

# **Garden State CLE Presents:**



## **New Jersey Personal Injury Review** **Winter 2024**

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**Lesson Plan**

**Wiggins vs. Hackensack Meridian Hospital, 478 N.J.Super  
355(App.Div.2024)**

**In-Kind Specialty Requirements for AOM**

The apparent objective of N.J.S.A. 2A:53A-41 is to ensure that, when a defendant physician is subject to a medical-malpractice action for treating a patient's condition falling within his [board-certified] specialty, a challenging plaintiff's expert, who is expounding on the standard of care, must practice in the same specialty. In short, a plaintiff cannot choose the specialty that the defendant physician was practicing when treating the patient; the plaintiff must respond to the information provided by the doctor in the answer. As our role is to construe the meaning of a statute and enforce it as intended by the legislature, we conclude plaintiffs' submission of only Dr. Fitzgibbons's AOM as an internist did not comply with the underlying purpose of the Act and did not suffice to support the continuation of the lawsuit.

Because plaintiffs failed to present the statutorily required AOM and did not request an extension of time to do so, the complaint should have been dismissed with prejudice.

**Moschella vs. Hackensack Meridian, 258 N.J. 110(2024)**  
**Required Contents of an Affidavit of Merit**

[The] only part of the statute detailing what must be included in the [AOM]” is the specification that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.

Given that the AOM statute does not make any reference to the review of medical records, we conclude that affiants are not required to state that they reviewed the medical records of the injured party.

Further, although N.J.S.A. 2A:53A-28 provides relief where a defendant refuses to provide medical records, creating an inference that medical records must be reviewed before submitting an AOM, that inference does not import a requirement that affiants state in the AOM that they reviewed the patient's medical records.

**Gonzalez vs. Ibrahim, 477 N.J.Super 647(App.Div.2024)**  
**Late Filing of AOM & the Common Knowledge Doctrine**

Under the common knowledge doctrine, an affidavit of merit (AOM) is not required in a medical malpractice action when jurors can determine a defendant's negligence based on their common knowledge, using their ordinary understanding and experience, without the need for an expert to establish the defendant's duty of care or the breach of that duty.

In a professional malpractice action, an AOM requires a plaintiff to make a threshold showing [a] claim is meritorious, in order that meritless lawsuits readily [can] be identified at an early state of litigation. An AOM is due within sixty days after a defendant files an answer but may be filed within 120 days upon a finding of good cause

Within ninety days of the service of a defendant's answer, the court must conduct a Ferreira conference to allow the parties to raise and address issues pertaining to the sufficiency of an AOM. The legislative goal of requiring an AOM is to facilitate the weeding-out of frivolous lawsuits.

A plaintiff who fails to provide an AOM runs the risk of having a complaint dismissed with prejudice for failure to state a cause of action, even if the complaint sets forth a meritorious claim. Still, to temper the draconian results of an inflexible application of the AOM filing deadline, our courts have allowed an extension of the 120-day deadline where equity applies. Hence, a complaint will be dismissed without prejudice if there are extraordinary circumstances to explain noncompliance. The court would then allow a plaintiff an extension of time to file an AOM.

There is no one-size-fits-all definition of what constitutes extraordinary circumstances to warrant an extension of time to file an AOM beyond the filing deadline. Yet, our courts have provided some guidance based upon a fact-sensitive [case-by-case] analysis.

**Estate of Campbell vs. Woodcliff Health & Rehabilitation, 479**

**N.J.Super 64(App.Div.2024)**

**Duty of Care in a Med-Mal Suit Based on COVID-19**

Selva Campbell, a stroke patient, was admitted to defendant Woodcliff Health & Rehabilitation Center in Bergen County on March 23, 2020, coming under the care of defendant Birinder Kaur, M.D. less than two weeks after the World Health Organization declared the novel coronavirus (COVID-19) a global pandemic and two days after Governor Murphy issued his first stay-at-home order.

Three weeks later, on April 14, Woodcliff discharged Mrs. Campbell from the facility to her home and the care of her husband Donville Campbell. The day before Mrs. Campbell's discharge, Dr. Kaur administered a COVID PCR (polymerase \*69 chain reaction) test to Mrs. Campbell. The off-site lab returned a positive test result to Woodcliff on April 16, two days after Mrs. Campbell's discharge. The facility notified Mrs. Campbell of her positive test as soon as staff received it. According to Plaintiff, Woodcliff advised Mrs. Campbell should quarantine, and Mr. Campbell should be tested immediately.

