TIMED AGENDA

EVENT: Mercer County Bar Association Xtreme CLE Program

SEMINAR: Collateral Sources and Admissibility of Medical Bills—Statutory and Case Law Analysis and Plaintiff, Defense and Judicial Perspectives

LOCATION: Mercer County College Conference Center, 1200 Old Trenton Road, West Windsor, NJ 08550

DATE: October 29, 2014

TIME: 6:15 p.m. – 8:00 p.m.

SPEAKERS: 1.) Honorable Douglas H. Hurd, P.J.Civ, Mercer County Vicinage
   2.) Colleen Crocker, Esq., Zirulnik, Sherlock & DeMille, Hamilton, NJ
   3.) John G. Devlin, Esquire—Devlin Cittadino & Shaw, Lawrenceville, NJ
   4.) Brian J. Duff, Esquire – Destribats Campbell, LLC, Hamilton, NJ

I. Introduction and Agenda

6:15-6:20 Speaker Introduction and Agenda Introduction (Brian J. Duff, Esq.)

II. Agenda and Minutes of Instruction for Brian J. Duff’s and Colleen Crocker’s Presentation

6:20 – 6:40 Historical perspective of collateral source rule; statutory response and purpose for same; collateral sources included/excluded in statutes and case law.

III. Agenda and Minutes of Instruction For Hon. Douglas H. Hurd’s Presentation—Judicial Considerations

6:40 – 6:55 Discussion of procedure for molding verdict to reflect collateral source deductions; discussion of credits against deductions; order of calculations for deductions; jury instructions for collateral source inquiries by juries.
IV. **Agenda and Minutes of Instruction For Colleen Crocker’s and Brian J. Duff’s Presentation—No-Fault Collateral Source Law, Tort Claims Act Collateral Source Law**


V. **Agenda and Minutes of Instruction For John G. Devlin, Esq.’s Presentation—Workers Compensation Act Section 40 Liens**

7:15-7:25 Discussion of procedural and evidential considerations for practitioners regarding impact of Section 40 lien on personal injury action recoveries and interplay with collateral source rule.

VI. **Agenda and Minutes of Instruction For Colleen Crocker Esq.’s, Brian J. Duff, Esq.’s, John G. Devlin, Esq.’s Presentation—Other “Boardable” Liens**

7:25-7:55 Discussion of ERISA, Medicaid, Medicare liens as recoverable, non-collateral source benefits. Statutory and case law basis for same. Discussion of potential for recovery of medical expenses in excess of PIP benefits for policies with limits below $250k. Practice strategies for handling same.

7:55-8:00 Question and Answer session.
Mercer County Bar Association

Xtreme 2014 CLE Seminar Evaluation

Boardable Damages and Third Party Liens in Personal Injury Cases

Wednesday, October 29, 2014

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Honorable Douglas N. Hurd was appointed to the Bench in 2009 and currently sits in Mercer County, where he has served as the Presiding Civil Judge since 2012.

Prior to his appointment, Judge Hurd was an Administrative Law Judge and served in several appointments in the Governor’s Office. He was an associate with the firm Mason, Griffin & Pierson and was a member of the firm’s Governmental Affairs and Labor and Employment Practice Groups. Judge Hurd started his career working as a Law Clerk to the Honorable John F. Kingfield, J.S.C. He is a graduate of the University of Delaware and earned his juris doctor from Widener University School of Law.
Colleen M. Crocker
Ms. Crocker earned her BA in Speech Communication from the University of Rhode Island graduating with Cum Laude honors. She then earned her MA in Speech Pathology from Trenton State College, Summa Cum Laude. In 1994, Ms. Crocker earned her JD from the Widener University School of Law, graduating with Dean's List honors. She was admitted to practice in Pennsylvania, New Jersey and the United States District Court for the District of New Jersey in 1994. In 2002, she was admitted to the Supreme Court of the United States. She is a member of the New Jersey State, Pennsylvania and Mercer County Bar Associations as well as the New Jersey Defense Association. Ms. Crocker is currently the vice-president of the Mercer County Bar Association and sits on the board of the Mercer County Bar Foundation. She is also a long standing member of the Mercer County American Inn of Court. She has served as a court-appointed Guardian and Special Master in Middlesex County Superior Court. Ms. Crocker is also certified by the Superior Court of New Jersey to serve as a court appointed arbitrator in civil matters. She has participated in the Widener University ITAP program as a coach/mentor. She began her legal career as an associate with the law firm of Stark and Stark, PC in August 1994. Ms. Crocker has been staff counsel for Selective Insurance with Zirulnik, Sherlock and DeMille since April 1998.
**John G. Devlin, Esq.** – Mr. Devlin was admitted to practice in NJ and PA in 1988. He is a Partner at Devlin, Cittadino & Shaw in Lawrenceville, NJ. He graduated from Seton Hall University School of Law in 1988. He obtained his undergraduate degree from Lafayette College. He concentrates his practice on personal injury and workers compensation matters. Mr. Devlin has successfully litigated multi-million dollar claims and achieved excellent results for injured clients. He has served as a lecturer in the past on topics related to personal injury and workers compensation.

**Brian J. Duff, Esq.**— Mr. Duff was admitted to practice in New Jersey (1996), the United States District Court for the District of New Jersey (1996) and the United States Court of Appeals for the Third Circuit (1997). He graduated from Seton Hall University School of Law in 1996. He obtained his undergraduate degree from Drew University. He is a partner at Destribats Campbell, LLC. His main practice areas include: personal injury (plaintiff and defense), civil litigation, workers compensation, commercial/business transactions and advice and real estate (commercial and residential). He has served as a lecturer in the past on topics related to personal injury, PIP and ethics and professionalism. He is served as a Trustee of the Mercer County Bar Association and Co-Chair of the Mercer County Bar Association’s Continuing Legal Education Committee.
Patient brought medical malpractice action against hospital and physical therapist. The Superior Court, Law Division, Hudson County, entered judgment for patient, and she appealed. The Superior Court, Appellate Division, Pressler, P.J.A.D., held that, as matters of first impression: (1) while allowing a credit against the collateral-source deduction for the totality of contributions made by the tort victim prior to social security disability is inappropriately excessive, some form of credit for those contributions should be allowed; and (2) because patient's tort recovery was being reduced by five years worth of social security contributions, five years worth of social security contributions should be credited against that deduction.

Affirmed in part and remanded.

West Headnotes

[1] Health 198H 832

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk828 Damages

Jury's damages verdict awarding patient $96,000 as compensation for future lost income in her medical malpractice action against hospital and physical therapist for injury to patient's knee, resulting in loss of significant mobility and requiring patient to use cane or walker on a permanent basis, was fair when viewed against the record and was hardly so insufficient as to shock conscience of the court or engender a sense of wrongness; award only compensated patient for two years of future loss of income although she was only 56 years, but because of her progressive patella disease, patient would have been able to work only for two more years even if knee injury had not occurred.

[2] Damages 115 60

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k60 k. Benefits Incident to Injury. Most Cited Cases

While patient, who prevailed in medical malpractice action, was not entitled to a credit against the collateral-source deduction of her social security disability benefits for all the contributions she had made over her working life, patient was entitled to a credit for the maximum social security contributions due from a taxpayer for the same period for which her disability payments had been deducted as collateral source payments. N.J.S.A. 2A:15-97.

[3] Damages 115 60
115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k60 k. Benefits Incident to Injury. Most Cited Cases

While allowing a credit against the collateral-source deduction for the totality of contributions made by the tort victim prior to social security disability is inappropriately excessive, some form of credit for those contributions should be allowed. N.J.S.A. 2A:15-97.

[4] Damages 115

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k60 k. Benefits Incident to Injury. Most Cited Cases

Offset for tort victim's contributions to social security must be limited to the same time period as is covered by the collateral-source rule. N.J.S.A. 2A:15-97.

[5] Damages 115

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k60 k. Benefits Incident to Injury. Most Cited Cases

Because patient's tort recovery against hospital and physical therapist in medical malpractice action was being reduced by five years worth of social security disability benefits, five years worth of social security contributions should be credited against that deduction pursuant to collateral source rule, and most reasonable, direct and fair accommodation was to credit patient with patient's social security contribution at the maximum employee contribution rate for each year of the five years for which the disability benefit deduction had been made. N.J.S.A. 2A:15-97.

**1048*146 George J. Kenny, Roseland, argued the cause for appellant (Connell Foley, attorneys; Mr. Kenny, of counsel and on the brief; Lynne A. Aretsky, on the brief).

V. Christopher Hirsch argued the cause for respondent Christ Hospital (Hardin, Kundla, McKeon, Poletto & Polifroni, attorneys; Mr. Hirsch, of counsel and on the brief). Respondent Oscar Pizolli did not file a brief.

Before Judges PRESSLER, CIANCIA and PARKER.

The opinion of the court was delivered by

*147 PRESSLER, P.J.A.D.

This personal injury negligence case raises a novel issue respecting the application of the statutory collateral source rule, N.J.S.A. 2A:15-97. Plaintiff Betty L. Woodger is receiving social security disability benefits on account of her disability caused or contributed to by the negligence of defendants Christ Hospital and Oscar Pizolli. In plaintiff's negligence action against these defendants, the jury awarded her $100,000 as compensation for past lost income, $96,000 as compensation for future lost income, and $100,000 for pain and suffering. Although plaintiff does not challenge the necessity of considering her social security disability benefits as a collateral source under N.J.S.A. 2A:15-97, she asserts that she is entitled to a credit against the deduction of those benefits from her jury award for the contributions she has made for social security during her working life, some
$60,000. The trial judge disagreed, and plaintiff appeals that ruling, among others. While we agree with the trial judge that plaintiff is not entitled to a credit for all the contributions she has made over her working life, we have concluded, for reasons of statutory interpretation and consideration of equity, that she is entitled to a credit for the maximum social security contributions due from a taxpayer for the same period for which her disability payments have been deducted as collateral source payments.

This is how the issue arises. In 1996 plaintiff, complaining of left knee pain, was diagnosed as suffering from **1049**patellofemoral disease. It is a progressive condition caused by a malalignment of the patella and the patella tendon which causes the bones above and below the kneecap to rub against each other, resulting in degeneration and arthritic changes of the knee. In 1997 plaintiff was diagnosed as having the same condition in her right knee. She was prescribed a regimen of physical therapy involving the use of a Kinetron machine and had nineteen sessions at the Christ Hospital Therapy Department prior to June 1998, when she underwent an arthroscopic repair of a torn lateral meniscus in her right knee. In July 1998, the first time after the surgery that she *148*used the Kinetron machine, she injured her right knee, and she alleges that she sustained the injury because of the negligent instructions given to her by defendant Pizolli, the physical therapist, respecting the use of the machine.

Plaintiff brought this action against the hospital and Pizolli alleging that because of Pizolli's negligence, she has lost significant mobility and is required on a permanent basis to use a cane or walker. Plaintiff is a registered nurse, and although she had previously held administrative nursing positions, at the time of the injury, because of staff restructuring, she was employed as a floor nurse. She claimed that she was no longer able to work and in November 1999 she was awarded social security disability benefits. The jury determined the liability claim against defendants and reached the compensatory damages verdict we have described. Plaintiff appeals both from the jury verdict and from the judgment thereafter entered by the trial court by which the verdict was molded in accordance with the collateral source statute and to award pre-judgment interest.

Before addressing the molded judgment which raises the collateral source issue, we consider briefly plaintiff's challenges to the verdict, which we reject substantially for the reasons cogently and articulately stated by the trial judge in denying her motion for new trial or additur. See R. 2:11-3(e)(1)(C). We add only these comments. Plaintiff argues that the trial judge erred by instructing the jury that if it found that plaintiff's present physical condition was attributable both to the injury she sustained on the Kinetron machine and to her pre-existing medical condition, it could not award damages attributable solely to the preexisting condition. The full charge as given accorded with Model Jury Charge 6.11G, “Aggravation of a Preexisting Illness,” and was clearly a correct statement of the law. Plaintiff does not suggest otherwise. Rather, her argument is that the proofs were insufficient to sustain the charge because, she claims, the surgery she had in June 1998 resolved her pre-existing condition. The fact of the matter is, however, that there was ample expert testimony, *149*both by her medical expert and defendant's, to permit the jury to find that the pre-existing condition was permanent, progressive and degenerative, only alleviated by the surgery, and that at most, the July 1998 event exacerbated the condition and accelerated its progress.

