

Quick HITTERS

New Jersey LEGAL UPDATES

Negligence—Comparative Negligence

Rokos v. Marina Associates, No. A-4981-06 (N.J. Super. App. Div. June 24, 2009) - Plaintiff alleged in her complaint that while playing a slot machine at defendant's casino she was assaulted and injured by an unknown man who was also a casino patron. Plaintiff claimed defendant's failure to exercise reasonable care for the safety of its patrons was the proximate cause of her injuries. The trial court upheld a jury's verdict finding that the defendant was not negligent. Plaintiff appealed, in part on the

basis that the trial court erred in refusing to instruct the jury that there was no comparative negligence or contributory negligence by the plaintiff. The Appellate Court disagreed and affirmed the trial court's decision to deny plaintiff this instruction on the basis that plaintiff could have been found to be negligent by sitting next to her assaulter if he otherwise appeared aggressive and for never calling security or seeking assistance during or moments after the alleged assault.

Tort Claims Act—Discretionary Acts

Stafford v. Kennedy, No. A-4960-07 (N.J. Super. App. Div. June 18, 2009) - After being bitten by a dog, plaintiff sued the Township, Township Board of Health, Health Officer, and Animal Control Officer (collectively, the "Maplewood defendants"), in addition to the dog's owner, on the basis that they were negligent for not seizing and impounding the dog after a prior biting incident less than a month before plaintiff was bitten. The Maplewood defendants were granted summary judgment under N.J.S.A. 59:2-3 and N.J.S.A. 59:3-2, which immu-

nizes public entities and public employees from injuries "resulting from the exercise of judgment or discretion." Plaintiff appealed, contending that the acts of the Maplewood defendants were "ministerial." The Appellate Division affirmed, finding that the acts were discretionary and that the dismissed defendants were not required to issue a summons, seize and impound the dog under N.J.S.A. 4:19-19, as the statute requires a series of discretionary findings before a potentially dangerous dog can be seized and impounded.

Insurance Coverage—First Publication Exclusion

Harleysville Insurance Co. of New Jersey v. M&R Mechanical Contractors, No. A-4812-07 (N.J. Super. App. Div. June 17, 2009) - Plaintiff brought a declaratory judgment action to establish that as an insurer it had no obligation to defend or indemnify defendant with respect to a federal lawsuit filed in Pennsylvania. The issue was whether a "first publication" exclusion in the liability insurance policy applied to a malicious use of process claim brought against the policy holder following three arbitration demands filed by the insured in the underlying matter. The trial court noted that the claim in ques-

tion represented a form of "personal and advertising injury" covered by the policy, unless coverage was otherwise excluded. The trial court found the "first publication" exclusion inapplicable as the malicious use of process claim was associated only with the third arbitration in the underlying matter which arose after the beginning of the policy period. The Appellate Division affirmed, noting that the exclusion is aimed at insulating an insurer from an exposure for harm that was already inflicted by an earlier publication predating the period of coverage, which were not the circumstances of this case.

Negligence – Duty of Care

Mattaliano v. Comstock Yacht Sales and Marina, No. A-0173-08 (N.J. Super. App. Div. June 2, 2009) - Plaintiff, an experienced boater, sustained injuries to his knee as he stepped onto a floating dock from a boat he had rented from defendant's marina. In his complaint, plaintiff alleged that defendant was negligent in failing to tie the boat down as he exited. Defendant moved for summary judgment. Plaintiff argued that as a business invitee, defendant owed plaintiff a duty to provide a safe and secure means of entering and departing the boat. The trial

court disagreed, finding that plaintiff had not established that his injuries were caused by an improper act or omission of defendant and that the court would not impose a new duty upon marina owners to tie up all boats tight to the dock and have employees present whenever someone gets on or off a boat. The Appellate Division affirmed, adding that plaintiff should have expected that some movement of the boat away from the dock would occur, as plaintiff was in control of his person and his immediate environment at all times leading up to his fall.

