PREMISES LIABILITY: UPDATE 2020

2020 Seminar Material

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PREMISES LIABILITY: UPDATE 2020

Featured Speaker

Gerald H. Baker, Esq.

Certified by the Supreme Court of New Jersey as a Civil Trial Attorney

Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C. (Springfield, Jersey City, Hackensack, Newark, Freehold, Elizabeth, Morristown; Mt. Laurel; New York City)

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2020 PREMISES LIABILITY UPDATE

Presented by Gerald H. Baker, Esq.

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A. Status of persons on land, Snyder v. I. Jay Realty, 30 N.J. 303 (1959).

1. Determination of duty depends on status of person on land.

a. Invitee.

b. Licensee.

c. Trespasser.

2. Determination of status.

a. By the court as a matter of law.

b. By the jury as a matter of fact.

B. Invitee, Restatement, Second, Torts, § 332.

1. A public invitee is a person who is invited to enter land as a member of the public for a purpose for which the land is held open to the public.

2. A business visitor is a person who has permission to enter land for a purpose directly or indirectly connected with the business of the possessor of the land and for the possessor's benefit.

3. Guests.

a. Person who is on the premises to convey some benefit upon homeowner, other than purely social.

b. Benedict v. Podwats, 109 N.J. Super. 402 (App. Div. 1970), aff'd 57 N.J. 219 (1970).

(1) Invited to sister's house to prepare floral arrangement for party.

(2) Performed chores for 2 hours: Hung laundry on wash line and Cleaned around house.

(3) Injured in backyard.

(a) Fell on brick steps in patio.

(b) While taking in laundry due to rain.

(4) Invited to perform chores for benefit of sister, not to engage in social gathering.

(5) Status of invitee, even if services are performed gratuitously.

C. Licensee, Restatement, Second, Torts § 330.

1. A licensee is a person who is allowed to enter land only by virtue of the possessor's consent.

a. Express or implied permission.

b. No benefit to possessor.

2. Types of licensees.

a. Household members.

b. Social guests of property owner.

(1) Person on premises for social purposes.

(2) Pearlstein v. Leeds, 52 N.J. Super. 450 (App. Div. 1958).

(a) Invited to party at cousin's house.

(b) Arrived day early to assist in preparations.

(c) After party was over, slipped while descending highly waxed steps.

(d) Main purpose on premises was social, not to render services.

(e) Status of licensee, even if performed services beneficial to host.

D. Trespasser, Restatement, Second, Torts, § 329.

1. A trespasser is a person who enters land.

2. Without a privilege to do so by consent or otherwise -- absence of permission.

3. Absence of benefit.

E. Duties Owed to Invitee.

1. Condition of Property, Restatement, Second, Torts, § 343.

a. Possessor of land is subject to liability for physical harm caused to invitees by a condition of the land.

b. If he knows or by the exercise of reasonable care should discover the condition and realize that it involves an unreasonable risk of harm.

c. If he should expect that the invitee would not discover the condition or would fail to realize the danger.

d. If he fails to use reasonable care to protect the invitee from the danger.

(1) Inspection.
(2) Maintenance or repair.
(3) Warning.

F. Duties owned to licensees.

1. Dangerous condition known to possessor, Restatement, Second, Torts § 342.

a. Possessor of land is subject to liability for physical harm caused to licensees by a condition of the land.

b. If possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm.

c. If he should expect that the licensee will not discover the condition or realize the danger.

d. If he fails to exercise reasonable care to make the condition safe or to warn the licensee of the condition and the risk.

e. If the licensee does not know or have reason to know of the condition and the risk.

2. Nature of duty.

a. Patent conditions (open and obvious).

(1) No duty to discover -- inspect, correct or warn.
(2) Awareness by licensee is a bar to recovery.

b. Latent conditions (concealed and unknown).

(1) No duty to discover -- inspect, correct or warn.

(2) Lack of awareness by possessor is a bar to liability.

c. Latent conditions (concealed and known).

(1) Known to possessor but unknown to licensee.
(2) No duty to discover.
(3) If aware, possessor has duty to correct or warn.

G. Duties owed to trespassers.

1. Condition of property, Restatement, Second, Torts, § 333.

a. A possessor of land is not liable for physical harm caused to trespassers from failure to exercise reasonable care.

b. A possessor has no duty to put land in a condition reasonably safe for the use of a trespasser.

c. A possessor has no duty to conduct activities so as not to endanger trespassers.

d. A possessor has a duty to refrain from conditions or activities that intentionally cause harm.

2. Permissive trespassers, Restatement, Second, Torts § 334, 335.

a. A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land.

b. May be subject to liability for bodily harm caused by an artificial condition on the land:

(1) If the possessor has created or maintained the condition.

(2) If the condition is likely to cause serious harm to trespassers.

(3) If the possessor has reason to believe that a trespasser will not discover the condition.

c. Imre v. Riegel Paper Corp., 24 N.J. 438 (1957), where landowner was aware that employees entered adjacent property through an open gate at lunch (beaten footpath to shores of Delaware River), landowner has a duty to warn permissive trespassers of hazardous condition that was created by landowner but concealed to trespassers (surface incineration of waste products).

3. Infant trespassers, Restatement, Second, Torts § 339.

a. A possessor of land is subject to liability for physical harm caused by an artificial condition upon the land to children who trespass upon the land.

(1) Possessor knows or has reason to know that children are likely to trespass.

(2) Possessor knows or has reason to know that the condition will involve an unreasonable risk of harm to children.

(3) Children, because of their youth, will not discover the condition or realize the risk.

(4) The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to the children.

(5) The possessor fails to exercise reasonable care to eliminate the danger or to protect the children.

b. Strang v. South Jersey Broadcasting, 9 N.J. 38 (1952), where landowner was aware that children used unfenced land as a playground, landowner has a duty to eliminate conditions that create an unreasonable risk of harm (an unattended fire) or to warn of hazard.

H. Abrogation of Traditional Status Categories.

1. English rule.

a. Common law -- duty of landowner depends on status of entrant.

b. Occupier's Liability Act (1957).

(1) No distinction between invitees and licensees.

(2) Standard of reasonable care.

2. Admiralty rule, Kermarec v. Campagnie Generale, 358 U.S. 625 (1959), common law has moved towards the imposition of a single standard of reasonable care.

3. California rule, Rowland v. Christian, 69 Cal 2d 108 (1968).

a. Status is not determinative of legal duty.

b. Duty of reasonable care to all persons who enter property.

c. Fourteen states have abrogated distinctions as to status.

I. The New Jersey Rule: A Balancing Test.

1. All of the surrounding circumstances, Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993), Handler

a. Customer attending open house held by real estate broker fell down step that was camouflaged by similar floor covering.

b. Customer sued broker.

(1) Violated common law duty.

(a) Owner/occupier owes duty of reasonable care (inspect, discover and warn) to invitees.

(b) Customers of real estate brokers are invitees (duty to inspect, discover and warn).

c. Traditional common law approach to premises liability: duty of landowner/occupier determined by status of person on property.

d. Inadequacy of common law rules.

(1) Attempt to pigeon-hole parties within traditional categories is strained and awkward.

(2) Common law classifications obscure rather than illuminate the determination of duty.

(3) Common law analysis not centered on factors that govern tort liability. Historical classifications are undergoing gradual change in favor of broadening application of general tort obligation.

(4) General tort obligation.

(a) Duty to exercise reasonable care.
(b) Protect against foreseeable harm to others.

(2) Imposition of legal duty is ultimately a question of fairness.

(a) Whether imposition of such a duty.

(b) Satisfies an abiding sense of basic fairness.

(c) Under all of the circumstances.

f. Imposition of legal duty involves "identifying, weighing and balancing" several factors:

(1) The relationship of the parties (status).

