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Personal Injury and Medical Malpractice

Personal Injury Defendants Find a Friendly Court

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Over the course of the past year, legal issues impacting the world of torts and personal injury law kept the New Jersey Supreme Court quite busy. The court's decisions in these areas have focused on the procedural, such as net opinions, adverse inference charges, civil reservations, liability issues on retrial, application of the Charitable Immunity Act and discovery under the Patient Safety Act, as well as the substantive, including bad faith in the context of uninsured motorist claims, condo association liability and an employee's comparative negligence.

It is hard to decipher a theme from among 11 opinions authored by five different justices. In some cases (see, eg., *Davis v. Brickman Landscaping* or *Maida v. Kuskin*), the court reminded practitioners and judges alike that process matters and rules should be followed. However, in other cases (*C.A., ex rel. Applegrad v. Bentolila*), strict application of the rules was relaxed. In one case (*Qian v. Toll Brothers*), the court expanded a cause of action to establish liability against a condominium association for personal injuries. In another context (*Badiali v. NJM* and *Wadeer v. NJM*), the court declined to expand bad-faith liability in uninsured motorist claims. Finally, while plaintiffs may celebrate the court's opinions in *Kuchera v. Jersey Shore Family Health Center* and *Qian*, for the most part, personal injury defendants found a friendly court over the past term, having prevailed in a clear majority of the court's opinions.

Net Opinions and Expert Witnesses

Expert testimony is meant to assist juries in understanding complicated issues that arise at trial. An expert's opinion often determines whether a plaintiff may sustain a claim. If an expert's opinion is not based on sufficient facts or empirical data in the record, or is the product of an expert's speculation or personal theory, a court can exclude the expert's testimony as a "net opinion." In cases where expert testimony necessary to establish liability or proximate cause is excluded, the plaintiff's case may be dismissed.

In two cases this term, *Townsend v. Pierre*, 221 N.J. 36 (2015), and *Davis v. Brickman Landscaping*, 219 N.J. 395 (2014), the court reviewed the basis for an expert's opinion and considered whether the opinion was reliable and admissible, or unsupported by the facts or objective data and inadmissible. The court in *Davis* also weighed whether expert testimony is necessary at all in the face of industry regulations.

In *Townsend*, the plaintiffs' decedent was riding his motorcycle eastbound, approaching an intersection where he had the right of way. The defendant motorist was driving north, approaching the same intersection, intending to stop first at the stop sign, and then turn left at the intersection. After stopping and then turning, the defendant collided with the motorcyclist, who died as a result of the crash.

In addition to suing the motorist, the plaintiffs sued the property manager and owner of a building located at the corner of the intersection, alleging that they negligently maintained overgrown shrubbery on the property. The plaintiffs also sued the township and county, alleging that they did not appropriately place the northbound stop sign. These conditions, the plaintiffs alleged, blocked the motorist's view of eastbound traffic, causing the motorist to turn into the intersection without seeing the motorcyclist.

The motorist testified that she stopped at the stop sign, edged forward a few times until her view of eastbound traffic was unimpeded, and then turned left without ever seeing the approaching motorcyclist before hitting him. Her passenger corroborated this testimony.

The plaintiffs retained an engineering expert who concluded that the township and county placed the stop sign in an inappropriate location, and that the property owner and manager did not maintain the shrubbery. The expert concluded that these conditions were a proximate cause of the accident and that the motorist must have been mistaken when she testified that she proceeded only once she had an unobstructed view of traffic.

The defendants moved to strike the expert's report, arguing that the conclusions were not based on the facts in evidence. The trial court granted the defendants' motion, concluding that the expert's report was a net opinion, and then granted the defendants' motions for summary judgment, dismissing the complaint. The Appellate Division reversed the order granting summary judgment in favor of the property owner and manager, holding that where there is a reasonable basis "to reject a credibility-based recollection of a fact witness," an expert can, in response to a hypothetical question, comment about "alternative factual possibilities" that are inconsistent with the testimony. *Townsend v. Pierre*, 429 N.J. Super. 522, 531 (App. Div. 2013).

The Supreme Court disagreed, reinstating the trial court's order granting summary judgment. The court pointed out that the plaintiffs must prove both a breach of duty to maintain the shrubbery on the property, and that overgrown shrubbery was a proximate cause of the accident. Whether the motorist's view was obstructed by the shrubbery when she turned left is a pivotal issue of fact. The motorist and her passenger testified that it was not. To rebut this

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testimony, the plaintiffs relied on the expert's opinion that it must have been.

