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Garden State CLE Presents:

The Annual New Jersey Personal Injury

&

Insurance Law Review

2011

Lesson Plan

The Annual Personal Injury & Insurance Law Review – 2011

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Statutory Bar under NJSA 39:6A-4.5

a. 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 section 4 of P.L.1972, c. 70 (C.39:6A-4) , section 4 of P.L.1998, c. 21 (C.39:6A-3.1) or section 45 of P.L.2003, c.89 (C.39:6A-3.3) 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.

b. Any person who is convicted of, or pleads guilty to, operating a motor vehicle in violation of R.S.39:4-50, section 2 of P.L.1981, c. 512 (C.39:4-50.4a), or a similar statute from any other jurisdiction, in connection with an accident, shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of the accident.

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The Dram Shop Act - NJSA 2A:22A-2 *et seq.*

Voss v. Tranquilino, 413 NJ Super. 82 (App. Div. 2010)

Although a literal reading of the statute suggests that all claims are barred, we reach a contrary conclusion. We hold that *N.J.S.A.* 39:6A-4.5(b) does not bar a dram shop claim because (1) the purpose of the statute is to reduce automobile insurance premiums and its scope should be limited accordingly to losses that are subject to coverage under Title 39; (2) an interpretation barring dram shop claims would unjustifiably constitute repeal by implication of a portion of the New Jersey Licensed Alcoholic Beverage Server Fair Liability Act [The Dram Shop Act]; and (3) immunizing liquor licensees from liability in such circumstances would be inimical to the policy of this State of curbing drunk driving.

[Note – Currently before the Supreme Court]

Wrongful Death - Aronberg v. Tolbert, 413 NJ Super. 562 (App. Div. 2010)

It is well established that a wrongful death action can be viable under circumstances in which a survival action is barred. The difference in these results derives from the fact that actions under the New Jersey Wrongful Death Act and the New Jersey Survivor Act serve different purposes and are designed to provide a remedy to different parties.

A survival action permits the decedent's estate to pursue any cause of action that the *decedent* would have had if he had survived. Because of this unity of identity between the claim asserted in the survival action and the claim that would have been asserted by the decedent if he had lived, it is reasonable to apply a bar designed to punish the decedent uninsured driver to the survival action that seeks to vindicate the claim of the uninsured driver who has died. Accordingly, the trial court correctly granted summary judgment dismissing that claim, a result that plaintiff has not sought leave to appeal. It does not follow, however, that the statutory bar should also apply to the wrongful death action.

The Wrongful Death Act is remedial legislation that is designed to "eliminate the inequity of denying all right of recovery for the death of a family member." In contrast to the survival action, recovery under the Wrongful Death Act compensates the survivors of the decedent for *their* losses as a result of the tortious conduct of others, and does not accrue to the decedent or his estate as a matter of law.

* * *

As noted, by its very language, the punitive reach of *N.J.S.A.* 39:6A-4.5(a) does not extend to the culpable uninsured motorist who is not operating the uninsured vehicle when injured.The target of the punitive goal is limited to "[a]ny person" who is required to obtain insurance, fails to do so and is injured while operating the uninsured vehicle. There is nothing in the language of *N.J.S.A.* 39:6A-4.5(a) that supports the conclusion that the Legislature intended to target innocent family members without any culpability for the lack of insurance. We can perceive no rational explanation for why such persons should be deprived of a cause of action for the damages they incur when the uninsured motorist who is injured while a passenger is unaffected by the statutory bar. Moreover, there is little likelihood that applying the bar to the wrongful death action would enhance the incentive to obtain insurance for those drivers who remained unmoved by the bar to their own ability to maintain an action.

[Note – Currently before the Supreme Court]

Causes of Action

Resident/Household – Sierfeld v. Sierfeld, 414 NJ Super. 85 (App. Div. 2010)

The court's interpretation of an insurance contract is a determination of law. We afford no special deference to the trial court's interpretation of the law and the legal consequences that flow from the established facts.

Insurance policies are contracts of adhesion and as such they should be "construed liberally in [the insured's] favor."

However, [l]iberal rules of construction of insurance policies do not sanction ... emasculation of the clear language of the policy. Unambiguous insurance contracts are enforced in accordance with the reasonable expectations of the insured. The court should read policy provisions so as to avoid ambiguities, if the plain language of the contract permits. The court should not torture the language of the policy to create an ambiguity.

[

[T]he words of an insurance policy are to be given their plain, ordinary meaning. In the absence of any ambiguity, courts should not write for the insured a better policy of insurance than the one purchased. A 'genuine ambiguity' arises only 'where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'

In determining whether a person is a resident of a "household," courts consider whether the person had his/her own bedroom, kept clothing and toiletries in the home, registered, insured and stored a car at the home, and performed household repairs Courts also consider whether the parties purchased food and household goods jointly or separately, allocated homemaking and housekeeping responsibilities and dined together or independently; whether fair market value rent was charged or utilities paid; and "whether arrangements were purely economic or broader, encompassing shared companionship as well as living facilities.

We are satisfied that under the circumstances of this case, the words "resident" and "household" as used in the policies are unambiguous, and that the parties had a "substantially integrated family relationship" sufficient to make plaintiff a resident of her parents' household at the time of the dog bite. Among other things, plaintiff enjoyed a relationship with the Sierfelds as a family member; she had no rental agreement and did not pay rent or utilities or contribute to household expenses; she had no set plan to move at the time of the dog bite and could have stayed with her parents beyond the six-month period; she had common use of the bathroom, kitchen and laundry room; and her driver's license contained her parents' address, her car was insured and registered there and she received her personal mail there. Plaintiff's use of a bedroom other than her childhood bedroom, and her lack of socializing or sharing meals with her parents or rarely watching television with them does not compel a contrary conclusion.