(2) The nature of the attendant risk.

(3) The opportunity and ability to exercise care.

(4) The public interest in the proposed solution.

g. Real estate broker has duty to ensure safety of customers who tour an open house.

(1) Duty to inspect to discover defects that are reasonably discoverable through an ordinary inspection for the purpose of selling the home.

(2) Not responsible to discover defects that are hidden (latent) and are unknown to broker.

2. Clohesy v. Food Circus Supermarkets, 149 N.J. 496 (1997), Coleman, where customer abducted from parking lot, shopkeeper had a duty to protect customers based upon the totality of the circumstances, even if no prior similar incidents.

3. Tighe v. Peterson, 175 N.J. 240 (2002), per curiam.

   a. Host had no duty to warn social guest of depth of pool where guest had been to the pool 20 times and was aware of location of deep and shallow end.

   b. Dissent, Long, Imposition of duty must satisfy an abiding sense of basic fairness under all of the circumstances so that owner of pool owes a duty to social gusts where the risk of harm is great and the means of avoiding the harm are small.

4. Monaco v. Hartz Mountain, 178 N.J. 401 (2004), Long, where employee of tenant was injured where a gust of wind dislodged a parking sign on the sidewalk, fairness and justice require the owner of a commercial office building to inspect and warn, even if the sign was installed and maintained by the city.

5. Smith v. Fireworks by Girone, 180 N.J. 199 (2004), Long, where child picked up an unexploded fireworks in a public park after a fireworks display and was injured when the fireworks exploded on private property, the public entity that created the condition is liable, even if the injury does not occur on public property.

6. Maisonave v. Newark Bears, 185 N.J. 70 (2005), Rivera-Soto, where patron struck in the face by a foul ball while purchasing food from a vending cart in the mezzanine, the balance of public policy and basic fairness imposes upon the operator of a baseball stadium the obligation to exercise reasonable care for the safety of patrons in concourses (but only a limited duty to patrons in the stands).

7. Olivo v. Owens-Illinois, 186 N.J. 394 (2006), LaVecchia, where wife of pipe welder contracted asbestosis after washing her husband's clothing at home, considerations of fairness and public policy impose upon the company that owned the premises where asbestos products were used, a duty to exercise due care for the safety of workers on the premises and to their spouses at home.

8. Desir v. Vertus, 214 N.J. 303 (2013).

   a. Where decedent was shot when neighbor asked for his help because he thought a robbery was going on at his business.

   b. Premises liability depends upon the application of categories of status.

   c. Where plaintiff not fit precisely into a category, the court must apply a "full duty analysis."

   d. Where the relationship of the parties, the nature of the risk, the ability to avoid the risk and the public interest is not clear, the property owner has no duty to a person who enters on the land.

9. Robinson v. Vivuto, 217 N.J. 199 (2014), Cuff (TA).

   a. Where pedestrian attacked by dog while taking a short-cut across school grounds.

   b. When a person alleges that a landowner acted negligently, the existence of a duty by a landowner to exercise due care to third persons is "generally governed" by the status of the third person "particularly when the legal relationship is clearly defined."

   c. When the legal relationships are "not clearly defined, other factors may influence the recognition of a duty of care."

   d. In the end, a court must assess "the totality of the circumstance."

10. Peguero v. Tau Kappa Epsilon, 439 N.J. Super. 77 (App. Div. 2015), Sabatino, Guadagno, Leone.

   a. Fraternity and members had no duty to prevent shooting of attendee at a party because gunfire was not reasonably foreseeable.

   b. Traditionally, the extent of duty was dictated by common law classifications.

   c. Modern case law has eschewed such rigid categories and instead adopted a more flexible analysis.

   d. Where the duty is not "well settled", the court must engage in a "full duty analysis."

   e. The function of tort law is deterrence and compensation.

   f. Ultimately, whether a duty exists in a question of fairness.

III. LANDLORD'S DUTY TO TENANTS: Radiator Covers.

A. Statutes and Regulations.

1. Department of Community Affairs (DCA) is a state agency created to provide administrative guidance, financial support and technical guidance to local governments, business and individuals to improve the quality of life in New Jersey.

2. Bureau of Housing Inspection inspects multiple-dwelling, buildings with three or more apartments.

   a. Hotel and Multiple Dwelling Law.

   b. Regulations for Maintenance of Hotels and Multiple Dwellings.

3. Regulations for Heating Systems, N.J.A.C. 5:10-14.3 (d).

   a. Standards for maintenance of heating systems.

   b. Heating equipment, facilities and systems shall be kept in good operating condition.

   c. Heating system, including such parts as heating risers, ducts and hot water lines shall be covered with insulating material to protect persons on the premises from receiving burns due to chance contact.

B. Common Law.

1. A landlord has a duty to exercise reasonable care to guard against foreseeable dangers arising from use of that portion of the property over which the landlord retains control.

a. Foreseeability.

b. Control.

2. This duty requires the landlord to maintain the property in a reasonably safe condition.

C. J.H. v. R&M Tagliareni, 239 N.J. 198 (2019), Fernandez-Vena, Does landlord owe duty of care to infant tenant who was burned by a radiator?.

1. Infant plaintiff, J.H., sustained serious burns from an uncovered, free-standing cast iron loop radiator in an apartment owned by defendant.

2. His father placed JH in a twin bed that did not have railings and was adjacent to a steam-heated radiator that did not have a cover.

3. JH was found the next morning lying on the floor with his head pressed against a hot radiator.

4. Control of the radiator.

a. Boiler room was locked and under the exclusive control of the plaintiff.

b. Individual apartments were not equipped with thermostats.

c. Tenants could shut=off valves in each room.

5. Landlord testified.

    a. No tenant was ever burned by a radiator.

    b. No tenant ever asked for a radiator cover.

    c. Never cited for a violation.

6. Plaintiff filed an action against defendants for negligent maintenance of the apartment for failing to provide radiator covers.

7. Trial court dismissed.

    a. Radiators not included within regulations dealing with heating systems.

    b. Landowner has no common law duty to cover radiators.

8. Appellate Division reversed.

    a. Radiator was part of heating system.

    b. Common law duty to cover radiators.

9. Supreme Court reversed.

    a. Regulations.

        (1) An administrative agency has the primary authority to implement policy in a specialized area.

        (2) The regulations represent the agency's judgment with respect to safeguards that are necessary for the health, safety and welfare of the public.

        (3) The plain reading of the regulations do not include radiators in the list of items that must be covered with insulation.

(a) Items within exclusive control of landlord.

(b) Items have a different function than a radiator.

(4) Court will defer to specialized expertise of agency.

b. Common law.

(1) Control of radiator.

(a) Tenant had control of valve on radiator.

(b) Landlord did not have control.

(2) Landlord had no duty to cover radiators.

10. Dissent, Rabner and Albin.

a. Risk of harm.

(1) Ten thousand people were injured from contact with hot radiators over the last decade and were treated in emergency rooms.

(2) The risk of harm from scalding hot radiators is real.

(3) People will continue to suffer the same types of injuries unless precautionary steps are taken.

b. Duty of care.

(1) Landlords have a duty to use reasonable care to guard against foreseeable hazards to tenants from areas within the landlord's control.

(a) Duty to prevent serious harm from scalding hot radiators.

(b) A simple radiator cover at a modest cost can prevent a foreseeable risk to apartment dwellers.

c. Nature of heating system.

(1) Centralized gas – fired boiler in locked room in the basement.

(2) Steam traveled from boiler to radiators in apartments.

(3) Landlord controlled the temperature of the steam coursing through the radiators.

(4) Tenants can only turn the radiator on and off, not regulate temperature.