The court wrote that the net opinion rule requires experts "to identify the factual bases for their conclusions." An expert's opinion must be excluded when it is "based merely on unfounded speculation and unquantified possibilities." 221 N.J. at 55. The court concluded that the expert's analysis contradicted the defendant's testimony, which her passenger had corroborated. As such, the opinion was based on speculation, and amounted to an inadmissible net opinion. Moreover, the court disagreed that the expert's conclusion could be presented as a "hypothetical"—where the expert would assume that the motorist was mistaken—because that conclusion would be premised on a rejection of uncontroverted testimony.

In *Davis*, the court addressed expert testimony concerning standards of care that went beyond industry regulations. There, a lit cigarette sparked a hotel fire that spread to a storage closet, then up the stairs to a hotel suite where the plaintiff/mother and her children were staying. The fire trapped the occupants, killing the children and injuring their mother.

The plaintiffs sued numerous parties, including inspectors of the hotel sprinkler system. The plaintiffs alleged that the inspectors had violated industry standards by failing to notify the hotel owner that a sprinkler was needed in the storage closet beneath the stairwell where the hotel suite was located. National Fire Protection Association (NFPA) regulations established standards for inspecting and maintaining sprinkler systems, and did not explicitly require a sprinkler in the storage closet. Despite the regulations, the plaintiffs' expert contended that industry standards required the inspectors to notify the hotel owner of the absence of a sprinkler in the closet.

The defendants moved for summary judgment dismissing the complaint, arguing that the regulations did not require a sprinkler in the closet, and that the plaintiffs' expert's report constituted a net opinion because the expert established a standard of care greater than that set forth by NFPA's regulations. The trial court granted the motion, finding that the defendants' compliance with NFPA regulations was sufficient to show that they had not acted negligently. The Appellate Division reversed, holding that compliance with an industry regulation alone is not dispositive on the issue of negligence, and the standard should be one of reasonable care, which is a fact question for the jury.

The Supreme Court reversed. The court found first that, due to the complexity of the fire code and regulatory scheme governing fire and sprinkler inspectors, expert testimony was necessary to establish the standard of care. Second, the court held that "[i]n support of his conclusion that reasonable care required defendants' inspectors to identify and report the need for an additional sprinkler, [the plaintiffs' expert] relied upon nothing more than his personal opinion about what the inspectors should have done." Id. at 413. He "made 'no reference … to any written document, or even unwritten custom or practice.'" Id. (quoting *Kaplan v. Skoloff & Wolfe*, 339 N.J. Super. 97, 103 (App. Div. 2001)). Instead, the expert "provided only his personal view, which 'is equivalent to a net opinion.'" Id. at 413-14.

Therefore, since the expert's testimony was deemed an inadmissible net opinion, the plaintiffs could not establish the required elements of their negligence claim, and their case against the sprinkler inspectors was dismissed.

The *Davis* case is important not only as another in a long line of decisions articulating and applying the net opinion rule, but as a reminder that adherence with published industry regulations alone will not definitively establish reasonable care. However, if an expert is going to opine that the standard of care exceeds the requirements of industry wide regulations, the expert must offer objective support of that opinion, not merely a personal opinion.

Adverse Inference When Party Fails to Call Medical Expert

When litigating a personal injury claim, it is common for the defense to arrange for an examination of the plaintiff. The physician retained by the defense will often find that the plaintiff's injuries are not as severe as alleged, but occasionally, the defense physician's opinion buttresses the plaintiff's claims. When that happens, not surprisingly, at the time of trial, the defense physician is nowhere to be found, disappointing a plaintiff's attorney who eagerly anticipated cross examining the defense physician. Whether the trial court can give the jury an adverse inference charge in such circumstances was the question in *Washington v. Perez*, 219 N.J. 338 (2014).

In *Washington*, the plaintiff claimed that she was injured in a motor vehicle accident as the result of the defendant's negligent operation of a bus. During discovery, the defense retained two medical experts who examined the plaintiff and concluded that, though the plaintiff had sustained prior injuries, she was also injured as a result of the subject accident. This latter opinion echoed the conclusions of the plaintiff's treating physicians.

At trial, the defense did not call either of its medical experts to testify. Upon the plaintiff's request, the trial court instructed the jury that if they found that the medical experts were witnesses who would be expected to testify, the jury could infer that their anticipated testimony would have been unfavorable to the defense. The jury returned a verdict for the plaintiff. The defendants appealed, claiming that the trial court improperly gave an adverse inference charge as to the absent medical experts. The Appellate Division agreed, reversed the verdict in the plaintiff's favor, and remanded for a new trial.

