–4. The action is

commenced by either an administrator ad prosequendum of the decedent or an executor, if the decedent dies testate. *N.J.S.A.* 2A:31–2. As a matter of law, a wrongful death action does not accrue to the decedent.

State v. Locasio, 425 N.J.Super. 474 (App. Div. 2012)

An expert witness may testify in our courts pursuant to *N.J.R.E.* 702 in situations where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" In such circumstances, "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Expert testimony must satisfy three requirements in order to be admitted at trial: "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony."

The next expert called by the State was Dr. Mihalakis. After presenting his credentials, the prosecutor then offered him specifically as "an expert in pathological medicine." In response to that proffer, defense counsel clarified that Dr. Mihalakis was being qualified as an expert in "[p]athology only," a limitation which the trial judge confirmed. Based upon that confirmation, defense counsel stated that he had no objection to Dr. Mihalakis offering expert testimony.

Defense counsel, however, did object when Dr. Mihalakis, later in the course of his direct examination, began to describe Berry as a "passenger" in the car. Defense counsel moved to strike the medical examiner's use of that term, which resulted in the prosecution asking Dr. Mihalakis additional foundational questions. After that added foundational testimony, defense counsel renewed his objection to Dr. Mihalakis commenting that Berry was the passenger in the car, given Dr. Mihalakis's lack of qualifications in accident reconstruction.

The judge overruled these objections, determining that Dr. Mihalakis, as a pathologist, was qualified to render opinions not only as to the "cause" of Berry's death, but also as to the "manner" of his death. The judge ruled that such an opinion as to whether Berry was the passenger or the driver was within the scope of the medical examiner's expertise:

Basically, as a medical examiner what he is allowed to do [is] he is allowed to give his opinion as to the cause, not only the cause, the collapse of the lung, the massive head injuries, probably the massive head injuries this guy was probably killed by, but he can also give an opinion as to the manner of death. So he can testify as to whether he was the passenger or the driver, whatever. I'll permit him to do it ...

Dr. Mihalakis's testimony went substantially beyond those permissible subjects within the domain of pathology. He presented the jury with a host of observations that delved into matters of physics and biomechanics, in a manner that transgressed190 the scope of his qualifications. For example, Dr. Mihalakis elaborated upon the movements of the bodies and objects within the car, with multiple comments about the effect of the vehicle's "sudden deceleration," and a pointed observation that Berry's body would be unlikely to "fly across" defendant's body in the passenger seat. The medical examiner also strayed from his defined area of expertise in offering the jury his view that Berry's body had "cushioned" defendant from being propelled more violently out of the car.**

Such opinions address far more than matters of pathology and the causes of injuries that Dr. Mihalakis observed in performing the autopsy of Berry and examining the photographs of the wrecked car. Instead, they explore issues within the realm of biomechanics and, to some extent, accident reconstruction. Dr. Mihalakis's opinions on these biomechanical subjects are markedly different from the permitted opinions of the medical examiner in a prior published decision from this court attesting that the victims' death had been caused by assaultive strangulation. The involvement and analysis of the movements of a motor vehicle and the forces inside it distinguish

this case from the facts and circumstances in *the published matter,* a one-on-one physical encounter where no automobile was involved, and where the medical examiner did not stray from his area of expertise.

Dr. Mihalakis's expert testimony was admissible to the extent he confined his opinions to the nature of the injuries and the objects that he believed had caused those injuries. Again, it was perfectly acceptable for Dr. Mihalakis to render opinions that Berry's skull was crushed by the tree. From that conclusion, he could also render an opinion—without getting into the biomechanical forces within an automobile—as to where Berry was sitting in the car when he suffered that injury. His opinions were inadmissible, however, when he testified about the likely movements of the occupants within the car, opining that those movements and forces were the cause of injuries and also identifying the occupants' respective locations based upon that biomechanical analysis.

Davis v. Devereux Foundation, 209 N.J. 269 (2012)

Thus, traditional concepts of duty govern the liability of institutions with *in loco parentis* responsibilities. Subject to the limits imposed by the Legislature upon the liability of charitable institutions in the CIA Devereux owes to Davis a duty of reasonable care. That duty extends to the selection and supervision of employees such as

McClain. Consistent with *Restatement* § 219(2)(b), New Jersey courts recognize the tort of negligent hiring, "where the employee either knew or should have known that the employee was violent or aggressive, or that the employee might engage in injurious conduct toward third persons.". And as discussed above, this Court has also imposed upon employers with *in loco parentis* responsibilities a duty to exercise reasonable care in the supervision of employees. We recognize and reaffirm that a duty of due care—subject to the statutory immunities afforded by the CIA—is imposed upon institutions, such as Devereux, which are charged to protect vulnerable citizens of our State.