Mrs. Campbell recovered from COVID, although she has since succumbed to other causes. Tragically, however, Mrs. Campbell's husband contracted COVID shortly after his wife, allegedly from her, and he died from complications of the virus on May 28, 2020.

Plaintiff, the Estate of Donville Campbell, filed a three-count complaint against Woodcliff and Dr. Kaur alleging medical negligence, wrongful death and a survival claim, all premised on Dr. Kaur's alleged “negligent, grossly negligent, careless and reckless actions and omissions” in failing to ensure Mrs. Campbell was not COVID positive before discharging her from Woodcliff. Plaintiff alleged Dr. Kaur owed a duty not only to her patient Mrs. Campbell, “but also to those third parties who foreseeably and reasonably relied on competent skill and care to be exercised” by Dr. Kaur in testing Mrs. Campbell for COVID

and discharging her home, “and who would be foreseeably affected by any deviation in the standard of care,” such as her husband Mr. Campbell.

Defendants Woodcliff and Dr. Kaur moved to dismiss the complaint for failure to state a claim pursuant to Rule 4:6-2(e), alleging they owed no duty of care to Mr. Campbell, and that defendants were immune under the New Jersey COVID-19 Immunity Statute, L. 2020, c. 18, and the Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. § 247d-6d.<sup>1</sup> The trial court denied defendants’ motions and their motions for reconsideration, finding plaintiff should be permitted the opportunity to take discovery on whether defendants’ conduct constituted gross negligence, thereby depriving them of the immunity provided by the New Jersey COVID-19 Immunity Statute.

We denied defendants’ motions for leave to appeal the denial of their dismissal motions. The Supreme Court granted defendants’ motions for leave to appeal and remanded the matter to us for consideration on the merits. Having reviewed the record and heard argument, we consolidate defendants’ appeals for purposes of this opinion and reverse the denial of their motions to dismiss, finding defendants immune from any liability under the New Jersey COVID-19 Immunity Statute.

**Motil vs. Wausau Insurance, 478 N.J.Super 328(App.Div.2024)**  
**UIM Coverage: Covered Driver & Covered Auto**

In this automobile insurance coverage dispute, defendant Wausau Underwriters Insurance Company appeals from the August 25, 2023 Law Division order denying reconsideration of the June 23, 2023 order, which granted summary judgment to plaintiff Britney Motil, entitling her to \$100,000 in underinsured motorist (UIM) insurance coverage. This appeal presents the novel issue of whether plaintiff was entitled to UIM coverage as a covered driver injured in an automobile accident while driving a covered auto with an identified alternate garaging address under her parents' automobile policy.

Defendant disclaimed coverage, under the policy's uninsured motorist (UM)/UIM endorsement step-down provision, because plaintiff was neither a named insured nor a defined family member.

We conclude there was ambiguity between the declaration and the policy's step-down provision of \$15,000 in UIM coverage because the declaration plainly provided: \$100,000 UM/UIM coverage for each person; plaintiff was a covered driver; the UM/UIM premium charged was the same for each vehicle; and plaintiff's vehicle was a covered vehicle with an alternate garaging address. Thus, the policyholder's reasonable expectation of \$100,000 UIM coverage should be afforded. We affirm.

**Goyco vs. Progressive Insurance, 257 N.J. 313(2024)**  
**Low Speed Electronic Scooters & No-Fault Benefits**

In this case, we are called upon to decide whether the operator of a low-speed electric scooter (LSES) is entitled to personal injury protection (PIP) benefits under the New Jersey Automobile Reparation Reform Act, N.J.S.A. 39:6A-1 to -35, commonly known as the No-Fault Act.

The No-Fault Act requires insurance companies to provide PIP benefits to insured individuals in two circumstances: (1) when the covered individual is “occupying, entering into, alighting from or using an automobile”; or (2) when the covered individual is a pedestrian. N.J.S.A. 39:6A-4. The No-Fault Act defines “pedestrian” as “any person who is not occupying, entering into, or alighting from a vehicle propelled by other than muscular power and designed primarily for use on highways, rails and tracks.” N.J.S.A. 39:6A-2(h).