The Supreme Court affirmed, first pointing out that "the adverse inference charge should not be

a reflexive response whenever a party fails to call an expected witness." Id. at 355. The court explained that the situation here is different than in other cases where the absent witnesses were fact witnesses. See, e.g., *State v. Hill*, 199 N.J. 545 (2009), and *State v. Clawans*, 38 N.J. 162 (1962). Expert witnesses, the court noted, are unique in that there are many reasons why a party may choose not to call a previously designated expert to testify at trial, including cost, availability, cumulative testimony or conservation of resources. As such, an adverse inference charge should rarely be invoked to address the absence of an expert.

In order to determine whether a case presents the "exceptional situation" where an adverse inference charge is warranted, the court followed the four-part standard adopted in *Hill*, 199 N.J. at 561-62. First, the uncalled witness must be peculiarly within one party's control. Second, the witness must be available, both practically and physically, to the party against whom the adverse inference charge is sought.Third, the court must consider whether the testimony will elicit relevant and critical facts at issue. Fourth, the court must decide whether the testimony appears to be superior to other testimony on the fact at issue.

After reviewing and applying these factors, the court found that the defense experts were equally available to both parties, and that their testimony was "merely corroborative or cumulative to plaintiff's proofs." Id. at 367. The adverse inference charge was granted in error and ran the risk of unfairly impacting the jury. The court found that the adverse inference charge "strongly suggested to the jury that defendants did not call their witnesses because they feared their testimony," and remanding for a new trial was the only way to rectify the error. Id. at 367-68.

Finally, the court laid out the procedural requirements for seeking an adverse inference charge. The party requesting the charge must notify the opposing party and judge, outside the presence of a jury, state the name of the witness not called, and set forth the basis for the belief that the witness has superior knowledge of relevant facts. Id. at 356, citing *Hill*, 199 N.J. at 560-61. Based on the standard set forth by the court, it is difficult to envision a circumstance when a party in the context of a personal injury case would ever be subject to an adverse inference charge for failing to call a medical expert, a reality the court seemed to acknowledge. Id. at 364 (an adverse inference charge "will rarely be warranted when the missing witness is not a fact witness, but an expert.").

Civil Reservation in Municipal Court:

The "civil reservation" is an important part of municipal court practice. It allows the judge, at the defendant's request, to order that a guilty plea not be evidential in any related civil proceeding. Rule 7:6-2(a)(1). If the prosecutor or the victim demonstrates good cause, or the charge to which a defendant pleads guilty does not arise out of the same occurrence as the civil proceeding, a civil reservation may not be entered. The civil reservation is widely used and promotes efficiency in municipal court proceedings, where a defendant need not be concerned that a guilty plea to a minor offence will be used against him in a later civil suit.

In *Maida v. Kuskin*, 221 N.J. 112 (2015), the defendant-driver struck a pedestrian while driving a motor vehicle. The driver pleaded guilty in municipal court to failing to report an accident. The transcript of the municipal court session contained no mention of a civil reservation. Thereafter, the driver's attorney wrote a letter to the municipal court judge "to confirm that a civil reservation was placed on the plea." Id. at 117. A copy of this letter was not sent to the plaintiffs' attorney, who attended the municipal court proceeding. The municipal court entered an order directing that the driver's guilty plea "shall not be used or be evidential in any civil proceeding." Id.

As a result of the underlying accident, the pedestrian and his wife sued the driver. The plaintiffs sought to introduce the defendant's guilty plea as evidence in the civil case. The trial court granted the plaintiffs' motion to strike the civil reservation and permitted use of the guilty plea at trial, explaining that under Rule 7:6-2(a)(1), a civil reservation must be requested in open court at the time the guilty plea is entered. Since this procedure was not followed, the trial court determined that the civil reservation should not have been granted. The Appellate Division reversed, holding that a civil reservation should be granted as a matter of course any time after entry of the plea, unless there is an objection.

The Supreme Court reversed yet again. The court reviewed both the Court Rules governing municipal court practice, and the various short-cuts that many courts, prosecutors and defense attorneys had utilized. Reminding practitioners to follow the rules, the court explained that Rule 7:6-2(a)(1) requires that the request for a civil reservation be made in open court and contemporaneously with the municipal court's acceptance of the guilty plea. Additionally, a defendant must provide the factual basis for the offense to which he is pleading guilty, and also state that he is guilty and wishes to plead guilty.

The facts in *Maida* showed that the defendant's request for the civil reservation was not made contemporaneously with the guilty plea or in open court and was thus invalid. This, however, was a hollow victory for the plaintiff, as the court determined that the guilty plea was inadmissible in the civil proceeding, because whether a person reports a motor vehicle accident or files an untimely report has no relevance to whether he operated a motor vehicle negligently. The guilty plea, therefore, was irrelevant and ruled inadmissible.