Portee Claims – Hinton v. Myers, 416 NJ Super. 141 (App. Div. 2010)

Portee v. Jaffe, 84 NJ 88 (1980)

Negligent Infliction of Emotional Distress

(1) the death or serious physical injury of another caused by defendant's negligence;
(2) a marital or intimate, familial relationship between plaintiff and the injured person;
(3) observation of the death or injury at the scene of the accident; and
(4) resulting severe emotional distress.

* * *

In addressing the third element, "[t]he viability of *Portee* claims depends only on whether the plaintiff has had a sensory, contemporaneous perception of an injury that was sustained by a spouse or close family member, irrespective of the distance from which that perception arises." Thus, for example, the Law Division judge recognized that plaintiffs' *Portee* claims were viable, despite the fact that plaintiffs did not actually see the fire incinerating the victim, because they knew the victim was inside the home being engulfed in the flames, having themselves just escaped the fire. More recently, we found that a father who ran into the kitchen upon hearing his infant daughter scream and saw steam coming from her body satisfied the third prong of *Portee:*

It is plain to us that the products [liability] defendants would not be entitled to summary judgment dismissing [plaintiff's] *Portee* claim on the ground that the father did not witness the accident. He heard the child's contemporaneous screams. The "observation" required by *Portee* involves sensory perception, and sight is only one of the senses.

Here, it is undisputed that plaintiff did not witness the accident and was completely unaware that an accident had occurred. During his deposition, he testified that he heard his daughter screaming and crying but that he did not contemporaneously hear any screeching of brakes, any thumping sounds, or anything of that nature shortly before he heard his daughter screaming and crying. He indicated that he "felt" that the voice he heard was that of his daughter but that he did not "know exactly that it was her or not." He was, however, concerned that the voice was hers. He also heard sirens outside of the building. Although he was seated by an open window, he did not look outside to see what was happening. Rather, he waited approximately twenty minutes and then asked permission to check on his "wife and kids." When he went outside, he saw his daughter's stroller broken into pieces and also observed the police and ambulance. It was at this point he learned that Briggs and their daughter had been involved in a car accident. Yaa Ayannah had already been removed to the hospital. After he arrived at the hospital, he observed her in a neck brace with medical personnel treating her. Shortly after his arrival, medical staff advised him that she had died.

These facts, viewed most favorably towards plaintiff, do not implicate plaintiff's contemporaneous perception of his daughter's fatal injury for purposes of asserting a *Portee* claim.

Products Liability/Net Opinion – Maynard v. Pelican Leisure, NJ Super. (App. Div. 2010)

Becker v. Baron Bros. 138 N.J. 145, 151 (1994)

To prevail in a products liability action, a plaintiff must demonstrate

1. the product was defective;
2. the defect existed when the product left the defendant's control; and
3. that the defect caused injury to a reasonably foreseeable user.'

Here, plaintiff established a prima facie case as to the first and third elements, but not as to the second."[T]he age and prior usage of the product in relation to its expected life span, durability and effective operability without maintenance are the most important considerations in determining whether an inference is permissible that the defective condition existed prior to sale[,]" when a plaintiff is unable to show directly a defect in the product's manufacture. The trial judge properly found that plaintiff established no basis permitting such an inference. His expert stated that the "defect" in the left binding was readily correctable by a mechanical adjustment; he was unable to "give an opinion" as to why the binding did not release. Plaintiff presented no evidence as to what adjustments were made to his bindings when he purchased new ski boots in Colorado. That was a significant intervening event between plaintiff's purchase of the bindings and the fall resulting in his injuries. Had this case been submitted to the jury, that jury would clearly be left to speculate as to what bearing that intervening event had on the failure of the left binding to release when plaintiff fell.

* * *

In addition to determining whether a witness is qualified to testify as an expert, the trial court must also decide the closely related issue as to whether the expert's opinion is based on facts and data. As construed by applicable case law, *N.J.R.E.* 703 requires that an expert's opinion be based on facts, data, or another expert's opinion, either perceived by or made known to the expert, at or before trial. Under the "net opinion" rule, an opinion lacking in such foundation and consisting of bare conclusions unsupported by factual evidence is inadmissible. The rule requires an expert "to give the why and wherefore" of his or her opinion, rather than a mere conclusion. The net opinion rule "forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data".

Workers Comp – Cooper v. Barnickel Entprs, 411 NJ Super. 343 (App. Div. 2010)

Course of Employment – Minor Deviation Rule

Jumpp v. City of Ventnor, 177 NJ 470 (2003)

In *Jumpp,* a city employee "was permitted to make brief stops at local establishments" while traveling between job sites in a city owned vehicle. He was nevertheless denied compensation for a fall suffered when he parked and left the vehicle with the motor running to retrieve his personal mail from a local post office located on the route to one of his job sites, a habit that [his supervisor] knew about and allowed.

Compensation was denied because the Court held "that when an employee is assigned to work at locations away from 'the employer's place of employment,' eligibility for workers' compensation benefits generally should be based on a finding that the employee is performing his or her prescribed job duties at the time of the injury. The Court explained that "[b]ecause off-premises employees may not report to a single 'premises,' the statute provides that they are to be compensated only for accidents occurring in the direct performance of their duties.... Employees who are where they are supposed to be, doing what they are supposed to be doing, are within the course of employment whether on-or off-premises, except when they are commuting."