[1] The main thrust of the additur motion was plaintiff's contention that the jury's future loss of income award was against the weight of the evidence because it only compensated her for two years of future loss of income although she was only 56 years old at the time of trial. As the trial judge pointed out, however, there was evidence from the defense that because of her progressive patella disease, plaintiff would have been able to work only for two years more
or so even if the July 1998 injury had not occurred. In
sum, the trial judge was satisfied that the jury's dam-
ages verdict was supported in all respects by the
proofs and was not disproportionate**1050 to the
injury sustained. Based on our review of the record,
we agree. We are satisfied that the verdict was fair
when viewed against the record and was hardly so
insufficient as to shock the conscience of the court or
engender a sense of wrongness. See, e.g., Mahoney v.
Podolnick, 168 N.J. 202, 229-230, 773 A.2d 1102
(2001); Carey v. Lovett, 132 N.J. 44, 68, 622 A.2d
1279 (1993); Baxter v. Fairmont Food, 74 N.J. 588,

[2] We come now to the collateral source prob-
lem. To begin with, because the disability decision of
the Social Security Administration was, by its terms,
reviewable in five years, the judge regarded any ben-
efits payable beyond that time as uncertain and spec-
ulative. He therefore limited the collateral-source
deduction to benefits plaintiff had received between
November 1999 and the date of the molded judgment,
July 2002, plus the benefits she would thereafter re-
ceive up to November 2004. As to future benefits, he
directed that they be subject to a cost of living increase
of 2.5 percent commencing January 2003 and that the
total amount of future benefits thus calculated be
discounted to present value by use of a 4.3 percent
discount rate, the rate *150 testified to by plaintiff's
economic expert. He also required the deduction of
plaintiff's income tax payments attributable to her
receipt of social security benefits. The figure arrived at
by the attorneys using this formula was a total collat-
eral-source deduction of $87,724.25. Plaintiff does not
dispute the calculation or any of the included elements
thereof, and we agree that, as far as it went, the for-
mula arrived at by the trial judge was impeccable. The
dispute is only whether the contributions made by
plaintiff to social security over her working life, a total
of nearly $60,000, should also have been credited to
her.

Neither our research nor that of the parties has
disclosed any reported opinion in any jurisdiction
addressing the question of whether, in the application
of the collateral source rule, the plaintiff is entitled to
credit for contributions previously made although
many jurisdictions deem social security benefits to
constitute a deductible collateral source. We approach
the issue, therefore, by considering the policy and
purpose of the collateral source rule and the nature of
social security disability benefits in that context.

The collateral source rule, N.J.S.A. 2A:15-97,
enacted in 1987, provides in full as follows:

In any civil action brought for personal injury or
death, except actions brought pursuant to the pro-
visions of P.L.1972, c. 70 (C. 39:6A-1 et seq.), if a
plaintiff receives or is entitled to receive benefits for
the injuries allegedly incurred from any other source
other than a joint tortfeasor, the benefits, other than
workers' compensation benefits or the proceeds
from a life insurance policy, shall be disclosed to the
court and the amount thereof which duplicates any
benefit contained in the award shall be deducted
from any award recovered by the plaintiff, less any
premium paid to an insurer directly by the plaintiff
or by any member of the plaintiff's family on behalf
of the plaintiff for the policy period during which
the benefits are payable. Any party to the action
shall be permitted to introduce evidence regarding
any of the matters described in this act.

The legislative intention in enacting the statute
was to abrogate the common-law collateral-source,
that is, the rule that permitted "a tort victim to retain
collateral benefits—that is, benefits that do not come
from a defendant—in addition to any amount that the
victim might recover from **1051 that defendant." Kiss
The purpose was to contain *151 spiraling automobile
insurance costs by precluding the plaintiff from re-
covering from the tortfeasor those damages duplica-
tive of benefits the plaintiff has already received or is
entitled to receive by way of "contract, employment,
or some other relation.” Ibid. Thomas v. Toys “R” Us, Inc., 282 N.J.Super. 569, 584, 660 A.2d 1236 (App.Div.), certif. denied, 142 N.J. 574, 667 A.2d 191 (1995). As the Supreme Court made clear in Kiss v. Jacob at 282, 650 A.2d 336, the types of benefits contemplated by the common-law rule and thus generally intended to be covered by the statute include those “from life-or health-insurance policies, from employment contracts, from statutes such as workers' compensation acts and the Federal Employers' Liability Act, from gratuitities, from social legislation such as social security and welfare, and from pensions under special retirement acts.” As enacted, the statute omitted from its ambit the proceeds of life insurance policies and, because of the lien consequence of a workers' compensation award, N.J.S.A. 34:15-40, workers' compensation benefits as well. We have also held that benefits such as Medicaid, subject to reimbursement by the plaintiff to the payer from the proceeds of a negligence judgment or settlement, are similarly not includable as a collateral source because they do not constitute double recovery. See Lusby v. Hitchner, 273 N.J.Super. 578, 642 A.2d 1055 (App.Div.1994). Following the general identification of collateral sources by Kiss v. Jacob, we have, however, held that social security disability payments are included. Parker v. Esposito, 291 N.J.Super. 560, 565-566, 677 A.2d 1159 (App.Div.), certif. denied, 146 N.J. 566, 683 A.2d 1162 (1996); Thomas v. Toys “R” Us, Inc., supra, at 589, 660 A.2d 1236. We further held in Parker that only those future payments of social security benefits that are neither contingent nor speculative nor subject to change or modification may be included, an instruction the trial court here followed by limiting the collateral-source calculation to those social security benefits payable up to the time of the mandated review.

The issue that has not, however, heretofore been considered is whether the plaintiff's contributions to social security may be credited against the collateral-source deduction of the premium paid for the collateral-source insurance proceeds. The evident intent of the statute in this regard was to recognize that since plaintiff has had to pay for the duplicative benefit that is being subtracted from the tort recovery, the cost to plaintiff of contracting for that benefit should, as a matter of economic fairness, be deducted from the total benefit proceeds. That is to say, it is plaintiff's net "collateral" proceeds rather than the gross proceeds that are deducted from the tort recovery. The trial judge denied any such crediting here simply on the ground that social security benefits are not insurance and the statute speaks only to insurance premiums. We do not, however, regard the statute's silence in this regard as dispositive.

We note at the outset, that the statute's reference only to insurance premiums as an offset against otherwise deductible insurance proceeds may be viewed in the light of the observation of the Supreme Court in Kiss v. Jacob, supra, 138 N.J. at 282, 650 A.2d 336, that the language of the statute “suggests strongly that the Legislature's essential concern was with insurance-type benefits.” We are, therefore, satisfied that it is fair to draw the inference that the Legislature, rather than intending to exclude social security contributions as a credit against benefits, simply did not consider the issue. Our task, then, is to determine whether allowing a set-off for the social security contributions is consonant with the overall legislative intent in enacting the statute.

At the outset, we agree with the trial judge that social security benefits do not constitute privately contracted-for insurance proceeds. Among the distinctions here relevant is that insurance contracts are ordinarily voluntary. Social security contributions are mandatory. 26 U.S.C.A. §§ 3101 and 3102. Moreover, there is a direct relationship between the insurance premium and the policy proceeds in that the premium pays for coverage for a specific period of time. If the risk is realized during that period, *153 the entire
policy proceeds paid for by that premium are payable to the insured. Social security benefits operate quite differently. Employees are required by law to make an annual contribution, equaled by their employer, based on their salary but up to a specified cap, to create the fund that will eventually accord benefits upon disability, retirement, or death. As we understand the social security law, disability and retirement benefits are in the same amount, subject to the same federal income tax, and an employee who receives disability benefits prior to retirement will have his benefits automatically redenominated as old-age benefits when reaching retirement age. 42 U.S.C.A. § 423; 26 U.S.C.A. § 86(d)(i); Publication 915, Social Security and Equivalent Railroad Retirement Benefits, Department of the Treasury, Internal Revenue Service (2002).

[3] From the foregoing thumbnail sketch, we think it plain that the social security contributions made by employees over their working lives pay, in effect, for considerably more than the limited period of disability payments that may be included as a collateral benefit under the Parker rationale. The totality of those contributions, equaled by the employer, pay for continued disability benefits, if any, after the initial review of the disability award; they pay for the retirement benefit the employee will receive upon reaching retirement age; and they pay for death and survivor benefits. Nevertheless, it is obvious that but for the mandatory contributions made by employees over their working lives, the disability benefit, the advantage of which accrues as well to the tortfeasor and most likely the tortfeasor's insurer, would not have been available. In that respect, the similarity between social security disability benefits and insurance proceeds outweighs their differences because conceptually the insurance premium and the social security contribution share the same purpose and the same consequence in the case of disability. We therefore conclude that while allowing a credit against the collateral-source deduction for the totality of contributions made by the tort victim prior to the disability is inappropriately excessive, we are also persuaded that some form of credit for those contributions should be allowed.

[4][5] We are satisfied that the insurance premium model provides the key to reconciling the conceptual similarities and distinctions between social security contributions and insurance premiums while at the same time preserving both the fundamental intent of the statute and its recognition of the fairness of the insurance-premium credit. Consistent with that model, the offset for contributions must be limited to the same time period as is covered by the collateral-source rule. Thus, because plaintiff's tort recovery is being reduced by five years worth of disability benefits, five years worth of social security contributions should be credited against the deduction. Presumably, because the plaintiff receiving disability benefits is unable to work during the period in which the benefits are received, there will be no contribution made during that time. The question then is the measure of the contribution to be deducted. Because the portion of the total social security contributions attributable to disability benefits eludes precise calculation, we conclude that the most reasonable, direct and fair accommodation is to credit the plaintiff with the employee's social security contribution at the maximum employee contribution rate for each year of the five years for which the disability benefit deduction has been made. The final judgment must therefore be amended to so reduce the collateral-source deduction, upon notice to the parties and such proofs as they may offer in the event of their inability to agree on the credit amount.

We remand to the trial court for adjustment of the collateral-source deduction in accordance with this opinion. In all other respects, the final judgment is affirmed.

Woodger v. Christ Hosp.
Cecilia WISE, Plaintiff,
v.
Cynthia MARIENSKI, Dawn Celli, John Does 1–10, and ABC Corporations 1–10 (said names being fictitious), Defendants.

Nina Wise, Plaintiff,
v.
Cynthia Marienski, ABC Corporations 1–10 (unknown corporations, bars and/or liquor establishments responsible for the incident in question) and John Does 1–10 (unknown individuals responsible for the incident in question), Defendants.

Decided June 16, 2011.

Background: Automobile accident victims sought to recover from alleged tortfeasor damages for medical expenses beyond those collectible or paid under victim's standard $15,000 Personal Injury Protection (PIP) plan in automobile policy. Alleged tortfeasor moved for an order barring victims from entering evidence of their outstanding medical expenses at the time of trial.

Holding: The Superior Court, Law Division, Kenneth J. Grispin, P.J. Cv., held that the victims were not precluded from recovering medical expenses beyond those collectible or paid under the PIP plan.

Motion denied.

West Headnotes

[1] Damages

No Fault statute governing inadmissibility of evidence of losses collectible under personal injury protection coverage did not preclude recovery of uncompensated economic loss consisting of medical expenses beyond those collectible or paid under several available “Standard” Personal Injury Protection (PIP) plans, and therefore, evidence pertaining to insured's medical expenses above those payable by PIP was admissible. N.J.S.A. 39:6A–12.

[2] Statutes

A court's duty is to construe a statute as it was written and to enforce the legislative will as written, not according to some unexpressed intention.
Where the language codified by the Legislature is plain and clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms; for a court to presume that the Legislature intended something other than that which it clearly and plainly expressed in plain language would be tantamount to rewriting the Legislature's written enactment by judicial fiat.

[4] Statutes 361 (Formerly 361k223.2(1.1))

In discerning legislative intent courts consider not only the particular statute in question, but also the entire legislative scheme of which it is a part, giving

primary regard to the fundamental purpose for which the legislation was enacted; to this end, the particular words are to be made responsive to the essential principle of the law, and it is not the words but the internal sense of the law that controls.

Howard N. Wiener, Rahway, for plaintiff Cecilia Wise (Tobin, Koster, Reitman, Greenstein, Caruso, Wiener & Konray, attorneys).

Nicholas Scutari, for plaintiff Nina Wise.

Gregory F. McGroarty, for Defendant Cynthia Marienski (Litvak & Trifiolis, Cedar Knoll, attorneys).

KENNETH J. GRISPIN, P.J.Cv.

*112 In this personal injury matter, defendant Cynthia L. Marienski has moved for an order barring plaintiffs Cecilia Wise (“Cecilia”) and Nina Wise (“Nina”) (collectively, “plaintiffs”) from entering evidence of their outstanding medical expenses at the time of trial, pursuant to N.J.S.A. 39:6A–12. For the following reasons, this court holds that N.J.S.A. 39:6A–12 does not preclude recovery of medical expenses beyond those collectible or paid under the several “Standard” Personal Injury Protection (“PIP”) plans. Evidence pertaining to plaintiffs' medical expenses above those payable by PIP is, therefore, admissible. Accordingly, defendant's motion is denied.

