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The New Jersey Annual

Personal Injury & Insurance Law Review – 2012

Lesson Plan

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NJSA 39:6A-4.5 - Dram Shop Act

Any person who, at the time of an automobile accident resulting in injuries to that person, is required but fails to maintain medical expense benefits coverage mandated by [*N.J.S.A.* 39:6A–4] shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of an accident while operating an uninsured automobile.

Voss v. Tranquilino, 206 NJ 93 (2011)

Nowhere in that legislative history was there any suggestion that the statute *96 would affect liability under the Dram Shop Act. Indeed, there is no evidence that the specific bar to suit set forth in *N.J.S.A.* 39:6A–4.5(b) was intended to have impact beyond the motor vehicle accident and insurance setting that Title 39 addresses. That understanding of the words of subsection 4.5(b) keeps the provision's application consistent with the clear purpose and single object advanced by the omnibus insurance reform legislation.

Finally, it is no small matter in our analysis that the bar in subsection 4.5(b) can coexist with the Dram Shop Act's deterrence and liability-imposing principles. There is no incompatibility between the two provisions. An intoxicated person is deterred from driving drunk by losing the right to sue under Title 39 for insurance coverage for his injuries. On the other hand, permitting an injured drunk driver to file an action against a liquor establishment and its servers for serving a visibly intoxicated patron similarly advances the goal of deterring drunk driving. In allowing the latter form of action to proceed, rather than barring it *ab initio* by *N.J.S.A.* 39:6A–4.5(b), we can be assured that the application of established principles of comparative negligence will apportion properly responsibility for damages as between dram shop parties and the injured drunk driver.

NJSA 39:6A-4.5 Wrongful Death/Survival Actions

Related Statutes
Wrongful Death Act – NJSA 2A:31-1 thru 6
Survivor's Act - NJSA 2A:15-3

Aronberg v. Tolbert, 207 NJ 587 (2011)

When an uninsured motorist's cause of action is barred by *N.J.S.A.* 39:6A–4.5(a), an heir has no right of recovery under the Wrongful Death Act. Under the plain language of the Act, the mother in this case can recover in her lawsuit only if her son would have been "entitled ... to maintain an action for damages resulting from the injury" had "death ... not ensued." Because her son, an uninsured motorist, could not have maintained a cause of action had he lived due to the statutory bar in *N.J.S.A.* 39:6A–4.5(a), his heirs cannot recover under the Wrongful Death Act.

***N.J.S.A.* 39:6A–4.5(a) places a strong incentive on motorists to purchase automobile insurance not only to protect themselves, but their family members as well. Perhaps the desire to protect a loved one is at least as great as the impulse to protect oneself. The plain language of *N.J.S.A.* 39:6A–4.5(a), as applied to the Wrongful Death Act, furthers the Legislature's purpose of coercing compliance with our automobile insurance laws.**

The Legislature has determined that *N.J.S.A.* 39:6A–4.5(a)'s lawsuit bar applies to the decedent's next of kin in a wrongful death action. We cannot ignore the relevant statutory language to reach a more sympathetic result for plaintiff.

NJSA 39:6A-4.5 – Owner as Passenger

Perrelli v. Pastorelle, 206 NJ 193 (2011)

***N.J.S.A.* 39:6A–4.5**(a) provides that an individual is barred from recovery if injured "while operating" an uninsured vehicle. A literal interpretation would construe the provision as applying only to a driver of the automobile, and would allow the culpably uninsured person to violate the law and not suffer its consequences. We thus hold that the preclusion of recovery contained in ***N.J.S.A.* 39:6A–4.5**(a) applies to the owner of an uninsured vehicle whether injured as a driver or passenger.

Slip & Fall – Icy Sidewalk & TCA

Tymczyszyn v. Columbus Gardens, 422 NJ Super. 253 (App. Div. 2011)

The question here concerns the immunity provided to public entities under the TCA. As a starting point, we agree with the trial court's implicit ruling that defendant, although a public entity, is not entitled to invoke the weather condition immunity in *N.J.S.A.* 59:4–7, or the common law immunity for snow related activities. With respect to *N.J.S.A.* 59:4–7, which grants public entities and public employees immunity "for an injury caused solely by the effect on the use *of streets and highways* of weather conditions," the Supreme Court made clear that the statutory terms limiting immunity to accidents that occur on a "street" or "highway" do not provide immunity for an accident that occurs on a driveway of a housing authority. The same logic excludes "sidewalks" as places to which the immunity provision applies under *N.J.S.A.* 59:4–7.