The *Jumpp* Court explained that the 1979 amendments to the workers' compensation statute were designed to narrow the minor deviation rule and "limit[ ] the reach of the workers' compensation statute." However, the Court stressed that the rule which allowed compensation for injuries that occurred in a minor deviation from employment was not "eliminated by the 1979 amendments" to the Act. The test of whether a minor deviation is compensable depends on whether that employee has embarked on a personal errand that would have been compensable if carried out by an on-premises employee.

* * *

Here, the judge of compensation made comprehensive findings based on credibility determinations. He found that petitioner was an "off-site" employee who, facing an extended wait to consult with an expert concerning a work-related issue, was injured while driving for a cup of coffee. It cannot be expected that he would stand like a statue or remain at the union hall with nothing to do for such a period, particularly when there was no coffee available at the site. We cannot conclude in these circumstances that the injuries were not compensable merely because petitioner chose to take his authorized "coffee break" other than at the closest location. The distance of the coffee shop from respondent's off-site jobsite was reasonable given the rural nature of the community in Winslow Township and the time petitioner had to wait to seek the counsel he sought. The judge found petitioner to be credible, and under *Jumpp,* accidents occurring during coffee breaks for off-site employees, which are equivalent to those of on-site workers, are minor deviations from employment which permit recovery of workers' compensation benefits.

Medical Malpractice

Neo-natal Injury – Carchidi v. Iavicoli, 412 NJ Super. 374 (App. Div. 2010)

Stigliano v. Connaught Laboratories, Inc., 140 *N.J.* 305 (1995)

NJRE 403 - "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of ... undue prejudice."

* * *

Cooper has a right to defend the claim of malpractice by its physicians. Part of its defense is to refute plaintiff's claim that if any of Cooper's doctors were negligent (which Cooper denies) that negligence did not cause plaintiff's injuries. Cooper has a legitimate need to engage the services of one or more well-qualified experts for this purpose. Cooper argues that it chose Drs. Clancy and Zimmerman because of their exemplary qualifications and because they are local. Cooper argues that the latter criteria is important so the jury does not perceive that it brought in "hired guns" from out of the area. Cooper has provided information showing that unlike the large neurology treatment group at CHOP, most hospitals in the South Jersey-Philadelphia area have ***385** few pediatric neurologists on staff. It therefore contends it would be prejudiced if it could not use CHOP physicians.

Like the defendants, plaintiff has a right to a fair trial. He must be prepared to meet adverse evidence presented by the defense, including expert opinion testimony by well-qualified experts. He argues that allowing Cooper to use as experts members of his treatment group will unnecessarily inject into the trial prejudice that will be difficult or impossible to overcome. Plaintiff also has a legitimate interest in preserving the loyalty and trust inherent in the physician-patient relationship he has established and maintained for nearly his entire life with Dr. Dlugos and other members of the CHOP neurology treatment team. He fears that the relationship will be detrimentally affected if members of the team are allowed to join the enemy camp as hired experts, engaged solely for the purpose of litigation.

Affidavit of Merit/Specialty Requirement – Ryan v. Renny, 203 NJ 37 (2010)

Waiver under NJSA 2A:53A-41(c)

A court may waive the same specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association and board certification requirements of this section, upon motion by the party seeking a waiver, if, after the moving party has demonstrated to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty, the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine.

* * *

This case presents us with an opportunity to interpret the waiver provision and to answer the question of whether the notion of a "good faith effort" contemplates a substantive explanation, to the court, why experts in defendant's field refused to supply plaintiff with an opinion. We hold that it does not and thus, the Appellate Division's superimposition of that requirement on the good faith analysis was unauthorized.

The waiver provision also prescribes that where plaintiff has made a good faith showing of inability to identify an expert in the same specialty or subspecialty as defendant, his proposed expert must possess "sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine." We interpret that language as a broad grant of discretion to the trial judge that does not bear with it, as defendant argues, a temporal requirement that the proposed expert be engaged in performing the medical procedure at issue on the date of the occurrence giving rise to the claim. Rather, the expert may have derived his training, experience, and knowledge "as a result of" prior practice in the field. That is not to suggest that a lapse of time may not bear on a judge's assessment of an expert's training, experience, and knowledge, only that it is not an automatic disqualifier.

Trial

Misconduct – Szczecina v. PV Holding, 414 NJ Super. 173 (App. Div. 2010)

In addition to being excessively argumentative, his opening statement attacked the integrity of defendants, defense counsel and the defense witnesses. Even more inappropriately, plaintiff's counsel asked the jury to "send a message" that "we're not going to accept that the paid agreers, the spin doctors[,] are trying to get [defendants] off the hook." His summation, which can appropriately contain argument to the jury, was inappropriate in this case because it continued additional inflammatory attacks on the defense.

"The fundamental purpose of opening statements is ' "to do no more than inform the jury in a general way of the nature of the action and the basic factual hypothesis projected, so that they may be better prepared to understand the evidence." Counsel "must be summary and succinct" and "[n]othing must be said which the lawyer knows cannot in fact be proved or is legally inadmissible

In addition, it is improper for an attorney to make derisive statements about parties, their counsel, or their witnesses.

Although attorneys are given broad latitude in summation, they may not use disparaging language to discredit the opposing party, or witness, or accuse a party's attorney of wanting the jury to evaluate the evidence unfairly, of trying to deceive the jury, or of deliberately distorting the evidence.

Discovery/Experts – Gensollen v. Pareja, 416 NJ Super. 585 (App. Div. 2010)

We granted leave to appeal in this matter to consider the extent to which a party may inquire into an expert's finances and litigation history in gathering information to prove at trial the expert's positional bias.