The parties do not dispute that plaintiff David Goyco's insurance policy with defendant Progressive Insurance Company (Progressive) must comply with those mandatory statutory provisions. What the parties contest is whether plaintiff was a “pedestrian” within the meaning of the No-Fault Act and, by extension, the policy. Plaintiff argues that LSES riders should be deemed “pedestrians” entitled to PIP benefits under the No-Fault Act in light of the 2019 enactment of N.J.S.A. 39:4-14.16(g), which provides that an LSES should be considered equivalent to a bicycle except in statutory provisions that clearly do not apply to an LSES.

We hold that an LSES rider does not fall within the definition of “pedestrian” for purposes of the No-Fault Act because the LSES is “a vehicle propelled by other than muscular power and designed primarily for use on highways, rails and tracks.” N.J.S.A. 39:6A-2(h). Therefore, Goyco is not entitled to PIP benefits.

**Padilla vs. Young II An, 257 N.J. 540(2024)**  
**Sidewalk Duty of Care For Commercial Landowners**  
**& Their Vacant Lots**

For over four decades since [our decision in Stewart vs. 104 Wallace Street, 87 N.J. 146(1981)], our courts have adhered to the rule imposing liability on commercial landowners. We are now tasked with determining whether that same liability should apply to commercial landowners of vacant lots. [Fundamental fairness is the guiding principle that] leads us to conclude that a duty should be imposed on owners of vacant commercial lots to maintain the abutting sidewalks in reasonably good condition.

There is something profoundly unfair about commercial property owners purchasing vacant lots and having no responsibility whatsoever for maintaining the area where the general public traverses. We therefore hold that all commercial landowners -- including owners of vacant commercial lots -- must maintain the public sidewalks abutting their property in reasonably good condition and can be held liable to pedestrians injured as a result of their negligent failure to do so.

The moment an individual or an entity purchases a lot in a commercially zoned area, meaning the only use to which that land can be put is commercial, the purchaser has begun a commercial endeavor and intends to make money.

By its essence, a commercial lot exists and is bought and sold for the purpose of making money. Indeed, when someone purchases a vacant commercial lot, which is a business decision that embraces all the attendant costs and burdens of conducting business. We conclude that one of those costs necessarily includes maintaining the abutting sidewalks so that they are in a reasonably safe condition for innocent passersby.

**Callahan vs. Tri-Borough Sand and Stone, 478 N.J.Super**  
**505(App.Div.2024)**  
**Duty of Care to a Trespasser**

In this case of first impression, the court considers the limitations on property owners' liability under N.J.S.A. 39:3C-18, when certain classes of motor vehicles are operated on its premises.

Plaintiff Bryan Callahan claimed he sustained severe injuries when he struck a steel cable while riding his dirt bike on the quarry grounds owned by defendants Tri-Borough Sand and Stone, Eureka Stone Quarry, Inc., and James D. Morrissey, Inc. The cable was part of the machinery used in dredging the quarry. The incident occurred on a Sunday afternoon, while the quarry was closed.

In an oral decision, the motion judge dismissed plaintiff's complaint on summary judgment, concluding defendants were immune from liability under N.J.S.A. 39:3C-18 because plaintiff lacked express consent to operate his dirt bike on their property. The judge summarily denied as moot plaintiff's motion for leave to file an amended complaint to assert allegations of willful and wanton misconduct.

Plaintiff now appeals from the March 3, 2023 memorializing orders. Comparing N.J.S.A. 39:3C-18 to a similar statute under the Landowner's Liability Act (LLA), N.J.S.A. 2A:42A-1 to -10, we conclude defendants did not act willfully to create a hazardous condition on their property by failing to lower the steel cable, within the meaning of N.J.S.A. 2C:39-18. Because we hold summary judgment was warranted under N.J.S.A. 39:3C-18, we conclude the motion judge properly denied plaintiff's motion for leave to amend his complaint.