Scope of Remand for New Trial

A remand for a new trial may be necessary to fairly allow parties their day in court. The scope of

that remand, however, is not always clear, especially in cases where only one portion of a trial contained prejudicial error. In *Henebema v. South Jersey Transportation Authority and N.J. State Police*, 219 N.J. 481 (2014), the Supreme Court was tasked with determining the scope of remand where the trial error involved a liability finding as to some defendants, but not others.

The underlying action involved a series of auto accidents that occurred on the Atlantic City Expressway during a heavy snowstorm. The plaintiff lost her leg as a result of a multivehicle pile-up. In addition to the drivers involved in the accident, the plaintiff sued the South Jersey Transportation Authority and the New Jersey State Police, both public entities, alleging that they did not comply with their standard operating procedures, that emergency personnel were not promptly dispatched to the scene, and that state resources were improperly allocated during this emergent situation. As a result, the plaintiffs alleged that those defendants allowed a dangerous condition to persist, as drivers and cars were stranded on the Atlantic City Expressway while awaiting assistance.

At trial, the judge instructed the jury on ordinary negligence principles as to all defendants. The court's charge did not require the jury to determine whether the actions of the public entities' employees were either ministerial in nature or discretionary. If their conduct was ministerial, then a negligence standard would be appropriate. If it was an exercise of discretion, then a jury would have to find that the conduct was palpably unreasonable in order to assign liability. See N.J.S.A. 59: 3-2.

The jury found that the Transportation Authority and State Police defendants were negligent and awarded the plaintiff over $8 million in damages. The jury found no negligence on the part of the plaintiff or the other drivers involved in the collisions.

The public entity defendants appealed. The Appellate Division reversed, finding that it was for the jury, not the court, to determine whether the acts in question were "ministerial" or "discretionary." The Appellate Division held that by taking the question away from the jury and instructing only as to ordinary negligence, the trial court committed reversible error. The Appellate Division remanded on the issue of liability alone. However, in remanding for a new trial on liability, the Appellate Division determined that the jury would reconsider only the liability of the public entity defendants without also reconsidering the liability of the other drivers or the comparative negligence of the plaintiff.

The public entity defendants then petitioned for certification, arguing that on retrial the jury should reconsider liability of all parties.

In its decision, the Supreme Court observed that, generally, issues in negligence cases should be retried together unless they are distinct and separable. "If issues are inextricably intertwined, then when one is remanded, the others, too must be retried." Id. at 491. In the present matter, the court noted that the jury, after being properly instructed, returned a verdict of no cause of action against the other drivers, and found no comparative negligence on behalf of the plaintiff. The issue of whether the other drivers and the plaintiff used reasonable care, the court continued, "is unrelated to the issue of whether the public-entity defendants complied with the appropriate standard of care in making decisions about how to respond to the evolving situation on the Expressway." Id. at 493. The issue involving the public entity defendants, therefore, was not inextricably intertwined with the negligence of the other parties. In that case, the court held, "the purpose of the retrial … is to have the jury determine … whether the public entities' employees were performing either ministerial or discretionary actions…. Once the appropriate standard is identified, the jury can determine, based upon the applicable standard, whether the public-entity defendants are liable." Id. at 495.

Therefore,when determining issues to be retried on a remand in a multi-defendant case, it is important to consider beyond whether they simply involve liability or damages, but to consider the standards that apply to the various defendants, and whether those standards were misapplied to all, or just some, of the defendants.

The Charitable Immunity Act and the "Modern Hospital"

In *Kuchera v. Jersey Shore Family Health Center*, 221 N.J. 239 (2015), the New Jersey Supreme Court addressed ambiguities that have arisen with regard to the charitable immunity extended to hospitals. Specifically, the court considered whether a hospital that engages in educational programming and charitable medical services is a charitable organization entitled to absolute immunity, or a nonprofit institution organized "exclusively for hospital purposes" and subject to limited liability with a damages cap.

While the plaintiff was receiving a free eye screening at a clinic organized by the Commission for the Blind and Visually Impaired at the Jersey Shore Family Health Center, she slipped and fell on what she believed was an oily substance on the floor. The Family Health Center, located next to and associated with Jersey Shore University Medical Center, was a nonprofit charitable clinic within the Meridian Health hospitals system, a nonprofit organization comprised of multiple hospitals and satellite facilities. The plaintiff sued the Family Health Center, Jersey Shore and Meridian for her injuries resulting from the fall.