The facts of this case (as opposed to the legal issues) are simple. On September 22, 2007, the parties were involved in an automobile accident, in which a vehicle driven by defendant rear-ended Cecilia's car, which Cecilia was driving at the time and in which Nina, Cecilia's sister, was riding as a passenger. Nina is not a licensed driver in the State of New Jersey, and is not a named insured on Cecilia's policy, or a resident of her household. As a result of the *113 accident, Cecilia suffered injuries to her neck, back and both of her knees. Nina suffered injuries as well. Cecilia subsequently underwent treatment for her injuries, including surgery to repair her left knee. Cecilia's automobile insurance policy provides for PIP coverage for economic damages of up to $15,000, which has been exhausted. As a result, Cecilia has $21,820 in outstanding medical bills and Nina has $26,212.96 in outstanding medical bills. Defendant now seeks to bar from trial evidence of these outstanding bills.

DISCUSSION

Part I

In 1972, the New Jersey Legislature enacted the New Jersey Automobile Reparation Reform Act (the “No Fault Act”), L. 1972 c. 70, codified as N.J.S.A. 39:6A–1 to –18. See Cynthia M. Craig & Daniel J. Pomeroy, New Jersey Auto Insurance Law 11 (Gann 2011) (“Craig & Pomeroy 2011”). Under this legislation, “all insurance policies written for private passenger vehicles were required to provide enumerated [PIP] benefits to certain classes of persons without regard to who was at fault in causing the accident. The primary object of this reform legislation was to get needed money to injured people quickly.” Ibid.


Evidence of the amounts collectible or paid under a standard automobile insurance policy pursuant to [N.J.S.A. 39:6A–4] ... to an injured person, including the amounts of any deductibles, copayments or exclusions, including exclusions pursuant to [N.J.S.A. 39:6A–4.3], otherwise compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person.

The court shall instruct the jury that, in arriving at a verdict as to the amount of the damages for noneconomic loss to be recovered by the injured person, the jury shall not speculate as to the amount of the
medical expense benefits paid or payable by an automobile insurer under personal injury protection coverage payable under a standard automobile insurance policy pursuant to [N.J.S.A. 39:6A–4]....

*114 Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss sustained by the injured party.


The issue before the Roig Court was whether N.J.S.A. 39:6A–12 prohibited a claimant from recovering in tort his otherwise uncompensated deductible and twenty percent copayment under a PIP policy. 135 N.J. at 501, 641 A.2d 248. The Roig Court noted that, in the original No–Fault Act, N.J.S.A. 39:6A–12 stated as follows: “Evidence of the amounts collectible or paid pursuant to sections 4 and 10 of this act to an injured person is inadmissible in a civil action for recovery of damages for bodily injury by such injured person.” Id. at 504, 641 A.2d 248.

In 1983, the Legislature amended the No–Fault Act to provide for the selection of a $500, $1000, or $2500 medical expense deductible. Ibid.; L. 1983, c. 362. FN1 Under this system, in exchange for choosing a higher deductible, an insured would benefit from paying a lower premium. Ibid. Presumably, because options existed for insureds to have deductibles covered by health insurers, this system would shift the costs of automobile insurance to those alternative insurers, thereby reducing the cost of automobile insurance overall. Id. at 505–06, 641 A.2d 248.

FN1. The 1983 amendment also provided for a tort limitation option, whereby, in exchange for lower premiums, an insured would be limited in their right to sue for pain and suffering where their medical expenses were below particular thresholds. Roig, supra, 135 N.J. at 504–05, 641 A.2d 248. The provision of this option was consistent with the overall goals of the No Fault Act of eliminating minor tort claims and reducing court backlog, thereby expediting serious claims and reducing the cost of insurance. Id. at 506, 641 A.2d 248.

*115 The 1983 amendment also added language to N.J.S.A. 39:6A–12, providing, in part:

Evidence of the amounts collectible or paid ... to an injured person, including the amounts of any deductibles or exclusions elected by the named insured ... otherwise compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person.

....

Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss sustained by the injured party.

[ Id. at 506, 641 A.2d 248.]

In response to further spiraling auto insurance costs, the Legislature again amended the No–Fault Act in 1988. Id. at 506, 641 A.2d 248; L. 1988, c. 119. FN2 This amendment “mandate[d] a $250 medical deductible and a 20% copayment for medical expenses between $250 and $5,000[.]” which would, the Leg-
islature hoped, lower the costs of insurance premiums for all New Jersey motorists. *Id.* at 507–14, 641 A.2d 248. *N.J.S.A. 39:6A–12* was again amended, to reflect these additions:

FN2. The 1988 amendment provided for two tort options. *Roig, supra,* 135 N.J. at 507, 641 A.2d 248. The first, known as the “verbal threshold” provided for the recovery of non-economic damages only in nine specific situations, in exchange for lower premiums. *Ibid.* The second, known as the “no threshold” option, provided for unlimited recovery of non-economic damages, in exchange for higher premiums. *Ibid.* The provision of these options would further the goals of the No-Fault Act by ostensibly limiting tort claims, thereby reducing court congestion and reducing the cost of auto insurance.

Evidence of the amounts collectible or paid pursuant to [*N.J.S.A. 39:6A–4 and N.J.S.A. 39:6A–10*] to an injured person, including the amounts of any deductibles, copayments or exclusions ... otherwise compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person.

The court shall instruct the jury that, in arriving at a verdict as to the amount of the damages for noneconomic loss to be recovered by the injured person, the jury shall not speculate as to the amount of the medical expense benefits paid or payable ... to the injured person.

Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss sustained by the injured party.

*Id.* at 507, 641 A.2d 248.

The party seeking recovery of his mandatory deductible and twenty percent copayment in *Roig* argued that the third paragraph of Section 12 provided for recovery of those “uncompensated” out-of-pocket expenses from the tortfeasor. *Id.* at 513, 641 A.2d 248. However, in response, the Court reasoned that all New Jersey motorists[ ] paid a lower annual insurance premium because of the mandatory PIP medical deductible and copayment. [Therefore,] to allow a claim for the deductible and the copayment would be antithetical to the entire No-Fault statutory scheme. That kind of recovery could be available only if the Legislature reinstated a fault-based system.

[ *Id.* at 514, 641 A.2d 248.]

The respondent further argued that because these amounts had not been “otherwise compensated,” as per the first paragraph of Section 12, they should be admissible. *Id.* at 514–15, 641 A.2d 248. The Court rejected this interpretation as “contrary to the clear legislative intent of the No–Fault Law [,]” *Id.* at 515, 641 A.2d 248, which, the Court stated, was enacted and amended with the purposes of removing the need for predetermination of fault prior to recovery, thereby eliminating minor tort claims from the judicial system and expediting relief to accident victims suffering from serious and disabling injuries, which would in turn reduce trial court backlog, as well as the cost of insurance. *Id.* at 502–11, 641 A.2d 248. To allow litigants to sue in tort for recovery of uncompensated deductibles and copayments would have been contrary to this purpose. The Court concluded by stating, broadly, that **951** the Legislature never intended to leave the door open for fault-based suits when enacting the No–Fault Law. [Otherwise], courts would again feel the weight of a new generation of congestion-causing suits, and automobile-insurance premiums would again rise. If the Legislature disagrees with our interpretation of its intent, it is, of course,
empowered to enact clarifying legislation.

[Id. at 516, 641 A.2d 248.]

In 1998 the Legislature enacted, as an amendment to the previous No–Fault Act (“AICRA”), L. 1998, c. 21 and c. 22, N.J.S.A. 39:6A–1.1 to 35. See Craig & Pomeroy 2011 at 87. This amendment changed the first clause of N.J.S.A. 39:6A–12 to read, in part:

... [E]vidence of the amounts collectible or paid under a standard automobile insurance policy pursuant to section ... 39:6A–4 ... to an injured person, including the amounts of any deductibles, copayments or exclusions ... otherwise *117 compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person.

[L. 1998, c. 21, § 16 (new language emphasized).]

In addition, the following definition was added: “‘Economic loss’ means uncompensated loss of income or property, or other uncompensated expenses, including, but not limited to, medical expenses.” L. 1998, c. 21, § 2 (enacted as N.J.S.A. 39:6A–2(k)). This amendment was thought, in some well-respected circles, to “effectively overrul[e]” Roig. See Patterson v. Adventure Trails, 364 N.J.Super. 444, 448, 836 A.2d 856 (Law Div.2003) (quoting Craig & Pomeroy, New Jersey Auto Insurance Law 238 (Gann 2003)). However, in D’Aloia, supra, 372 N.J.Super. 246, 858 A.2d 16, the Appellate Division laid any such speculation to rest, affirming Roig's ban on the entry of deductibles and copayments into evidence.

The D’Aloia court first noted “that section 2k makes clear that ‘economic loss,’ which section 12 permits an accident victim to recover from the tortfeasor, includes uncompensated medical expenses.” Id. at 250, 858 A.2d 16. However, because the part of N.J.S.A. 39:6A–12 prohibiting admission of evidence of deductibles and copayments remained intact, “it logically follow [ed] that they [were] not recoverable.” Ibid. Further reasoning that this interpretation was in furtherance of the Legislature's intent in enacting AICRA, the D’Aloia court affirmed denial of the appellant's claim. Id. at 251–52, 858 A.2d 16.

In Kim, supra, 2010 N.J.Super. Unpub. LEXIS 2302, the Law Division first confronted the issue presently before this court; namely, whether N.J.S.A. 39:6A–12 prohibits the entry into evidence of medical expenses, where an insured had chosen $15,000 in PIP coverage. The Kim court's decision revolved, in part, around the definition of “standard automobile insurance policy” in N.J.S.A. 39:6A–12. Id. at *1–2.

As prologue, in enacting AICRA, the Legislature recognized, in part, that:

The high cost of automobile insurance in New Jersey has presented a significant problem for many-lower income residents of the state, many of whom have been *118 forced to drop or lapse their coverage in violation of the State's mandatory motor vehicle insurance laws, making it necessary to provide a lower-cost option to protect people by providing coverage to pay their medical expenses if they are injured.

[N.J.S.A. 39:6A–1.1]

To effectuate this purpose, the Legislature allowed for insurance providers to offer lower levels of PIP coverage, with the goal **952 of enabling lower-income residents to afford automobile insurance by paying lower premiums. While the Pre–AICRA system required a standard automobile insurance policy to provide only $250,000 in medical expense benefits, AICRA allows for more flexibility. A “Standard Automobile Insurance Policy” is now defined as “an automobile insurance policy with at least the coverage

Payment of medical expense benefits in accordance with a benefit plan provided in the policy and approved by the commissioner, for reasonable, necessary, and appropriate treatment and provision of services to persons sustaining bodily injury, in an amount not to exceed $250,000 per person per accident.... Benefits payable under this section shall: (1) Be subject to any option elected by the policyholder pursuant to [N.J.S.A. 39:6A–4.3 (emphasis added).]

N.J.S.A. 39:6A–4.3(e) defines medical expense coverage options as follows: “Medical expense benefits in amounts of $150,000, $75,000, $50,000 or $15,000 per person per accident.... If none of the aforesaid medical expense benefits options is affirmatively chosen in writing, the policy shall provide $250,000 medical expense benefits coverage....” AICRA thus allows automobile operators to purchase coverage that is consistent with their financial resources.

The Kim court reasoned that a “standard automobile insurance policy,” as that term appears in N.J.S.A. 39:6A–12, “automatically includes PIP coverage of $250,000,” Kim, supra, 2010 N.J.Super. Unpub. LEXIS 2302, at *2. Because $250,000 was therefore the “standard,” any amount under that amount was “collectible,” and thereby excludable from evidence, pursuant to N.J.S.A. 39:6A–12. Id. at *7–8. This conclusion was reached by reasoning that, by allowing insureds the option of paying lower premiums in exchange*119 for lesser amounts of coverage, the Legislature essentially created a trade-off, similar to that in Roig, whereby in exchange for lower premiums, an insured gave up his or her rights in tort:

“If an insured chooses a $1,000 or $2,500 deductible in exchange for a premium reduction, the Legislature, clearly, did not intend that that insured would be able to sue the tortfeasor for the below deductibles. Under that logic, insureds choosing the highest deductible would have the best deal: the lowest premium and the right to recover the excluded expenses in court against the tortfeasor.... To allow a claim for the deductible and the copayment would be antithetical to the entire No-Fault statutory scheme. That kind of recovery could be available only if the Legislature reinstituted a fault-based system.”