(5) The choice to turn the heat on or off on a cold day is not a choice.

(6) Heat is a necessity, not an option.

(7) When radiator is turned on, burns are a foreseeable risk.

d. Standard of care – full duty analysis.

(1) Relationship of parties.

(2) Nature of risk.

(3) Ability to exercise care.

(4) Public interest.

e. Relationship of parties: Landlord and tenant.

f. Nature of risk - a burn from contact with radiator.

g. Ability to exercise care.

(1) Landlords control heating system.

(2) Access to apartments before tenants move in or with consent.

(3) Radiator covers available at modest cost.

(4) Pass on the costs to tenants.

h. Public interest.

(1) Protecting children.

(2) Protecting tenants.

i. Issues for jury.

(1) Breach of duty.

(2) Proximate cause.

(3) Apportionment of liability.

(a) Landlord.

(b) Management company.

(c) Infant’s father.

j. Legislature makes final determination as to duty.

(1) Amend Hotel and Multiple Dwelling Law to require landlords to put protective covers on radiators.

IV. CHARITABLE IMMUNITY: College Concert:

A. Common Law – Judicial expressions of public policy, D'Amato v. Orange Memorial Hospital (1925).

B. Repudiated by Supreme Court, Collopy v. Newark Eye & Ear Infirmary (1958).

1. Lack historical foundation.

2. Contrary to modern concepts of justice.

C. Charitable Immunity Act, N.J.S.A. 2A:53A (1959).

1. Avoid diversion of charitable trust funds.

2. Encourage altruistic activities by limiting impact of litigation on charities.

3. Public policy to protect non-profit organizations.

D. Statutory Immunity.

1. A non-profit corporation, society or association.

2. Organized exclusively for religious, charitable or educational purposes.

3. Including their trustees, directors, officers, employees, agents, servants or volunteers.

4. Shall not be liable to respond in damages to any person who shall suffer damage.

5. From the negligence of any agent of such organization.

6. Where such person is a beneficiary of the works of such organization.

7. To whatever degree.

8. No immunity to any person unconcerned in, unrelated to and outside of the benefactors of such organization.

E. Qualification for charitable immunity (3 prongs).

1. Entity formed for non-profit purposes.

2. Organized exclusively for religious, charitable or educational purposes.

3. Promoting such objectives to a person who was a beneficiary of the charitable works.

F. Green v. Monmouth University, 237 N.J. 516 (2019), Fernandez-Vina, Is a University entitled to charitable immunity for injury sustained at a concert?

1. Third prong.

a. Was non-profit organization engaged in performance of the objectives it was organized to advance.

b. Was injured party a direct recipient of those good works.

2. Certificate of Incorporation.

a. Establish an institution of learning to promote education.

b. To instruct students in general cultural education.

c. To provide events open to the public including classes, conferences, lectures, forums, exhibitions, conventions, plays, motion pictures, concerts and athletic contests.

d. Calculated, directly or indirectly, to advance the cause of education and wholesome recreation.

3. Fact sensitive inquiry.

    a. Plaintiff attended a conference at Multipurpose Activity Center (MAC).

    b. Martina McBride, Joy of Christmas Tour.

    c. Slipped while climbing a set of stairs.

        (1) Area poorly lit.

        (2) Rubber strip sticking out 2 inches from steps.

        (3) Tripping hazard.

4. Licensing agreement.

    a. Concerts East/TMI.

        (1) University's agent for live music entertainment of artistic performers at the MAC.

        (2) Rights to proceeds from ticket sales and sponsorships.

    b. Monmouth University.

        (1) Rental fee of $10,000 to cover cost of setting up facility, police and fire.

        (2) Facility fee of $1.50 per ticket to cover direct costs.

        (3) Proceeds from concessions, Beer Garden and parking.

5. Trial court granted summary judgment in favor of University.

6. Appellate Division reversed with a dissent.

7. Supreme Court affirmed.

8. Hosting a musical concert open to the public served the educational goals for which the University was organized to promote.

    a. An activity explicitly provided under the Certificate of Incorporate.

    b. Non-profits may provide a wide range of services beyond their core purpose as long as they further the charitable objectives they were organized to advance.

    c. The term "educational" is not limited to scholastic activities.

    d. McBride concert was both "educational" and "charitable."

        (1) "A cultural and educational experience."

        (2) Served the University's stated goal "of presenting concerts open to the public to advance the cause of education."

    e. Decision to rent out the MAC to host a concert does not result in loss of immunity.

        (1) Charitable entity allowed to contract with a third party to run a charitable event, like a concert.

        (2) Does not matter if entity made a profit or lost money.

9. Plaintiff was a beneficiary of the educational purpose of Monmouth University.

   a. Member of general public.

   b. Not a student.

   c. Paid for ticket.

   d. Interpret beneficiary broadly – "to whatever degree."

   e. If plaintiff's presence "was clearly incident to accomplishment of defendant's charitable purpose."

   f. "Although Green was not a Monmouth University student, she was a beneficiary.

V. CHARITABLE IMMUNITY: Source of Funds.

A. Charitable Immunity Act, N.J.S.A. 2A:53A (1959).

1. An organization formed for non-profit purposes.

2. Organize exclusively for religious, educational or charitable purposes.

3. Promoting such purposes to a person who was a beneficiary of the charitable works.

B. Purposes of Organization (Second Prong).

1. Educational and religious.

a. Commonly understand meaning.

b. Automatically satisfy the second prong.

c. No financial analysis is required.

2. Charitable.

a. A more complex notion that defies precise definition.

b. Conduct a "source of funds assessment" to discern whether a charitable purpose is being fulfilled.

(1) Look beyond non-profit structure.

(2) Social service activities.

c. Some level of support from charitable donations and trust funds.

d. The acceptance of government funds does not transform a private non-profit corporation into a government instrumentality.

C. F.K. v. Integrity House, 460 N.J. Super. 105 (App. Div. 2019), Sumner, Mitterhoff, Susswew, Did drug treatment facility receive sufficient sources of charitable funding to be entitled to charitable immunity?

1. Plaintiff, F.K. was injured when he slipped and fell on wet floor in residential drug treatment facility.

2. Integrity House's certificate of incorporation – purpose to keep former drug addicts drug free.

3. Tax-exempt organization under §501(c)(3).

4. Tax return 2015.

   a. Total revenue $20,094,046.

   b. Government grants $15,355,805.

   c. Fundraising events $157,310 (Contributions).

   d. Fundraising events $252,855 (Gross receipts).

   e. Program service revenue $4,261,364.

5. Gross receipts of $252,855 (private contributions) 1.26%.

6. Gross receipts plus contributions 2.04%.

7. Plaintiff filed complaint for negligence.

8. Defendant raised affirmative defense of charitable immunity.

9. Defendant moved for summary judgment.

10. Trial court granted motion.

11. Appellate Division reversed.

    a. Charitable immunity is an affirmative defense for which defendant bears the burden of persuasion.

    b. Integrity House failed to submit sufficient evidence of source and use of funding.

        (1) Analysis of tax return.

        (2) Percentage of funds raised from charitable contributions.

        (3) Fee structure of services.

        (4) Fundraising efforts.

        (5) Public service efforts to relieve government.

    c. Percentage of total revenue from private charitable contributions is disputed.

        (1) Whether 1.26% or 2.04%.

        (2) Too nominal to advance purpose of immunity.

            (a) Protect private charitable contributions.

            (b) Relieve government of burden.

    d. Substantial government funding.

        (1) Maximize government funding.

        (2) Operate programs exclusively with that funding.