We turn next to the questions of notice under the TCA. The requirement that a public entity have actual or constructive notice of a dangerous condition is "not applicable where public employees through neglect or wrongful act or omission within the scope of their employment create a dangerous condition.." Whether a public employee created a dangerous condition through negligent acts or omissions may be an issue of fact that must be decided by a jury.

Here, a jury can find the dangerous icy condition that caused plaintiff to fall was created by defendant's negligent accumulation of snow on either side of the pathway, thus giving rise to the foreseeable risk that melting snow would refreeze into a patch of ice. Given the description of the sidewalk at the time of the accident provided by both plaintiff and Officer Rotondi, a jury can find defendant either did not use, or did not use enough, deicing material to prevent the melting snow from refreezing. Alternatively, a jury can rely on the opinions of plaintiff's expert witnesses to find defendant was constructively on notice of this dangerous condition.

Slip & Fall – Condo Rental

D'Alessandro v. Hartzel, 422 NJ Super. 575 (App. Div. 2011)

To establish a prima facie case of negligence, a plaintiff must establish the following elements: (1) duty of care, (2) breach of that duty, (3) proximate cause, and (4) damages. The duty owed to a plaintiff is determined by the circumstance that brought him or her to the property. Whether a defendant owes a legal duty, as well as the scope of the duty owed, are questions of law for the court to decide.

[We have previously] addressed the duty a lessor owes a tenant in the particular context of a short-term vacation rental property. We concluded [that there will be liability]

if the plaintiff demonstrates that the lessor has failed to disclose a condition "which involves unreasonable risk of physical harm to persons on the land" if

"(a) the lessee does not know or have reason to know of the condition or risk involved; and

(b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk."

Measured against this standard, the record in this case, viewed in a light most favorable to plaintiff, does not allow a jury to reasonably find a breach of that duty. First and foremost, plaintiff has offered no proof that the condition of which she complains was dangerous or involved an unreasonable risk of physical harm to visitors. There has been no showing, for instance, that the layout of the entranceway violated requirements or standards set forth in state statutes and regulations or in local construction codes. In this regard, mere allegations of a design flaw or construction defect, without some form of evidentiary support, will not defeat a meritorious motion for summary judgment

7.

Slip & Fall – Icy Sidewalk & Residential Condo Association

Luchejko v. City of Hoboken, 207 NJ 191 (2011)

In this appeal we review whether a 104–unit condominium complex is liable in tort for injury sustained by a pedestrian on its abutting public sidewalk. An unbroken series of decisions by this Court has maintained a distinction between commercial and residential property owners for the purpose of imposing a duty to maintain sidewalks. [Previously,] based on a balancing of relevant tort law considerations, we held that it would be fair for commercial landowners to be held responsible for maintaining abutting public sidewalks and to be required to recompense innocent pedestrians injured as a result of the negligent failure to do so. We did not then extend sidewalk liability to residential properties, , and have not done so since.

In this matter, the Appellate Division affirmed the trial court's grant of summary judgment to the property owner, concluding that no reasonable trier of fact could find that this overwhelmingly owner-occupied 104–unit condominium complex was a commercial entity. We granted certification, [and] now affirm. There is no call to upset the well-established and longstanding difference in the duties imposed on residential versus commercial property owners. Moreover, we agree with the courts that have considered this matter and have concluded that this condominium complex is residential.

8.

Duty of Care

Estate v. Desir v. Vertus, 418 NJ Super. 310 (App. Div. 2011)

The facts in this case support the imposition of a duty of reasonable care based on [Defendant's] conduct that he knew or should have known would bring [the decedent] to the danger that caused his injury and death. [The defendant] acknowledges that he went to [the decedent], a friend and neighbor, who was in the safety of his own home and not aware of or endangered by the events that led [the defendant] to flee from his apartment and seek assistance. While [the defendant] never acknowledged that he knew there was a robbery in progress, he admitted that from what he saw he was scared and thought that there was. [The defendant] passed by the house closest to his because that neighbor did not have a phone, and he passed by the second house because those neighbors were elderly and, one might infer, because he thought the elderly couple could or would not assist. Instead, he went to the home of [decedent] and [his friend] who were his friends and clients. [The defendant] told them "something was going on" in his apartment and described what he saw, but he did not say that the something he feared was a robbery. [The defendant] asked [them] to call his business to find out what was happening; he did not expressly ask them for additional help because they were already helping him. When the phone call to [the defendant's] apartment went unanswered, [the decedent and his friend] left to see what was happening. [The defendant] admits that he thought they were going to his business where he believed a robbery was underway yet he did nothing to warn or stop them, even though he had no reason to believe that either [the decedent or his friend] was better able to respond to the situation than he.