We start with a premise that no one disputes-a litigant is entitled to explore in discovery whether an expert maintains a positional bias. However, contrary to what plaintiff argues and what the trial judge concluded, the pursuit of discovery from an expert is neither limitless nor may it continue unceasingly until the expert cries "uncle" and concedes positional bias. Instead, in the vast majority of cases, discovery should stop once the expert provides information that would permit the requesting party to argue to a fact-finder that the expert is a "professional witness" or "hired gun" who mostly offers opinions that largely seek to vindicate a particular position.

We cannot, of course, provide a bright-line rule to be applied in all such matters. Each discovery request must inevitably turn on its own particular facts and circumstances. But, in ruling on similar discovery requests, trial judges must recognize that licensed professionals do not surrender their privacy rights when hired to render an expert opinion for monetary consideration.

The discovery rights provided by our court rules are not instruments with which to annoy, harass or burden a litigant or a litigant's experts.

A party may ask for an estimate of the extent to which the expert has rendered opinions for plaintiffs or defendants. And a party may obtain an approximation of the portion of professional time the expert devotes to providing services in litigation. In the vast majority of cases, truthful responses to those inquiries will likely provide all the information necessary for the party to argue that the expert possesses a positional bias and will be sufficient to terminate any further inquiry into the expert's private business and financial matters.

Exculpatory Agreements

Gym Membership – Stelluti v. Casapenn Entprs, 203 NJ 286 (2010)

It is well recognized that the common law imposes a duty of care on business owners to maintain a safe premises for their business invitees because the law recognizes that an owner is in the best position to prevent harm. That standard of care encompasses a duty "to guard against any dangerous conditions on [the] property that the owner either knows about or should have discovered[,] ... [and] to conduct a reasonable inspection to discover latent dangerous conditions." That said, the law recognizes that for certain activities conducted by operation of some types of business, particularly those that pose inherent risks to the participant, the business entity will not be held liable for injuries sustained "so long as [the business] has acted in accordance with 'the ordinary duty owed to business invitees, including exercise of care commensurate with the nature of the risk, foreseeability of injury, and fairness in the circumstances. When it comes to physical activities in the nature of sports-physical exertion associated with physical training, exercise, and the like-injuries are not an unexpected, unforeseeable result of such strenuous activity.

In sum, the standard we apply here places in fair and proper balance the respective public-policy interests in permitting parties to freely contract in this context (i.e. private fitness center memberships) and requires private gyms and fitness centers to adhere to a standard of conduct in respect of their business. Specifically, we hold such business owners to a standard of care congruent with the nature of their business, which is to make available the specialized equipment and facility to their invitees who are there to exercise, train, and to push their physical limits. That is, we impose a duty not to engage in reckless or gross negligence. We glean such prohibition as a fair sharing of risk in this setting, which is also consistent with the analogous assumption-of-risk approach used by the Legislature to allocate risks in other recreational settings with limited retained-liability imposed on operators.

With respect to its agreement and its limitation of liability to the persons who use its facility and exercise equipment for the unique purpose of the business, we hold that it is not contrary to the public interest, or to a legal duty owed, to enforce Powerhouse's agreement limiting its liability for injuries sustained as a matter of negligence that result from a patron's voluntary use of equipment and participation in instructed activity. As a result, we find the exculpatory agreement between Powerhouse and plaintiff enforceable as to the injury plaintiff sustained when riding the spin bike.

Insurance Coverage

UIM Coverage – Tonic v. American Casulty, 413 NJ Super. 458 (App. Div. 2010)

In *Longworth, supra,* we defined the insured's and insurer's obligations regarding the possible settlement of claims against a third-party tortfeasor given the tension that existed between "the subrogation clause" and "the consent-to-settle clause" contained in most UIM policies at the time. By refusing to permit the insured to settle his claim with the tortfeasor, we noted that UIM carriers placed their insureds in a "limbo" that "utterly frustrate[d] the legislative purpose of providing maximum and expeditious protection to the innocent victims of financially irresponsible motorists." As a result, we held:

[A]n insured receiving an acceptable settlement offer from the tortfeasor should notify his UIM carrier. The carrier may then promptly offer its insured that sum in exchange for assignment to it by the insured of the claim against the tortfeasor. While promptness is to be ultimately determined by the circumstances, 30 days should be regarded as the presumptive time period if the insured notices his carrier prior to assignment of a trial date. In any event, an insured who has not received a response from his carrier and who is in doubt as to whether acceptance of the tortfeasor's offer will impair his UIM rights may seek an immediate declaratory ruling from the trial court on order to show cause on such notice as is consistent with the circumstances. We further hold that UIM carriers may, if they choose, honor demands from their insureds to proceed to arbitration of the UIM claim prior to disposition of the claim against the tortfeasor.

As we see it, plaintiff fully complied with *Longworth's* procedures. He notified defendant that he had reached a tentative settlement with State Farm; when defendant refused to make payment and assume prosecution of the claim against the potential tortfeasors, and also refused to consent to releasing Canon, plaintiff sought declaratory relief. Defendant's response was, likewise, permissible under *Longworth.* It chose to argue that it need not approve the settlement or assume litigation of the case because plaintiff was not entitled to UIM benefits having already compromised defendant's subrogation rights.

Arbitration/Trial De Novo – Guaciaro v. Gonzalez, 412 NJ Super. 505 (App. Div. 2010)

There are two reported cases that have considered the scope of a trial de novo following the rejection of an arbitration award, *Derfuss v. New Jersey Manufacturers Insurance Co.,* 285 *N.J.Super.* 125, 666 *A.*2d 599 (App.Div.1995), and *Salib v. Alston,* 276 *N.J.Super.* 108, 647 *A.*2d 484 (Law Div.1994). In those two cases, the policies contained identical language with respect to rejecting an arbitration award. The language in those policies, however, differed from the language in the policy before us.