VI. EXCULPATORY CONTRACTS: Health Club

A. Common Law Duty of Business Owners.

1. Duty of reasonable care to invitees.

2. Provide a safe environment for doing that which is in the scope of the invitation.

3. Business owners are in the best position to control the risk of harm.

B. Enforceability of Exculpatory Clauses.

1. Prospective release from liability.

2. General factors.

a. Freedom to contract.

b. Right of competent adults to bind themselves as they see fit.

c. Encourage a lack of care.

d. Historically disfavored in the law.

e. Subject to close judicial scrutiny.

f. Ambiguities resolved in favor of accountability.

3. Specific factors.

a. Does not adversely affect the public interest.

b. Exculpated party not under legal duty to perform.

c. Does not involve a public utility or common carrier.

d. Contract does not grow out of an unequal bargaining power (contract of adhesion) or is otherwise unconscionable.

C. Stelluti v. Casapenn, 203 N.J.286 (2010).

1. Plaintiff injured when handlebars of stationary bike dislodged during spinning class at fitness center.

   a. First time at gym.

   b. Instructor set handlebars.

2. Waiver and Release Form.

   a. Narrative of inherent risks of injury during strenuous physical exercise.

   b. Limitation of liability for injuries sustained as a matter of their negligence that results from a patron's:

      (1) Voluntary use of equipment or

      (2) Participation in instructed activity.

   c. Disclaimer of liability for injuries that occur on the club's sidewalks or parking lot.

3. Exculpatory clause enforceable for injury sustained when riding a spin bike.

   a. Business owners held to standard of care congruent with nature of their business.

   b. To make available specialized equipment and facilities to invitees who are there to exercise, train and push physical limits.

   c. No duty for injuries attributable to defective or poorly maintained equipment or to improper instruction.

   d. Duty not to engage in reckless conduct or gross negligence.

(1) Failed to remedy defective equipment of which club or employees is aware.

(2) Dangerously maintained equipment.

e. Fair and proper balance of public policy interests.

(1) Public interest in ensuring that health club maintains safety of premises.

(2) Permit business to limit liability from negligence.

(3) Not require health club to guarantee safety of patrons who voluntarily assume risk of strenuous physical activity.

(a) Voluntary use of equipment.

(b) Voluntary participation in instructional activities.

(4) Interest in ensuring safety of patron is outweighed by greater good served by presence of health club in community.

(a) Health clubs perform salutary purpose of offering equipment and activities to patrons for challenging physical exercise.

(b) Positive social value in allowing gyms to limit liability to patrons who assume the risk of participation in activities that could cause injury.

(c) Not chill establishment or health clubs.

f. Foreseeable as an inherent aspect of the nature of the business activity of health clubs.

(1) Business offers members use of physical fitness equipment.

(2) Place to engage in strenuous physical activity.

(3) That involves an inherent risk of injury.

g. Need not address validity of disclaimer for injuries that occur.

(1) On club's sidewalks or parking lots.

(2) Common to any commercial enterprise that has business invitees.

4. Plaintiff not in classic position of unequal bargaining power (contracts of adhesion).

a. Could have taken business to another club.

b. Could have found another means of exercise.

c. Could have sought advice before signing up.

5. Justice Albin dissent.

a. Not in public interest.

b. Not consistent with Court's long-standing, progressive common-law jurisprudence of protecting vulnerable consumers.

c. Not in step with the enlightened approach taken by courts in other jurisdiction.

6. Craig & Pomeroy.

   a. Stelluti decision remarkable for its departure from settled New Jersey law.

   b. Court "blithely" ignores the basic principles of tort law.

      (1) Tort liability encourages due care.

      (2) Proprietor of commercial premises in best position to ensure that the property is maintained properly.

   c. Permits proprietor of recreational facility to shift the burden of inspecting its athletic equipment to its customers.

      (1) No idea how a machine works.

      (2) How old the equipment is.

      (3) How often it has been used.

   d. Court assigns no significance to the "blatant" lack of due care demonstrated by the health club.

      (1) Poorly maintained equipment.

      (2) Incompetent instructions.

D. Pulice v. Green Brook Sports, 236 N.J. 1 (2018).

1. Plaintiff, Maria Pulice, was a patron at a health club.

2. A distracted health club trainer negligently dropped a dumbbell on her head.

3. Plaintiff signed an exculpatory clause.

   a. Condition of membership.

   b. Immunize health club from own negligence.

4. Standard form contract in health club industry.

   a. Contract of adhesion (take-it-or-leave-it).

   b. Public has no bargaining power to alter terms.

5. Price of admission to a health club is to surrender right to insist that club provide a safe environment.

6. Trial court dismissed claim.

7. Appellate Division affirmed.

8. Supreme Court granted plaintiff's petition for certification.

   a. Parties settled.

   b. Supreme Court entered order of dismissal.

9. Justice Albin dissented.

   a. Would hear the appeal.

      (1) Not dismiss on grounds of mootness.

      (2) Issues raised of paramount public importance.

      (3) Grave social consequence.

   b. Re-visit Stelluti.

      (1) Exculpatory clause permits health club operate negligently.

      (2) Through its negligence, "to maim and kill its patrons without consequence."

      (3) A health club or gym should have a non-delegable duty to exercise reasonable care to ensure a patron's health and safety.

      (4) The operator of a commercial recreational enterprise can inspect the premises for unsafe conditions and train their employees with regard to proper operation of the club's facilities.

      (5) Our common law should not give license to health clubs to escape their duty through a standard-form, industry-wide exculpatory clause.

c. Purpose of tort law.

(1) Compensate victims and prevent accidents.

(2) When business owners exercise due care.

(a) Fewer accidents.

(b) Fewer lawsuits.

(c) Insurance premiums go down, not up.

d. The power to correct this mistake remains in the hands of the court when the next health club misadventure presents itself.

e. The Legislature has a central role as the preeminent author of public policy in a democratic society.

(1) The Legislature can act before the next preventable health club injury.

E. Senate Bill S-825 (Scutari, Lagana).

1. A health care services contract.

2. Shall not limit the liability of the health club to a buyer for injuries.

3. Caused by or resulting from the negligence of the owner or operator, or an agent or employee of the owner or operator, of the health club.

VII. SIDEWALKS: Vacant Church Property.

A. Duty of Care for Public Sidewalk.

1. Generally, landowner does not owe a duty of care to pedestrians injured as a result of a condition of the public sidewalk abutting the premises.

   a. Normal wear and tear.

   b. Normal effects of elements.

2. Landowner does owe a duty for negligent construction or repair.

3. Commercial landowners have a duty to maintain the public sidewalks abutting their property in reasonably good condition.

   a. Free from defects.

   b. Free from snow and ice.

4. Church does not have a duty to maintain the public sidewalk abutting its property.

   a. Uses the property <u>solely</u> for religious purposes.

   b. Not a commercial use.

5. Church does have a duty to maintain public side if uses property for commercial purposes.

B. Ellis v. Hilton United Methodist Church, 455 N.J. Super. 33 (App. Div. 2018), Haas, Rothstadt, Gooden Brown – Are the owners of a vacant church liable to a pedestrian who fell on the abutting sidewalk:

1. Plaintiff, Timothy Ellis, slipped and fell on sidewalk that was uneven and broken.

2. Sidewalk abutting church property.

3. Church property was vacant.

   a. Not in operation for 2 years.

   b. No worship or other programs.

4. Plaintiff filed motion to classify property as commercial.

   a. Abandoned property.

   b. Potential to generate income.

   c. Covered by premises liability insurance.

5. Trial court denied motion and Appellate Division affirmed.

   a. Church used property solely for religious purposes.

      (1) Owner of noncommercial property that is not subject to liability for abutting sidewalk.

      (2) Vacant property not put to commercial use is not subject to sidewalk liability.

      (3) Changing use from use as a church to "no use" as vacant property does not result in imposition of liability.

b. Vacant church is not a commercial property, even though maintained liability insurance.