The factors most pertinent to duty, foreseeability of the harm, the relationship between the parties, and opportunity and ability to exercise care warrant imposition of a duty here.

9.

TCA – Constructive Notice

Polzo v. County of Essex, ___ N.J. ___ (2012)

We must determine whether a county can be held liable for a fatal accident that occurred when a person lost control of her bicycle while riding across a two-foot wide, one-and-one-half inch depression on the shoulder of a county roadway. Although potholes and depressions are a common sight on New Jersey's roads and highways, public-entity liability is restricted under the New Jersey Tort Claims Act (TCA), *N.J.S.A.* 59:1–1 to 12–3. Liability attaches to a public entity only when a pothole or depression on a roadway constitutes a dangerous condition; the public entity either causes the condition or is on actual or constructive notice of it; and, if so, the public entity's failure to protect against the roadway defect is palpably unreasonable. *See* *N.J.S.A.* 59:4–2.

Here, the trial court granted summary judgment in favor of Essex County and dismissed plaintiff's wrongful-death and survival-action lawsuit, finding that the County did not have actual or constructive notice of a dangerous condition of the roadway's shoulder and, alternatively, that the County did not act in "a palpably unreasonable" manner by failing to repair the depression. The Appellate Division reversed, concluding that a jury could determine that the County affirmatively caused a dangerous condition of property by not having in place a proactive program to inspect its roadway for the type of defect that was presumably responsible for the fatal accident in this case.

We now hold that the Appellate Division erred in suggesting that public entities may have to employ the equivalent of roving pothole patrols to fulfill their duty of care in maintaining roadways free of dangerous defects. In this case, just five weeks before the accident, while filling some potholes, the County surveyed the entire length of the subject roadway. Even when viewed in the light most favorable to plaintiff, we cannot conclude that the County was on constructive notice of a "dangerous condition" on the shoulder of its roadway that "created a reasonably foreseeable risk" of death, or that the County's failure to correct this depression before the tragic accident was "palpably unreasonable."

Recovery of PIP Benefits

Drive New Jersey Insurance v. Gisis, 420 NJ Super. 295 (App. Div. 2011)

The language of *N.J.S.A.* 39:6A–9.1 is clear on its face. The statute provides that an insurer paying PIP or medical expense benefits pursuant to certain statutes may recover those payments from "any" tortfeasor who was not, at the time of the accident, "required to maintain personal injury protection or medical expense benefits coverage" under the laws of this State or any tortfeasor who did not maintain such coverage, although required to do so.

It is undisputed that, at the time of the accident, the alleged tortfeasors [driver and owner of the school bus] were not "required" to maintain PIP or medical expense benefits coverage. Although *N.J.S.A.* 17:28–1.6 requires the owners and operators of motor buses to maintain medical expense benefits coverage in an amount of $250,000, school buses are expressly excluded by *N.J.S.A.* 17:28–1.5(c) from the definition of a "motor bus." Thus, according to the plain language of *N.J.S.A.* 39:6A–9.1, Drive New Jersey has a right to seek recovery of its PIP payments from defendants.

As we have indicated, that case held that *N.J.S.A.* 39:6A–9.1 barred recovery of PIP payments when the alleged tortfeasor was required to maintain PIP or medical expense benefits coverage. The statute does not preclude Drive New Jersey from seeking reimbursement of its PIP payments in this case because, although Philadelphia Indemnity's policy provided medical expense benefits coverage for the school bus, the alleged tortfeasors were not *required* to maintain that coverage.

Rova Farms – Bad Faith

Related Cases:
Rova farms v. Investors Insurance, 65 NJ 474 (1974)

Wood v. New Jersey Manufacturers, 206 NJ 562 (2011)

Although *Rova Farms* was decided almost forty years ago, this appeal presents the first opportunity for this Court to determine "whether an insured's claims of bad faith against its insurer under [*Rova Farms*] are to be decided by a judge or jury." We conclude that a *Rova Farms* claim that an insurer in bad faith failed to settle a claim within the policy limits, thereby in fact exposing its insured to liability for any excess, represents a traditional contract claim that the insurer breached the implied covenant of good faith and fair dealing and to which the right to trial by jury attaches.