The defendants moved for summary judgment dismissing the complaint, arguing that N.J.S.A. 2A:53-7, which grants immunity from negligence actions to nonprofit entities organized exclusively for charitable, educational or religious purposes, applied, instead of N.J.S.A. 2A:53A-8, which exposes nonprofit entities organized exclusively for hospital purposes to liability up $250,000. The trial court agreed, finding that the Medical Center has hybrid

purposes that include educational and charitable services, as well as the operation of a hospital. The educational and charitable services provided by the defendants led the trial court to conclude that they should be immune from liability under N.J.S.A. 2A:53A-7. The Appellate Division affirmed, and even extended the trial court's ruling by interpreting the term "educational purposes" broadly to account for medical training performed by the hospital.

The Supreme Court reversed, finding that the key question in determining which immunity to apply depended on the purpose of the institution, not its use on any given day. The court explained that "[t]he modern hospital is now a place where members of the community not only seek emergency services but also preventative services, therapy, educational programs, and counseling." Id. at 251. With hospitals now serving as "complex full-service institutions," it is not enough to simply say that because a hospital provides charitable services, or education, it should be automatically entitled to absolute immunity. Instead, the court recognized an expanded notion of the many health-related pursuits of the modern hospital.

Accordingly, the court held that the defendants fell into the category of a nonprofit institution organized exclusively for hospital purposes and thereby entitled to a limited immunity with a damages cap of $250,000. By taking a broader look at the relationship between a single activity, i.e., the provision of health-care services to those who cannot afford health care, and the "central organizing principles of the hospital" as a whole, the court was able to clarify these "hybrid" situations that arise often in the context of hospitals and their accompanying charitable and educational services. Id. at 255.

Privilege Under N.J.'s Patient Safety Act

The Legislature enacted the Patient Safety Act in 2004 to help reduce medical errors in health-care facilities. N.J.S.A. 26:2H-12.23 to -12.25. The act encourages health-care workers to conduct a self-critical analysis of the care they provide, and to openly review medical errors. As a result, the act contains a statutory privilege shielding specific communications from discovery in subsequent litigation. N.J.S.A. 26:2H-12.25(b), (c), (e) and (g). The issue in *C.A. ex rel.Applegrad v. Bentolila*, 219 N.J. 449 (2014), involved whether the documents requested by the plaintiff were protected from disclosure by the Patient Safety Act.

The plaintiffs in *C.A.* claimed that the defendants negligently deprived their daughter of oxygen at the time of her delivery, causing her to suffer severe brain damage. During discovery, the plaintiffs sought production of the hospital's investigative and peer review records relating to their daughter's birth. The defendants opposed the request. The dispute's centerpiece involved a memorandum entitled Director of Patient Safety Post-Incident Analysis.

After the trial court and Appellate Division initially addressed the discoverability of this memorandum, the matter was remanded back to the trial court. At that point, following a seven-day evidentiary hearing, the trial court denied the plaintiffs' motion to compel production of the memorandum, finding that the hospital had substantially complied with the Patient Safety Act, thus rendering the document privileged. The Appellate Division reversed in part, finding that this memorandum was not privileged because the hospital did not meet all of the requirements set forth in the act. Specifically, the Appellate Division focused on the fact that no physicians were present for the roundtable discussion of the incident, and the findings recorded in the memorandum were never presented to the Patient Safety Committee.

Likely because this represented a matter of first impression under the Patient Safety Act, the Supreme Court granted the defendants' motion for leave to appeal to consider whether the memorandum should be disclosed. The court first examined the regulatory history of the Patient Safety Act. In 2007, when the alleged medical malpractice occurred, the comprehensive regulatory scheme governing patient safety and the disclosure of documentation had not yet been enacted. In fact, only the basic mandate of the Patient Safety Act was in place. It was not until 2008 that the regulatory process was complete. In 2008, N.J.A.C. 8:43-10.9 established a scheme for establishing the confidentiality of documents created during a self-critical analysis. Specifically, only documents, material and information developed exclusively during a self-critical analysis conducted as part of one of three processes are privileged: (1) the patient or resident safety committee; (2) the patient or resident safety plan; or (3) reporting to regulators.