6. Owners of vacant residential or noncommercial property do not have a duty to maintain public sidewalk.

7. Duty for internal walkways.

VIII. SOCIAL HOST: Activities on Property.

A. Social Guest: Model Jury Charge 5.20F(4).

1. Social guests are someone invited to their hosts' premises.

2. Social guests must accept the premises of their host as they find them.

3. Hosts have no obligation to make their home safer for their guests then for themselves.

4. Hosts are not required to inspect their premises to discover defects that might cause injury to their guests.

5. However, if the social host knows or has reason to know:

a. Of an artificial or natural condition on the premises which could pose an unreasonable risk of harm to a social guest and

b. That the social guest could not be reasonably expected to discovery it.

c. The social host (owner or occupier) owes the social guest a duty to exercise reasonable care.

(1) To make the condition safe or

(2) To give warning to the social guest of its presence and the risk involved.

6. Although social guests are required to accept the premises as the host maintains them, they are entitled to the social host's knowledge of dangerous conditions on the premises.

7. Where the social guest knows or has reason to know of the condition and the risk involved and, nevertheless, enters or remains on the premises, the social host cannot be held liable.

8. You may find the social hosts (owner or occupier) negligent:

   a. If they knew or had reason to know of the dangerous or defective condition.

   b. Realized or in the exercise of reasonable foresight should have realized that it involved an unreasonable risk of harm to the social guest.

   c. Had reason to believe that the social guest would not discover the condition and realize the risk.

   d. Failure to take reasonable steps to protect the guest from the danger by either making the condition safe or warning the social guest.

9. However, you may <u>not</u> find the social host negligent.

   a. If you find that the defect was obvious and;

   b. The social host had reason to believe that the social guest would be aware of the defect and risk.

10. Exceptions to general duty of social hosts.

    a. Voluntary undertakings – where social hosts have gratuitously performed an act for the safety of social guests, the host must exercise reasonable care in carrying out the undertaking.

    b. Activities of Social Hosts – where social hosts perform activities on the premises, the host must exercise due care to protect their guests.

B. Piech v. Layendecker, 456 N.J. Super. 367 (App. Div. 2018), Fasciale, Gorden Brown, Rose, Are social hosts liable for injuries caused by activities on property:

1. Plaintiff, Staci Piech, was injured when she was struck by a metal pole used to strike a pinata.

2. Social guest at home friend, John Layendeck, at a birthday party for his son, Glenn Layendecker.

3. Glen used a thin metal pole to swing at pinata multiple times.

    a. Pole began to bend.

    b. Pole snapped and struck plaintiff.

4. Judge charged jury.

    a. Social guest, general duty owned, MJC 5.20 F(4).

        (1) Social guests must accept premises as they find them.

        (2) Social hosts are not required to inspect premises.

        (3) Social hosts are not negligent if the defective condition was obvious and the social guest would be aware.

b. Exception (2).

(1) Where the social host is conducting an activity on the premises, the host is under an obligation to exercise reasonable care for the protection of the guest.

5. Jury returned a verdict of no cause.

6. Appellate Division reversed.

a. The injury was caused by an activity – swinging at the pinata.

b. Not a dangerous condition of property.

c. The jury instructions contradicted each other.

(1) Plaintiff never alleged a dangerous condition of property.

(2) Both charges should not have been given simultaneously.

d. Proper standard is reasonable care in conducting an activity on the premises.

IX. SOCIAL HOSTS: Liquor Liability.

A. New Jersey Licensed Alcoholic Beverage Server Fair Liability act, N.J.S.A. 2A:22A-1 (Dram Shop Act).

1. A person who sustains personal injury as a result of the negligent service of alcoholic beverages by a licensed server may recover damages only if the server is deemed to be negligent.

   a. Served a visibly intoxicated person.

   b. Served a minor where the server knew or reasonably should have known that the person was a minor.

2. "Visibly intoxicated" means a perceptible act which presents clear signs of intoxication.

B. Social Host Liability Statute, N.J.S.A. 2A:15-5.6.

1. A person who sustains bodily injury as a result of the negligent provision of alcoholic beverages by a social host to a person who has attained the legal age to purchase and consume alcoholic beverages.

2. May recover damages from a social host.

3. If the social host willfully and knowingly provided alcoholic beverages to a person who was visibly intoxicated in the social host's presence and

4. If the circumstances created an unreasonable risk of foreseeable harm to the life of another and

5. If the social host failed to exercise reasonable care and diligence to avoid the foreseeable risk and

6. If an injury arose out of an accident caused by the negligent operation of a vehicle by the visibly intoxicated person who was provided alcoholic beverages by a social host.

7. Social host is defined as a person.

   a. Who legally provides alcoholic beverages.

   b. To another person who has attained the legal age to purchase and consume alcoholic beverages.

C. Narleski v. Gomes, A-9/10 (2020), Albin, Does an underage adult (over the age of 18 but under the age of 21) have a duty not to facilitate the service of alcohol to a visibly intoxicated underage guest in his home if the guest is expected to operate a motor vehicle?

1. Decedent, Brandon Narleski, purchased beer and vodka from Amboy Food, a/k/a Krauszers, without presenting identification.

2. Narleski was accompanied by 3 friends, all over the age of 18 (adults) but under the age of 21 (underage): Underage adults.

3. Drove to house of Mark Zwierzynski at 7 P.M.

   a. Owned by mother and father, separated.

   b. Lived with mother.

   c. Mother not at home when arrived.

4. Mark brought friends to upstairs bedroom.

   a. Played video games and watched TV.

   b. Narleski drank 2-3 cups of vodka.

5. Nicholas Gomes came to house at 9 P.M.

    a. Zwierzyski handed Gomes a cup.

    b. Gomes drank 2 vodkas and orange juice in presence of Zwierzyski.

    c. Gomes spent 50 minutes at house and had a "buzz."

6. Gomes left house in his car.

    a. Narleski was a passenger and was "fairly drunk."

    b. Gomes lost control and crashed into center divider.

    c. Narleski ejected from vehicle and pronounced dead.

    d. Gomes had BAC.16% (twice legal limit).

7. Expert in neuropharmacology.

    a. Most drinkers display classic signs of visible intoxication.

    b. Relative risk of fatal motor vehicle accident is 82-1772 times greater than sober drivers.

8. Gomes pled guilty.

    a. Second degree vehicular homicide.

    b. Sentenced to 7 year term in state prison.

9. Narleski's parents filed wrongful death action against Gomes and Amboy Food.

10. Amboy Food filed third party complaint against Zwierzynski and his parents for contribution (Joint Tortfeasors Act).

a. Social host negligently supervised his guests (Narleski and Gomes).

11. Narleski's parents settled case with Gomes and Amboy.

12. Zwierzynski filed motion for summary judgment against Amboy.

13. Trial court granted summary judgment.

a. Parents duty to supervise children ends when they become adults.

b. Zwierzynski had no duty to supervise adult friends during consumption of alcohol.

14. Appellate Division affirmed, 459 N.J. Super. 377 (App. Div. 2019), Fasciale

a. Parents had no statutory or common law duty to prevent adult underage son from allowing adult underage friends to drink alcohol in their home.

b. No established precedent to impose duty on Zwierzyski to prevent adult underage friends from drinking while in parent's home.

c. New Rule of Law.

(1) Adult under legal drinking age.

(2) Owes a common law duty.

(3) To desist from facilitating the drinking of alcohol by underage adults.

(4) In his residence.

d. Not apply retroactively.

e. Defer new rule for 180 days for judicial review or legislation.

15. Supreme Court reversed.

a. Public policy.

(1) Intoxicated driving remains a preeminent threat to public safety.