Kendall v. Hoffman-LaRoche, 209 N.J. 173 (2012)

Although at common law there was no limit on the time in which a party could institute a legal action, statutes of limitations have since been adopted regarding all causes of action. At issue in this case is

which provides that an action for "an injury to the person caused by the wrongful act, neglect or default of any person ... shall be commenced within two years next after the cause of any such action shall have accrued...."

Statutes of limitation are intended to penalize dilatoriness and serve as measures of repose. When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. Where, however, the plaintiff does not know or have reason to know that he has a cause of action against an identifiable defendant until after the normal period of limitations has expired, the considerations of individual justice and the considerations of repose are in conflict and other factors may fairly be brought into play.

Those considerations comprise the so-called "discovery rule," the goal of which is to avoid [the] harsh results that otherwise would flow from mechanical application of a statute of limitations. Accordingly, the doctrine postpones the accrual of a cause of action so long as a party reasonably is unaware either that he has been injured, or that the injury is due to the fault or neglect of an identifiable individual or entity. Once a person knows or has reason to know of this information, his or her claim has accrued since, at that point, he or she is actually or constructively aware of that state of facts which may equate in law with a cause of action.

At the heart of every discovery rule case is the issue of "whether the facts presented would alert a reasonable person exercising ordinary diligence that he or she was injured due to the fault of another.

Critical to the running of the statute is the injured party's awareness of the injury and the fault of another. The discovery rule prevents the statute of limitations from running when injured parties reasonably are unaware that they have been injured, or, although aware of an injury, do not know that the injury is attributable to the fault of another.

Knowledge of fault and knowledge of injury may occur simultaneously:

Fault is apparent, for example, where the wrong tooth is extracted during surgery, or a foreign object has been left within the body after an operation.

However, where the relationship between plaintiff's injury and defendant's fault is not self-evident, it must be shown that a reasonable person, in plaintiff's circumstances, would have been aware of such fault in order to bar her from invoking the discovery rule

Davis v. Barkaszi, 424 N.J.Super. 129 (App. Div. 2012)

N.J.S.A. 2A:22A–5, enacted in 1987, provides that:

a. A person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcoholic beverage server may recover damages from a licensed alcoholic beverage server only if:

(1) The server is deemed negligent pursuant to subsection b. of this section; and

(2) The injury or damage was proximately caused by the negligent service of alcoholic beverages; and

(3) The injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.

b. A licensed alcoholic beverage server shall be deemed to have been negligent only when the server served a visibly intoxicated person, or served a minor, under circumstances where the server knew, or reasonably should have known, that the person served was a minor.

The model jury charge derived from this statute is as follows:

Thus, plaintiff is entitled to recover from the *[name of licensed alcoholic beverage server],* if plaintiff proves by the preponderance (greater weight) of evidence the following elements:

1. That defendant served alcoholic beverages to *[name];*

2. That when the alcoholic beverage was served the person was visibly intoxicated (or, was known or reasonably should have been known to be a minor);

3. That such service of alcoholic beverages was a proximate cause of the *[event]* and injury complained of; and

4. That the injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.

[

The jury charge read by the trial judge in this case, as well as the jury verdict sheets, were based on this model jury charge. In reviewing a charge to the jury, an appellate court will not reverse the trial court if it is convinced that the charge as a whole was accurate. "[T]o be a proximate cause ... conduct need only be a cause which sets off a foreseeable sequence of consequences, unbroken by any superseding cause, and which is a substantial factor in producing the particular injury." In discussing principles of comparative fault in dram shop cases, New Jersey courts have employed a presumption that "[i]f the tavern serves alcohol to a visibly-intoxicated patron, a court will ordinarily presume the patron's lack of capacity to evaluate the ensuing risks." In such circumstances, the jury should consider this presumption when apportioning fault among joint tortfeasors in a dram shop case.

KC's Korner notes that the language of speaks solely to the "negligent service of alcoholic beverages." Only the drinks served after "the server served a visibly intoxicated person," are to be considered in a proximate cause analysis. The trial judge's interpretation of the law of proximate cause under as he instructed the jury in his charge and placed in the verdict sheets, was *146 incorrect because it allowed the jury to conclude that if KC's Korner served Barkaszi one drink after he was visibly intoxicated, then it is liable for the result of his drunk driving, even if that one drink did not contribute to his intoxication at the time of the accident because it was not yet absorbed into Barkaszi's bloodstream.