Fundamentally, and regardless of how it is couched or what label is affixed to it, a *Rova Farms* bad faith claim is and always has been a breach of contract claim, and it is beyond question that a breach of contract claim was at common law and remains today an action triable to a jury. We also so conclude because the relief sought by plaintiff—the payment of the money damages judgment she recovered against defendant's insureds in excess of the policy limits of the insurance contract between defendant and its insured—invokes solely legal and not equitable relief and, assuming bad faith liability is imposed, upon payment of that excess plaintiff will have received the full measure of recovery she seeks.

Portee Claim – Duty to Defend

Related cases:
Portee v. Jaffe, 84 NJ 88 (1980)
Sequela – an abnormal condition resulting from a previous disease.

Abouzaid v. Mansard Gardens Association, 207 NJ 67 (2011).

[I]t is well-recognized that "emotional distress can and often does have a direct effect on other bodily functions. Thus, although that count was silent regarding the existence of physical manifestations, it did not exclude the possibility that such manifestations would be proved during the course of the litigation. Accordingly, it was indefinite whether the claim was within the scope of coverage. In those circumstances, a potential for plaintiffs to prove a covered claim existed and doubts regarding the duty to defend should have been "resolved in favor of the insured."

To be sure, unlike a garden-variety emotional distress claim, a *Portee* claim does not *require* the physical sequelae which, [previously], we declared rendered the term "bodily injury" in the policy ambiguous. Although that distinction might eventually result in the conclusion that an insurance policy limited to coverage for bodily injury would not provide coverage, it is of no moment in deciding whether the insurer has a duty to defend. In [a different, earlier case], the complaint did not allege physical manifestations. Yet, we said it provided the insurer with notice of the possibility of a covered claim, meaning that with proper proofs, coverage would ensue. . The same is true here. Plaintiffs' *Portee* complaint alleged emotional distress but was silent regarding physical manifestations, thus providing the potential for a covered claim and triggering the requirement of defense.

Indeed, we presume that the extraordinary level of emotional distress required to support a *Portee* claim—"severe emotional distress will, in most cases, bear with it a physical component. Thus, a policy providing coverage for claims of "bodily injury" will be understood to require a defense from the filing of a *Portee* complaint unless such defense is specifically excluded by other contract language. That is reasonable from the perspective of the insurer, who is on notice that the plaintiff may, in fact, prove physical sequelae, and from that of the insured, who expects to be defended against potential claims, regardless of the imprecision in the third-party's pleadings.

13.

Remittitur

Ming Yu He v. Miller, 207 NJ 230 (2011)

The authority to apply remittitur springs from the court's power to grant a new trial. That power may be exercised when "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law."

The corollary power to order remittitur is a special device through which the court addresses a jury's excessive award of damages. A remittitur order is actually an alternative to ordering a new trial. That is, it describes the power of a court upon a motion for a new trial due to excessive damages rendered by a jury to require the plaintiff to consent to a decrease in the award to a specified amount as a condition for denial of the motion.

We have encouraged trial courts to use remittitur when warranted so as to avoid the unnecessary expense and delay of a new trial. The power of remittitur is not to be exercised lightly, however, because we repose enormous faith in the ability of juries to equate damages with dollars to make the plaintiff whole, so far as money can do. We rely on juries to perform that task while recognizing that [a]ssigning a monetary value to pain-and-suffering compensation is difficult because that kind of harm is not gauged by any established graduated scale.

A trial court, faced with a jury verdict that the court concludes is excessive, may order a new trial or, alternatively, remittitur, bearing in mind that its power is "limited.". The trial court should not disturb the jury's award unless it is so disproportionate to the injury and resulting disability as to shock the conscience and [convince the court] that to sustain the award would be manifestly unjust. As this Court has described the standard to be applied, the verdict may only be set aside if it is wide of the mark and pervaded by a sense of wrongness.

14.

First, the jury is the bedrock of our system of justice. It stands as the institution that we charge with the difficult task of achieving justice through applying its collective wisdom and judgment in evaluating liability and awarding damages. The jury's views of the facts and the credibility of the witnesses as expressed in its verdict are entitled to deference from both the trial and appellate courts.

Second, remittitur is intended to be used in limited circumstances and is reserved for the unusual case that meets the "shocking" criteria. Maintaining the unique place that we have long assigned to this tool is critical lest it become a device used by courts to substitute their opinions of adequacy of compensation and tread upon the rightful role of the jury.