The memorandum in question, however, was prepared before the development of this regulatory scheme, so the court considered its discoverability against the backdrop of the Patient Safety Act alone. N.J.S.A. 26:2H-12.25(g) shields from discovery documents, material or information developed "as part of a process of self-critical analysis conducted pursuant to" N.J.S.A. 26:2H-12.25(b), which requires that a hospital develop a patient safety plan that includes at least the following: (1) a patient safety committee; (2) a process for teams to conduct analysis of patient safety practices to reduce the risk of adverse events; (3) a process for teams to analyze "near misses"; and (4) a process of ongoing patient safety training. Id. at 469. The court found, by a 4–3 vote, that the hospital generally complied with these requirements, and that the memorandum was prepared as part of the process of self-critical analysis as set forth by the act that was in effect in 2007. Id. at 469-72. Therefore, the court ruled that the document was shielded from discovery.

Bad Faith Claims in Uninsured Motorist Cases

Insurance companies have a duty of good faith and fair dealing in processing uninsured (UM) motorist claims, but what does that duty entail? The Supreme Court was tasked with

determining whether New Jersey Manufacturers Insurance Company (NJM) acted in bad faith in relation to two separate claims brought against the company, *Badiali v. New Jersey Manufacturers Ins. Co.*, 220 N.J. 544 (2015), and *Wadeer v. New Jersey Manufacturers Ins. Co.*, 220 N.J. 591 (2015). In both cases, the court determined that the carrier did not act in bad faith, a holding that serves to highlight the imbalance of power between the insured and the insurer in cases where it may be more beneficial for the insurer to simply wait until trial and roll the dice on the outcome.

In *Badiali*, the plaintiff was injured when he was rear-ended by an uninsured motorist. The plaintiff was insured under both his personal policy with NJM and his employer's policy with Harleysville. He filed a claim for UM benefits with both carriers. The claim proceeded to arbitration, and the plaintiff was awarded $29,148.62, with both carriers responsible to pay one-half of this award. Harleysville paid its half, but NJM rejected the award and demanded a trial de novo under policy language that allowed either party to reject an arbitration award that exceeded $15,000. NJM argued that because the entire award, irrespective of its share, exceeded $15,000, it was entitled to a trial de novo.

The plaintiff sued to enforce the award. The trial court, in a summary action pursuant to N.J.S.A. 2A:24-7, confirmed the arbitration award and found NJM liable for $14,574.31 (half of the total award), notwithstanding the fact that the total arbitration award exceeded the $15,000 threshold as ground to reject the award. The Appellate Division affirmed. Thereafter, NJM paid its share in full.

The plaintiff then filed a separate bad faith/consumer fraud action against NJM, seeking counsel fees and consequential damages caused by NJM's delay in resolving the underlying matter. NJM moved for summary judgment dismissing the complaint, arguing that it had "fairly debatable" reasons for rejecting the award. Specifically, NJM claimed that it had relied on a recent unpublished Appellate Division case that allowed NJM to reject an arbitration award under nearly identical circumstances. Because that unpublished opinion vindicated this course of conduct in another case, NJM argued, it would be inconsistent to find that it acted in bad faith in the pending matter. The trial court agreed and granted NJM's motion, which the Appellate Division affirmed. 429 N.J. Super. 121.

The plaintiff petitioned for certification and argued that NJM failed to establish that, in fact, it had relied on the unpublished Appellate Division decision when pursuing its course of action in the underlying matter. Further, the plaintiff argued that NJM was bound by a reported case, *D'Antonio v. State Farm*, 267 N.J. Super. 247 (App. Div. 1993), which the Appellate Division cited in the first matter when it ruled that NJM owed half of the arbitration award even though that share did not exceed $15,000, after which NJM capitulated and paid its share.

The Supreme Court affirmed the Appellate Division's opinion. The court explained that demonstrating negligence is not enough to establish a bad-faith claim against an insurer, and "mere failure to settle a debatable claim does not constitute bad faith." Id. at 554. The court found that having pursued a similar course of action in a previous case with the approval of the Appellate Division, "NJM had adequate reason to believe that its conduct was consistent with judicially accepted contract interpretation, corporate policies and practices," even if the decision was unpublished. Id. at 560. Further, even without relying on the unpublished decision, the court acknowledged that although the policy language was unclear, "NJM's position was … at the very least, fairly debatable and based on a reasonable and principled reading of the applicable policy language." Id. at 561. The policy did not specifically state that NJM's portion of the arbitration award had to exceed $15,000, and, thus, its position was fairly debatable in that it could reasonably be read to apply to the entire award, regardless of who was required to pay. In so holding, however, the court clarified that going forward, "any reference in a policy of insurance to the statutory $15,000 policy limit as the basis for rejecting an arbitration award applies only to the amount that the insurance company is required to pay, not to the total amount of the award." *Id*. at 563.