(2) Imposition of severe sanctions on drunk drivers.

(3) Prohibit service of alcohol to minors and visibly intoxicated adults.

b. Primary goals of tort law.

(1) Fair compensation of victims.

(2) Deterrence of conduct.

c. Factors for establishment of a duty, Hopkins

(1) Relationship of the parties.

(2) Nature of attendant risk.

(3) Opportunity and ability to exercise care.

(4) Public interest.

d. Relationship of the parties.

(1) Zwierzynski was social host who controlled access to home.

(2) Invited underaged friends into house to drink.

(a) Activity forbidden by law.

(b) Activity that could not engage in public.

(3) Even if he did not serve alcohol to Gomes, he supplied the cup and observed the consumption of alcohol.

e. Nature of attendant risk.

(1) Public health threat of drunk driving.

(2) Visibly intoxicated adult leaves party to drive a car.

f. Opportunity and ability to exercise care.

(1) Ban the flow of alcohol to underage drinkers.

(2) Ensure that guest does not drink to point of visible intoxication.

(3) If visibly intoxicated, keep on premises or arrange to drive home.

g. Public interest.

(1) Deterring destruction of lives on roadways.

(2) Strong incentive on social host to exercise due care: or suffer the consequences.

16. Plaintiff may recover from social host.

a. Social host knowingly permitted or facilitated the consumption of alcohol by underage guests in a residence under his control.

b. Social host knowingly provided alcohol to visibly intoxicated underage guest or permitted that guest to serve himself or be served by others.

c. Social host knew or reasonably should have known that a visibly intoxicated social guest would operate a motor vehicle.

d. Social host did not take reasonable steps to prevent visibly intoxicated guest from getting behind the wheel.

e. Social guest negligently operated a motor vehicle while intoxicated.

17. Retroactivity.

a. Rule foreshadowed by case law and statutes.

b. Apply retroactively to plaintiff who successfully claimed rights not yet established.

18. Summary judgment reversed.

a. Material issues of disputed fact to be determined by jury.

X. EVIDENCE: Certificate of Death.

A. Hearsay.

1. Hearsay is not admissible except as provided by these rules, Evidence Rule 802.

2. Hearsay is a statement, other than one made by the declarant while testifying at trial.

3. Offered in evidence to prove the truth of the matter asserted.

B. Expert Opinion, Evidence Rule 808.

1. Expert opinion included in an admissible hearsay statement shall be excluded.

2. If the declarant has not been produced as a witness.

3. Unless the court finds that the circumstances involved in rendering the opinion tend to establish its trustworthiness.

a. Motive, duty and interest of declarant.

b. Whether litigation was contemplated by the declarant.

c. The complexity of the subject matter.

d. The likelihood of accuracy of the opinion.

4. Prohibition on admission of complex expert opinions contained in admissible hearsay documents where there are disputed issues concerning their trustworthiness.

C. Testimony by Experts.

1. Testimony, Evidence Rule 702.

a. If scientific, technical or other specialized knowledge.

b. Will assist the trier of fact to understand the evidence or to determine a fact in issue.

c. A witness qualified as an expert by knowledge, skill, experience, training or education.

d. May testify in the form of an opinion.

2. Bases of Opinion, Evidence Rule 703.

a. The facts upon which an expert bases an opinion.

b. May be those made known to the expert before the hearing.

3. Net Opinion Rule.

a. Expert's opinions must be supported by the facts.

b. Experts must give the "whys and wherefores" supporting their opinions, not mere conclusions.

D. Quail v. Shop-Rite Supermarkets, 455 N.J. Super. 118 (App. Div. 2018), Sabatino, Ostrer, Rose - Is Certificate of Death admissible to prove medical causation?

1. Decedent, Mary Quail, was injured at Shop-Rite supermarket when her motorized shopping cart struck a counter and a cash register fell on her right leg.

2. Mary said she was shaken but not hurt.

3. Four days later, she went to the hospital with a swollen leg due to a hematoma.

4. She died the next day.

5. The Deputy County Medical Examiner inspected body and issued a Certificate of Death.

    a. Manner of death was an accident.

    b. Cause of death was complications of blunt trauma of right leg.

6. Certificate of Death bears signed signature of Registrar of State of New Jersey, Office of Vital Statistics.

7. Report of Medical Examiner.

    a. Right leg reveals extensive swelling due to hematoma.

    b. Based upon medical history and external examination, it is my opinion that the deceased died as a consequence of complications of blunt trauma with contributory conditions atrial fibulation, diabetes, coronary artery disease, congestive heart failure.

8. Decedent's husband filed a wrongful death and survivorship action against Shop Rite.

9. Defendant filed a motion for summary judgment.

    a. Certificate of Death is inadmissible hearsay and net opinion.

    b. Plaintiff did not retain an expert witness to establish medical causation.

10. Trial court granted the motion to dismiss.

    a. Plaintiff produced sufficient evidence of negligence in failing to ensure that store aisles were safe for motorized shopping carts.

    b. Certificate of Death was inadmissible.

    c. Plaintiff was not able to prove medical causation without medical testimony.

11. State Medical Examiners Act, N.J.S.A. 52:17B-92.

    a. The records of the medical examiner shall be considered public records.

    b. Such records shall be received as competent evidence in any court.

    c. Shall not include statements made by witnesses.

12. Appellate Division affirmed.

    a. Certificate of Death is an admissible hearsay record as a "vital statistic", Evidence Rule 803 (c)(9).

    b. Complex opinions contained within such documents are not admissible if disputed.

        (1) Subjective opinions of non-testifying medical examiner should not be admitted

        (2) Without opportunity to cross-examine.

c. Certificate of Death is a net opinion because it does not address the "whys and wherefores" of the cause of death.

(1) How the medical examiner concluded that the cause of death was accidental.

(2) How the mechanism of injury to her leg produced her death.

(3) Net opinion unless the author testifies to elaborate on the conclusions.

13. Plaintiff needed an expert opinion to prove proximate cause connecting the impact to her leg to her medical complications at the hospital.

a. Highly technical assessment of complex medical issues.

b. Beyond the ken of the average juror.

c. Lay inference is not enough to get or complex issue of medical causation before a jury.

E. Admission of Reports of Non-Testifying Experts.

1. James v. Ruiz, 440 N.J. Super. 45 (App. Div. 2015) hearsay opinion of radiologist as to disc bulge.

2. Brun v. Cardoso, 390 N.J. Super. 409 (App. Div. 2006), hearsay opinión of radiologist of MRI of the spine.

3. Hayes v. Delamotte, 231 N.J. 373 (2018), hearsay opinion of doctor concerning spinal problems.

XI. RES IPSA LOQUITUR: Elevator Doors.

A. Duty of Condominium Association.

1. Protect residents from dangerous conditions within common elements.

2. Non-Delegable duty to ensure that elevator doors are maintained in good working order.

B. Condominium Act, N.J.S.A. 46:8B-1.

1. Condominium association responsible to maintain and repair common elements.

2. Common elements include an elevator shared by occupants or general public (not part of dwelling unit).

C. Res Ipsa Loquitur (Burden of Proof).

1. Factfinder may draw an inference of negligence when:

a. The occurrence itself ordinarily bespeaks negligence.

b. The instrumentality was within the defendant's exclusive control.

c. There is no indication that the injury was the result of the plaintiff's own voluntary act or negligence.

2. Common sense notion that party who maintains exclusive control over the instrumentality is in a superior position to explain what went wrong.

3. If due care had been exercised, the injury would not have occurred.

4. Burden of proving negligence of property owner rests with plaintiff (burden of persuasion).

5. Res Ipsa permits jury to draw an inference of negligence and shift burden of proof to defendant (burden of production).

   a. Not due to defendant's negligence.

   b. Due to negligence of third party.

   c. Due to negligence of plaintiff.