Third, remittitur serves the specific function of creating an efficient mechanism to address an award of damages that is excessive without requiring the parties to endure the time, expense and uncertainty of a new trial. It is not an opportunity for either the trial or the appellate court to impose its view of the case on the parties, nor is it a chance for those courts to interfere with an award that is merely generous, albeit sustainable. Like our cautionary language concerning new trial motions in general, it is not the role of the courts, either at the trial or appellate level, to sit as the decisive juror or substitute their notions of justice for those expressed by the jury.

Fourth, the decision to order a remittitur must spring from an overriding sense of injustice, a shock to the court's conscience, a certain and abiding belief that the award, in light of the facts and the evidence, falls outside the relatively wide range of one that is acceptable and appropriate.

Reinstatement of Dismissed Complaint

Related Case:
Ghandi v. Cespedes, 390 NJ Super. 193, 197 (App. Div. 2007)
[Motions should be granted with "great liberality" at 197]
Rule 1:13-7(a) (good cause vs. exceptional circumstances)

Baskett v. Cheung, 422 NJ Super. 377 (App. Div. 2011)

Good cause is an amorphous term, that is, it is difficult of precise delineation. Its application requires the exercise of sound discretion in light of the facts and circumstances of the particular case considered in the context of the purposes of the Court Rule being applied. *Rule* 1:13–7(a) is an administrative rule designed to clear the docket of cases that cannot, for various reasons, be prosecuted to completion. Dismissals under the rule are without prejudice. Accordingly, the right to reinstatement is ordinarily routinely and freely granted when plaintiff has cured the problem that led to the dismissal even if the application is made many months later. [Quoting Ghandi]

We are mindful that plaintiffs' excuses for not exercising personal oversight are meager and incomplete. For instance, not one of the individual plaintiffs has explained why inquiries were not made of the first attorney concerning the progress (or lack thereof) of the case. We are, nonetheless, most concerned with the lack of attention to the matter by the first attorney, whose neglect cannot be excused by the operational difficulties he encountered in his law practice that led to his unawareness of the court's *Rule* 1:13–7 notice. If that attorney were truly engaged and "work[ing] on the case" (as he claimed in his motion certification) he would have realized that service was deficient because his case file would have contained no proof of service and defendant had not responded in any way.

Nevertheless, in light of the good cause standard and lack of evidence of prejudice to defendant, we are constrained to balance the factors of *Rule* 1:13–7(a) in such a way as to comport with the indulgence mandated by *Ghandi.* Consequently, because we view plaintiffs as essentially blameless, the courthouse doors should not be locked and sealed to prevent their claims from being resolved in the judicial forum.

Exclusionary Clauses

Duddy v. Geico, 421 NJ Super. 214 (App. Div. 2011)

GEICO sent plaintiff a letter declining coverage because she had sold the vehicle. Plaintiff filed suit, relying on that portion of her GEICO policy that included theft as a covered loss under the comprehensive coverage portion of her policy. GEICO, in turn, argued that the loss was not covered because another portion of the policy excluded as a covered loss a loss that resulted from sale of an owned auto.

"The interpretation of contracts and their construction are matters of law for the court subject to de novo review."

. We note that this dispute with respect to the meaning of plaintiff's insurance policy is governed by certain underlying legal principles that are well settled.

We begin with an overview of the fundamental rules for interpreting insurance policies. As contracts of adhesion, such policies are subject to special rules of interpretation [and] should be construed liberally in the insured's favor to the end that coverage is afforded to the full extent that any fair interpretation will allow. Notwithstanding that premise, the words of an insurance policy should be given their ordinary meaning, and in the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability.

Thus, those clauses of an insurance policy that afford coverage are to be broadly construed in favor of the insured so as not to defeat the insured's reasonable expectations.

Initially, we question whether plaintiff's transaction can fairly be characterized as a contract of sale in light of the fact that there clearly was no meeting of the minds, and the transaction was not consummated; plaintiff did not receive the bargained-for consideration. A sale contemplates a transfer of property from one person to another for a consideration of value.... Implicit [are] the unconditional obligations of the seller to pass title, and of the buyer to pay a valuable consideration therefore. We are satisfied that to treat this transaction as a "sale" for purposes of plaintiff's insurance policy would run counter to the policy we noted earlier, of strictly construing exclusionary clauses in an insurance policy.

Late Filing of TCA Claim

Related Statute NJSA 59:8-8 *et. seq*.

