Garden State CLE Presents:

New Jersey Personal Injury Review - 2023

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Barron vs. Gerstein, 472 N.J. Super. 572 (App. Div. (2022)

Statute of Limitations and COVID-19

Rule 1:3-1 makes clear when the statute of limitations expires on a legal holiday, the party must act on the next day that is not a Saturday, Sunday, or legal holiday. The Rule does not add to the statute of limitations all Saturdays, Sundays, or legal holidays that fall within the statute-of-limitations period. The Rule distinguishes time periods of less than seven days, excluding all holidays from the calculation of those time periods, and time periods of seven days or more, excluding a holiday from the calculation of those time periods only if the holiday falls on the last day of the time period. The reason for this distinction is obvious. Unquestionably it was not intended to have the effect of shortening the time prescribed by the Legislature in which actions may be instituted.

The March 17, 2020 COVID-19 order converted every day, from March 16 to March 27, 2020, into a legal holiday. Thus, pursuant to Rule 1:3-1 and the March 17, 2020 order, if a statute of limitations ran on a claim on March 20, 2020, a plaintiff could satisfy the statute of limitations by filing a complaint on Monday, March 30, 2020, the first day after the last day of the time period that was not a Saturday, Sunday, or legal holiday. The order did not have the effect of adding days to any statute of limitations.

Bryant vs. Cumberland County, 472 N.J. Super. 626 (App. Div. 2022)
Service of Tort Claims Notice

Plaintiff Sheila Bryant and her husband filed this personal injury action in February 2020, alleging Cumberland County's negligence caused her to slip and fall in the county courthouse parking lot nearly two years earlier. Rather than answer the complaint, the County moved to dismiss or, in the alternative, for summary judgment, asserting that plaintiffs failed to comply with the Tort Claims Act's notice requirements. The County did not claim some infirmity in the notice's form or content; it argued instead that the notice was not properly served because plaintiffs sent it to the County Clerk instead of the Clerk of the Board of County Commissioners.

We find nothing in the broad phrasing of N.J.S.A. 59:8-7 and -10 to suggest, as the County argues, that it is only the clerk of the board of county commissioners that a plaintiff must serve with a notice of claim. If that is what the Act intended, then it could have said so. We also find nothing in these provisions to foreclose the possibility that the Legislature may have intended that more than one county office or officer could represent the county for purposes of receiving a notice of claim. This is suggested as well by Rule 4:4-4(a)(8), which allows for service of process on public bodies other than the State by personally serving the summons and complaint on "the presiding officer or on the clerk or secretary thereof." Our courts have not previously considered or construed Rule 4:4-4(a)(8), but its plain language plausibly supports the notion that there is, in fact, more than one person who may accept service of a summons and complaint for a county and that one of those persons would be "the clerk ... thereof," a phrase that may reasonably be understood as connoting the county clerk. We have not been provided with a principled reason for concluding that the Tort Claims Act's requirements for service of a notice of claim on a county are more exacting than Rule 4:4-4's requirements, which have constitutional underpinnings, for serving a summons and complaint on a county.

Castano vs. Augustine, ___ N.J. Super. ___ (2023)
Lawsuit bar for intoxicayed drivers – NJSA 39:6A-4.5

This appeal requires us to consider whether, in the absence of a conviction or guilty plea to DWI, the statute nevertheless bars the claim of a plaintiff who was seriously injured in a traffic accident after admittedly drinking liquor and beer at several establishments during the day, and who may have had a blood alcohol concentration (BAC) that exceeded the legal limit at the time of the accident.

We conclude that defendants are not entitled to summary judgment because plaintiff neither pled guilty to, nor was convicted of, DWI.

Memudu vs. Gonzales, ___ N.J. Super.___ (2023)
Lawsuit bar for intoxicayed drivers – Operation element under NJSA 39:6A-4.5

This appeal raises the novel issue of whether the statutory bar set forth in N.J.S.A. 39:6A-4.5(a) precludes an uninsured plaintiff's claims stemming from the second of two separate accidents occurring a half hour apart at the same location, the latter of which resulted in the death of Najim Memudu (decedent) as he attempted to retrieve a cell phone from his disabled vehicle. In considering this question, we must address whether decedent was "operating" his uninsured vehicle at the time of the second accident for the purposes of N.J.S.A. 39:6A-4.5(a). Based on our review of the record and the applicable legal principles, we conclude the statutory bar pursuant to N.J.S.A. 39:6A-4.5(a) is not implicated because decedent was not operating his vehicle.