In *Salib,* the plaintiff was injured in an automobile accident with an uninsured vehicle and sought UM coverage under her own policy, which mandated arbitration. The arbitrators found her to be twenty percent at fault and set her damages at $40,000, resulting in a net recovery of $32,000.The plaintiff rejected that award and sought a trial on all issues. The trial court examined the language of her policy and concluded that she was entitled to a trial on damages only.

A similar result occurred in *Derfuss,* which involved a UM arbitration that resulted in an award of damages of $350,000 to the plaintiff but an apportionment of forty percent liability against her. The plaintiff rejected the award and ultimately was granted a trial on all issues, which resulted in a jury verdict of damages of $500,000 and a twenty percent apportionment of fault, for a net recovery of $400,000. Her insurer appealed, contending that under the policy language, the subsequent trial should have been limited only to the question of damages. After examining the language of the arbitration clause, we agreed, concluding that the plaintiff was entitled to a trial on the quantum of her damages but could not contest the apportionment of fault made in the arbitration proceedings. We applied the forty percent apportionment of fault from the arbitration to the verdict of $500,000, concluding the plaintiff was entitled to recover $300,000.

We perceive a significant difference in the language in the *Derfuss* and *Salib* policies and the language of the State Farm policy which is before us.

Phantom Vehicles – Estate of Hanges v. Met Property, 202 NJ 369 (2010)

N.J.R.E. 804(b)(6) codifies an exception to the hearsay rule. It allows, in civil proceedings only, the admission of "a statement made by a person unavailable as a witness because of death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy.

In the context of a summary judgment motion, the trial court disallowed the admission of several hearsay statements made by a decedent concerning the cause of an automobile accident, ruling that, because it was in the decedent's self-interest to color the version of the events he gave to the police in the light most favorable to him, that self-interest automatically rendered that hearsay statement not in good faith and untrustworthy, thus inadmissible. The Appellate Division, although sustaining several of the evidentiary determinations made by the trial court concerning the decedent's later hearsay statements, disagreed with the trial court's rejection of the statements made by the decedent to a police officer shortly after the accident. It concluded that there was no factual basis in the record to support the trial court's determination that such statement was not made in good faith or was not trustworthy.

We agree. As a threshold matter, we observe that, ordinarily, an evidentiary determination made during trial is entitled to deference and is to be reversed only on a finding of an abuse of discretion; we see no reason to impose a different standard of review on an evidentiary determination made, as here, in the context of a summary judgment application. Applying that standard of review, the record discloses that the sole reason proffered by the trial court in determining that the hearsay statement was not trustworthy-that it was in the declarant's self-interest to make the statement-lacked an evidential foundation. In those circumstances, the trial court's determination constituted an abuse of discretion and cannot be sustained.

Phantom Vehicles – Cockerline v. Menendez, 411 NJ Super. 596 (App. Div. 2010)

To prevail on a claim of negligence, a plaintiff must establish that the "defendant breached a duty of reasonable care, which constituted a proximate cause of the plaintiff's injuries.". "Ordinarily, negligence is ... 'a fact which must be proved and which will never be presumed.

The principle of res ipsa loquitur, however, creates "an allowable inference of the defendant's want of due care," with respect to an injury-producing occurrence, upon a showing that "(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 effect of the doctrine is to establish a *prima facie* case by permitting the jury to infer negligence." *Res ipsa loquitur* is not a theory of liability; rather, it is an evidentiary rule that governs the adequacy of evidence in some negligence cases."

The fact that there is no explanation for an accident does not, by itself, entitle a plaintiff to invoke res ipsa loquitur. "Rather, a plaintiff has the burden of producing evidence that reduces the likelihood of other causes so 'that the greater probability [of fault] lies at defendant's door.'

" *Res ipsa loquitur* is grounded in probability and the sound procedural policy of placing the duty of producing evidence on the party who has superior knowledge or opportunity for explanation of the causative circumstances This foundational premise for res ipsa loquitur rests upon one of the doctrine's elements, that the instrumentality causing the injury was within the defendant's exclusive control.

We agree with defendant that under the evidence presented at trial, res ipsa loquitur was inapplicable because it is impossible to conclude that the instrumentality causing the injury was within defendant's exclusive control. Indeed, it is not even clear what was the instrumentality that caused the injury. Multiple factors were at work, not all of them human; a non-exclusive list includes, in addition to Clark's operation of the UPS truck: the weather; the phantom tractor-trailer that sideswiped the UPS truck, interfering with Clark's ability to bring it to a stop; and the phantom car stopped perpendicular to the flow of traffic which caused Menendez to stop in a lane of traffic.

Plaintiff's failure to establish this critical element of the doctrine of res ipsa loquitur is fatal to its application to her case. "[B]efore the doctrine of *res ipsa loquitur* operates to shift the burden of persuasion to the defendant in a negligence case, the plaintiff first must meet all of the elements of the three-part *res ipsa loquitur* test, and ... a plaintiff's failure to prove any one of those elements by a preponderance of the evidence renders the doctrine and its concomitant burden-shifting unavailable to that plaintiff."