McDade v. Siazon, 208 NJ 463 (2011)

The New Jersey Tort Claims Act, *N.J.S.A.* 59:1–1 to 13–10, imposes strict requirements upon litigants seeking to file claims against public entities. Under *N.J.S.A.* 59:8–8, a claimant must file a notice of claim upon a public entity or public employee "not later than the ninetieth day after accrual of the cause of action." *N.J.S.A.* 59:8–8. The Legislature, however, has created a mechanism for obtaining discretionary relief from the strict ninety-day deadline; within one year after the accrual of the cause of action, *N.J.S.A.* 59:8–9 permits the filing of a motion for leave to file a late notice. This motion may be granted if the claimant has shown "sufficient reasons constituting extraordinary circumstances for his failure to file notice of claim" within the statutory period of ninety days, and "that the public entity or the public employee has not been substantially prejudiced thereby."

The issue before the Court is whether a plaintiff who has failed to serve a timely notice of claim pursuant to *N.J.S.A.* 59:8–8, and has failed to file a motion for leave to file a late notice in accordance with *N.J.S.A.* 59:8–9, can pursue a claim against a public entity. Plaintiffs Michael McDade and Pamela McDade, intending to file an action for personal injury against the owner of a sewer pipe that allegedly injured Mr. McDade, served a tort claims notice upon a municipality that was not the owner of the pipe. They did not conduct an investigation to determine the actual owner, and were not advised of the true owner's identity until seven months after the claim accrued. Instead of obtaining leave of court to file a motion for leave to file a late tort claim notice pursuant to *N.J.S.A.* 59:8–9, plaintiffs served an untimely "amended" notice upon the public entity that owned the pipe, followed seventeen months later by the filing of their complaint. The trial court denied defendants' summary judgment motion, invoking the discovery rule to hold that plaintiffs' claim had not accrued until they were advised of the identity of the pipe's owner. After granting leave to appeal, the Appellate Division reversed the denial of summary judgment, holding that the discovery rule did not toll the accrual of plaintiffs' claims in the absence of an order granting leave to file a notice of late claim under *N.J.S.A.* 59:8–9.

We now affirm. As the Appellate Division panel properly held, the discovery rule does not obviate the need to comply with the requirements of *N.J.S.A.* 59:8–8 and *N.J.S.A.* 59:8–9. Because plaintiffs declined to invoke the statutory procedure by which a court determines whether the late filing of a notice of claim can be excused, the defendant public entity is entitled to summary judgment.

In this case, the discovery rule does not delay the accrual of plaintiffs' claims. Plaintiffs knew on January 22, 2006, that plaintiff Michael McDade had been injured by the pipe, and that the owner of the pipe was potentially liable for that injury. The fact that plaintiffs were not immediately aware of the true identity of the pipe's owner does not alter the analysis. The discovery rule "provides that in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Plaintiffs did not act with the reasonable diligence required by the discovery rule. There is no indication that plaintiffs ever inspected the pipe to determine whether its owner could be identified, either by a designation on or near the pipe itself, or by confirming its function as a component of the MUA's waste treatment system. There is no evidence that plaintiffs searched the public record, inquired about **1132 the ownership of the pipe at municipal or MUA offices, or took any affirmative steps to determine the identity of the pipe's owner. Given plaintiffs' awareness of the injury, and their knowledge that the entity responsible for the pipe was a potential tortfeasor, the discovery rule does not toll the date of accrual of plaintiffs' cause of action.

Diminution in Value Exclusionary Clause

Kieffer v. High Point Insurance, 422 NJ Super. 38 (App. Div. 2011)

We hold that where an insurer has fully, completely, and adequately "repaired or replaced the property with other of like kind and quality," any reduction in market value of the vehicle due to factors that are not subject to repair or replacement cannot be deemed a component part of the cost of repair or replacement. Under the "repair or replace" provision of the policy's limit of liability, the insurer's liability is capped at the cost of returning the damaged vehicle to substantially the same physical, operating, and mechanical condition as existed immediately before the loss. This obligation does not include liability for any inherent diminished value caused by conditions or defects that are not subject to repair or replacement, such as a stigma on resale resulting from "market psychology" that a vehicle that has been damaged and repaired is worth less than a similar one that has never been damaged. While the insured may well suffer this type of damage as a result of a direct or accidental loss, the plain language of the policy clearly and unambiguously limits the insurer's liability to "the amount necessary to repair or replace the property with other of like kind and quality." If the market value of the vehicle, after full, adequate, and complete repair or replacement, is diminished as a result of factors that are not subject to "repair" or "replacement," the insurer has no obligation to pay the diminution in value. No other reasonable interpretation can be given to the parties' express agreement that the insurer's liability is capped at the amount necessary to "repair or replace."