[ Id. at *4–5 (quoting Roig, supra, 135 N.J. at 514, 641 A.2d 248). ]

Accordingly, the Kim court concluded that by choosing a lower premium, an insured forewent “coverage for medical expenses which would be eligible for compensation.” FN3 Id. at *5. The Kim court further **953 noted that the Legislature set up a PIP system whereby an insured would always be responsible for some part of its medical expenses:

FN3. Consumer-choice principles have also bolstered the Appellate Division's conclusion that AICRA prohibits an uninsured tortfeasor from recovering medical expenses and lost income from a tort recovery. “A consumer could elect certain automobile coverages which would provide greater or lesser rights. The trade-off was in premiums paid. Greater rights required higher premiums; lesser rights generated lower premiums.” Monroe v. City of Paterson, 318 N.J.Super. 505, 508–09, 723 A.2d 1266 (App.Div.1999) (citing Roig, supra, 135 N.J. at 506–07, 641 A.2d 248). After the incident giving rise to Monroe, but prior to the Appellate Division's holding, the Legislature had affirmatively barred actions by uninsurers. See N.J.S.A. 39:6A–4.5(a). That prohibition was recently extended to an uninsured owner of a vehicle occupying that vehicle as a passenger. See Perrelli v.
“by mandating the $250 deductible and the twenty-percent copayment, the Legislature guaranteed that in every automobile accident some medical expenses would not be paid under PIP. For those below-deductibles and copayments, the insured was responsible, either through the insured's other insurance coverage, or, if the insured had no other insurance, as in this case, out of the insured's own pocket.”

[Id. at *6. (quoting Roig, supra, 135 N.J. at 509, 641 A.2d 248).]

The Kim plaintiff had therefore in effect bargained away its right to sue for the amounts in excess of its $15,000 PIP policy:

Plaintiff purchased a standard automobile policy pursuant to N.J.S.A. 39:6A–4 under which $250,000 in PIP payments were collectible. Plaintiff chose to elect to *120 exclude a portion of those medical payments in return for lower premiums paid. The medical bills which plaintiff seeks to recover from the tortfeasor, which are less than $250,000 but exceed the $15,000 PIP coverage plaintiff chose, are barred from being introduced at the time of trial.

[Id. at *7–8.]

Part II

[1] For the following reasons, this court respectfully disagrees with the Kim court's analysis. While it has been held that “[t]here is no surer way to misread any document than to read it literally,” Roig, supra, 135 N.J. at 515, 641 A.2d 248 (quoting Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir.1944) (Hand, J.)), and while the cases above illustrate that the Legislature's broad intent in enacting AICRA could support a holding barring entry into evidence of medical expenses above plaintiff's $15,000 PIP limit, this court is reticent to interpret the Legislature's intent so broadly as to so sharply contradict the unambiguous language of its enactments.


Therefore, where the language codified by the Legislature is “plain and clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms.” State Dep't of Law & Public Safety v. Bigham, 119 N.J. 646, 651, 575 A.2d 868 (1990). For a court to presume that the Legislature intended something other than that which it clearly and plainly expressed in plain *121 language would be tantamount to rewriting the Legislature's **954 written enactment by judicial fiat. See Hardwicke v. Am. Boychoir, 368 N.J.Super. 71, 96–97, 845 A.2d 619 (App.Div.2004) (“A court may neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language.”) (internal citation omitted). This court therefore declines to do so, especially where, as here, a litigant proffers an interpretation in conflict with that statute's plain meaning.

N.J.S.A. 39:6A–2(k)'s definition of “economic loss” specifically includes “medical expenses.” N.J.S.A. 39:6A–12, in turn, prohibits itself from being interpreted to preclude a victim in an automobile ac-
incident from recovering uncompensated economic losses from a tortfeasor. The Legislature thereby evinced, in clear language, its intention to allow recovery in tort of medical expenses for which an accident victim has not been otherwise compensated.

In contrast, the Roig and D’Aloia courts were faced with language in N.J.S.A. 39:6A–12 that was interpreted to prohibit admittance of evidence of co-payments and deductibles. It logically followed that “economic loss” could not be so broadly interpreted to include those items. The Roig Court’s broad inferences regarding the Legislature’s intent were necessary to elucidate otherwise ambiguous statutory language, which could have been read to mean that uncompensated copayments and deductibles qualified as “economic loss.” However, in this case, contrary to defendant’s exhortations, such inferences should not be applied to contradict the Legislature’s clear language.


[4] Defendant asserts that a “standard automobile insurance policy” is $250,000, and that the lower amounts of coverage provided for in N.J.S.A. 39:6A–4.3 are therefore outside of this definition. However, defendant’s proffered definition is in conflict with the in pari materia reading of N.J.S.A. 39:6A–2(n), 39:6A–4 and 39:6A–4.3, as illustrated above. “Statutes are to be read in pari materia, that is, those which relate to the same matter or subject ... are to be construed together as a unitary and harmonious whole, in order that each may be fully effective.” Clifton v. Passaic Cnty. Bd. of Taxation, 28 N.J. 411, 421, 147 A.2d 1 (1958); accord Marino v. Marino, 200 N.J. 315, 330, 981 A.2d 855 (2009). N.J.S.A. 39:6A–2(n) defines a “standard automobile insurance policy” as providing for PIP coverage of medical expenses of at least the amount provided in N.J.S.A. 39:6A–4. N.J.S.A. 39:6A–4 in turn states that a standard policy shall not exceed $250,000 per person, per accident. FN4 and further states that benefits payable are subject to any option elected pursuant to N.J.S.A. 39:6A–4.3, which provides for coverage as low as $15,000. Under defendant’s proffered definition, the statutes’ references to a “minimum” and “maximum” coverage range is superfluous. Indeed, if the Legislature had intended a “standard” policy to only provide one level of coverage, then it could have done so, rather than providing for a range of coverage. Defendant’s definition also conflicts with N.J.S.A. 39:6A–4, which, by referencing N.J.S.A. 39:6A–4.3, provides for coverage under a standard policy of far less than $250,000. To define a “standard automobile insurance policy” as providing for only $250,000 in PIP coverage is therefore in conflict with an in pari materia reading of the above statutes. Accordingly, this court declines to adopt defendant’s definition.

FN4. N.J.S.A. 39:6A–10 does permit insurers to provide additional medical expense coverage in excess of $250,000 to named insureds who have chosen a standard automobile insurance policy, their resident relatives and others provided for under N.J.S.A.
39:6A–4. However, this “Cadillac” option, insofar as it is in excess of $250,000, falls outside the definition of “standard automobile insurance policy” as per N.J.S.A. 39:6A–4. To define the “Cadillac” option otherwise would render N.J.S.A. 39:6A–4’s proscription on maximum coverage for a “standard automobile insurance policy” ineffective.

An “amount collectible” under N.J.S.A. 39:6A–12 therefore depends on the limit of the insured’s PIP policy, which in this case was $15,000. Plaintiffs are therefore only barred from admitting evidence of medical expenses under that amount.

Part III

[5] In discerning ... legislative intent we consider not only the particular statute in question, but also the entire legislative scheme of which it is a part[.] ... giving] primary regard ... to the fundamental purpose for which the legislation was enacted.... [T]o this end, the particular words are to be made responsive to the essential principle of the law. It is not the words but the internal sense of the law that controls ...

[ Roig, supra, 135 N.J. at 515, 641 A.2d 248 (internal quotations and citations omitted).]


This court is also cognizant of the Legislature’s intent to allow for consumer choice. As illustrated above, Roig recognized a legislative intent to bar recovery of deductibles and co-payments as a trade-off for lower premiums and the convenience of the no-fault system. “Compensated medical deductibles and copayments are fixed and capable of calculation at the time the insured is issued the policy. It is the in-
sured who determines what type of premium he or she will pay by selecting an appropriate deductible in exchange for a premium reduction.” Bennett v. Hand, 284 N.J. Super. 43, 45–46, 663 A.2d 130 (App.Div.1995) (holding that an accident victim who does not meet verbal threshold can sue for lost income, despite Roig's broad definition of legislative intent). However, medical expenses are distinguished. Unlike deductibles and copayments, an accident victim can hardly be expected to anticipate the severity of his or her injuries, and the consequent expense of his or her medical care. AICRA is devoid of any legislative intent to have insureds bargain for potentially bankrupting medical bills, in exchange for lower premiums. In fact, the express language of the third paragraph of N.J.S.A. 39:6A–12, read in conjunction with N.J.S.A. 39:6A–2(k), states the opposite.

Plaintiffs are not having their cake and eating it, too. Their medical expenses are not instantly recoverable. Instead, they must file suit, go through the discovery process, and run the gauntlet of proving defendant's liability, as well as the necessity and reasonableness of the medical bills, to a jury. That process typically takes years. Even if they are successful in this endeavor, they will still have to collect their damages, which could be impossible if a defendant is uninsured, or underinsured. So, while plaintiffs have been able to recoup a portion of their medical expenses fairly quickly, they must now labor without the assuredness of the no-fault system and proceed through the tort system to, hopefully, recover the remainder. Moreover, if the excess medical expenses are recovered, it is not a windfall to plaintiffs, because these expenses are owed to their medical providers.

This court is mindful of the Legislature's intent, in enacting the no-fault legislation, to eliminate minor claims from the courts and reduce trial backlog. However, in the face of express statutory language to the contrary, this intent should be effectuated with discretion:

We are mindful that from the inception of the no-fault statutory scheme, the Legislature intended to eliminate minor personal-injury-automobile-negligence cases from the court system ... and permitting a person whose injuries do not satisfy the verbal threshold to recover lost income, at least to the extent that the income loss is otherwise uncompensated, will cause many claims for lost income in minor automobile accident cases. However, the Legislature clearly provided for recovery of such “uncompensated economic loss.”


This court likewise declines to so broadly execute the Legislature's intent. Plaintiffs' medical expenses are hardly minor. In addition, defendant concedes that, under its proffered statutory construction, had plaintiffs incurred medical expenses even one dollar in excess of $250,000, that minor excess expense would be permitted into evidence before a jury. It is incongruous that a standard policyholder, who had chosen a lower option provided for by the Legislature, and accepted the risk of indebtedness to medical providers, would be prohibited from entering his or her expenses into evidence as well. There is little evidence that the Legislature intended to make such a distinction between those who can afford maximum coverage and those who cannot. To the contrary, as illustrated above, the provision for lesser amounts of coverage was to enable lower-income drivers to enter the no-fault system, not have them take on potentially insurmountable medical bills in the event of a serious accident, with no means of recovery.

CONCLUSION

For the foregoing reasons, defendant's motion to bar entry into evidence of plaintiffs' medical expenses is denied.
Superior Court of New Jersey,
Appellate Division.

Teresa THOMAS and William Thomas, Plaintiffs–Appellants,
v.


Customer and her husband brought personal injury action against store where she slipped and fell. The Superior Court, Law Division, Ocean County, awarded no damages to husband, entered judgment for customer, and molded verdict pursuant to statute providing for reduction of personal injury award by amount of duplicate benefits received. Customer appealed. The Superior Court, Appellate Division, Keefe, J.A.D., held that: (1) as matter of first impression, in resolving disputes under award reduction statute, procedure to be followed should not differ dramatically from hearing on motion for summary judgment in verbal threshold context; (2) evidence was sufficient to support finding that customer was 25 percent negligent; (3) evidence was sufficient to support quantum of damages awarded; (4) evidence was sufficient to support finding that husband was not entitled to damages on per quod claim; (5) trial court properly excluded testimony concerning results of X-ray apparently revealing objective signs of injury, where X-ray had not been disclosed to defense during discovery and was not revealed until after store’s opening statement; (6) trial court properly permitted store’s counsel to question customer about when she hired attorney; (7) plenary hearing is not required in every case before verdict is molded pursuant to award reduction statute; (8) evidence was sufficient to support finding that customer received double recovery in that her medical bills were paid at 80 percent copayment rate; (9) customer would not be credited with medical bills which she allegedly incurred but which were not covered by jury award; (10) customer would not be credited with attorney fees she paid; and (11) social security statute did not preempt state from reducing customer's award by amount of social security benefits she received.

Affirmed.

West Headnotes

[1] Appeal and Error 30

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(D) Motions for New Trial
30k300 k. Necessity of timely motion. Most Cited Cases

To preserve “weight of the evidence” issue for appellate review, party seeking to advance the issue must make timely motion for new trial.


275 New Trial
275III Proceedings to Procure New Trial
275k115 Time for Application
275k120 k. Excuses for delay. Most Cited Cases

Plaintiff substantially complied with rule establishing time requirements for service of motion for new trial when she attempted to deposit motion papers...
at Post Office on business day during normal business hours, but was prevented from doing so because of unforeseen incident that required Post Office to be closed. R. 4:49–1(b).