**Estate of Massi vs. Barr, N.J.Super (App.Div.2024)**

**(Redacted)**

**Roadway Surfaces That Endanger Bicyclists**

Bicycle riding has become increasingly prevalent on our public roadways. That increased usage has heightened safety concerns about the condition of roadway surfaces used by bicyclists as well as motor vehicles. Since the 1990s, the New Jersey Department of Transportation (“DOT”) has published guidelines for the safe condition of road surfaces used by both bicycles and motor vehicles.

This Tort Claims Act case arises from a now-deceased plaintiff's bicycle accident on a two-lane public road that straddled two municipalities. The accident occurred on a stretch of the road that was chronically pitted with potholes, apparently due to drainage and freezing problems. According to the deposition testimony of a local public safety director, potholes at that location had to be patched and re-patched “hundreds” of times in the five years before the accident. Several citizens periodically reported the road's poor condition before the accident. The road had no full-sized shoulders or designated bike lanes.

Plaintiff swerved his bicycle to avoid a passing truck, and lost control and fell when his tires hit the potholes. Plaintiff's engineering expert opined that incorrect methods had been used to patch the road. The expert further opined that the persisting uneven surfaces were dangerous, not only for bicycles but also for motorcycles.

This opinion clarify and extends [the published case law] concerning roadway surface conditions that endanger the safety of bicyclists on public roads. In a fact pattern involving a bicycle accident on a road's potholed shoulder, the Court held in Polzo II that the public entity defendant had no duty to maintain the shoulder to an extent safe for bicyclists. The Court distinguished that no-duty-to-bicyclists situation

from a roadway condition that also happens to be unsafe for motorized vehicles.

We apply the rationale of Polzo II here to this bicycle accident that occurred in a vehicular lane, and to a record with an unrebutted expert opinion that the road surface was unsafe for both bicycles and also motorcycles. We conclude a public entity that is palpably unreasonable in failing to correct such a known dangerous road condition may be liable to a bicyclist who is injured because of that danger. In doing so, we also recognize that a plaintiff operating a two-wheeled vehicle must use due care when confronting a visibly hazardous, potholed surface.

Viewing this record in a light most favorable to plaintiffs, we vacate summary judgment in favor of the two municipal defendants that maintained and patched the road. We remand for further proceedings, vesting the trial court with discretion to permit further discovery and motion practice focused on the legal principles we have clarified today.

**Arias vs. County of Bergen, 479 N.J.Super**  
**268(App.Div.2024)**  
**Landowners' Liability Act**

The Court affirmed the trial court's dismissal of plaintiff's personal injury action under the Landowners Liability Act (LLA), N.J.S.A. 2A:42A-2 to -10. Plaintiff fell while rollerblading in a park owned and maintained by the County of Bergen. The County of Bergen argued entitlement to immunity under the LLA.

The Court, focusing on "the dominant character of the land" where plaintiff fell rather than the land uses surrounding the park, agreed with the trial court's conclusion that the park constituted a "premises" under the LLA. Therefore, the County of Bergen was entitled to immunity absent "willful or malicious failure to guard, or to warn against a dangerous condition."

Given the dwindling available open space in this State, the LLA reflects an important public policy of encouraging large land areas, consisting of natural outdoor expanses, where the general public may participate in sport and recreational activities free of charge. Premises under the LLA may consist of large tracts of rural or semi-rural lands or "lands having similar characteristics," such as the park owned by the County of Bergen.

**Alternative Global One vs. Feingold, \_\_\_ N.J.Super**  
**(App.Div. 2024)**  
**Subpoena and Deposition of Non-Party Witness**

Plaintiffs in the underlying out-of-state litigation served a subpoena on a non-party, New Jersey resident, seeking his deposition pursuant to Rule 4:11-4(b). The trial court denied the witness's motion to quash the subpoena and for a protective order. On appeal, the witness argued the trial court had misapplied the law regarding discovery of non-party witnesses and had failed to recognize that the subpoena was harassing and sought duplicative, irrelevant, and confidential information.

The court affirmed the order. Acknowledging that a court must consider certain factors when addressing a discovery dispute involving a non-party witness, the court held the trial court had not abused its discretion or misapplied the law when it concluded the non-party witness could not avoid being deposed by claiming a lack of relevancy or relying on unsupported, blanket assertions of harassment and confidentiality.