Moreover, we reject plaintiffs' contention that because the three policies here broadly define coverage afforded to their insureds, they are to be characterized as "all risk" policies. The specificity of the exclusion provisions in each of the policies militates against any construction other than that claims based upon diminution in value are not covered.

Charitable Immunity

Related Statute- NJSA 2A:53A-7(c)(2)

Hehre v. DeMarco, 421 NJ Super. 501 (App. Div. 2011)

At all times relevant to this case, plaintiff Alfred Hehre was a student at Holy Spirit High School, an educational institution affiliated with and sponsored by the Catholic Diocese of Camden. Defendant David Pfeifer was a teacher and track coach at Holy Spirit. Plaintiff was injured in a motor vehicle accident while being driven to a school-sponsored track meet by a fellow student-athlete. Plaintiff filed suit against the driver, alleging negligent operation of the car; the owners of the driver's car under an agency theory of liability; and the track coach, Holy Spirit High School, and the Catholic diocese of Camden (the school defendants), claiming these school defendants failed to provide safe transportation to the school-sponsored event.

After joinder of issue, the school defendants moved for summary judgment, arguing plaintiff's claims were barred under New Jersey's Charitable Immunity Act (CIA or Act), *N.J.S.A.* 2A:53A–7 to –11. The trial court denied the motion, holding that *N.J.S.A.* 2A:53A–7(c)(2) exempts from immunity a "trustee, director, officer, employee, agent, servant or volunteer" of a charity who causes "damage as the result of the negligent operation of a motor vehicle." Under the trial court's construction of the statute, plaintiff can invoke the exemption to immunity under *N.J.S.A.* 2A:53A–7(c)(2) if he can prove to a jury that the student-athlete who drove him to the track meet was acting as an agent of the school defendants at the time of the accident.

By leave granted, the school defendants now appeal arguing the trial court erred when it construed the exemption provided in *N.J.S.A.* 2A:53A–7(c)(2) as vitiating the otherwise clear immunity afforded to charitable entities in *N.J.S.A.* 2A:53A–7(a). We agree and reverse. The exemption to immunity provided in *N.J.S.A.* 2A:53A–7(c)(2) applies only to a "trustee, director, officer, employee, agent, servant or volunteer" of a charitable entity who causes "damage as the result of the negligent operation of a motor vehicle." Under the plain meaning of the language used by the Legislature, *N.J.S.A.* 2A:53A–7(c)(2) does not vitiate the immunity granted by the Legislature in *N.J.S.A.* 2A:53A–7(a) to an associated charitable entity, such as a school or diocese. The exemption to immunity in *N.J.S.A.* 2A:53A–7(c)(2) also does not apply to the track coach because plaintiff does not allege that the coach negligently operated a motor vehicle involved in the accident.

The simultaneous addition of language extending, for the first time, the immunity of *N.J.S.A.* 2A:53A–7(a) to "trustees, directors, officers, employees, agents, servants or volunteers" of the charitable entities, together with a provision designating a specific exception under *N.J.S.A.* 2A:53A–7(c)(2) for "any trustee, director, officer, employee, agent, servant or volunteer causing damage as the result of the negligent operation of a motor vehicle," indicates that the Legislature intended the immunity exception to apply only to the individual actors expressly designated by the plain language of *N.J.S.A.* 2A:53A–7(c)(2), and not to corresponding charitable entities, which are otherwise shielded from liability under *N.J.S.A.* 2A:53A–7(a). If the Legislature had intended the exception to extend to charitable entities as well as the individual actors, the exception provision would have been written to mirror the language of *N.J.S.A.* 2A:53A–7(a), which extends general charitable immunity to any "nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers."

Duty of Care

Badalamenti v. Simpkiss, 422 NJ Super. 86 (App. Div. 2011)

There is no bright line rule that determines when one owes a legal duty to prevent a risk of harm to another. Duty is a fluid concept. Whether a legal duty is owed and the scope of that duty is generally a matter of law for the courts to decide on a case by case basis. Factors to be considered include: "(1) the relationship of the parties; (2) the nature of the attendant risk; (3) the ability and opportunity to exercise control; (4) the public interest in the proposed solution; and, most importantly; (5) the objective foreseeability of harm. These factors must be "identified, weighed and balanced by the court in a "fact specific" analysis which "must satisfy 'an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. [T]he essential question is whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. Duty is largely grounded in the natural responsibilities of social living and human relations, such as have the recognition of reasonable men; and fulfillment is had by a correlative standard of conduct."

