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## **SUMMARY JUDGMENT: The Story of Brill v. Guardian Life**

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**Featuring**

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**And**

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### **Program description**

NJ insurance attorneys will tell you there is just no escaping Brill v. Guardian Life Ins. Co. of Am. This 1.0 CLE credit program dives into why this case is cited so frequently, and we look at its impact – both historically and in daily practice.

## **I. Introduction**

- **Robert Rubinstein, Certified Civil Trial Attorney**
- **Landmark decisions are decisions that change how a case is handled, how a case is tried, a monumental change in the law itself**
- **For example: DiProspero v. Penn, 183 NJ 477 (2005) and Serrano v. Serrano, 183 NJ 508 (2005) – cases about what is needed to pierce the verbal threshold and before these cases there were different requirements; in these cases for the first time the court eliminated the significant impact requirement based on a new interpretation of NJSA 39:6A-1.1, et seq (AICRA), and court said that if there is a doctor certification of a permanent injury then summary judgment would not be appropriate – eliminated large portion of summary judgment motions**
- **Landmark decisions: new law, number of people affected, overall importance of the case, how the case changes the practice**
- **Agha v. Feiner, 198 NJ 50 (2009) and Brun v. Cardoso, 390 NJ Super 409 (App. Div. 2006) – prior to these case in a PI case an expert could come in to testify as to what an MRI said by referencing the report they reviewed for their opinion (under Evidence Rule 703), this case changed the law and said that experts cannot rely on an MRI report and that radiologist who read the film or an expert trained to read the MRI had to testify and then review MRI to be able to testify in court – changed entire process because many experts were not qualified to read MRI and increased costs to plaintiff's attorney**
- **When you have a new landmark decision everyone scrambles to figure out what needs to be done to conform to the new law**
- **Another characteristic of a landmark decision is how many times the case is cited by other courts and rely upon it**
  - **Winberry v. Salisbury, 5 NJ 240 (1950) – 402 times cited**
  - **Judson v. Peoples Bank and Trust, 17 NJ 67 (1954) – 3,299 times cited**
  - **Rova Farms v. Investors Insurance, 65 NJ 474 (1974) – 3892 times cited**
  - **State v. Johnson, 42 NJ 146 (1964) – 2975 times cited in published opinions**

- **Manalapan Realty v. Township of Manalapan, 140 NJ 366 (1995) – 2304 times cited**

## **II. Landmark Decision – Summary judgment (“SJ”)**

- **Brill v. Guardian Life, 142 NJ 520 (1995) – 7640 times cited – summary judgment**
  - **Other standard summary judgment cases often cited:**
  - **Anderson v. Liberty Lobby, 477 US 242 (1986)**
  - **Celotex v. Catrett, 477 US 317 (1986)**
  - **Matsushita Electric v. Zenith Radio, 475 US 574 (1986)**
- **Many types of civil cases file summary judgment and oftentimes an appealed issue**
- **Brill did not change SJ process as opposed to defining it better**
- **Brill brought judges a more detailed way of approaching a SJ motion**
- **Judges are concerned with granting a SJ motion because it can change a case and judges get reversed quite often on SJ motions**
- **SJ motion allows the moving party to go to the court and say here are the undisputed facts and look at them and still the moving party wins as a matter of law**
- **Purpose behind SJ early on is to weed out frivolous claims or defenses**
- **Example: person would use on promissory note and would not have a defense because they just did not pay it, they would defend with no real defense – so SJ was necessary to bring the cases to a head**
- **Can also move for partial SJ – example: suing for non-payment but defense is usury interest rate; can get partial SJ for the non-payment and then go to trial on the issue of the interest rate and whether it was usury – don’t have to move for SJ on every aspect of the case**
- **On a PI case some attorneys will move for SJ in rear end collision under Dolson v. Anastasia, 55 NJ 2 (1969) – presumption in rear end collision that car in the rear is at fault – this SJ is usually granted – then only try damages and causation but have eliminated fault**
- **Judson court – wanted to create a “business like procedure” – where there is no genuine issue of material fact, then parties should not be forced to trial when there are no issue of fact to try**

- **R. 4:46 – SJ**
- **Not going to waste time and resources when there is no question for the jury to answer – only legal issues to be determined by the court**
- **Brill was necessary because SJ was not being handled as well as the court would have liked it to be handled and in light of Anderson, Celotex, and Matsushita cases from US Supreme Court**
- **Brill clarified SJ and talked more about the process of weighing the evidence and looking at the burdens of persuasion and determining what was proper to go to a jury**
- **Brill has helped defense attorneys in an employment setting to bar a claim**
- **DiProspero has changed SJ issue in PI cases**
- **Brill – when there is no genuine issue of material fact and the moving party is entitled to a judgment on the law based on those facts then SJ should be granted**
- **Rule says that based on Brill first when the motion is filed the moving party is required to file a concise statement of material facts not in dispute – numbered paragraphs that must cite to the record**
- **R. 4:46-2(c) – Proceedings and Standards on Motions –material issues of fact must come from the record, including affidavits, pleadings, answers to interrogatories, depositions, admissions – if statement of facts is not filed with the motion then court can deny motion**
- **Responding party is required to submit a counter statement of facts, citing to the record**
- **Judge must review the statement of facts to determine if there is a genuine issue of material fact – under Judson whether it was a material issue was not addressed**
- **For SJ purposes the evidence that is submitted must be admissible – can be something to address when opposing an SJ motion**