275 New Trial

275III Proceedings to Procure New Trial

275k115 Time for Application

275k116.3 k. Compliance with requirements. Most Cited Cases

New Trial 275 119

275 New Trial

275III Proceedings to Procure New Trial

275k115 Time for Application

275k119 k. Effect of delay or laches. Most Cited Cases

Plaintiff did not violate rule establishing time requirements for service of motion for new trial, where plaintiff substantially complied with rule and opposing party was not prejudiced with non-literal compliance with rule. R. 4:49–1(b).

[4] Appeal and Error 30 999(1)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)2 Verdicts

30k999 Conclusiveness in General

30k999(1) k. In general. Most Cited Cases

Superior Court, Appellate Division must defer to trial court in those areas where trial court has expertise, or “feel of the case,” e.g., credibility or demeanor of witnesses; outside such areas, appellate court is permitted to make independent determination of whether miscarriage of justice occurred.

[5] Appeal and Error 30 999(1)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)2 Verdicts

30k999 Conclusiveness in General

30k999(1) k. In general. Most Cited Cases

Judges are admonished not to readily substitute their own judgment for that of initial factfinder.

[6] Appeal and Error 30 999(1)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)2 Verdicts

30k999 Conclusiveness in General

30k999(1) k. In general. Most Cited Cases

Initial factfinder's judgment is entitled to considerable respect and should be overturned only after reviewing judge has carefully scrutinized record and determined that to uphold judgment would result in manifest denial of justice.

[7] Appeal and Error 30 999(1)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

It is only when judgment is accompanied by sense of “wrongness” that it should be disturbed on review.

[8] Negligence 272 C≡1289

272 Negligence
   272XVII Premises Liability
      272XVII(L) Defenses and Mitigating Circumstances
         272k1281 Plaintiff's Conduct or Fault
         272k1289 k. Buildings and structures. Most Cited Cases
            (Formerly 272k67)

Negligence 272 C≡1304

272 Negligence
   272XVII Premises Liability
      272XVII(L) Defenses and Mitigating Circumstances
         272k1301 Effect of Others' Fault
         272k1304 k. As grounds for apportionment; comparative negligence. Most Cited Cases
            (Formerly 272k98)

Evidence was sufficient to support finding that customer who fell in store was 25 percent negligent; notwithstanding defect in floor caused by missing tile, jury could have concluded that store owner placed yellow warning sign on floor marking place where tile was missing, and that reasonable customer could have and should have observed it.

[9] Damages 115 C≡185(1)

115 Damages

115IX Evidence
   115k183 Weight and Sufficiency
   115k185 Personal Injuries and Physical Suffering
         115k185(1) k. In general. Most Cited Cases

Evidence was sufficient to support quantum of damages awarded to customer who fell in store; issue involved credibility, videotape of customer's activities belied her assertion that she could not perform ordinary functions such as carrying child or driving vehicle, customer's physician did not say that her injuries would prevent her from performing ordinary activities, and medical evidence did not demonstrate objective findings of injury.

[10] Damages 115 C≡186

115 Damages
   115IX Evidence
   115k183 Weight and Sufficiency
   115k186 k. Loss of earnings, services, or consortium. Most Cited Cases

Husband and Wife 205 C≡232.3

205 Husband and Wife
   205VI Actions
      205k231 Evidence
         205k232.3 k. Weight and sufficiency. Most Cited Cases

Evidence was sufficient to support jury's finding that husband of customer who fell in store was not entitled to damages on per quod claim; videotape of wife's activities affected weight to be given husband's testimony concerning impact on him of wife's allegedly diminished ability to function, and husband's testimony contained inconsistencies concerning his employment.
Trial court in personal injury action properly excluded testimony concerning results of X-ray apparently revealing objective signs of injury, where X-ray had not been disclosed to defense during discovery and was not revealed until after defendant's opening statement; X-ray could not have been anticipated by defendant in view of absence of report of objective findings by plaintiff's physician, prejudice was significant in that defendant had built case around theory that no objective medical findings were reported, and evidence was not pivotal to plaintiff's case, in that it was merely corroborative of physician's testimony.

Although discovery rules are to be construed liberally and broadly to facilitate search for truth during litigation, concealment or surprise are not to be tolerated.

Not every failure to apprise opposing counsel of information or witnesses in addition to those provided
in pretrial discovery results in testimonial exclusion.

[16] Appeal and Error 30 3043(6)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J) Interlocutory and Preliminary Proceedings

30k1043 Interlocutory Proceedings

30k1043(6) k. Discovery and depositions. Most Cited Cases

307II Depositions and Discovery

307II(A) Discovery in General

307Ak44 Failure to Disclose; Sanctions

307Ak45 k. Facts taken as established or denial precluded; preclusion of evidence or witness. Most Cited Cases

Whether new evidence introduced at trial is pivotal to plaintiff's case is the critical aspect of issue of whether, when new evidence is introduced by plaintiff at trial, court should exclude evidence.

[18] Privileged Communications and Confidentiality 311H 146

311H Privileged Communications and Confidentiality

311HII Attorney-Client Privilege

311Hk144 Subject Matter; Particular Cases

311Hk146 k. Client information; retainer and authority. Most Cited Cases

(Formerly 410k201(1))

Trial court properly permitted defense counsel to question personal injury plaintiff about when she hired attorney; although plaintiff argued that question invaded attorney-client privilege, question was limited by judge to when plaintiff hired attorney, was not focal point of case, and had some bearing on plaintiff's motivations and credibility.

[19] Damages 115 59

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

Focus of statute providing for reduction of award by amount of duplicate benefits received by plaintiff is
to protect and relieve burden placed on insurance companies when plaintiff's benefits are cumulative. N.J.S.A. 2A:15–97.

[20] Damages 115 $59

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

Plenary hearing is not required in every case before verdict is molded pursuant to statute providing for reduction of personal injury award by amount of duplicate benefits received by plaintiff; statute's provision, that any party to action shall be permitted to introduce evidence regarding any matters described in statute, simply means that either party can provide supporting documents or affidavits to argue application of statute. N.J.S.A. 2A:15–97.

[21] Statutes 361 $1091

361 Statutes
361III Construction
361III(B) Plain Language; Plain, Ordinary, or Common Meaning
361k1091 k. In general. Most Cited Cases
(Formerly 361k188)

Courts are to give words of statute their common and ordinary meaning, unless instruction in statute states otherwise.

[22] Damages 115 $59

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

Essence of statute providing for reduction of personal injury award by amount of duplicate benefits received by plaintiff is that plaintiff must disclose to court records of his or her benefits from collateral sources so that tort recovery can be offset against them. N.J.S.A. 2A:15–97.

[23] Damages 115 $59

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

In resolving disputes under statute providing for reduction of personal injury award by amount of duplicate benefits received by plaintiff, procedure to be followed should not differ dramatically from hearing on motion for summary judgment in verbal threshold context of Oswin v. Shaw. N.J.S.A. 2A:15–97.

[24] Damages 115 $59

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

In resolving disputes under statute providing for reduction of personal injury award by amount of du-
plicate benefits received by plaintiff, plenary hearing will be the exception, and is warranted only where plaintiff has fully complied with good-faith disclosure requirements implicated by statute, but fact issue remains; such holding is based on fact that evidence concerning plaintiff’s benefits can be proven through documents. N.J.S.A. 2A:15–97.

[25] Damages 115

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

Evidence was sufficient to support finding that personal injury plaintiff received double recovery in that her medical bills were paid at 80 percent copayment rate, for purposes of statute providing for reduction of personal injury award by amount of duplicate benefits received by plaintiff; defendant supplied employment records stating that bills were paid at that rate, and plaintiff failed to explain why that rate should not be applied. N.J.S.A. 2A:15–97.

[26] Appeal and Error 30

30 Appeal and Error

30III Decisions Reviewable

30III(F) Mode of Rendition, Form, and Entry of Judgment or Order

30k123 k. Necessity of formal judgment or order. Most Cited Cases

Appeal was from judgment, not from judge's reasons for judgment.

[27] Damages 115

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

Personal injury plaintiff would not be credited with medical bills which she allegedly incurred but which were not covered by jury award, in molding verdict under statute providing for reduction of personal injury award by amount of duplicate benefits received by plaintiff; judge was required to deduct from jury award the amount received by plaintiff from medical insurance without considering other factors, and to hold otherwise would require tort-feasor to pay portion of medical expenses that jury did not find was reasonably connected to accident. N.J.S.A. 2A:15–97.

[28] Damages 115

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(B) Aggravation, Mitigation, and Reduction of Loss

115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

Personal injury plaintiff would not be credited with attorney fees she paid, in molding verdict under statute providing for reduction of personal injury award by amount of duplicate benefits received by plaintiff; to credit attorney fees would have effect of awarding counsel fees in favor of plaintiff, which was result that should not be reached without specific legislative endorsement. N.J.S.A. 2A:15–97; R. 4:42–9(a)(8).

[29] Damages 115

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

Personal injury plaintiff's past lost wage award would be reduced by amount of social security benefits and state temporary disability payments received by plaintiff.

[30] Negligence 272 ☐549(11)

272 Negligence
272XVI Defenses and Mitigating Circumstances
272k545 Effect of Others' Fault
272k549 As Grounds for Apportionment; Comparative Negligence Doctrine
272k549(11) k. Particular cases and percentages. Most Cited Cases
(Formerly 272k97)

Personal injury plaintiff's past lost wage award would be reduced by percentage of plaintiff's contributory negligence.

[31] Damages 115 ☐59

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

Damages 115 ☐187

115 Damages

115IX Evidence
115k183 Weight and Sufficiency
115k187 k. Impairment of earning capacity. Most Cited Cases

Trial court did not abuse its discretion in reducing personal injury plaintiff's future lost wages to zero because it believed that her state or federal benefits would be greater than sum awarded by jury; plaintiff failed to meet her obligation of providing necessary documentation to support award of future lost wages.

[32] Damages 115 ☐60

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k60 k. Benefits incident to injury. Most Cited Cases
(Formerly 356Ak140.1 Social Security and Public Welfare)

Social Security 356H ☐131

356H Social Security
356HII Benefits
356HII(G) Payments and Recovery Back
356Hk131 k. In general. Most Cited Cases
(Formerly 356Ak140.1 Social Security and Public Welfare)

Statute providing for reduction of personal injury award by amount of duplicate benefits received by plaintiff applies to social security benefits; no federal mandate exists for social security benefits, that is, they are not reimbursable to federal government if recipient receives replacement benefit. N.J.S.A. 2A:15–97.

[33] Damages 115 ☐59

Plaintiff Teresa Thomas (Teresa) fell while shopping at defendant Toys “R” Us. She and her husband, William, instituted suit against defendant for damages resulting from that fall. A jury returned a verdict finding defendant 75% negligent and Teresa 25% contributorily negligent. The jury awarded damages as follows: $10,887 for medical expenses; $42,504 for lost wages; $11,012 for future lost income; $12,500 for pain and suffering; and $0 for William's per quod claim. The total judgment in favor of Teresa was $76,903. The judge molded the verdict in accord with N.J.S.A. 2A:15–97 as follows: $1,642 for medical expenses; $6,334 for lost wages; $0 for future lost wages; and $9,375 for pain and suffering.

Plaintiffs' motion for an additur or a new trial was denied. Plaintiffs now appeal and present the following issues for resolution.

POINT I THE TRIAL COURT IMPROPERLY DENIED PLAINTIFFS A NEW TRIAL AND/OR ADDITUR ON BOTH THE ISSUES OF DAMAGES AND LIABILITY

POINT II THE TRIAL COURT MADE TWO ERRONEOUS EVIDENTIAL RULINGS RESULTING IN A MANIFEST DENIAL OF JUSTICE

POINT III THE COURT'S TREATMENT OF THE COLLATERAL SOURCE RULE WAS IMPROPER

A. The Trial Court Committed Reversible Error By Not Having An Evidentiary Hearing Before Molding The Verdict as to Collateral Sources

B. The Court Miscalculated Plaintiff's Medical Benefits Resulting in an Improper Application of the Collateral Source Rule

C. The Trial Court Improperly Reduced Plaintiff's Lost Wage Award

D. The Trial Court Erroneously Used Plaintiff's Social Security Benefits as a Set-off in Violation of
Federal Preemption.

*578 We have carefully reviewed the record in light of plaintiffs' contentions which were thoroughly and articulately presented in their appellate briefs and at oral argument. However, we are satisfied, for the reasons stated herein, that there is no warrant for our intervention, and that the judgment under review must be affirmed.