Delvalle vs. Trino, 474 N.J. Super. 124 (App. Div. (2022)
Duty of care – common law negligence – *Portee* claims

In celebration of the end of summer and his friend Melanie's birthday, twenty-one-year-old Airel invited his friends to a party at his home where he lived with his parents. Airel told guests to bring swim attire if they wanted to go swimming. He purchased alcohol for his guests to drink, knowing that at least twenty-five percent of them were underage, but they would be allowed to drink. Yet, according to Charlene, who was the only parent at home during the party, alcohol was prohibited at the party. At least sixty people attended the party; Raniel attended with the Koos.
At one point, a visibly intoxicated Raniel entered the pool with Wendy after she agreed to his request to throw her in the pool—an activity he had planned weeks before. Wendy got out of the pool but Raniel, a former Marine trained to swim, did not. After Wendy tried unsuccessfully to pull Raniel out of the pool, Garcia and Tran went in to rescue Raniel. Sadly, efforts to resuscitate Raniel were unsuccessful. There was a twenty-five-minute delay between the time Raniel's body was pulled out of the pool and when 9-1-1 was called.

Garcia left the Trino residence to take his minor girlfriend away from the party so she would not be cited for under-aged drinking. He returned within thirty minutes and spoke with the Bergenfield Police. The autopsy report concluded acute alcohol (ethanol) intoxication—Raniel's blood alcohol content (BAC) at the time of drowning was .119 percent—as the cause of the accidental drowning and cardiac arrest.

The case law has yet to suggest that a social host has the duty to prevent a voluntarily intoxicated adult guest from going swimming to safeguard the guest's own well-being. There is no indication the Trinos' pool had a dangerous condition that was unknown to Raniel which proximately caused his drowning. The Trinos therefore cannot be held "liable to [their] invitees for physical harm caused to them by any ... condition on the land whose danger is known or obvious to them." Looking at other state courts, we find no ruling where a social host was held liable based upon common-law negligence or wanton and reckless misconduct for the injury or death of an intoxicated adult guest to whom alcoholic beverages were furnished.

In Portee, the Court approved a cause of action for negligent infliction of emotional distress, which required proof of "(1) the death or serious physical injury of another caused by defendants' 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." 84 N.J. at 101, 417 A.2d 521.

Ralph contends, in viewing the video of Raniel and Wendy jumping in the pool, he saw Raniel drowning, causing him severe emotional distress. (Pb48). This does not satisfy Portee because he must have been present when his son drowned to make a claim. Moreover, while the video may be Ralph's last and unnerving "snapshot" of Raniel while he was alive, it does not depict him drowning or in any type of distress. Thus, there are insufficient facts to sustain a Portee claim.

Rivera vs. Cherry Hill Towers, 474 N.J. Super. 234 (App. Div. (2022)

Duty of care to a visitor – common law negligence

Plaintiff Fritzy Rivera alleges defendant Vikco, Inc.'s negligence in failing to provide a safe environment as property manager of the Cherry Hill Towers apartment complex was the proximate cause of her being shot by her estranged husband, Brian Walker, as she left her friend's apartment. Vikco was not the property manager when Walker accessed Cherry Hill Towers through an open security gate. Rivera contends the opened security gate was a practice established by Vikco and continued by the new property management company.
The motion court denied Vikco's summary judgment motion to dismiss Rivera's complaint. The court reasoned there was a genuine issue of material fact to be determined by the jury as to whether Vikco owed Rivera a duty to provide a safe environment at Cherry Hill Towers when Vikco was not the property manager *238 at the time of the shooting. We granted Vikco leave to appeal the motion court's order.

We conclude whether Vikco owed Rivera a duty is a question of law that should have been determined by the motion court, not by a jury at trial. We further conclude that under the circumstances of this case, our common law does not support plaintiff's theory that Vikco's duty to provide security at Cherry Hill Towers continued after its management services were discontinued. Accordingly, the motion court's order is reversed, and summary judgment is granted to Vikco.

We conclude Vikco did not owe a duty to Rivera when Walker drove through an open security gate to commit his horrific act. It is foreseeable that failing to secure the premises would allow Walker or others with criminal intentions to enter the apartment complex unabated, creating a risk to tenants and their guests. However, because Vikco's services as property manager had been discontinued at the time of the shooting, it did not have a relationship with Rivera and had no ability to exercise control over the complex. There is no public interest in imposing security responsibility upon Vikco for conduct that was under the full control of AION without input from Vikco.