The second case, *Wadeer v. NJM*, also involved an uninsured motorist claim. The plaintiff claimed that he was injured when a "phantom vehicle" (or, an unknown and unidentifiable vehicle) forced his car to strike two other vehicles. The plaintiff filed a UM claim under his NJM policy, which had a $100,000 limit. The plaintiff provided evidence of his injuries to NJM, but NJM made no offer to settle the case. The matter proceeded to arbitration, where the panel awarded $125,000, but reduced that award by 30 percent, to $87,500, to account for the percentage of plaintiff's comparative fault. NJM rejected this award and demanded a trial de novo. At that point, plaintiff's counsel notified NJM of his position that NJM was acting in bad faith. The plaintiff then filed suit against NJM, seeking UM benefits but not raising allegations of bad faith.

The matter proceeded to non-binding arbitration under R. 4:21A. The arbitrator found liability was split 50/50 and reduced a gross award of $325,000 against NJM to $162,500. This still did not elicit an offer from NJM, nor did the plaintiff's Offer of Judgment filed pursuant to R. 4:58-2 in the amount of $95,000.

The case proceeded to trial, where a jury found the phantom vehicle 100 percent liable and awarded the plaintiffs $255,175. Post-trial, the plaintiff moved to enter judgment for this entire amount and sought prejudgment interest, attorney fees and costs of suit under the Offer of Judgment rule, which permitted such an award in cases where a plaintiff obtains a money

judgment in an amount that is 120 percent of the offer of judgment. At oral argument on the motion, plaintiff's counsel again raised the issue of NJM's bad faith. The trial court entered its order in the amount of $100,000, representing the full policy limits, but still awarded the plaintiff interest, fees and costs pursuant to the Offer of Judgment rule because the jury's verdict of $255,175 was 20 percent greater than the offer of judgment of $95,000. Finally, the court noted "that NJM's actions did not constitute bad faith because NJM had fairly debatable reasons for denying the benefits of the policy." 220 N.J. at 600. Both parties appealed.

The Appellate Division affirmed the molded verdict of $100,000. However, the Appellate Division ruled that the sanctions permitted by the Offer of Judgment rule would be triggered by the molded verdict, not the jury's verdict. Therefore, the Appellate Division reversed the award of interest, fees and costs of suit.

The plaintiff then filed a separate action alleging that NJM acted in bad faith. The trial court dismissed this action under the entire controversy doctrine and the doctrine of res judicata. On appeal, the plaintiff argued that the "bad-faith action did not ripen until the jury returned its verdict." The Appellate Division disagreed, holding that "NJM's pretrial actions were sufficient to establish the basis for a bad-faith claim" and, thus, should have been brought as part of the earlier action. Id. at 597.

The Supreme Court affirmed, finding that the principle of res judicata barred this claim from being re-litigated. The court found that the plaintiff had a fair opportunity to litigate this claim in the earlier action, and could not now seek a second bite at the apple after the issue was resolved during the prior litigation.

In its decision, however, the court referred two issues to the Civil Practice Committee. First, it referred the question of whether "fairness requires that our court rules be modified to permit an insured to bring a bad-faith cause of action against an insurer after the underlying UM claim is resolved," or at the same time as the underlying uninsured motorist action. Id. at 610. Second, the court considered the application of the Offer of Judgment rule and whether the jury's verdict or the court's molded judgment should serve as the trigger for sanctions. Id. at 611. This second issue is especially relevant in cases where the offer of judgment is close to the policy limits, and any award is going to be molded to within the policy limits, in which case the offer of judgment provides little incentive for carriers to settle because they have little to lose. The recommendations of the Civil Practice Committee on these two issues have yet to be made, and may have a significant impact on uninsured motorist claims going forward.

Liability of Condo Homeowners Associations for Poorly Maintained Sidewalks

In August, the Supreme Court opened a door to liability claims against homeowner's associations for personal injuries sustained on their property. n *Qian v. Toll Brothers*, __ N.J. __ (Aug. 12, 2015), the plaintiff was injured when she slipped and fell on ice that had accumulated on a sidewalk within her "55-and-over" condominium development, the Villas at Cranbury Brook in Plainsboro. The homeowners' association for the development contracted with a management group to maintain the property, and the management group in turn employed a contractor to clear ice and snow from sidewalks. According to the terms of their contract, the contractor would automatically clear any snow or ice of two inches or more, but the association would have to call when the accumulation was less than that. The plaintiff sued the homeowners' association for her injuries, and the question before the court was whether the association and the management company could be held liable.

