

"QUICK HITTERS"

LEGAL UPDATE

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Bennet, Bricklin & Saltzburg LLP is committed to providing our clients with high quality yet cost effective civil litigation services. From the inception of the firm in 1946, our priority has been service and many of our clients have retained us for 20, 30 and 40 or more years. The firm's litigators are experienced in the areas of insurance coverage and bad faith, special investigations and fraud, premises liability, automobile liability, employment law, aviation law, subrogation and medical malpractice. Our "Quick Hitters" Legal Update is designed to give New Jersey insurance professionals a quick overview of the most recent New Jersey decisions involving the insurance industry.

If in the future you would like to receive "Quick Hitters" by email or know of someone who might like to be added to our mailing list, please let us know by contacting Michael Dolich (dolich@bbs-law.com) or Michael Weiner (weiner@bbs-law.com).

Negligence – Premises Liability

Branagan v. Gamuzza, No. A-1401-07 (N.J. Super. App. Div. July 22, 2008) - Plaintiff sustained personal injury when he slipped and fell on a sidewalk abutting defendant's commercial property. The record evidence demonstrated that defendant purchased the commercial property as a vacant lot and it remained vacant with no improvements at the time of the accident. Accordingly, the trial judge granted defendant summary judgment, holding that the maxim that commercial landowners are responsible for maintaining in reasonably good condition the sidewalks abutting their property did not apply to defendant because her property was vacant land. As there was no dispute that defendant's property was vacant, the Appellate Division affirmed.

Fleming v. Macy's East, Inc., No. A-5572-06 (N.J. Super. App. Div. July 30, 2008) - Plaintiff slipped and fell while attempting to exit a Macy's store in the Quakerbridge Mall. Plaintiff did not see the puddle she slipped on before the accident, but after the accident she looked back and saw a puddle of clear liquid approximately ten inches in diameter. Plaintiff notified the store, which promptly cleaned the liquid. The trial judge granted defendant summary judgment, finding that plaintiff did not produce any evidence that defendant knew or should have known about the puddle. The Appellate Division affirmed, holding that defendant did not have sufficient knowledge or notice of the puddle prior to the accident.

Negligence – Contractual Indemnification

Serpa v. New Jersey Transit, 401 N.J. Super. 371 (App. Div. 2008) - In a personal injury action by general contractor's employee, a public entity settled with the employee and brought a third-party action for indemnification from the general contractor. The public entity's claim was submitted to a jury for an allocation of fault. The jury found the public entity to be 15 percent liable and the employer 85 percent liable. The court then refused the general contractor's request that it be granted an offset for all amounts it had paid as worker's compensation. On appeal, the employer argued that it was entitled to the offset. The appellate court affirmed the entry of judgment against the employer for the full amount of its percentage of responsibility since the contract entitled the public entity to indemnification for the employer's negligence. The court held that since the plaintiff was a public entity, it had no statutory obligation to reimburse the employer for worker's compensation benefits paid to the original plaintiff.

Negligence – Boardable Medical Expenses

Ribeiro v. Sintra, No. A-0701-07 (N.J. Super. App. Div. July 10, 2008) - Plaintiff sustained injury when he fell one level in the house next to his when it was under construction. Although his medical bills totaled more than \$175,000, his providers accepted approximately \$25,000 in total payment. Prior to the commencement of the jury trial, plaintiff argued that the total amount of the bills should be furnished to the jury whereas the defense argued that the jury should be furnished with only the accepted payment amount. The trial judge excluded all medical bills, finding that a jury could be misled either way. After the verdict,

Spotlight Case

Dorney v. Mammi, No. 06-4695 (NCH), 2008 WL 4378349 (D.N.J. Sept. 22, 2008) - In a case in which Bennett, Bricklin & Saltzburg, LLP participated as defense counsel, plaintiff alleged negligence against the defendants/homeowners where plaintiff agreed to help defendants trim branches from a large oak tree on their property in West Virginia. The matter was venued in district court in New Jersey under diversity jurisdiction. Defendant held the base of an extension ladder against the tree while plaintiff ascended to the top of the ladder approximately 30 feet above the ground and began using an electric chainsaw to cut a branch 12-15 feet long with a one foot diameter. Plaintiff and defendant had differing versions of how the plaintiff fell from the ladder and sustained serious injury; however, both parties admitted that they did not see what the other was doing at the time of the fall. Plaintiff contended that defendants were negligent as they failed to: (1) properly secure the ladder; (2) provide safety equipment; and (3) prevent plaintiff from engaging in a dangerous activity. On motion for summary judgment, the court first engaged in a choice of law analysis ultimately concluding that West Virginia state law would apply. Thereafter, the court granted summary judgment after oral argument holding plaintiff failed to prove that defendant breached a duty or that defendant's alleged negligence was a proximate cause of the accident.

plaintiff appealed, claiming that he should have been able to furnish all medical bills to the jury. The Appellate Division reversed and remanded for a new trial on damages, holding that under N.J.S.A. 2A:15-97, the jury should have been advised of the total medical expenses incurred, i.e., accepted in payment, approximately \$25,000.