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SPOTLIGHT CASES

Smith v. Diocese of Camden/Annunciation School, No. A-5261-07 (N.J. Super. App. Div. June 3, 2009) - Plaintiff sued for damages she sustained on the property of the defendant-school while she was delivering Easter candy to her child's class. The trial court granted the defendant's motion for summary judgment on the basis that it had immunity under the Charitable Immunity Act, N.J.S.A. 2A:53-7. On appeal, plaintiff argued that the school was not entitled to immunity because she was a volunteer, and not a beneficiary of the school. The Appellate Division disagreed finding that plaintiff was a beneficiary under a two-part test. The first prong, whether the injury occurred while the organization was engaged in its charitable works, was not at issue. The sole dispute was whether the injured party was a direct recipient of charitable works. The Appellate Division found that plaintiff was not a volunteer, because her conduct was a benefit to the students, including her child in the class; she would not have made the trip otherwise.

Donaldson v. Community Food Bank of New Jersey, No. A1132-08 (N.J. Super. App. Div. June 4, 2009) - Plaintiff sustained injuries after she slipped and fell in a puddle of water while participating in a culinary arts training program conducted by defendant, a New Jersey non-profit entity organized for charitable and educational purposes. The trial court granted defendant's motion for summary judgment, dismissing plaintiff's complaint on the ground that it was barred by the Charitable Immunity Act. Plaintiff argued that the Act did not bar her claim because she was conferring a benefit upon defendant at the time of the accident as the food she and others prepared in the program was eaten by defendant's employees. The Appellate Division disagreed, affirming the lower court's decision and finding the bar established by the Act applies if a person "is a beneficiary, to whatever degree, of the works of such nonprofit [organization]."

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Defamation— Fair-Comment Privilege

Petersen v. Meggitt, 407 N.J. Super. 63 (App. Div. 2009) - Plaintiffs, a company which boarded horses, and its owner, brought a defamation action against defendants, a reporter and various newspapers, relating to an article the reporter wrote regarding the plaintiffs' disposal of a customer's dead horse. The lower court granted summary judgment to defendants on the basis of the fair-comment privilege. This privilege provides a defense to a libel or slander action when the words in question are a fair comment on a matter of public interest or concern, even though the words are of or concerning a private individual. The Appellate Division affirmed the lower court, finding that the article clearly related to an issue of public health and safety and reported on municipal-court proceedings. The Appellate Division also found that plaintiff did not produce any evidence that the reporter acted with malice necessary to overcome the privilege.

Negligence—Dog Bite

Dalman ex rel. Padilla v. Braxton, No. A-4709-07 (N.J. Super. App. Div. June 16, 2009) - Plaintiff was injured after four dogs attacked her. In addition to bringing suit against the dogs' owners, plaintiff sued the landlords of the residential building where the dogs lived and she resided on the basis that the landlords were negligent. The trial court granted the defendant-landlords summary judgment on the basis that prior to the incident, the landlords were not aware that the dogs had vicious propensities. The Appellate Division reversed, finding that genuine issues of material fact existed as to whether landlords had notice of the dogs' dangerous propensities. The landlords were aware that a tenant's four dogs of nearly 200 pounds each were allowed to run freely in the backyard of an apartment building. The Appellate Division also noted that although a dog's size alone would unlikely constitute notice of the animal's dangerous propensity, a jury could reasonably infer that the landlords had knowledge or should have known of the dogs' dangerous propensities from the evidence that they were allowed to run loose on the property where other tenants' children played, notwithstanding that the dogs had been known to growl while in the yard.