Deemer – Cupido v. Perez, 415 NJ Super. 587 (App. Div. 2010)

The question is whether the phrase in the second sentence, "an insurer authorized to transact or transacting automobile or motor vehicle insurance business in this State" includes an insurer that is only authorized to transact commercial motor vehicle insurance in the State. *N.J.S.A.* 17:28-1.4. We conclude that the deemer statute imposes an obligation to provide certain New Jersey automobile insurance coverages upon an out-of-state insurer that itself, or through an affiliated entity, is authorized to transact either private passenger automobile or other motor vehicle insurance business in the State, including commercial motor vehicle insurance.

Plaintiff asserts that the deemer statute is not applicable because Nationwide's affiliates are only authorized to insure commercial motor vehicles in New Jersey, and by that description, the vehicles are not required to be insured for no-fault PIP benefits. We agree that, generally, commercial motor vehicles are not required to be insured for PIP benefits. *N.J.S.A.* 39:6A-4. However, the issue is not whether a plaintiff's insurance policy actually includes New Jersey no-fault PIP benefits coverage. Rather, the issue is whether an out-of-state insurer that issues a motor vehicle insurance policy was authorized to transact either private passenger automobile or motor vehicle insurance business (including commercial motor vehicle insurance), directly or indirectly, in New Jersey. If so, then the insurance policy is deemed to include New Jersey no-fault PIP benefits, standard liability insurance, and uninsured motorist coverage pursuant to the deemer statute, thus subjecting the plaintiff-insured to the defense of the limitation-on-lawsuit threshold.

Verbal – Haywood v. Harris, 414 NJ Super. 204 (App. Div. 2010)

Since he chose the LOL option, plaintiff could only recover for "noneconomic loss" by proving "a bodily injury which result[ed] in death; dismemberment; significant disfigurement or significant scarring; [a] displaced fracture[ ]; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement." *N.J.S.A.* 39:6A-8a. " 'Noneconomic loss' means pain, suffering and inconvenience." *N.J.S.A.* 39:6A-2i. "An injury [is] considered [to be] permanent when the body part or organ ... has not healed to function normally and will not heal to function normally with further medical treatment." *N.J.S.A.* 39:6A-8a.

However, the LOL has no effect upon a person's claim for "economic loss." *See N.J.S.A.* 39:6A-2k (" 'Economic loss' means uncompensated loss of income or property, or other uncompensated expenses, including, but not limited to, medical expenses."). "We have held that plaintiffs need not satisfy the [LOL] threshold to recover for economic loss." "Even evidence of prospective income loss based on a career choice that was denied plaintiff because of the injury [i]s sufficient to defeat summary judgment as to 'economic damages.

However, we have also recognized that if a plaintiff fails to prove a "permanent injury," there must be a limit upon any award made for future economic loss. "Future economic loss must depend upon an injury which affects plaintiff's ability to earn income in the future. Hence, where the claim is based on a permanent injury within the meaning of *N.J.S.A.* 39:6A-8a, there must be a 'permanent injury' to sustain recovery *beyond wages lost during a reasonable period of recuperation and recovery.*"

Thus, we conclude that plaintiff was not barred as a matter of law from making a claim for future lost wages resulting from injuries in this accident, but we also conclude that plaintiff's claim was limited to only those future wages lost for a "reasonable period of recuperation and recovery."

Policy Exclusions/Duty to Defend – Flomerfelt v. Cardiello, 202 NJ 432 (2010)

The procedural posture in which this matter has reached us therefore does not permit a definitive answer to the question, as a matter of fact, about the cause or causes that led to plaintiff's injuries, either temporary or permanent. Nor can we determine the sequence of events that led to the injuries or whether drugs provided or used at the party, that is the excluded acts, had a substantial nexus to those injuries. The question, therefore, is what the language of the exclusion means in this context and, more to the point, how the duties to defend and indemnify should be evaluated. Although the record is not sufficiently developed to decide the question of the insurer's liability for indemnity, the duty to defend can be resolved utilizing our traditional analysis.

In evaluating the duty to defend, we can lay the complaint and the policy side by side and see that in this dispute some theories of liability would be covered and others would not. If, for example, the finder of fact were to conclude that alcohol ingestion, either in the context of the social host serving plaintiff when she was visibly intoxicated, , or in combination with a delay in summoning aid, was the cause for the injuries, or set the chain of events in motion, and that there was not a substantial nexus between drugs at the party and the injuries, the claim would fall within the coverage of the policy and would not be barred by the exclusion. If the finder of fact were to conclude that plaintiff's injuries were caused by use of drugs before she arrived at the party, by genetic predisposition, or by long-term drug use such that the injuries did not "originate in," "grow out of" or have a "substantial nexus" to her use of drugs at the party, the claim would also be covered. Whether any of those possibilities is the likeliest outcome is of no consequence, because our traditional analysis of the duty to defend requires that Pennsylvania General provide a defense

9-1-1 Calls

Negligence – Wilson v. Jersey City, 415 NJ Super. 138 (App. Div. 2010)

The claimed breaches of duty by the call takers, however, relate to their less than stellar on-the-scene behavior, not to governmental policy decisions that might benefit from immunity. Accordingly, Jersey City and its call takers do not enjoy similar TCA immunity. We emphasize that our point of view does not require a jury to conclude that these governmental actors conducted themselves negligently, or even if they were negligent, that such conduct proximately contributed to a plaintiff's harm. Rather, we simply cannot find that TCA immunity exists under the indulgent state of facts that we have identified for the summary judgment analysis. Plaintiffs should not be deprived of the right to present an appropriate factual backdrop and expert opinion to a jury for its thoroughgoing review. Whether plaintiffs will succeed in persuading the jury of the alleged breaches of duty and the more thorny issue of proximate cause, remains to be seen.