Real Estate Disclosures

Gueye v. Amato, No. A-0773-07 (N.J. Super. App. Div. July 17, 2008) - Plaintiff appealed the trial court's dismissal of a breach of contract claim against the seller of real property. Plaintiff and defendant entered into an agreement of sale for a commercial property. After a property inspection, plaintiff's counsel wrote to defense counsel and requested status of water problems in the basement. Defense counsel responded that the water stains were from past problems that had been rectified by regrading the area. Plaintiff did not have the home re-inspected or request defendant to take any further action. The Appellate Division affirmed the trial judge's decision, finding that defendant was relieved of any obligation regarding the water problem in the basement under the agreement of sale when plaintiff took no further action on the original inspection and thereafter chose to close on the property.

Tort Claims Act – Late Notice

Reese v. City of Newark, No. A-6058-06 (N.J. Super. App. Div. July 14, 2008) - Plaintiff was terminated by defendant, City of Newark Housing Authority. Plaintiff thereafter pursued a wrongful termination claim pursuant to the Law Against Discrimination and a breach of contract claim. Plaintiff's counsel, after failing to settle the lawsuit, withdrew due to a conflict of interest. Plaintiff's new attorney filed a motion for leave to file a late tort claim notice in anticipation of litigation. The trial court granted the motion, finding that there was confusion between the plaintiff's original and subsequent attorneys as to whether the wrongful termination action was a tort, subject to tort claims notice, or a contract action, for which no tort notice was required. The Appellate Division affirmed. The appellate court acknowledged that it could not be established at the early stage of the litigation whether the plaintiff had a contract claim or a tort claim. Thus, the general confusion between the plaintiff's two attorneys on this issue amounted to the type of exceptional circumstances that would allow the filing of a late tort claims notice.

Tort Claims Act – Willful Misconduct

Toto v. Ensuar, 196 N.J. 134 (2008) - The plaintiff, an expert witness, came to the courthouse to testify. He was carrying a pocketknife at the time and was asked by an officer to return the pocketknife to his car. The plaintiff complained that the court officer was rude, but returned the knife to his car and sought to re-enter the building. A brief verbal altercation took place, and the plaintiff then sought out the attorney who had retained him. He was followed by the officer who together with another officer arrested him. The plaintiff claimed that one of the officers assaulted him. The plaintiff was subsequently released. He filed an action against the two sheriff's officers for willful misconduct and false arrest/false imprisonment. At trial, the jury concluded that the verbal threshold under the Tort Claims Act was not pierced because plaintiff did not satisfy the two-pronged test requiring a plaintiff seeking to collect pain and suffering damages under N.J.S.A. 59:9-2(d) to show "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." On appeal, the Supreme Court held that when a public employee's actions constitute willful misconduct, plaintiff need not satisfy the two-pronged verbal threshold under Tort Claims Act to recover damages, and may instead recover the full measure of damages applicable to a person who sues a defendant who is not a public employee.

Defamation

Senna v. Florimont, 2008 WL 4299800, ___ N.J. ___ (2008) - Plaintiff, an operator of a boardwalk game of chance, filed an action against a nearby competitor for defamation and tortious interference with plaintiff's ability to conduct business. The action arose after the defendant's employees broadcast over a loudspeaker that plaintiff was a cheat. The trial court dismissed plaintiff's defamation lawsuit on summary judgment, finding that an actual-malice standard applied because games of chance, as a highly regulated industry, were a matter of public concern; and because plaintiff could not prove actual malice. The Appellate Division affirmed. The Supreme Court reversed, holding that the false and defamatory verbal broadsides of defendant's employees, and impugning the honesty of a business competitor, fall into the category of commercial speech that is not entitled to heightened protection under the actual-malice standard.

Insurance Coverage

Welcome v. Just Apartments, LLC v. Hartford Cas. & Ins. Co. v. U.S. Fire Ins. Co., No. A-3650-06 (N.J. Super. App. Div. July 11, 2008) - The dispute involves coverage to defendant Dolner for a personal injury claim arising out of a construction accident. Defendant Just Apartments was the owner of the construction project that hired co-defendant Dolner as the general contractor. Dolner had a general liability insurance policy with U.S. Fire. As part of the contract for this project, Just Apartments was required to obtain a general insurance policy naming Dolner as an insured, which it did through Hartford Insurance. Upon cross-motions, the trial judge determined that U.S. Fire provided coverage to Dolner. On appeal, the Appellate Division reversed, determining that it was the intent of the parties that the subject construction project would be

exempted from coverage under the "wrap up" clause of the U.S. Fire policy, as coverage was specifically provided for Dolner under the Hartford policy.