6. Plaintiff has no obligation to exclude other possible causes or to show that defendant had actual or constructive notice.

D. McDaid v. Aztec West Condominium Association, 234 N.J. 130 (2018), Albin – Is resident entitled to an inference of negligence when injured by a malfunctioning elevator door?

1. Plaintiff, Maureen McDaid, who has cerebral palsy, was struck by elevator door that closed prematurely and knocked her to the ground.

2. Elevator doors had two safety features.

   a. A mechanical safety edge that causes a door to retract when contacts an object.

   b. An electric eye that detects the presence of objects in pathway.

3. Plaintiff complained to property manager that elevator door closed too fast.

4. After accident, construction code official for City found that electric eye was in need of repair.

5. Elevator maintenance company found that electric eye relay was not functioning properly.

6. Plaintiff brought negligence action.

    a. Condominium association.

    b. Property management company.

    c. Elevator maintenance company.

7. Plaintiff expert.

    a. Elevator malfunctioned due to defective electric eye.

8. Defendant expert.

    a. Elevator properly maintained.

    b. Plaintiff failed to clear the path of the elevator door in a timely matter.

9. Trial court granted defendant's motion for summary judgment.

    a. Res Ipsa not apply – malfunctioning elevator door is not an occurrence that ordinarily bespeaks negligence.

    b. Mechanical device is subject to failure from time to time without negligence.

    c. Plaintiff failed to exclude other causes for malfunction.

    d. Plaintiff failed to establish that defendant had actual or constructive notion of malfunction.

10. Appellate Division affirmed.

11. Supreme Court reversed.

    a. In a negligent maintenance action, res ipsa applies to malfunctioning elevator doors.

    b. Based on common knowledge, an automatic door "probably does not close on an innocent patron causing injury unless the premises' owner negligently maintained it."

    c. Elevator door accidents will occur from time to time without anyone being at fault.

    d. However, "based on the balance of probabilities," an elevator door that closes onto a passenger in an occurrence bespeaks negligence.

    e. Plaintiff did not have to present expert testimony pinpointing the cause of the malfunction.

    f. Plaintiff was not required to exclude other possible causes.

    g. Owner of premises (entity exercising exclusive control over elevator), is in a superior position to explain what went wrong.

    h. Plaintiff not required to show that defendants had notice of malfunction.

        (1) Condominium association had duty to maintain elevator in good working order.

        (2) Property management company and elevator maintenance company had duty to keep elevator in good working order.

i. At trial, defendant may offer defenses to negligence claim.

(1) Plaintiff not within plane of electric eye due to her neurological condition.

(2) Problem with electric eye was a rare occurrence that was not detectable.

(3) Presumption of negligence rebutted by facts.

XII. SPORTS AND RECREATIONAL ACTIVITIES: Student-Teacher Basketball Game.

A. Duty to Supervise.

1. School officials have duty to supervise the children in their care.

2. Teachers must be present at all times to oversee students on school playgrounds, hallways, classrooms, lunchrooms and auditoriums.

B. Duty of Participants in Recreational Sports.

1. Participants in informal recreational sports have a duty to avoid infliction of injury caused by reckless or intentional conduct (not simple negligence).

2. Heightened standard.

a. Certain level of risk of harm is a normal part of a recreational game.

b. Promote rigorous participation in athletic activities.

c. Avoid a flood of litigation generated by recreational games and sports.

C. C.H. by Cummings v. Rahway Board of Education, 459 N.J. Super. 236 (App. Div. 2018), Yannotti, Gilson, Natali – Is school and teacher liable for injury sustained by student during student – teacher basketball game?

1. Plaintiff was a student playing on a student-teacher fundraising basketball game.

a. Plaintiff was 14 years old in 8th grade.

b. Team of teachers played team of students.

2. Plaintiff injured while jumping for rebound when she was shoved out of the way so that the teacher could get a rebound.

3. Filed suit against teacher, school and school board for negligence and intentional conduct.

    a. Game officiated by a referee.

    b. Additional supervision by 5 teachers who did not participate in the game.

    c. Typical basketball games, although teachers playing "aggressively."

4. Teacher did not try to injure student "intentionally."

5. Teacher did not act "recklessly" while jumping for rebound.

    a. Normal contact when players attempt to make rebounds during a basketball game.

    b. Teacher's conduct not excessively harmful.

XIII. EVIDENCE: Production of Photographs and Statements.

A. Scope of Discovery, N.J.S.A. 4:10-2(a) – General Rule of Open Discovery.

1. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending litigation.

a. Including identity and location of persons having knowledge of any discoverable matter.

b. The existence, description, nature, custody, condition and location of any books, documents, electronically stored information or other tangible things.

2. Not grounds for objection.

a. The information sought will be inadmissible at trial if reasonably calculated to lead to the discovery of admissible evidence.

b. The party has knowledge of the matters as to which discovery is sought.

B. Work-Product Doctrine, N.J.S.A. 4:10-2(c)- Exception to General Rule.

1. A party may obtain discovery of documents and tangible things.

2. Prepared in anticipation of litigation or for trial.

3. By a party's representative (including attorney, consultant, insurer or agent).

4. Only upon a showing that the party seeking discovery.

a. Has a substantial need of the materials in the preparation of the case and

b. Is unable, without undue hardship, to obtain the substantial equivalent of the material by other means.

5. The court shall protect against disclosure.

a. The mental impressions, conclusions, opinions or legal theories.

b. Of attorney or other representative.

c. Concerning the litigation.

C. Paladino v. Auletto Enterprises, 459 N.J. Super. 365 (App. Div. 2019), Rothstadt, Gilson, Natoli – Is catering company required to produce photographs and statements prepared prior to litigation.

1. Plaintiff, Caroline Paladino, was injured while a guest at a wedding reception when she fell down a staircase at a catering facility.

2. She reported the accident to the facility.

3. Defendant prepared an accident report and notified general liability insurance carrier.

4. Claims examiner for insurance company retained an investigator.

a. Purpose was not to determine whether insured owed coverage to defendant.

b. Purpose was to prepare a defense if plaintiff filed a lawsuit.

5. Two weeks after accident, investigator:

a. Inspected facility, took photographs, made diagram.

b. Recorded oral statements of employees.

6. Five weeks later, plaintiff's counsel and a photographer:

    a. Inspected and measured the staircase.

    b. Took photographs.

7. Four weeks later, defendant's insurance carrier provided plaintiff:

    a. Surveillance video.

    b. Incident report.

8. Plaintiff filed motion for production of photographs and statements.

9. Trial court granted motion.

    a. Photographs and statements obtained before litigation, Pfender v. Torres, 336 N.J. Super. 379 (App. Div. 2001).

    b. Insurer may have had interests apart from protecting rights of insured.

10. Appellate Division reversed and remanded.

    a. Discovery requires a case-by-case, fact-specific analysis.

    b. No per se or presumptive rule that materials prepared before litigation are not prepared in anticipation of litigation (and, thus, are discoverable).

    c. Multi-part, fact-specific test.

        (1) Whether materials were prepared in anticipation of litigation by a party or representative.

        (2) If so, party seeking materials must show.

(a) A substantial need for the discovery and

(b) Unable, without undue hardship, to obtain the substantial equivalent of the materials.

(3) If produced, court shall protect against disclosure of mental impressions.

d. Work-product only protects documents or prepared materials, not facts.

e. Work-product does not protect statements that are prepared in the normal cause of business.

f. Work-product does not protect statements after person testifies at trial.

g. Trial court.

(1) Failed to apply a fact-specific analysis.