Immunity – Massachi v. Newark, 415 NJ Super. 518 (App. Div. 2010)

We now hold that *N.J.S.A.* 52:17C-10 does not afford immunity to a 9-1-1 emergency communications center and to its employees for the negligent rendering of 9-1-1 services, including dispatching police to an incorrect location, failing to keep the caller on the line so she could update the 9-1-1 employee on the location of the perpetrator and failing to broadcast an alert to surrounding municipalities. We also reject the City's claim that the "increased risk/substantial factor" jury charge was improper. We do, however, agree that the judge's omission of special jury interrogatories asking the jury to apportion damages had a clear capacity to produce an unjust result. In particular, not asking the jury to determine, in percentages, what portion of the ultimate injury (Massachi's death) was the result of her pre-existing condition as an abductee, and what portion of the ultimate injury was the result of the City's negligent handling of the 9-1-1 call, created reversible error.

Slip and Fall

Sidewalk – Luchejko v. City of Hoboken, 414 NJ Super. 302 (App. Div. 2010)

Generally, a plaintiff has a cause of action against a commercial property owner for injuries sustained on a deteriorated sidewalk abutting that commercial property when that owner negligently fails to maintain the sidewalk in reasonably good condition.

It extends to include commercial landowners who unreasonably fail to remove snow and ice from the abutting sidewalk after actual or constructive notice.

A property will not be considered commercial if it is predominantly owner-occupied. In making such a determination, a court must balance the nature of ownership as well as the ability to pass along the cost of liability. It is not the use to which the property is put that is determinative, but rather the nature of the ownership. In balancing the relevant factors, the key issue in determining whether a property is commercial is its "capacity to generate income

Here, Skyline is a non-profit corporation and its members are the present unit owners within the Skyline complex. Only owners are permitted to be members. The owners are permitted to lease their individual units, subject to the covenants and restrictions contained in the deed and by-laws. Although fees are collected from the members, the funds collected are used solely for the upkeep of the property, with no profit realized. This is different from a rental apartment building, which is considered commercial due to the owner's capacity to generate income from the property Further, those persons who hold trustee positions within Skyline do not earn an income for their participation and thus there is no benefit derived.

Boardwalk – Pote v. Atlantic City, 411 NJ Super. 354 (App. Div. 2010)

The establishment of a duty in tort liability is a question of law. The jury then determines whether that duty was satisfied. Whether a landowner owes a duty of reasonable care toward its patrons "turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. This determination requires the balancing of several factors, such as "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." This fact-specific analysis, hereinafter referred to as the "Hopkins" standard, must also generate intelligible and sensible rules that provide future parties with discernable guidelines.

New Jersey courts have not imposed a duty on a property owner to maintain a public street or to clear ice and snow from a public street. In *Stewart v. 104 Wallace Street, Inc.*, 87 *N.J.* 146, 157, 432 *A.*2d 881 (1981), our Supreme Court first imposed a duty on commercial landowners to reasonably maintain abutting sidewalks and held them liable for a pedestrian's injuries resulting from their negligent failure to do so. The Court later included in that obligation the removal of snow and ice from abutting sidewalks.

It is more appropriate to analyze the facts of this case under the more fluid *Hopkins* standard of basic fairness and public policy rather than attempt to classify the boardwalk as a sidewalk or public street. We are cognizant that the commercial relationship between a business enterprise and its patrons has traditionally required the exercise of "a higher degree of care" than is owed to other persons.

We recognize that because Boardwalk Hall is uniquely accessed by its patrons only from the boardwalk, it enjoyed some benefit from the public use of the boardwalk. However, we are not convinced the benefit automatically translates into a corresponding duty to protect its patrons from the hazards of the public thoroughfare that is maintained by the City. Nor are we convinced that a pedestrian walking along the boardwalk during the day with clear visibility of intermittent patches of ice and snow faces a substantial risk of slipping and suffering injury.

Damages – Kozma v. Starbucks, 412 NJ Super. 319 (App. Div. 2010)

The jury heard evidence that following the injury Plaintiff played [thirty-six] holes of golf in two days, drove [seventy-five percent] of the trip to Orlando, Florida and walked around Disney World for seven days. The Jury properly concluded that Plaintiff's injury was temporary and had healed without treatment and without limiting the Plaintiff in his daily activities.

While it is true that plaintiff presented expert testimony that could support a jury determination that a permanent injury was sustained, the jury was not required to reach that conclusion.

A jury "need not give controlling effect to any or all of the testimony provided by experts even in the absence of evidence to the contrary. "The jury may adopt so much of it as appears sound, reject all of it, or adopt all of it

Likewise, although plaintiff recognizes that the jury's award must stand unless it is plainly wrong or shocking to the conscience of the court, his argument is implicitly based on the assumption that the jury was required to accept all the evidence favorable to him. This disregards the rule that in reviewing a jury's verdict, a judge must view the evidence in the light most favorable to the party opposing the motion for relief

We agree with the trial judge that the evidence was susceptible to an interpretation that minimized the monetary equivalent of plaintiff's pain and suffering to its vanishing point. Given the long history of plaintiff's related prior injuries, the jury was free to conclude either that plaintiff's current complaints stemmed from that legacy, or that the fall at Starbucks was inconsequential in affecting plaintiff's lifestyle and quotient of pain and suffering.

Tort Claims Act

Police Academy Recruit – Marcinczyk v. PTC, 203 NJ 586 (2010)

At issue on this appeal is the validity of an exculpatory agreement that a police recruit was required to execute by the Somerset County Police Academy (Academy) as a condition of participation in the Academy's training program. The recruit was injured during the training and filed a lawsuit claiming a dangerous condition of ***787** property and inadequate supervision. In response, the Academy successfully invoked the exculpatory agreement on its motion for summary judgment and the Appellate Division affirmed.