In circumstances such as these, where a defendant reasonably raises the defense that no alcohol served after visible intoxication entered the driver's bloodstream prior to the accident, the trial judge should amplify the proximate cause paragraph of the model jury charge. In these limited circumstances, the judge should instruct the jury that the negligently served alcohol must have had sufficient time to negatively affect the driver's ability to drive. The facts underlying

the time of consumption in relation to the time of the accident will necessarily limit a defendant's access to this amplified charge.

Badiali v. NJ Manu., 429 N.J.Super. 121 (App. Div. 2012)

With *Badiali I* providing the background, we turn to the crux of this appeal. Citing statutory and common law grounds, plaintiff chiefly argues that NJM failed to act in good faith when it refused to pay its share of the arbitration award and, instead, advocated an interpretation **40 of the insurance policy that we ultimately rejected in *Badiali I* in further litigating this dispute. In arguing here that it acted in good faith in *Badiali I,* NJM relies upon a 2004 unpublished decision in which another panel of this court held, in essentially the same circumstances, that [prior case law] was distinguishable and that the insurer (also NJM) was entitled to reject the arbitration award and demand a trial de novo.

Interestingly, NJM offered no sworn statement or evidential material to suggest that it relied upon *Geiger* in refusing to pay its share of the arbitration award and in taking the position that culminated in our decision in *Badiali I* Notwithstanding its peculiar late appearance in the discourse, *Geiger* 's mere existence precludes a finding that NJM's position was either instituted or pursued in bad faith. That is, plaintiff cannot persuasively argue that NJM's position was posited or prosecuted in bad faith when that very position was endorsed by another panel of this court. Accordingly, the trial judge properly entered summary judgment in NJM's favor.

Khandelwal v. Zurich Insurance, 427 N.J.Super. 577 (App. Div. 2012)

In New Jersey, intra-family exclusions are not per se void as against public policy in all instances. Previously, the Supreme Court enforced such an exclusion in a boat owner's policy. We have upheld such exclusions in homeowner's policies. However, our courts have consistently held that intra-family exclusions are not permitted in the context of an automobile insurance policy. ("For completeness, we note also that in the automobile insurance context, courts have held intra-family exclusions void, not on the ground of ambiguity, but because the Legislature's automobile insurance scheme has rendered such provisions violative of public policy. The exclusion of auto injuries to an insured is not permitted by law."

Repossession v. Geico, 423 N.J.Super. 518 (App. Div. 2012)

GEICO's policy covered the policy holder and "[a]ny other person using the auto with [her] permission." Whether repossessors are covered as permitted users is a question of law subject to our de novo review. Our research discloses no case that has addressed the precise issue. The trial court's grant of summary judgment is also subject to de novo review. We conclude that Repossession, as AmeriCredit's agent, did not use injured plaintiff's vehicle "with permission," as we interpret the policy, because Repossession's use was as of right, and injured plaintiff lacked the power to revoke or prevent Repossession's use. Use as of right pursuant to irrevocable authority is inconsistent with the concept of permission. We differ slightly with the trial court, which reasoned that Repossession lacked permission because the injured plaintiff lacked the power to grant or withhold the repossessor's use once her car was taken. We believe injured plaintiff lacked the power to withhold or revoke use even earlier—once she granted her lender a security interest.

As a secured creditor, AmeriCredit was empowered to obtain repossession not only under the contract, but also under the Uniform Commercial Code. *See* *N.J.S.A.* 12A:9–609 (stating that "[a]fter default a secured party ... may take possession of the collateral" and may do so "without judicial process if it proceeds without breach of the peace"). Thus, regardless of the repossession provision in the installment credit contract, AmeriCredit was entitled by law to

repossess once the lender obtained a security interest in the vehicle. Moreover, once the injured plaintiff entered the installment credit contract, she lacked any authority to revoke her lender's right to repossess.

In support of our interpretation, our highest Court has adopted the view that "permission" incorporates the power to withhold consent. Commentators agree that use as of right is inconsistent with permissive use; and the concept of "permission" connotes the power to grant, withhold and revoke use. 'Permission' implies the right to withhold permission, so that, where the use is by right, it is not a use by permission.

Our conclusion is consistent with public policy and well-settled principles that guide our interpretation of a personal automobile insurance contract. Extending coverage to repossessors as permitted users does not serve an apparent interest of named insureds. To the extent the risks created by automobile repossessors' negligence are borne by the insurers of the repossessed vehicles' owners, those costs will ultimately work their way into the rates of the vehicle owners like this plaintiff. Yet, individual policy holders like Jackson bear no responsibility in choosing the entity that will repossess their car, and exercise no control over the manner in which repossessors use their cars.