Of all the factors noted above, foreseeability has generally received the greatest attention in the case law. The question of whether harm to another is foreseeable is capable of objective analysis and is based on the totality of circumstances. The totality of circumstances standard [in determining foreseeability] encompasses all the factors a reasonably prudent person would consider.

Workers Comp – Fellow Servant Rule

Related Statute: NJSA 34:15-8

McDaniel v. Man Wai Lee, 419 NJ Super. 482 (App. Div. 2011)

The workers' compensation system represents the bargain that was struck between employers and employees concerning workplace injuries, whereby employers shoulder the expense of workers' injuries arising out of the performance of work duties. The Workers' Compensation Act "provide[s] a method of compensation for the injury or death of an employee, irrespective of the fault of the employer or contributory negligence and assumption of risk of the employee." The Act serves as "the exclusive remedy for an employee who sustains an injury in an accident that arises out of and in the course of employment. Fundamental to the Act is the premise that by accepting the benefits provided by its schedule of payments, the employee agrees to forsake a tort action against the employer.

The statute's exclusivity bar also prohibits an injured employee's legal action to recover for injuries caused by a fellow employee. Specifically, *N.J.S.A.* 34:15–8 provides, in pertinent part, "a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong." This provision blankets co-employees with immunity from suit by injured co-workers.

“The purpose of the [immunity provision] was not so much to protect the fellow servant from liability as it was to protect the employer from paying twice, once through compensation and a second time through indemnification of the fellow servant against the injured employee's judgment.”

“In order for the statute to apply as a bar to a suit against a co-employee, three conditions must be satisfied: (1) the plaintiff must have suffered a compensable injury; (2) the plaintiff and defendant must have been co-employees; and (3) the defendant must have been acting ‘in the course of his employment.’ ”

Reimbursement of PIP Benefits – Statute of Limitations

N.J. Manufacturers v. Lange, 417 NJ Super. 393 (App. Div. 2011)

***N.J.S.A.* 39:6A-9.1** requires that an insurer, which has provided personal injury protection (PIP) benefits, must commence suit for reimbursement from a tortfeasor within two years of "the filing of the claim." The parties dispute whether the claim is filed when an insured or health care provider first requests reimbursement for PIP benefits or when the insured submits a claim form requested by the insurer-a determination critical to the survival of this action. After closely examining this difficult issue, we conclude the Legislature most likely intended that the "claim" is "filed" when the latter event occurs.

We think it unlikely that the Legislature intended to leave parties in the dark as to the commencement of the limitations period by choosing an uncertain triggering event. Instead, the Legislature likely had some other event in mind when it referred to "the claim" in ***N.J.S.A.* 39:6A-9.1.** Our focus on the definite article in the phrase "the claim" in ***N.J.S.A.* 39:6A-9.1** was helpful in recognizing the Legislature's intent to fix one particular, distinguishable event as the trigger for the limitations period. Yet our consideration of the word "claim" as used in the statutory scheme, as well as the purposes of the no-fault laws, compels our conclusion that it is the submission of the PIP claim form that triggers the two-year limitations period contained in ***N.J.S.A.* 39:6A-9.1.**

PIP Arbitration – Appeal

Open MRI v. Mercury Insurance, 421 NJ Super. 160 (App. Div. 2011)

In the present matter, we find a right of appeal to exist insofar as it is based on the Law Division judge's determination to reform the insurance policy underlying Open MRI's claim. The DRP was correct in concluding that she lacked the statutory authority to order reformation. Because reformation constituted the relief sought by Open MRI from the outset, its institution of an arbitration proceeding pursuant to the APDR Act was ineffective. As a practical matter, Open MRI's reformation claim could only be considered, if at all, by a Law Division judge. We find, when the relief sought in arbitration (reformation) is beyond the power of the DRP to award, the Law Division action is in essence a de novo proceeding as to which a right of review exists in order for us to carry out our supervisory powers as traditionally exercised over Law Division orders. *R.* 2:2–3.

Landlord – Duty of Care

Meier v. DAmbose, 419 NJ Super. 439 (App. Div. 2011)

Considering all these factors, it is appropriate to impose a duty upon the lessor to maintain and inspect the furnace. In the absence of a lease provision to the contrary, which might affect responsibility for maintaining the furnace and hence potential liability as between landlord and tenant, we hold that defendant landlord had a duty to the decedent to maintain the furnace and, thus, to inspect it periodically to ensure that it was in safe operating condition and not creating a fire hazard. Fulfillment of that duty did not require notice of a defect. In the language of *Restatement (Second) of Torts* § 358, that duty gave the landlord reason to know of a dangerous condition of the furnace in his property.