

Quick HITTERS

New Jersey LEGAL UPDATES



Negligence—Bystander Liability

Butterfield v. Lucas Elec. Co., Inc., No. A-1568-08 (N.J. Super. App. Div. Sept. 1, 2009) – Plaintiff's infant son fell in a hole that defendant excavated in the course of installing new light stanchions for tennis courts. Plaintiff claimed that defendant was liable to her for negligent infliction of emotional distress under Portee v. Jaffee. The trial court granted defendant's motion for summary judgment on the basis that the "death or serious physical injury" element of the Portee claim for negligent infliction of emotional distress was not met. The Appellate Division agreed and affirmed the grant of

summary judgment. The Appellate Division noted that plaintiff did not observe "death" or "serious injury" on the part of her son, who only experienced contusions as a result of his fall. It was her son's condition, rather than her own, that was the necessary component of meeting the death or serious physical injury requirement. The Appellate Division also affirmed the trial court's rejection of plaintiff's claims under the parental bystander theory, finding that she lacked a reasonable fear of her own immediate personal injury merely by observing the condition of her son in the hole.



Negligence—Premises Liability

Costa v. Bahammou, No. A-6235-07 (N.J. Super. App. Div. Sept. 17, 2009) – Plaintiff, a contractor, brought suit against a property owner after plaintiff sustained injuries falling off a ladder. The fall occurred while the plaintiff was attempting to cut down a tree in the path of a driveway he was constructing on defendant's property. At the close of trial, plaintiff's action was dismissed by the trial court on defendant's motion. The trial court ruled that the plaintiff was owed only a limited duty of care by the defendant property owner, absent a sufficient degree of control or supervision of the project by the property owner. The Appellate Division reversed, holding that whether the property owner exercised a sufficient degree of control was a question for the jury. The Appellate Division noted

that had the contractor been experienced in tree removal, there might have been no basis for liability. However, the jury heard testimony that the contractor had no experience cutting down trees and was very apprehensive about doing so. Furthermore, there was testimony that the contractor agreed to cut down the tree only after the property owner promised to provide all the tools and "safety," yet the property owner provided only a ladder and chainsaw. The Appellate Division therefore held that the jury could reasonably conclude that the property owner's failure to provide any other safety equipment was a violation of the owner's duty to furnish such safeguards as may reasonably have been necessary.



Damages—Exacerbation of Injury

Cappellucci v. Acme Markets, Inc., No. A-2754-08 (N.J. Super. App. Div. Sept. 29, 2009) – Plaintiff slipped on cooking oil on the floor of an aisle in a supermarket operated by defendant Acme Markets, Inc. The defendant acknowledged its negligence. The question of damages, however, was tried to a jury. The accident was the third incident of the year for the plaintiff involving orthopedic injuries. Plaintiff's doctor opined at trial that because he had

treated the plaintiff over the course of several accidents he was able to identify exacerbations and acceleration of pre-existing conditions attributable to plaintiff's various accidents. The jury awarded plaintiff money damages as a consequence of this slip and fall. The defendant appealed from the judgment contending the trial court erred in failing to grant its motion for involuntary dismissal because the plaintiff did not "apportion damages"



Insurance Coverage—Suit Limitation Clause

Frischia v. Andrade, No. A-2124-08 (N.J. Super. App. Div. Oct. 9, 2009) – Plaintiff appealed from the grant of summary judgment to defendant insurance company in which the motion judge concluded that plaintiff was not entitled to insurance coverage for his property damage claim because he failed to file his Law Division complaint within the one-year suit limitation period specified in the controlling insurance policy. In particular the insured argued that although he was sent four separate

letters from the carrier regarding the investigation and eventual denial of his claim, none of those letters specifically mentioned the suit limitation provisions of the policy and did not advise the insured that an appeal of the denial would need to be filed within one year of the date of the denial. The Appellate Division affirmed the motion judge's conclusion. The Appellate Division held that because the carrier had alerted its insured on numerous occasions that its policy of insurance contained

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EDITORS

Michael Dolich, Esquire
dolich@bbs-law.com

Michael A. Weiner, Esquire
weiner@bbs-law.com

Michael B. Gerstein, Esquire
gerstein@bbs-law.com

COPY EDITOR

Lesa M. DeCarlo
decarlo@bbs-law.com

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Negligence – Notice

Florius v. New Jersey Transit, No. A-1158-08 (N.J. Super. App. Div. Sept. 14, 2009) – Plaintiff sustained injuries from a fall that occurred when she exited a bus owned and operated by defendant. Plaintiff claimed that the bus driver was negligent because the driver knew there was a dangerous physical condition at the bus stop, that being the existence of a three inch depression in the curb, and nevertheless the driver stopped there to discharge her. Defendant claimed that it was plaintiff's inattention, along with the surface of the ground upon which the plaintiff exited, consisting of rocks and gravel that caused plaintiff to fall. Defendant additionally argued that the bus driver was unaware of any prior accident caused by the curb's condition. The trial court granted summary judgment to defendant on the basis that there was no evidence that the bus driver was negligent in the manner in which she operated the bus. The Appellate Division affirmed, noting that for summary judgment purposes it was accepted that plaintiff's fall was caused by the defective curbing at the bus stop. However, the record failed to reveal that bus driver was aware of the condition of the curbing. The Appellate Division held that a reasonable bus driver would not have concluded the area possessed manifest characteristics of potential harm, given the photographs of the scene.

between her pre-existing condition and injuries sustained in the lawsuit incident. The Appellate Division upheld the verdict finding that the plaintiff's doctor's testimony was adequate to survive the defendant's motion to dismiss at trial. According to the court, the evidence sufficiently showed that the plaintiff's injuries were caused or exacerbated by the fall she sustained on Acme's property.

limitations and because insureds in New Jersey are expected to read their policy's terms and conditions, the insured was bound by the one-year suit limitation provision in the policy. The Appellate Division affirmed even though the insured claimed he never received a copy of the actual policy of insurance.