(2) Simply reasoned that statements given to investigator before commencement of litigation were not protected.

h. Remanded for fact-specific analysis.

(1) Whether photographs or statements were prepared in anticipation of litigation.

(2) Whether plaintiff showed a substantial need for discovery.

(3) Whether plaintiff was unable to obtain substantial equivalent of photographs without undue hardship.

i. Photographs.

(1) Insurance investigation took photographs on 10/26/15.

(2) Plaintiff' counsel took photographs on 12/3/15.

(3) Video recording.

(4) Was there any change to staircase that plaintiff was not able to capture.

j. Witness statements.

(1) Witnesses should be deposed.

(2) If witness can recall the facts in the statements that they gave to the insurer's investigator, then plaintiff is able to get the "substantial equivalent" of the recorded statements.

(3) If witness cannot recall the circumstances of the accident, then plaintiff cannot obtain the "substantial equivalent" of the statements.

XIV. TORT CLAIMS ACT: Absolute Immunity.

A. Common law doctrine of sovereign immunity.

B. Abrogation of common law, Willis v. Department of Conservation & Economic Development, 55 N.J. 534 (1970), persons injured by wrongful conduct of the State are entitled to recovery where the state generated the risk of injury by caging a ferocious animal without proper safeguards.

C. Tort Claims Act, N.J.S.A. 59:1-1 (1972).

1. Legislative declaration.

a. Strict application of sovereign immunity yields inherently unfair and inequitable results.

b. Government has unlimited power to act for the public good.

c. Public policy that public entities shall be liable only for negligence within limitations of the Act.

2. Immunities.

a. Public entity is not liable for injury except as provided by this Act, N.J.S.A. 59:2-1.

b. Public entity is not liable for an injury resulting from the exercise of judgment or discretion, N.J.S.A.59:2-3.

c. Public entity is not liable for failure to make an inspection or by reason of making a negligent inspection of property, N.J.S.A. 59:2-6.

d. Public entity is not liable for failure to provide supervision of public recreational facilities, N.J.S.A. 59:2-7.

e. Public entity is not liable for failure to provide ordinary traffic signals, signs, markings or other similar devices, N.J.S.A. 59:4-5.

f. Public entity is not liable for plan or design of public property if approved by the governing body in advance of construction of improvement, N.J.S.A. 59:4-6.

g. Public entity is not liable for effect of weather conditions on the use of the streets and highways, N.J.S.A. 59:4-7.

h. Public entity is not liable for condition of any unimproved public property including natural conditions of any lake, stream, bay, river or beach, N.J.S.A. 59:4-8.

3. Liability.

a. Public entity is liable for injury caused by negligent act or omission of a public employee within the scope of employment, N.J.S.A.59: 2-2.

b. Public entity is liable for dangerous condition of public property, N.J.S.A. 59:4-2.

(1) A public entity is liable for injury caused by condition of public property.

(2) If property was in a dangerous condition.

(3) If injury was proximately caused by dangerous condition.

(4) If dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred.

(5) If public entity had notice:

(a) The condition was created by the negligent act or omission by employee of the public entity within the scope of employment OR

(b) The public entity had actual or constructive notice of the condition in sufficient time prior to the injury to have taken measures to protect against the condition.

(6) If action the entity took to protect against the condition or the failure to act was palpably unreasonable.

c. Public entity liable for failure to provide emergency signals, signs, markings or other devices necessary to warn of dangerous conditions which endanger the safe movement of traffic N.J.S.A. 59:4-4.

4. Claims against public entities, N.J.S.A. 59:8-8.

a. Notice of claim within 90 days from accrual of cause of action.

b. Suit within two years from accrual of claim.

D. Absolute Immunity, N.J.S.A. 59:3-5, a public employee is not liable for an injury caused.

1. By his adoption of or failure to adopt any law or

2. By his failure to enforce any law.

E. Qualified Immunity, N.J.S.A. 59:3-3, a public employee is not liable.

1. If he acts in good faith in the execution or enforcement of any law.

F. Immunity.

1. Absolute Immunity – Failure to enforce a law (means "non-action").

2. Qualified Immunity – Good faith enforcement of a law (means "action").

G. Lee v. Brown, 232 N.J. 114 (2018), Fernandez-Vena, Is City and electrical inspector entitled to absolute immunity?

1. Plaintiffs (decedents and individuals) were injured while trying to escape a fire in a multi-family home.

2. Suit against City and electrical inspector for failing to enforce code violations against a homeowner.

3. Fire Department inspected smoke from a boiler at Brown's home and discovered improper wiring in electrical panels.

4. Electrical inspector found that wiring did not comply with building code.

a. Notice of Violation.

b. Notice of Penalty.

5. Inspector returned to home.

a. Owner said not repaired wiring.

b. Told owner to repair within two weeks.

6. Procedure.

    a. If code violation constitutes an imminent hazard.

    b. Notify supervisor.

    c. Supervisor determines whether to shut off power.

    d. Did not contact supervisor due to prior conflict.

    e. Instead contacted an employee in the Community Improvement Department.

        (1) Showed her photographs.

        (2) She said that she would speak with another city official.

7. City and inspector moved for summary judgment based upon absolute immunity.

8. Trial court denied motion.

    a. Entitled to qualified immunity.

    b. Genuine issue of fact as to whether inspector acted in bad faith.

9. Appellate Division affirmed.

    a. Qualified immunity – inspector was enforcing the law.

    b. Issue of fact as to good faith.

        (1) Inspector aware of imminent harm.

        (2) Acted in bad faith by not contacting supervisor.

10. Supreme Court reversed.

    a. Critical causation issued.

        (1) Inspector's failure to contact supervisor to secure a shut off of power.

        (2) Not affirmative action to enforce a law.

    b. Inspector's failure to act was cause of fire, not any action taken by him.

    c. Failure to enforce the law is absolute immunity.

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About the Author/Speaker…

Gerald H. Baker, Certified as a Civil Trial Attorney by the Supreme Court of New Jersey, is Counsel to Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C. with offices in Springfield, Jersey City, Hackensack, Newark, Freehold, Elizabeth and Mt. Laurel, New Jersey; and New York City. He represents plaintiffs in personal injury and wrongful death cases including automobile, premises, aviation, railroad, construction, products liability and medical malpractice, and was formerly the Managing Partner of Baker, Pedersen & Robbins in Hoboken, New Jersey.

Mr. Baker is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York; the United States Court of Appeals for the Second, Third and Fourth Circuits; and the United States Supreme Court. He is Past Chair of the New Jersey State Bar Association's Automobile Reparations Committee, a past Chair of the Legislative Committee and a former member of the NJSBA Board of Trustees. Mr. Baker has been Treasurer of the Hudson County Bar Foundation for many years and is a past President and member of the Board of Trustees of the Hudson County Bar Association. He has served on the Board of Governors of the New Jersey Association for Justice (NJAJ, formerly ATLA-NJ) and is a member of the Million Dollar Advocates Forum.

Mr. Baker is a frequent lecturer on automobile insurance, premises liability and practice for ICLE, NJAJ, the New Jersey State Bar Foundation and the *New Jersey Law Journal*, as well as bar associations and other professional organizations. His articles on automobile insurance, premises liability and trial practice have appeared in many newspapers and professional periodicals. He is the recipient of numerous awards, including the 2000 ICLE Alfred C. Clapp Award, the 1994 ATLA-NJ Gold Medal, the 1998 NJSBA Distinguished Legislative Service Award, the Trial Lawyers of New Jersey Trial Lawyer Award and the NJAJ O'Connor Trial Award.

Mr. Baker received his B.A. from Cornell University and his J.D. from Yale Law School. He was Law Clerk to the Honorable Robert Matthews, Superior Court of New Jersey, Chancery Division, Hudson County.

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