Rivera vs. Valley Hospital, 251 N.J. 1 (2022)

Med-Mal – Punitive damages

As a matter of law, the evidence presented, even affording plaintiffs all favorable inferences, does not establish that defendants' acts or omissions were motivated by actual malice or accompanied by wanton and willful disregard for Ruscitto's health and safety. A reasonable jury could not find by clear and convincing evidence that punitive damages are warranted based on the facts of this case, and partial summary judgment should have been granted.

Gilligan vs. Junod, 474 N.J. Super. 39 (App. Div. (2022)

Affidavit of Merit – LPN as a licensed professional

This appeal presents a question of first impression: is a licensed practical nurse a "licensed person" as defined in and covered by the Affidavit of Merit (AOM) statute, N.J.S.A. 2A:53A-26 to -29. Defendant Susan Junod, a licensed practical nurse, appeals from orders declaring that plaintiff did not need to file an AOM to pursue professional-negligence claims against her and denying her motion to dismiss the complaint for failure to provide an AOM. We affirm both orders because the AOM statute applies only to certain specified "licensed person[s]" and a licensed practical nurse is not included in the statute.

On the morning of August 6, 2018, plaintiff called Dr. Meslin's office and spoke with Junod. Junod is a licensed practical nurse who works for Virtua Surgical Group, P.A. (Virtua Group), the medical practice where Dr. Meslin works.

Plaintiff told Junod that his wife was in pain and not able to eat. Junod informed plaintiff that his wife most likely was experiencing post-operative gas and that she should continue taking her medications, try to eat, drink liquids, and walk around. Later that morning, plaintiff called back and told Junod that the pain medications had sedated his wife. Junod advised plaintiff that his wife might be overmedicated and told him he should cut back on the medications and have his wife get up, eat, and walk around.

Later that same day, plaintiff left Junod "numerous messages" asking her to call him back to discuss his wife's condition. Sometime later that day, Junod returned plaintiff's phone calls and told *42 him he should give his wife Maalox or Pepto Bismol and get her to eat and walk around.
The following morning, plaintiff found his wife unresponsive. Later that day, she was taken to a hospital and pronounced dead.

The AOM statute expressly uses the term "a registered professional nurse." N.J.S.A. 2A:53A-26(i). Although the AOM statute states that it covers "a registered professional nurse pursuant to P.L.1947, c. 262 (C.45:11-23 et seq.)," the reference to the Nursing Statute plainly does not include "a licensed practical nurse."

Hoelz vs. Bowers, 473 N.J. Super. 42 (App. Div. (2022)

Med-Mal – Contribution from other tortfeasors

The JTCL abrogates the New Jersey common law. It gives tortfeasors the right of contribution from fellow joint tortfeasors. N.J.S.A. 2A:53A-2. Under the JTCL, if one of several joint tortfeasors paid the injured person more than his or her pro rata share of a judgment, that tortfeasor would be entitled to recover the excess from the remaining tortfeasors. A defendant who paid the injured person more than that defendant's pro rata share of a judgment — the total judgment divided by the total number of defendants — would be 'entitled to recover the excess from the remaining tortfeasors. The right of contribution is purely statutory,
In this appeal, we consider again whether a settling tortfeasor may pursue a contribution claim against an alleged joint tortfeasor if the settlement with the plaintiff was never reduced to judgment.

The plain language of the statute predicates Bowers' ability to pursue her third-party contribution claim against Comiskey upon a judgment in Hoelz's favor. That statutory requirement has little to do with the public notice provided by a judgment, but rather everything to do with the natural consequences that flow from the entry of a judgment against the settling tortfeasor blessed with the imprimatur of the court. Moreover, as a court of intermediate appellate jurisdiction, we are bound by the Court's prior holdings which require the court's entry of a money judgment in the plaintiff's favor against the contribution claimant as predicate to a right of contribution. We therefore reverse the order denying Comiskey's motion to dismiss and remand the matter to the Law Division to enter an order dismissing Bowers' third-party complaint for contribution.