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Negligence - Duty of Care

McNaboe v. Horizon Diner, No. A-5799-07 (N.J. Super. App. Div. Aug. 12, 2009) – Plaintiff sustained injuries when he slipped and fell on ice in a parking lot of one restaurant adjoining but not part of a parking lot of a restaurant he intended to patronize. Plaintiff parked in defendant's lot because the parking lot of the nearby restaurant was full. The lot where plaintiff fell had signs posted that it was only intended for restaurant customers. Plaintiff testified that never intended to enter the restaurant which owned the parking lot where the plaintiff fell. The trial court granted sum-

mary judgment to defendant, on the basis that defendant owed no duty of care to plaintiff, who was essentially a trespasser on defendant's property. The Appellate Division affirmed, noting that the defendant's lot did not amount to an open house invitation that would trigger defendant's duty of care to plaintiff. Moreover, the Appellate Division rejected plaintiff's argument that even as a trespasser, he was owed a duty of care. Defendant could not be charged with notice of the attendant risk presented by the conditions of ice on its parking lot on the date in question.



Negligence—Causation

Ferrara v. Continental Airlines, Inc., No. A-5868-07 (N.J. Super. App. Div. Sept. 15, 2009) – Plaintiff slipped and fell in the course of exiting a toilet stall and walking to the sink in a bathroom at Terminal C in Newark International Airport. The bathroom was leased to defendant Continental Airlines, Inc., which contracted with defendant-cleaning company to maintain and clean the bathroom. The trial court granted summary judgment to the defendant-cleaning company, on the basis that there was no proof in the factual record as to what caused plaintiff's fall. The Appellate Division reversed, noting that the plaintiff presented sufficient circumstantial evidence that her injuries were caused by the company's negligence. The Appellate Division noted that a jury could conclude that the bathroom floor was not merely wet, but had recently been mopped based on the presence of a cleaning woman in the bathroom who was an employee of the cleaning company and was carrying a mop and a warning sign at the time of the incident.

Smith v. Greenstone Development, LLC, No. A-0151-08 (N.J. Super. App. Div. Sept. 28, 2009) - Plaintiff stepped on a screw while walking on a public sidewalk. The screw

penetrated plaintiff's sandal, imbedding itself into plaintiff's right foot. At the time of the accident, plaintiff did not observe any construction occurring at the property. Plaintiff returned to the accident site approximately one week after the incident and observed various types of screws and nails scattered upon the sidewalk. However, none of the screws observed were identical to the type of screw that caused his injury. In the weeks following the accident, plaintiff observed construction occurring on the site and noticed a Molfetta construction truck parked nearby. The plaintiff filed suit against the construction company and the owner of the property adjoining the sidewalk. The defendants' motions for summary judgment were granted, the trial holding that the property owner and its general contractor were not liable to the plaintiff for her injury caused by stepping on a screw on a public sidewalk adjacent to a construction site. The Appellate Division affirmed, holding that the plaintiff did not link the screw in question by direct or circumstantial evidence to the construction. In particular, the court noted that nothing indicated that the screw was one of the types of screws used in the construction of the building.



Toxic Torts—Causation

Smith v. Northridge at Edison, No. A-2482-07 (N.J. Super. App. Div. Oct. 6, 2009) – Plaintiff appealed from a summary judgment order dismissing her complaint for a respiratory disorder allegedly caused by a mold condition in the basement apartment she occupied. The trial court's ruling was that plaintiff presented insufficient evidence from which a rational jury could find that the condition of the apartment was the cause of her respiratory disorder. In particular, the motion judge concluded that the opinion rendered by plaintiff's treating doctor on causation was a net opinion because he did not identify the specific nature of the mold spores or any other contaminant that was present in the apartment and plaintiff's environmental expert did not test for specific spores when he inspected the apartment. The Appellate Division reversed. The court observed that substantial relevant facts were made known to plaintiff's treating physician by plaintiff through her history. These included the condition of the apartment as observed by plaintiff over a period of months, a description of the nature, severity and timing of plaintiff's respiratory episodes, medical intervention for those episodes and plaintiff's response to treatment on those prior occasions. The court further noted that plaintiff's treating physician also made his own observations as a result of his clinical examination of plaintiff, among those being that plaintiff's chest exhibited stridor, intercostal retraction and diffuse pulmonary wheezing. According to the court, these observations undoubtedly corroborated symptoms described by plaintiff. Thus, the Appellate Division was satisfied that the doctor's opinion was not a net opinion.