I

[1][2] In order to preserve a “weight of the evidence” issue for appellate review, the party seeking to advance the issue must make a timely motion for a new trial. In this case, the trial judge ruled that plaintiffs' motion for a new trial was not filed and served in a timely fashion. However, he addressed the merits of plaintiffs' motion. Although the trial judge ruled on the merits of the motion, the procedural issue has been preserved for appellate review. Defendant urges that the trial judge was correct in his ruling on the motion, and that we need not address the merits of the evidence issue now presented by plaintiffs.

[3] A motion for a new trial “shall be served not later than 10 days after ... the return of the verdict of the jury.” R. 4:49–1(b). The period begins to run from the date the verdict is received in open court, and it is a non-relaxable rule, even in extenuating circumstances, R. 1:3–4(c). Spedick v. Murphy, 266 N.J.Super. 573, 587–588, 630 A.2d 355 (App.Div.), certif. denied, 134 N.J. 567, 636 A.2d 524 (1993). However, we have recognized that the requirements of the rule are met in situations where there is “substantial compliance” with its terms. Stegmeier v. Saint Elizabeth Hosp., 239 N.J.Super. 475, 571 A.2d 1006 (App.Div.1990) (finding substantial compliance with the rule where the motion papers were delivered to an independent carrier within the ten day time period).

In this case, substantial compliance occurred when plaintiffs attempted to deposit the motion papers at the Freehold post office on a business day during normal business hours, but were prevented from doing so because of an unforeseen incident that required the post office to be closed. FN1 Thus, where there has been substantial compliance with the rule, and the opposing party has not been prejudiced by the non-literal compliance, we hold that R. 4:49–1(b) was not violated.

FN1. Because this motion was made before September 1, 1994, service of the motion for a new trial was complete upon mailing. However, as a result of the September 1, 1994, amendment, service of a motion for a new trial is complete only upon receipt of the papers by opposing counsel. R. 1:6–3.

[4][5][6][7] We now turn to the merits of the issue, and the appropriate standard of review. This court must defer to the trial court in those areas where the trial court has expertise, or a “feel of the case,” e.g., the credibility or demeanor of the witnesses. Outside such areas, an appellate court is permitted to make an independent determination of whether a miscarriage of justice occurred. Carrino v. Novotny, 78 N.J. 355, 360, 396 A.2d 561 (1979); Baxter v. Fairmont Food Co., 74 N.J. 588, 597–598, 379 A.2d 225 (1977). “[A] jury verdict, from the weight of the evidence standpoint, is impregnable unless so distorted and wrong, in the objective and articulated view of the judge, as to manifest with utmost certainty a plain miscarriage of justice.” Carrino, supra, 78 N.J. at 360, 396 A.2d 561. Further, judges are admonished not to readily substitute their own judgment for that of the initial factfinder. Baxter, supra, 74 N.J. at 597–598, 379 A.2d 225. Thus, the initial factfinder's judgment is entitled to considerable respect and should be overturned only after the reviewing judge has carefully scrutinized the record and determined that to uphold the judgment would result in a manifest denial of justice. Ibid. It is only when the judgment is accompanied by a sense of “wrongness” that it should be
disturbed on review. Id. at 599, 379 A.2d 225 (quoting State v. Johnson, 42 N.J. 146, 162, 199 A.2d 809 (1964)).

[8] Applying those standards to this case, we are satisfied that there was sufficient, credible evidence in the record to justify the jury's conclusion that Teresa was 25% negligent. Notwithstanding the defect in the floor caused by the missing tile, the jury could have concluded that defendant placed a yellow warning sign on the floor marking the place where the tile was missing, and that a reasonable shopper, such as Teresa, could have and should have observed it.

[9] As to the quantum of damages awarded to Teresa for her injuries, the record reveals credibility issues that are traditionally the exclusive province of a jury to resolve. A significant aspect of the case, and a factor that the trial judge relied upon in analyzing the issue, was the video tape of Teresa's activities, which belied her assertion that she could not perform ordinary functions, such as carrying her child or driving a vehicle. Further, her doctor never articulated that her injuries were such that they would prevent her from driving, doing laundry, or other such activities. Moreover, the medical evidence presented to the jury did not demonstrate any objective findings of injury.

[10] We reach the same result with respect to the jury's verdict on William's per quod claim. The video tape of Teresa's activities clearly affected the weight to be given his testimony concerning how her allegedly diminished ability to function impacted on his life. Further, William's testimony contained inconsistencies concerning his employment, an issue properly developed and explored by defense counsel on cross-examination.

II

Plaintiffs argue here that the trial judge made two erroneous evidentiary rulings. The first centers on an X-ray that Teresa's doctor had in his file that was discovered by plaintiffs' counsel for the first time at trial. The second ruling was permitting defense counsel to question Teresa about when she hired an attorney.

[11] Plaintiffs' counsel first discovered the X-ray report at trial, on June 14, 1994, while preparing the doctor for his testimony. The X-ray was taken on January 31, 1994. The radiologist reported that the X-ray revealed a straightening of Teresa's lumbar lordosis. It was the only objective finding of injury that plaintiff had. Defense counsel objected based on surprise and prejudice, and the trial court did not admit the X-ray report. The judge explained that the rules of discovery demanded full and fair disclosure, and the admission of an X-ray on the day of trial would prejudice defendant. However, the judge prohibited defense counsel from cross-examining Teresa's doctor on the fact that X-rays were negative so the jury would not be given a false impression. During cross-examination, defense counsel covered other objective tests that Teresa underwent, the EMG, a neurological exam, a bone scan and MRIs, and the fact that they were all negative.

[12][13][14][15] The discovery rules are to be construed liberally and broadly to facilitate the search for the truth during litigation. However, “[c]oncealment or surprise are not to be tolerated in a modern judicial system.” Lang v. Morgan's Home Equipment Corp., 6 N.J. 333, 338, 78 A.2d 705 (1951). A trial judge can suspend the imposition of sanctions in three scenarios:

1. absence of a design to mislead or conceal—as, for example, mistake, inadvertence, excusable neglect, or honest misunderstanding;
2. absence of the element of surprise if the evidence is admitted;
3. absence of prejudice which would result from the admission of the evidence.
The trial court is vested with discretion in resolving such an issue and can impose the sanction of exclusion if such an outcome is just and reasonable. *Westphal v. Guarino*, 163 N.J.Super. 139, 145–146, 394 A.2d 377 (App.Div.), aff’d o.b., 78 N.J. 308, 394 A.2d 354 (1978). Not every failure to apprise opposing counsel of additional information or witnesses results in testimonial exclusion. See *Gaido v. Weiser*, 227 N.J.Super. 175, 192–93, 545 A.2d 1350 (App.Div.), aff’d, 115 N.J. 310, 558 A.2d 845 (1988) (Defendant’s medical expert's opinion that varied from synopsis provided with interrogatory was not excluded because trial court gave plaintiff's counsel opportunity to de- pose doctor and new testimony revealed no new theory of the case of which plaintiff's attorney was not aware.); *Amaru v. Stratton*, 209 N.J.Super. 1, 14, 506 A.2d 1225 (App.Div.1985) (Trial court's decision not to exclude testimony upheld because contested testimony was based on pretrial discovery and did not pose threat of surprise or prejudice.); *Brown v. Mortimer*, 100 N.J.Super. 395, 242 A.2d 36 (App.Div.1968) (Witness permitted to testify whose name had not been supplied by filing of timely amendment to interrogatory.)

In *Gaido*, supra, and *Brown*, supra, the trial judges refrained from excluding the evidence because the evidence was in line with the theory of the case, *Gaido*, supra, 227 N.J.Super. at 193, 545 A.2d 1350, and it was conceded that a party was not prejudiced or surprised when a witness was called to testify. *Brown, supra*, 100 N.J.Super. at 401–402, 242 A.2d 36. Here, on the other hand, the X-ray could not have been anticipated in view of the absence of any report of objective findings by Teresa’s doctor. Thus, surprise is clearly evident. More importantly, prejudice is significant here because defendant had prepared a case built around a theory that no objective medical findings through X-rays or MRIs were reported. Likewise, defense counsel would not have been prepared to cross-examine Teresa’s doctor or prepare his own expert witness on the significance of the X-ray. Thus, the trial judge did not err by excluding reference to the X-ray.

[16] A related issue presented is whether the judge erred by not declaring a mistrial or adjourning the case to allow the parties to adjust to the new evidence. Generally, a trial judge is not obligated to grant an adjournment or declare a mistrial to allow the parties to prepare and research the evidence. The ruling is discretionary. Simply stated, unless the judge's decision to exclude the evidence created a manifest denial of justice, the decision on exclusion must stand. *State v. Carter*, 91 N.J. 86, 106, 449 A.2d 1280 (1982).

**1243** [17] The critical aspect of this issue is whether the evidence excluded was pivotal to plaintiffs’ case. In *Ratner v. General Motors Corp.*, 241 N.J.Super. 197, 574 A.2d 541 (App.Div.1990) the excluded evidence was the imprint of plaintiff's shoe on the brake in an automobile. Plaintiff's theory of the case was self-acceleration; thus, the imprint was the proverbial “smoking gun.” *Ibid.* at 203, 574 A.2d 541. Plaintiff's case disintegrated without this evidence as no expert could find a defect in the vehicle's acceleration system. *Ibid.* We noted that the element of surprise was not created by the plaintiff or her attorney, and that they were as surprised as defendant. *Ibid.* Further, prejudice was limited as defendant would not have been inconvenienced by an adjournment or mistrial, as defense counsel conceded at oral argument. *Ibid.* Thus, given the pivotal nature of the evidence as compared to the elements of surprise and prejudice, the exclusion was not just and reasonable and a denial of justice had occurred. *Ibid.*

Plaintiffs rely heavily on *Ratner*. However, we find it clearly distinguishable on the facts. Here, Teresa presented objective findings of spasm through the testimony of her doctor. All objective tests, other than the one X-ray, were negative. Thus, even if the doctor was permitted to refer to the X-ray report, it
was at best simply corroborative of his own detection of spasm. The evidence was not the “smoking gun” evidence upon which the Ratner decision turned.

FN2. However, the doctor was permitted to testify about finding spasm, although it was not mentioned in his report.

[18] Plaintiffs' second objection occurred during Teresa's cross-examination, when defense counsel asked when she filed the complaint against defendant. Plaintiffs objected and argued that the line of questioning invaded the attorney-client privilege and involved a statute of limitations issue. The question was limited by the judge to when plaintiff hired her attorney. We find no error here. It was certainly not a focal point of the case and had some bearing on plaintiffs' motivations and credibility.

III

Plaintiffs argue that the trial judge incorrectly applied the collateral source rule. Essential to the resolution of this issue is N.J.S.A. 2A:15–97 which reads in pertinent part:

*584 In any civil action brought for personal injury, ..., if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, ..., shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable. Any party to the action shall be permitted to introduce evidence regarding any of the matters described in this act.

[19] Kiss v. Jacob, 268 N.J.Super. 235, 633 A.2d 544 (App.Div.1993), rev'd on other grounds, 138 N.J. 278, 650 A.2d 336 (1994) provides guidance for the resolution of the issues presented. In that case, the Supreme Court stated that the purpose of N.J.S.A. 2A:15–97 was “to do away with the common-law collateral source rule.” Id. at 281, 650 A.2d 336. We similarly concluded that: “The overriding legislative intent of the Legislature in adopting N.J.S.A. 2A:15–97 was to prevent a claimant from receiving benefits beyond the damages awarded under a judgment entered and to relieve defendants and insurance companies from having to compensate plaintiffs for damages in excess of the total amounts of their losses.” Kiss, supra, 268 N.J.Super. at 247, 633 A.2d 544. The focus of the act was to protect and relieve the burden placed on insurance companies when a plaintiff's benefits are cumulative. Id. at 248, 633 A.2d 544. “No legitimate public interest is served in this case, or in many tort cases, in allowing plaintiff to receive double recovery for his or her actual losses and **1244 damages and thus compelling the carrier for the tortfeasor to pay benefits more than once.” Id. at 249, 633 A.2d 544. The benefits that the Legislature focused upon in enacting N.J.S.A. 2A:15–97 include life- or health-insurance policies, social security and welfare payments, and pension benefits. Kiss, supra, 138 N.J. at 282, 650 A.2d 336 (quoting Statement to Senate Bill No. 2708 (Nov. 23, 1987)).

A

[20] Plaintiffs contend that the trial judge erred because he failed to hold an evidentiary hearing before he molded the verdict *585 based on N.J.S.A. 2A:15–97. The trial judge opined that N.J.S.A. 2A:15–97 does not require a plenary hearing in every case. We agree.