Both the trial court and the Appellate Division applied the Supreme Court's 2011 ruling in *Luchejko v. Hoboke*n, 207 N.J. 191 (2011), to determine that the defendants were immune from liability. In *Luchejko,* the court, following the rule that homeowners owed no duty to maintain public sidewalks that abut their private residential properties, determined that a homeowners association similarly had no duty to maintain public sidewalks abutting its property and located next to a highway. The trial court and Appellate Division drew parallels from *Luchejko*, even though this case concerned a private sidewalk within the development, and not a public sidewalk abutting the property.

In reversing this decision, the Supreme Court explained that *Luchejko* was not controlling. A private sidewalk within the development is not the same as a public sidewalk located between the development and a public highway. The court emphasized that it is not about who uses the sidewalk, but rather who owns it. Here, the homeowners association clearly owned these sidewalks and was responsible for their maintenance. In fact, the homeowners association's bylaws stated that the association was responsible for the maintenance of all common areas, including the sidewalk in question. Additionally, the association had a statutory obligation under the relevant portion of the Condominium Act, N.J.S.A. 46:8B-14(a), to properly maintain the sidewalks. As further support that the Legislature did not intend to relieve homeowners associations from all liability, the court pointed out that homeowners' associations are required, under the Condominium Act, to maintain liability insurance for personal injuries occurring on the property.

The only remaining question, which was remanded to the trial court for further consideration, involved whether the plaintiff was, in fact, a unit owner. The homeowners association bylaws prohibited unit owners from suing the homeowners association. However, there was evidence to suggest that the plaintiff's son, and not the plaintiff, actually owned the unit in which she lived. While that issue remained open, it seems likely that homeowners associations, to the

extent that their bylaws are silent on this issue, will amend their bylaws to at least preclude unit owners from suing the association for personal injuries. Such a step may limit the impact on homeowners associations, but not eliminate it entirely, as injured parties who are not unit owners, guests, for example, may now bring claims against the homeowners association and its management companies.

An Employee's Comparative Negligence in Workplace Accidents

In *Fernandes v. DAR Development Corp.*, __ N.J. __ (July 28, 2015), the court addressed the issue of the comparative negligence jury charge in the context of an employee who sustained a workplace injury. The plaintiff was injured in a trench collapse while installing sewer pipe at a residential construction site in Warren. As a result of the collapse, the plaintiff was buried up to his chest. His employer subsequently pulled him out, but the plaintiff suffered significant injuries and was unable to work again. The plaintiff sued the general contractor, arguing that it owed a duty to maintain a safe workplace, and its failure to do so caused the trench to collapse and his injuries.

At trial, the general contractor sought a comparative negligence jury charge, arguing that the plaintiff should have known not to enter the trench based on his long history of excavation work and his role in deciding when to use trench protection methods. While all parties agreed that the accident would not have occurred if the trench had been properly outfitted with safety devices, the defense sought to shift blame to the plaintiff in choosing to enter the trench at all. The trial court rejected the request for a comparative negligence jury charge, and the jury subsequently returned a verdict for the plaintiff in the amount of $792,000. The Appellate Division affirmed, citing *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150 (1979), where, in the context of a product liability case, the New Jersey Supreme Court found it proper to refuse to charge the jury with comparative negligence where the worker was injured while using a defective machine in a reasonably foreseeable way and in a setting where he had no choice.

The Supreme Court affirmed, but disapproved of the Appellate Division's extension of *Suter* to all workplace accidents where an employee is engaged in a task on the employer's behalf. Instead, the court reaffirmed the rule in *Kane v. Hartz Mountain Indus.*, 278 N.J. Super. 129 (App. Div. 1994), *aff'd o.b.*, 143 N.J. 141 (1996):

> that an employee's contributory negligence is generally available as a defense when the employee sues a third person in an ordinary negligence action .... Further, plaintiff being a member of the workforce, with all the compulsions attendant to that status, is a factor which is subsumed in the jury's analysis of whether he acted prudently, and the jury may be so instructed.

__ N.J. at __ (quoting *Kane*, supra, 278 N.J. Super. at 150-51). The court went on to hold that "a plaintiff's negligence may only be submitted to the jury when the evidence adduced at trial suggests that a worker acted unreasonably in the face of a known risk and that conduct somehow contributed to his or her injuries." Id.

In reaching its conclusion that plaintiff's negligence should not be submitted to the jury, the court found that the "record is abundantly clear that plaintiff did not proceed unreasonably in the face of a known risk." There was no evidence that the plaintiff knew the trench was in danger of collapse, that he had had a chance to independently assess the stability of the trench, or that he had received safety training from the general contractor or his employer. As such, "the burden of deciding when and where to take protective measures" fell on the employer and the general contractor, not the plaintiff.