Krastanov v. K. Hovnanian/Shore Acquisitions, LLC, No. A-5923-06 (N.J. Super. App. Div. Aug. 6, 2008) - Plaintiff's decedent brought a wrongful death action against defendant Hovnanian as the owner of property and F&W as decedent's employer, a subcontractor of defendant Hovnanian. Hovnanian was named as an additional insured on F&W's general liability insurance policy maintained by Steadfast Insurance Company. Hovnanian also had its own general liability insurance through PNMC. By way of cross motions for summary judgment, the trial court ruled that the PNMC policy obtained by Hovnanian was primary for the wrongful death lawsuit. On appeal, PNMC argued that both policies contained the same or similar "other insurance" provisions. Read together, the Appellate Division determined that identical other insurance provisions are deemed to be "mutually repugnant" and that both insurers are required to apportion the costs of settlement and fees, although the court did not elaborate on how the costs should be apportioned.

Expert Witnesses – Premises Liability

Jackson v. Target Stores, No. A-0798-06 (N.J. Super. App. Div. July 21, 2008) - Plaintiff slipped and fell on a welcome mat outside of her home that was manufactured by defendant Ronile and sold by defendant Target. Plaintiff's expert issued a report finding that the backing material used on the mat had unsatisfactory slip resistance. The expert's conclusion was based on his calculation of the static coefficient of friction when compared to industry standards. The expert also tested similar mats sold at the time that used different backing material. The trial judge excluded the expert's report as net opinion and granted defendants' summary judgment motion. The Appellate Division reversed, finding that the expert's conclusions with regard to safer alternatives raised an issue of fact to be determined by a jury.

Punitive Damages

Dixon and Garris v. CEC Entertainment, Inc. d/b/a Chuck E. Cheese, No. A-2010-06 (N.J. Super. App. Div. Aug. 6, 2008) - Plaintiffs were at a Chuck E. Cheese establishment for a birthday party. Plaintiffs got into an altercation with an employee of Chuck E. Cheese during which the employee took a knife and stabbed one of the two plaintiffs. Plaintiffs brought a personal injury lawsuit that sought punitive damages against the Chuck E. Cheese establishment. At the conclusion of the trial, the judge dismissed the punitive damages claim. Plaintiffs appealed. The evidence demonstrated that defendant's employee had no prior altercations with patrons, was a good worker, had no criminal history, and that defendant had no knowledge of any prior incidents involving its employee. The Appellate Division affirmed the trial court's dismissal of punitive damages, finding that the evidence of the interplay between defendant and its employee did not rise to the level required by the Punitive Damages Act.

Prima Facie Tort Cause of Action

Richard A. Pulaski Construction Co., Inc. v. Air Frame Hangars, Inc., 195 N.J. 457 (2008) - In this

case, the Supreme Court considered whether New Jersey recognizes a cause of action in prima facie tort and, if so, the scope of that cause of action. This cause of action is said to exist where the actor's conduct is generally culpable and not justifiable under the circumstances but does not come within a traditional category of tort liability. The construction company plaintiff filed a verified complaint seeking to confirm an arbitration award against a developer for the balance due on a construction contract, and later added a fraud claim against an officer and shareholder of the developer. The Law Division confirmed the arbitration award into a judgment in the construction company's favor, but granted the officer and shareholder's motion for summary judgment. The construction company appealed. The Appellate Division affirmed, but remanded for a determination of whether the facts alleged could support a prima facie tort claim against the officer and shareholder. On remand, the Law Division, Mercer County, entered judgment for the construction company on the prima facie tort claim. The officer and the shareholder appealed. The Appellate Division affirmed. The officer and shareholder petitioned for certification. The Supreme Court held that (1) a prima facie tort cause of action, however defined, may lie only if no other tort is available; (2) the availability to the construction company of a contract claim against developer barred a separate claim for a prima facie tort against the officer and shareholder of developer; (3) the construction company's improperly perfected construction lien was a nullity and, hence, could not serve as a basis to undergird a prima facie tort claim against the officer and shareholder; and (4) existence of the doctrine allowing a plaintiff to pierce a corporate veil barred construction company's resort to a prima facie tort claim against the officer and shareholder. The judgment of Appellate Division was reversed and the case was remanded to the trial court for entry of judgment in favor of the officer and shareholder.

Spoilation

Robertet Flavors, Inc. v. Tami-Githens, Inc., No. A-2381-06 (N.J. Super. App. Div. July 30, 2008) - Plaintiff hired a number of defendant contractors to build its new corporate headquarters. After construction, plaintiff noticed increased leaking of rainwater through the windows. Defendant Academy Glass, which installed the window systems, was summoned back to the building on numerous occasions but did nothing more than caulk around the windows. Ultimately, plaintiff hired different companies to inspect and correct the installation problems. During these subsequent inspections and remediation, plaintiffs filed suit against the original contractors and subcontractors. Defense attorneys immediately advised plaintiff's attorney of their intent to have experts inspect the premises. That request went unanswered. Defendants were not advised of the remediation until after it was mostly completed. The trial judge granted defendants' summary judgment motion after barring plaintiff from presenting any expert testimony due to its spoliation of evidence. Although the Appellate Division agreed with the trial judge regarding spoliation, it reversed the trial court's grant of summary judgment, finding that plaintiff could present expert testimony regarding the window systems during the years that Academy Glass returned to the building to inspect and try to repair the problems.