[21] The statute simply provides that “[a]ny party to the action shall be permitted to introduce evidence regarding any of the matters described in this act.” N.J.S.A. 2A:15–97. Courts are to give words their common and ordinary meaning, unless instruction in
the statute dictates otherwise. Great Atlantic and Pacific Tea Co., Inc. v. Borough of Point Pleasant, 137 N.J. 136, 644 A.2d 598 (1994). The above quoted language does not support plaintiffs’ interpretation, that a trial judge must conduct a plenary hearing on the collateral source implications. Rather, it simply stands for the proposition that either party can provide supporting documents or affidavits to argue the application of the statute.

Plaintiffs argue that this court's decision in Serratore v. Nardi, 237 N.J.Super. 566, 568 A.2d 573 (App.Div.), certif. denied, 122 N.J. 131, 584 A.2d 206 (1990) should govern because the PIP statute involved in that case, N.J.S.A. 39:6A–12, is the counterpart to N.J.S.A. 2A:15–97. Plaintiffs' reliance is misplaced. N.J.S.A. 39:6A–12 deals with the inadmissibility in a civil action of evidence pertaining to monies collectible by an injured person under PIP coverage in order to preclude double recovery. In Serratore, we held that where there is a dispute about coverage, it should be resolved by the judge sitting as a trier of fact. Id. at 571, 568 A.2d 573. We have no quarrel with that result so far as it goes. However, it does not address this statute, nor the relative burden of the parties in creating genuine factual disputes.

[22] The issue presented here is one of first impression because it addresses the procedure to be followed in resolving N.J.S.A. 2A:15–97 disputes. The essence of the statute is that the plaintiff must disclose to the court records of his/her benefits from collateral sources so that the tort recovery can be offset against them. As noted above, the statute permits either party to submit “evidence” to establish that benefits have or have not been received. However, the primary burden is on the plaintiff.

*586 [23][24] In our view, the procedure to be followed should not differ dramatically from a hearing on a motion for summary judgment in the verbal threshold context of Oswin v. Shaw, 129 N.J. 290, 609 A.2d 415 (1992). Regardless of the fact that it is the defendant who benefits from the statute, and may be the first to bring the matter to the attention of the court, the Legislature made it clear that it is the plaintiff, under N.J.S.A. 2A:15–97, who must supply documents and records showing what duplicate benefits have and will be received. Clearly implied by the procedure is the requirement that plaintiff present the relevant evidence in good faith, just as the opposing party in a summary judgment proceeding must submit an affidavit that is specific and cannot merely rely on the pleadings. Indeed, in the summary judgment context, sanctions can be imposed for the submittal of evidence in bad faith. R. 4:46–5(b).

Most, if not all, evidence concerning a plaintiff's benefits can be proven through documents. We expect that proceedings of this nature will rarely require determinations of credibility. Thus, a plenary hearing will be the exception, and is warranted only where the plaintiff has fully complied with the good faith disclosure requirements implicated by the statute, but a fact issue remains.

[25][26] Here, plaintiff failed to provide the necessary support and documentation to prove that she had not received a double recovery. Most of the evidence produced **1245 was supplied by defendant. For example, defendant supplied the employment records which facially state that plaintiff's bills were paid at an 80% rate. Plaintiff never explained why the copayment rate should not be 80%, as determined by the judge, or why some bills were not covered. Simply put, plaintiffs failed to sustain their statutorily implied good faith burden of coming forward with documentary evidence relevant to the issue of duplicate benefits. While the trial judge may have stated other reasons for his conclusion, the appeal is from the judgment, not from the judge's reasons. Heffner v. Jacobson, 100 N.J. 550, 553, 498 A.2d 766 (1985). Thus, we *587 affirm the trial judge's decision to apply the 80% copayment factor in determining plaintiff's medical benefits.
B

However, regardless of that determination, plaintiffs also maintain that the trial judge erred in not taking other credits into account when he calculated collateral benefits. Specifically, plaintiffs contend that the judge should have considered the fact that Teresa actually incurred $11,497 in medical bills, while the jury awarded her only $10,887. She contends that the $610 difference should have been credited to her in determining to what extent she received a duplicate medical award. Additionally, Teresa contends that her one-third counsel fee should be considered as a credit to her in deciding what benefits were duplicated, regardless of whether they are medical or income replacement benefits.

[27] We reject both arguments essentially based upon the plain language of the statute. The statute requires any benefit received by a plaintiff which “duplicates” a benefit received in the jury verdict “be deducted from any award recovered by plaintiff [.]” N.J.S.A. 2A:15–97 (emphasis added). Thus, the judge is required by statute to deduct from the jury “award” the amount received by a plaintiff from medical insurance, without considering other factors. Plaintiffs’ interpretation would have the effect of requiring the tortfeasor to pay a portion of a medical expense that the jury apparently did not find was reasonably connected to the accident. In this case, the trial judge took 80% of the $10,887 awarded by the jury as the amount of plaintiff’s duplicate benefit, not 80% of the amount of the medicals plaintiff attempted to prove. He was correct in doing so.

[28] Likewise, the attorney fee is not a factor in the jury “award” and, thus, cannot be a factor in determining to what extent a plaintiff has received a duplicate benefit. Traditionally, our courts have required litigants to bear their own costs of litigation. *588 Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982). Where the Legislature has intended a different result, it has had no difficulty in expressing itself. Indeed, our court rules provide that, except as provided by the rules themselves, attorney fees cannot be awarded unless “permitted by statute.” R. 4:42–9(a)(8); see Pressler, Current N.J. Rules, comment 2 on R. 4:49–9. In this case, a consideration of counsel fees in deciding the issue of duplicate benefits, would have the effect of awarding counsel fees in favor of plaintiffs on those claims, a result that should not be reached without specific legislative endorsement.

C

[29][30] Plaintiffs argue that the judge incorrectly reduced Teresa’s past lost wage award. The jury awarded $42,504 for lost wages. The judge reduced that amount by Teresa’s social security benefits and State temporary disability payments. He then reduced the net award by Teresa’s 25% contributory negligence and arrived at a lost wage award of $6,334. We find no error in the judge's calculation warranting a reversal.

[31] As to future lost wages, plaintiffs argue that there is no duplication of benefits because Teresa will receive social security benefits less than her monthly salary. The trial judge reduced Teresa’s future lost wages to zero because he believed the State or federal benefits will be greater than the sum awarded by the jury. The judge accurately observed that this issue had not been as fully documented as the other wage-connected issues. We are satisfied on the record presented to the trial judge that there is **1246 no abuse of discretion exhibited by his conclusion in view of the plaintiff’s obligation to provide the necessary information on such matters.

[32] Lusby By and Through Nichols v. Hitchner, 273 N.J.Super. 578, 642 A.2d 1055 (App.Div.1994) held that N.J.S.A. 2A:15–97 does not apply to Medicaid payments because such payments are reimbursable. Plaintiffs attempt to extend that holding to the present case with respect to Teresa’s receipt of social security benefits, inasmuch as those benefits are based upon the amount *589 Teresa has placed into the
system. However, the concepts are clearly distinguishable. Medicaid reimbursement is federally mandated. Thus, a plaintiff receiving Medicaid benefits will not receive a double recovery, assuming the federal law will be observed. There is no such federal mandate for social security benefits. That is, they are not reimbursable to the federal government if the recipient receives a replacement benefit.

D

[33] Finally, plaintiffs argue that the federal social security statute, 42 U.S.C.A. § 424a, preempts the State from reducing an injured person's social security benefits by a tort award. The argument is without merit. See Lamb v. Connecticut Gen. Life Ins. Co., 643 F.2d 108, 110–111 (3rd Cir.1981), cert. denied, 454 U.S. 836, 102 S.Ct. 139, 70 L.Ed.2d 116 (1982) (Reduction of payments under group disability insurance policy reflecting amount of social security benefits received does not violate the Social Security Act.). The amount of social security benefits received by plaintiff has not been diminished by State law. Plaintiff has received and will continue to receive whatever social security benefits federal law and regulations permit. Ibid. The State law under review, N.J.S.A. 2A:15–97, simply does not permit a plaintiff to duplicate those benefits through a tort award. Thus, there is no conflict between State and federal law. See Feldman v. Lederle Laboratories, 125 N.J. 117, 133–134, 592 A.2d 1176 (1991), cert. denied, — U.S. 3027, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1992). Teresa's social security benefits have not been set off or diminished by State action.

Affirmed.
Background: Medicare recipient brought action against the Secretary of the Department of Health and Human Services (DHHS) challenging the determination that she was required to reimburse the government for conditional medical expenses that it advanced on her behalf after recipient received settlement from third-party tortfeasor. The United States District Court for the District of New Jersey, Joseph H. Rodriguez, J., 956 F.Supp.2d 563, dismissed the action. Recipient appealed.

Holdings: The Court of Appeals, Hardiman, Circuit Judge, held that:
(1) recipient's liability settlement from third-party tortfeasor qualified as a “primary plan” within the meaning of the Medicare as a Secondary Payer Act;
(2) recipient's $90,000 settlement with tortfeasor included her medical expenses, and thus recipient had obligation to reimburse Medicare for $10,121.15 in medical expenses;
(3) the New Jersey Collateral Source Statute (NJCSS) did not prevent Medicare from recovering medical expenses as part of her damages in tort suit;
(4) state court's order apportioning settlement proceeds did not bar government from seeking reimbursement for medical expenses;
(5) District Court lacked jurisdiction to adjudicate recipient's unexhausted claim pursuant to “equity and good conscience” exception under Act; and
(6) District Court lacked federal question jurisdiction over due process claim.

Affirmed.
source rule in general. Most Cited Cases

Under the New Jersey Collateral Source Statute (NJCSS), a tort plaintiff cannot recover damages from a defendant when she has already received funding from a different source. N.J.S.A. 2A:15–97.

[3] Damages 115 59

115 Damages

  115III Grounds and Subjects of Compensatory Damages

  115III(B) Aggravation, Mitigation, and Reduction of Loss

    115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

A purpose of the New Jersey Collateral Source Statute (NJCSS) is to prevent a tort plaintiff from recovering damages from both a collateral source of benefits and a tortfeasor. N.J.S.A. 2A:15–97.

[4] Damages 115 64

115 Damages

  115III Grounds and Subjects of Compensatory Damages

  115III(B) Aggravation, Mitigation, and Reduction of Loss

    115k64 k. Reduction of loss by insurance. Most Cited Cases

A purpose of the New Jersey Collateral Source Statute (NJCSS) is to shift the burden of medical costs related to tort injuries, whenever possible, from liability insurers to health insurers, and thereby keep liability insurance premiums down. N.J.S.A. 2A:15–97.


15A Administrative Law and Procedure

  15AV Judicial Review of Administrative Decisions

    15AV(A) In General

    15AVk681 Further Review

      15Ak683 k. Scope. Most Cited Cases

The Court of Appeals reviews the District Court's order dismissing claims challenging an administrative agency's determination de novo.


15A Administrative Law and Procedure

  15AV Judicial Review of Administrative Decisions

    15AV(E) Particular Questions, Review of

      15Ak784 Fact Questions

      15Ak791 k. Substantial evidence. Most Cited Cases

Substantial evidence required to support an administrative agency's determination means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.


15A Administrative Law and Procedure

  15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

    15AIV(C) Rules, Regulations, and Other Policymaking

      15Ak428 Administrative Construction of Statutes

      15Ak431 k. Deference to agency in general. Most Cited Cases

A court strongly defers to an administrative
agency's legal interpretation of its implementing statute.

[8] Health 198H 545

198H Health
  198HIII Government Assistance
  198HIII(C) Federal Medical Assistance to the Elderly (Medicare)
  198Hk538 Recovery Back or Recoupment of Payments
  198Hk545 k. Medicare as second payer.

Most Cited Cases

Medicare recipient's liability settlement from third-party tortfeasor qualified as a “primary plan” within the meaning of the Medicare as a Secondary Payer Act, triggering recipient's obligation to reimburse government for Medicare payments to cover her medical expenses; tortfeasor was a business entity that had liability insurance policy. Medicare Act, § 102(a), 42 U.S.C.A. § 1395y(b)(2)(A)(ii).

[9] Health 198H 545

198H Health
  198HIII Government Assistance
  198HIII(C) Federal Medical Assistance to the Elderly (Medicare)
  198Hk538 Recovery Back or Recoupment of Payments
  198Hk545 k. Medicare as second payer.

Most Cited Cases

The fact of a Medicare recipient's settlement with tortfeasor alone, if it releases a tortfeasor from claims for medical expenses, is sufficient to demonstrate the recipient's obligation to reimburse Medicare for medical expenses it paid under the Medicare as a Secondary Payer Act. Medicare Act, § 102(a), 42 U.S.C.A. § 1395y(b)(2)(B)(ii); 42 C.F.R. § 411.22(b)(2).

