



LITIGATION QUARTERLY

• A NEWSLETTER RELATING TO NEW JERSEY LITIGATION LAW •

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Liability Cases - Legal Update

By Betsy G. Ramos, Esq.



Over the last several months, a number of significant cases have been decided by the New Jersey appeals courts -- either the Appellate Division or Supreme Court -- that pertain to the defense of tort claims or insurance claims. Below is a summary of these cases. A complete copy of any of the cases or additional information on these topics is available upon request.

***Luhejko v. City of Hoboken* (Supreme Court July 2011)**

The New Jersey Supreme Court decided that a condominium association and its management company were not liable to a pedestrian who was injured when he fell on black ice on the sidewalk abutting the condominium complex. The court found that the condominium association did not qualify as a commercial property owner. As a residential owner, the Court held that it had no liability, in accordance with well settled law.

This case is particularly significant for public entities because municipalities can typically pass along liability for an accident on a public sidewalk to an abutting commercial landowner, but not to an abutting residential landowner.

***Abouzaid v. Mansard Gardens*, 207 N.J. 67 (Supreme Court June 2011)**

The New Jersey Supreme Court held that a claim filed under *Portee v. Jaffee* triggered a duty to defend under a CGL policy even if the *Portee* complaint fails to allege a bodily injury. While a *Portee* claim may not have a physical component (so as to qualify as a "bodily injury" under the policy), the extraordinary level of emotional distress required to support a *Portee* claim, in most cases, has a physical component. Thus, a policy providing coverage for claims of "bodily injury" will require a defense from the filing of the complaint unless such defense is specifically excluded by other contract language.

***Carlin v. Cornell, Hegarty & Koch* (Unpublished App. Div. Aug 2011)**

In this unpublished decision, the Appellate Division held that a separately filed spoliation lawsuit growing out of a successful defense of a covered claim fell within the scope of coverage and required a defense - despite the claim being for

fraudulent concealment with fraud being an excluded claim. Because this claim could have been brought as an application to reopen the prior bodily injury litigation, which was a covered claim, the carrier would have had a duty to provide a defense up until the court found fraud or misrepresentation. Where an action alleges covered and non-covered claims, the carrier is required to defend until all covered claims have been resolved. Here, the spoliation claim was resolved in favor of the insured. Thus, the carrier's duty to defend was converted to an obligation to pay all costs of defense.

The *Abouzaid* and *Carlin* cases are examples of how the New Jersey courts strive to find coverage for insureds under insurance policies.

***Perrelli v. Pastorelle*, 206 N.J. 193 (Supreme Court June 2011)**

Construing *N.J.S.A. 39:6A-4.5(a)*, which bars an uninsured driver from pursuing an action to recover damages while "operating" an uninsured vehicle, the New Jersey Supreme Court found that the person does not have to actually be driving the vehicle at the time of the accident to be barred from suing for injuries. The Court found this provision to be equally applicable to either the driver or the passenger, if injured while in their uninsured vehicle. Thus, the uninsured's claim for personal injuries was barred.

***Aronberg v. Tolbert* (Supreme Court August 2011)**


The New Jersey Supreme Court considered whether the heir of an uninsured driver could sue under the Wrongful


Death Act or whether the statute, *N.J.S.A. 39:6A-4.5(a)*, which bars a lawsuit for personal injuries by an insured motorist, extinguished that claim, just as it did the survival action. The Court found that when an uninsured motorist's claim was barred by this statute, an heir had no right of recovery under the Wrongful Death Act. The heir should have no greater right than the motorist to make a claim.

The *Perrelli* and *Aronberg* cases demonstrate the Supreme Court's enforcement of the compulsory New Jersey insurance laws if an individual wishes to sue for injuries suffered in an auto accident.

***Kieffer v. High Point Ins. Co.* (App. Div. August 2011)**

This case involved first party insurance claims brought against three different carriers in these consolidated appeals due to vehicular mishaps. Plaintiffs claimed that they should be entitled to be paid for the diminution in values of their cars. All of the policies excluded coverage for diminution in value as a covered claim. Despite various arguments by the plaintiffs to avoid the application of the exclusion such as an ambiguous definition of repair and replace, a reasonable expectation argument, and violation of public policy, the Appellate Division found the exclusion to be valid and dismissed the claims for diminution in value.

This case showed some creative arguments by plaintiffs' counsel - although none carried the day before the Appellate Division. 

	<p>In addition to editing the <i>Litigation Quarterly</i>, Betsy G. Ramos, Esq. is co-chair of Capehart Scatchard's Litigation practice and has been recognized as one of South Jersey's Top Attorneys as published by <i>SJ Magazine</i>. She has over 25 years experience as a litigator handling matters including tort claims and civil rights defense, business litigation, employment litigation, construction litigation, insurance coverage, tort defense, and general litigation.</p>
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TOPICS YOU WOULD LIKE TO SEE ADDRESSED

If you have any suggestions for future articles, please contact Newsletter Editor and Litigation Group Co-Chair, Betsy G. Ramos, Esq., via telephone at 856.914.2052 or via email at bramos@capehart.com.

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