Negligence—Tender of Defense

Laws v. Quest Diagnostics, No. A-4394-07 (N.J. Super. App. Div. June 4, 2009) - Plaintiff asserted claims against multiple defendants for damages arising from plaintiff's slip and fall on ice on a parking lot. The Appellate Division affirmed the trial court's entry of orders requiring Defendants Princeton Research Lands, Inc. (Princeton) and Thompson Realty Company of Princeton, Inc. (Thompson) to provide Defendant Quest Diagnostics of Pennsylvania, Inc. (Quest) with a defense and indemnification for all claims for damages asserted by plaintiffs. Quest was a tenant of the premises owned by Princeton, and Thompson was Princeton's agent that had responsibility for the management

of the property. The Appellate Division found that although the lease between Princeton and Quest required Quest to provide general comprehensive liability coverage and to name Princeton as an insured under that coverage, that provision of the lease did not relieve Princeton of its express obligation under the lease to defend and indemnify Quest with regard to claims arising from "any act or omission of landlord or any of its officers...arising out of landlord's ownership or control of the building or common facilities." The lease required Princeton to maintain all of the common facilities, including the parking lot, curbs and sidewalks.

Negligence—Premises Liability

Coe-Lee v. Park, No. A-4752-07 (N.J. Super. App. Div. June 24, 2009) - Plaintiff was injured when she slipped and fell on black ice on a sidewalk in front of defendant's market. Defendant claimed that he cleared the snow and that there was no ice on the sidewalk. The trial court granted summary judgment to defendant on the basis that there was no evidence of actual knowledge that there was ice at the time plaintiff was injured and no evidence from which the jury could conclude that there was constructive notice of ice. The trial court denied plaintiff's motion for reconsideration. The Appellate Division reversed and remanded, finding that a dispute as to whether a commercial landowner had actual or constructive notice of an icy condition on the sidewalk is for the finder of fact, not a court on a motion for summary judgment.

Civil Procedure—Service of Process

Price v. 39th Street Development, LLC, No. A-0198-08 (N.J. Super. App. Div. June 1, 2009) - Plaintiff appealed the dismissal of his complaint by the lower court for failing to properly effectuate service of process upon the defendant-business. The Appellate Division reversed the lower court and held that the plaintiff made a good faith effort to effect personal service on the business through the sheriff's department. The sheriff's department was unable to serve the business because it was closed. The Appellate Division held that this attempt satisfied the "reasonable and good faith" requirement of Rule 4:4-3(a), which did not require multiple attempts at service, only that the attempt be reasonable and made in good faith. Having satisfied this requirement, the Appellate Division found that plaintiff was then permitted to serve the business by mail.

Expert Witness—Net Opinion

Rokos v. Marina Associates, No. A-4981-06 (N.J. Super. App. Div. June 24, 2009) - Plaintiff appealed from a jury verdict on the basis that the trial court impermissibly allowed the defense to present improper net opinion to counter conclusions set forth by plaintiff's expert, where plaintiff was assaulted at defendant's casino by an unknown assailant. Plaintiff's expert testified regarding the fields of security management and risk assessment. The Appellate Division found that the testimony claimed to be net opinion was simply testimony by the defendant's director of surveillance as to his personal knowledge of whether two people standing in front of a slot machine would be sufficient for one of his operators to notify security. The jury verdict was thus upheld.

Tort Claims Act—Notice

Lebron v. Sanchez, 407 N.J. Super. 204 (App. Div. 2009) - Plaintiff, a former elementary student, filed suit against the defendant Board of Education. Plaintiff made a claim of negligent supervision after she was struck by a vehicle while walking home from school and crossing a street that did not have crossing-guards monitoring plaintiff at the time of the accident. Following the accident, plaintiff transmitted her tort claims notice to the Board listing her name, address, attorney's name and address, and description of the occurrence, as required under the Tort Claims Act - N.J.S.A. 59:8-4. The lower court granted summary judgment to the Board, in part because it found that this notice failed to advise the Board that a claim was being made against it for anything other than liability related to the crossing guard issue, which was actually the city's responsibility. The Appellate Division reversed, holding that the notice to the Board provided sufficient information to promptly evaluate its liability and potential exposure related to plaintiff's other claims of negligence, regardless of its lack of accountability to post crossing guards.