### **III. Tactics for SJ**

- **Cannot file motion until opportunity to exchange discovery, including depositions**
- **Motions supposed to be done at close of discovery because otherwise how can whether there is a genuine issue of material fact be determined**

- **Request for Admissions**
- **Depositions**
- **Interrogatories are not enough to use for SJ**
- **Depositions are stronger than affidavits**
- **Look at elements of the defense/claim**
- **List in the concise statement of materials facts everything that is disputed**
- **If you are entitled to SJ as a matter of law, then would file the SJ motion – “take everything they say as true and we still win because the law says so”**
- **Hypothetical: rear end accident and driver in front car has bad injuries; front driver has BAC as .14 and pleads guilty to drunk driving**
  - **NJSA 39:6A4.5 – loss of right to use for failure to insure, for DWI, for intention acts**
  - **Summary judgment case??**
  - **SJ says that plaintiff was found guilty of DWI but under the law there is no cause of action**
  - **Concise statement of material facts would include the guilty plea for the DWI, including transcript of plea hearing, etc.**
  - **Plaintiff may say that rear end accident therefore not fault of plaintiff – trying to create a material fact – but there is no issue of law and it is not a material fact under the controlling law**

#### **IV. How to fight an SJ**

- **When defending these motions, look at the case and find what those issues are**
- **There may be a genuine issue of fact that may not be material**
- **Take a handful of darts and throw them hoping that there is something there to save the case**
- **Go through elements that you have to prove or that adversary must prove and look at each element and see how you are going to respond to it – find the issue if it is there**
- **If there are no issues of material fact, then in a bad situation**
- **Hypothetical: DWI and rear end collision case**
  - **If defendant’s plea did not comport with court rules whereby the plea did not provide a factual basis – that is not the basis of an argument against SJ**

- **Judge would not consider this a genuine issue of material fact – the judge would say that is an issue for the criminal court**
- **Res Ipsa Loquitor case – representing an individual on an escalator in Atlantic City and going up escalator and it stops suddenly and person falls and breaks his hip; suit filed and no expert retained; defendants argued bad caselaw and judge initially agreed with them (Jimenez v. GNOC, 145 NJ 374 (1996)); plaintiff argued that there is new law (Jerista v. Murray, 185 NJ 175 (2005)) and moved for reconsideration; judge ruled in favor of plaintiff and defendant moved for SJ saying plaintiff had to prove that casino was totally in control of the escalator; for res ipsa to work plaintiffs had to show that only casino was in control of the escalator; ultimately judge agreed with plaintiff but defendants found video tape before trial that showed how accident actually happened – someone at bottom with a suitcase hit emergency stop button**
- **DiProspero v. Penn – only real requirement under the case is a Certification of Permanency (NJSA 39:6A-1.1, et seq) – for insurance fraud laws and saying permanent injury; weeded out the junk verbal threshold cases**
  - **SJ motion attaches plaintiff’s medical records that may indicate not permanent**
- **Advise client that they should be at the SJ hearing – so that plaintiff can hear that case is being dismissed, and because it is more difficult for a judge to grant SJ when the person is sitting in the courtroom**
- **Most SJ motions have oral argument because they are dispositive**
- **Pardo v. Dominguez, 382 NJ Super 489 (App. Div. 2006) – a herniated disc gets you over the verbal threshold**
- **Permanency of the injury becomes a genuine issue of material fact – i.e. dueling experts**
- **Before DiProspero had to show permanent impact – which allowed for more SJ motions to be granted**
- **Brill puts a level of discipline on the plaintiff’s bar to have a viable case**

## **V. Going to the Appellate Division**

- **The court looks to determine if there are genuine issues of material fact**
- **Arguments are not based on the law, they are based on the facts**
- **SJ motion/trial judges are required to provide their findings of fact and conclusions of law – and many judges are unwilling to do that – be sure to ask for specifics (R.1:7-4) – so that you can file an appeal**
  - **Ask judges if the decision is on the papers then determine whether the judge will present their opinion on the record and then order the transcript**
  - **Can file a motion to require judges to set out their findings of fact and conclusions of law – be careful of the time limitations under the Court Rule**

## **VI. Advice to attorneys**

- **Try to get the judge to rule as to what is a genuine issue of material fact or not**
- **Brill is a landmark decision (as well as Judson) – Brill updated Judson and defined Judson and set forth what judge's role is in SJ motions**
- **Depending on the type of case – look to SJ to resolve the case from the outset of the case – because issues of law not fact**
- **Look at jury instructions to determine elements of the case**
- **Same standard for SJ and for R. 4:37 – directed verdict**

## **VII. Final thoughts on Brill**

- **Brill serves its purpose**
- **Judges needed to weed out cases that should not have been there – Brill has accomplished that**