We now reverse and remand. We hold that the exculpatory agreement is invalid because it contravenes public policy as expressed in the New Jersey Tort Claims Act.

In essence, the Tort Claims Act has three aims: to protect public entities and public employees from constant legal onslaught in recognition of the breadth of their public responsibilities; to permit injured citizens to seek recompense from public entities for negligence in narrowly defined circumstances; and to avoid a piece-meal approach and impose some order on the subject.

In the delicate balance that is the Tort Claims Act, the Legislature achieved those goals by generally re-imposing immunity for public entities but carving out narrow exceptions for which it determined liability should attach and in connection with which citizens should be entitled to file a claim. Those exceptions constitute a policy judgment regarding the areas in which a public entity or a public employee should be required to answer for their violations of the standard of care. Indeed, the Legislature declared its judgment to be the "public policy of this State."

That said, defendants' effort to extract a complete exculpatory waiver from police academy trainees fails because it confounds those carefully crafted provisions of the Tort Claims Act. Indeed, compelled exculpatory waivers directly thwart the policies embodied in the Tort Claims Act by immunizing public entities from liability for conduct for which the Legislature intended them to answer; by depriving our citizens of a statutorily-authorized remedy; by effectively reestablishing common law sovereign immunity, which the Tort Claims Act was crafted to leaven; and by introducing randomness into a scheme that was intended to be uniform.

Extending 90-days – Mendez v. S.J. Transp, 416 NJ Super. 525 (App. Div. 2010)

The decision to grant permission to file a late notice under the Tort Claims Act "within the one year period is a matter left to the sound discretion of the trial court, and will be sustained on appeal in the absence of a showing of an abuse thereof. Furthermore, a reviewing court is to "examine more carefully cases in which permission to file a late claim has been denied than those in which it has been granted, to the end that wherever possible cases may be heard on their merits, and any doubts which may exist should be resolved in favor of the application."

What constitutes extraordinary circumstances is not statutorily defined, and is determined on a case-by-case basis after consideration of the facts. For example, extraordinary circumstances can be found based on the severity of a party's injuries. In determining whether extraordinary circumstances exist, "a judge must consider the collective impact of the circumstances offered as reasons for the delay

We have also held that where discovering the identity of a responsible party is not thwarted by the original defendants, the issue becomes "whether plaintiff was diligent and made reasonable efforts to discover the identity of the true tortfeasor A key factor in determining whether a plaintiff acted with diligence in pursuing his or her claim is the promptness in contacting and retaining counsel to pursue plaintiff's rights.

Mendez and his passenger were hospitalized for a number of weeks and continued, at the time of the motion, to suffer memory deficits. Nevertheless, attorneys were retained on their behalf within a month of the accident. Both attorneys served initial Tort Claims notices within the ninety-day period and certified to their multiple attempts, both within and after that time, to obtain the videotapes of the accident scene. It is undisputed the SJTA never responded to the numerous requests from Felix's attorney, and Mendez's attorney was unsuccessful in obtaining the tapes from the municipal prosecutor until October 19, 2009, which she promptly provided to Felix's attorney. Thus, through reasonable diligence, neither attorney was able to view the videotapes until mid-to-late October 2009.

Plaintiffs contend the videotape provides the first basis for a potential claim against appellants. Where there is no evidence in the record of prejudice to the public entity occasioned by the delay in filing the claim and extraordinary circumstances are shown, granting leave to file a late notice is appropriate, as it allows cases to be heard on their merits.

Immunity – Seals v. Morris County, 417 NJ Super. 74 (App. Div. 2010)

Contey v. New Jersey Bell Telephone Co., 136 *N.J.* 582, 643 *A.*2d 1005 (1994)

Historically, the liability of public utilities arising out of the placement of their utility poles was traditionally analyzed by applying principles of ordinary negligence, with the question of foreseeability being key to the imposition of liability.

In *Contey,* a motorist was injured when her vehicle struck a utility pole after she missed an unmarked turn in the roadway.

The Court framed the question of the utility companies' liability as 'whether the asserted negligence in the placement of the pole is to be considered as the proximate cause, or whether the operation or movement of the colliding vehicle may be said to be the real cause, the collision with the pole being merely incidental.

The *Contey* Court noted that statistics disclosed that "[a]pproximately 65,000 injuries occur annually because of vehicle-utility-pole accidents. From those statistics, the Court determined that the risk of harm to the public was "great." Next, the Court reasoned that "because the risk is great, the public interest in the solution is very great." Further, referring to *N.J.S.A.* 48:17-8, the Court noted that a utility company has no right to unilaterally determine the location of a pole, requiring in the first instance, permission from the property owner to place a pole on the owner's property. The Court also referenced *N.J.S.A.* 48:17-11, which requires utility companies to erect poles in accordance with ordinances and resolutions adopted by the local municipality or board of freeholders. Finally, the Court observed the increased role of governmental bodies in paving highways and installing curbs.

After weighing all of these factors, the Court expressed its belief that responsibility for the safety of motorists should rest with those who own, control, and maintain the thoroughfare. Although utility companies have a duty to foresee that motorists will leave the traveled portion of the highway, the governmental bodies and highway planners are best suited to determine how the utilities should fulfill that duty. Those public bodies are in the best position to provide and to enforce standards and regulations governing utilities. Utilities do not have the right to locate poles wherever they deem expedient. Public bodies may by their ordinances and regulations require the *relocation, removal, shielding, or redesign of poles that do not meet safety standards.*