Monk vs. Kennedy University Hospital, 473 N.J. Super. 178 (App. Div. (2022)

Survival Act – Tolling of Med-Mal SOL for minors

In these three consolidated interlocutory appeals, we consider whether the trial court erred in denying summary judgment to defendants, who moved to dismiss plaintiffs' complaint as untimely because it was filed four and a half years after decedent's death. Plaintiffs, Shenise Monk and Jordi Wilson, parents of J.W., filed a complaint on behalf of their son seeking damages stemming from J.W.'s death at age six months. The trial court allowed the action to proceed by applying the minority tolling provision found in N.J.S.A. 2A:14-2(a). We find minority tolling applies only to actions brought on behalf of minors, and not to actions brought on behalf of decedents or their estates. The causes of action available to plaintiffs were limited to wrongful death and survival claims, each of which applies a two-year statute of limitations. We vacate the orders denying summary judgment but remand the matters to the trial court because it did not address plaintiffs' alternative argument that they had substantially complied with these statutes of limitations.

Pfannenstein vs. Surrey, ___ N.J. Super. ___ (2023)

Med-Mal and Kind-for-Kind AOM

On April 14, 2021, plaintiff Janan Pfannenstein filed a complaint, individually and on behalf of her husband John's estate (collectively, plaintiff),[1] generally alleging defendants Christine Surrey, D.O., Bhavikaben Babaria, M.D., and Powerback Rehabilitation[2] were negligent in providing medical care and treatment to John, thereby causing his death on April 14, 2019.

On July 15, 2021, before defendants answered the complaint and asserted their internal medicine specialty, plaintiff filed the AOM of Biree Andemariam, M.D., who opined that "the skill, care[,] and knowledge exercised by defendants ... fell outside accepted standards of medical care." Dr. Andemariam stated she was certified by the American Board of Medical Specialties (ABMS) as a specialist in hematology, which she identified as "the subject matter involved in this action." Dr. Andemariam further asserted: "In the year immediately preceding the occurrence that is the basis for this claim, I devoted a majority of my professional time to the active clinical practice of hematology." Dr. Andemariam did not indicate that she specialized in internal medicine or was board certified in that specialty.

In their September 15, 2021 answer to plaintiff's complaint,[3] defendants asserted they both were specialists in internal medicine. Defendants further disclosed that the treatment they provided John involved the practice of internal medicine. It is undisputed that Drs. Babaria and Surrey were not board certified in hematology, nor did they specialize in that subspecialty of internal medicine.

At issue in this medical negligence matter is the kind-for-kind specialty requirement embodied in the New Jersey Medical Care Access and Responsibility and Patients First Act (PFA), N.J.S.A. 2A:53A-37 to -42. This appeal requires us to determine whether the affidavit of merit (AOM) of a board-certified hematology expert satisfied the PFA's equivalency requirement where neither defendant doctor specialized, nor was board certified, in hematology when they rendered care to the decedent. Instead, both defendants specialized in internal medicine at the time of the alleged treatment, and one was board certified in that specialty, but plaintiff's proffered expert did not specialize in internal medicine. The trial court denied defendants' motion to dismiss plaintiff's complaint for failure to provide a sufficient AOM, essentially concluding the affiant's hematology subspecialty was "subsumed" in defendants' internal medicine specialty and, as such, the affiant was qualified to opine that defendants deviated from the standards of medical care by improperly prescribing heparin to the decedent.

We granted defendants leave to appeal from the April 14, 2022 Law Division order. We now hold the PFA's kind-for-kind specialty requirement embodied in N.J.S.A. 2A:53A-41(a) is not satisfied when the AOM's affiant specialized in a subspecialty of the treating doctor's specialty but did not specialize, nor was board certified, in the physician's specialty when the alleged medical negligence occurred. We therefore conclude plaintiff failed to satisfy the PFA's equivalency requirements and reverse the trial court's order denying defendants' dismissal motion. In doing so, we reject plaintiff's alternate argument that she satisfied the waiver exception to the PFA under N.J.S.A. 2A:53A-41(c), which would have rendered moot defendants' appeal.

Adams vs. Yang, ___ N.J. Super.___ (2023)

Expert's opinion - Judicial estoppel

We begin our analysis by considering the doctrine of judicial estoppel. In order to protect the integrity of the court system, "[w]hen a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events. The doctrine has been summarized as follows: " '[t]o be estopped [a party must] have convinced the court to accept its position in the earlier litigation. A party is not bound to a position it unsuccessfully maintained. Stated differently, "[t]he principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events. However, judicial estoppel is not a favored remedy, because of its draconian consequences. It is to be invoked only in limited circumstances:

It is ... generally recognized that judicial estoppel is an "extraordinary remedy," which should be invoked only "when a party's inconsistent behavior will otherwise result in a miscarriage of justice. Thus, as with other claim and issue preclusion doctrines, judicial estoppel should be invoked only in those circumstances required to serve its stated purpose, which is to protect the integrity of the judicial process.