[10] Health 198H 545

198H Health
  198HIII Government Assistance
  198HIII(C) Federal Medical Assistance to the Elderly (Medicare)
  198Hk538 Recovery Back or Recoupment of Payments
  198Hk545 k. Medicare as second payer.

Most Cited Cases

The scope of Medicare's responsibility for a Medicare recipient's medical expenses, and thus of the recipient's own obligation to reimburse Medicare, pursuant to the Medicare as a Secondary Payer Act, is ultimately defined by the scope of the recipient's own claim against the third party that is later released in settlement. Medicare Act, § 102(a), 42 U.S.C.A. § 1395y(b)(2)(B)(ii).


198H Health
  198HIII Government Assistance
  198HIII(C) Federal Medical Assistance to the Elderly (Medicare)
  198Hk538 Recovery Back or Recoupment of Payments
  198Hk545 k. Medicare as second payer.

Most Cited Cases

Medicare recipient's $90,000 settlement with third-party tortfeasor for injuries she sustained when she fell on tortfeasor's premises included her medical expenses, and thus recipient had obligation, under Medicare as Secondary Payer Act, to reimburse Medicare for the $10,121.15 in medical expenses that Medicare had paid on her behalf to treat injuries she sustained in the fall; the settlement agreement expressly anticipated Medicare's lien, and released tortfeasor from all liability, including medical expenses.
and recipient's counsel had repeatedly contacted her Medicare contractor to determine the amount of the Medicare lien so that he could use it to justify a settlement demand. Medicare Act, § 102(a), 42 U.S.C.A. § 1395y(b)(2)(B)(ii).

[12] Damages 115k64

115k64 k. Reduction of loss by insurance.
Most Cited Cases

Health 198H 545

198H Health
198HIII Government Assistance
198HIII(C) Federal Medical Assistance to the Elderly (Medicare)
198Hk538 Recovery Back or Recoupment of Payments
198Hk545 k. Medicare as second payer.
Most Cited Cases

The New Jersey Collateral Source Statute (NJCSS), as predicted by the Court of Appeals, did not prevent a Medicare recipient from recovering medical expenses as part of her damages in tort suit, even though the medical expenses had been provisionally paid by Medicare, since Medicare was entitled to reimbursement for those expenses under the Medicare as Secondary Payer Act. Medicare Act, § 102(a), 42 U.S.C.A. § 1395y(b)(2)(A)(ii); N.J.S.A. 2A:15–97.


170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine

170BXV(A) In General
170Bk3006 Sources of Authority
170Bk3008 State Courts and Their Decisions in General
170Bk3008(3) k. Inferior courts.
Most Cited Cases

In predicting how the state's highest court may rule on a matter of state law, a federal court may consider the decisions of state intermediate appellate courts, which, although not dispositive, should be accorded significant weight in the absence of an indication that the highest state court would rule otherwise.

[14] Health 198H 545

198H Health
198HIII Government Assistance
198HIII(C) Federal Medical Assistance to the Elderly (Medicare)
198Hk538 Recovery Back or Recoupment of Payments
198Hk545 k. Medicare as second payer.
Most Cited Cases

New Jersey Superior Court's apportionment order, which stated that no portion of Medicare recipient's settlement with third-party tortfeasor included Medicare expenses, did not bar government from seeking reimbursement for provisional medical expenses it paid, under the Medicare as Secondary Payer Act, as that order was not "on the merits"; recipient sought the order not to resolve any outstanding issue in her tort suit, but only to the extent necessary to obtain specified documentation relevant to anticipated administrative Medicare proceedings, the state court effectively rubberstamped recipient's request, and government was not party to the proceeding. Medicare Act, § 102(a), 42 U.S.C.A. § 1395y(b)(2)(A)(ii).

[15] Health 198H 556(3)
District Court lacked jurisdiction to adjudicate Medicare recipient's claim that any reimbursement she owed government out of settlement from third-party tortfeasor, pursuant to Medicare as Secondary Payer Act, for provisional medical expenses it paid, was required to be apportioned, pursuant to "equity and good conscience" exception to Act, where recipient failed to administratively exhaust that claim. Social Security Act, § 205(g, h), 42 U.S.C.A. § 405(g, h); Medicare Act, § 102(a), 42 U.S.C.A. § 1395y(b)(2)(A)(ii).


Medicare is a federal entitlement program that provides health insurance benefits to qualified elderly and disabled individuals. See 42 U.S.C. § 1395y(b)(2). When first enacted, Medicare paid its beneficiaries' medical expenses, even if beneficiaries could recoup them from other sources, such as private health insurance. See, e.g., Zinman v. Shalala, 67 F.3d 841, 843 (9th Cir.1995).
[1] In 1980, Congress enacted the MSP Act in an effort to reduce escalating costs. As its title suggests, the statute designates Medicare as a “secondary payer” of medical benefits, and thus precludes the program from providing such benefits when a “primary plan” could be expected to pay. 42 U.S.C. § 1395y(b)(2)(A). When the primary plan cannot promptly pay a beneficiary's medical expenses, however, Medicare makes conditional payments to ensure that the beneficiary receives timely care. \textit{Id.} § 1395y(b)(2)(B). Once “the beneficiary gets the health care she needs ... Medicare is entitled to reimbursement if and when the primary payer pays her.” \textit{Cochran v. U.S. Health Care Fin. Admin.}, 291 F.3d 775, 777 (11th Cir.2002).

[2] This appeal involves, \textit{inter alia}, the interaction of the MSP Act with a state law, the New Jersey Collateral Source Statute (NJCSS), N.J. Stat. Ann. § 2A:15–97. Under the NJCSS, a tort plaintiff cannot recover damages from a defendant when she has already received funding from a different source. The statute provides:

\begin{quote}
In any civil action brought for personal injury or death ... if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable.
\end{quote}


[3][4] The NJCSS has two purposes. First, it prevents a tort plaintiff from recovering damages from both a collateral source of benefits (\textit{i.e.}, a health insurer) and a tortfeasor. \textit{Parker v. Esposito}, 291 N.J.Super. 560, 677 A.2d 1159, 1162 (App.Div.1996). Second, it aims to shift the burden of medical costs related to tort injuries, whenever possible, from liability insurers to health insurers, and thereby keep liability insurance premiums down. \textit{Lusby v. Hitchner}, 273 N.J.Super. 578, 642 A.2d 1055, 1061 (App.Div.1994). In this appeal, Taransky contends that because the NJCSS barred her from recovering medical costs from her tortfeasor, it would be inappropriate for her to reimburse the Government for its conditional medical payments.

A

Taransky was injured on November 7, 2005, when she tripped and fell at the Larchmont Shopping Center in Mt. Laurel, New Jersey. The Medicare program conditionally paid $18,401.41 for her medical care.

Almost two years later, Taransky filed suit against the owners and operators of the shopping center (collectively, Larchmont) in the Superior Court of New Jersey, Burlington County, seeking damages for bodily injury, disability, pain and suffering, emotional distress, economic loss, and medical expenses. Shortly after filing suit, Taransky's lawyer contacted her designated Medicare contractor repeatedly, requesting the exact amount of Medicare's claim. In one letter, counsel complained: "I cannot negotiate the case unless I know the full amount of Medicare's claim." JA at 295. In another, he stated: "I would like to try to resolve Ms. Taransky's claim, but will have difficulty doing so without knowledge of Medicare's lien and its benefit payments in this matter." JA at 307. On several occasions, the Medicare contractor provided Taransky's counsel with information about Medicare's conditional payments, which continued to accumulate as Taransky's lawsuit proceeded.

After two years of litigation, Taransky settled her claims against Larchmont for $90,000. In the settle-
ment agreement, she granted Larchmont a full release of “all past, present and future claims,” including for “medical treatment” and for “medical expense benefits” in connection with the accident. JA at 271. The agreement also provided that any liens or subrogation claims would be “satisfied and discharged from the settlement proceeds,” and that Taransky would indemnify Larchmont with respect to such claims. *Id.*

Relevant to this case, the agreement provided that the indemnified liens “specifically include [ ], but [are] not limited to, Medicare, Medicaid, workers compensation liens and/or claims.” *Id.*

On the heels of the settlement, Taransky filed a motion in the New Jersey Superior Court requesting an order “apportioning the proceeds of the settlement between various elements of damages, but only to the extent necessary to obtain specified documentation relevant to anticipated administrative proceedings with the federal Centers for Medicare and Medicaid Services.” JA at 267. Taransky acknowledged that her lawsuit had sought damages for “certain expenses for medical treatment,” and that some of her treatment “was paid for through the federal government's Medicare program.” *Id.* In spite of these facts, Taransky argued that the NJCSS precluded tort plaintiffs like herself from recovering losses such as medical expenses that were already paid by another source. Based on that premise, she claimed that her Medicare expenses were not considered in the settlement negotiations and were not included in the settlement amount. JA at 268. Taransky's counsel notified her Medicare contractor of the motion, but did not make the contractor or the Government a party to her state court case. Neither Larchmont nor the Government responded to Taransky's motion.

On November 20, 2009, the Superior Court granted Taransky's motion and entered an order for “good cause shown,” stating that the settlement did not include any Medicare expenses: “[N]o portion of the recovery obtained by [Taransky] in this matter is attributable to medical expenses or other benefits compensated by way of a collateral source.” JA at 260, 261. The order specified that the settlement amount was “allocated solely to recovery for bodily injury, disability, pain and suffering, emotional distress, and such non-economic and otherwise-uncompensated loss as plaintiff may have suffered.” JA at 261.

**B**

After Taransky settled her case, a Medicare contractor demanded reimbursement of the $10,121.15 that the Medicare program had paid on her behalf. *FN2* Taransky refused to pay, citing the NJCSS and the allocation order she had received from the Superior Court. She also contended that the Government could not demand reimbursement *FN3* from a tortfeasor's liability settlement under the MSP Act because a tortfeasor was not a “primary plan” under the meaning of the statute, and that reimbursement would be inequitable because she had not recovered any of her medical expenses.

*FN2.* Medicare's requested reimbursement deducted a proportionate share of Taransky's attorneys' fees and the incidental costs of procuring the settlement.

The Administrative Law Judge (ALJ) found against Taransky on all claims. *FN3* The ALJ ruled that the Government could be reimbursed from the proceeds of a tort settlement, and refused to recognize the state court's allocation order because it was not made “on the merits.” He also rejected Taransky's contention that the NJCSS precluded the Government from reimbursement, reasoning that the NJCSS did not apply to Medicare's conditional payments. Finally, the ALJ found that reimbursement would not be inequitable, as he was unconvinced that the settlement truly did not include damages for medical expenses.

*FN3.* Before reaching the ALJ, Taransky appeared before the Medicare Secondary Recovery Contractor (the first level of appeal
in the Medicare administrative process) and a Medicare Qualified Independent Contractor (QIC) (the second level of appeal), both of which held her liable for reimbursement.

The Medicare Appeals Council affirmed the ALJ's opinion in its entirety, writing separately only to expound on two points. First, it determined that the settlement in fact included damages for Taransky's medical expenses, finding that Taransky's counsel—who repeatedly demanded confirmation of the amount of Medicare's lien—had used Medicare's payments as a basis for the settlement. Second, citing Mason v. Sebelius, 2012 WL 1019131 (D.N.J. Mar. 23, 2012), the Appeals Council ruled that the NJCSS did not preclude tort victims from obtaining damages for Medicare benefits in tort liability settlements.

On July 16, 2012, Taransky filed suit in the United States District Court for the District of New Jersey, reiterating her claim that she was not responsible for reimbursing the Medicare program from the proceeds of her settlement. As she had argued during the administrative process, Taransky contended that reimbursement was unauthorized by the MSP Act and barred by the NJCSS. She also proffered two new arguments: (1) that Medicare's recovery should be limited to a proportionate share of her settlement that reflected her medical expenses; and (2) that the Government's refusal to acknowledge the Superior Court's allocation order violated her right to due process under the Fifth and Fourteenth Amendments.

The Government moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim, or in the alternative, for summary judgment. The District Court granted the motion, holding that it lacked jurisdiction over Taransky's proportionality and due process arguments. This timely appeal followed.

II

The District Court had jurisdiction over Taransky's exhausted claims pursuant to 42 U.S.C. §§ 405(g) and 1395ff(b). We have jurisdiction pursuant to 28 U.S.C. § 1291.

FN4. As discussed in section IV, infra, the District Court correctly held that it lacked jurisdiction over Taransky's proportionality and due process arguments.

[5][6][7] We review the District Court's dismissal order de novo. See *313Ballentine v. United States, 486 F.3d 806, 808 (3d Cir.2007) . Like the District Court, we accept the agency's factual findings if they are supported by substantial evidence in the administrative record. Mercy Home Health v. Leavitt, 436 F.3d 370, 377 (3d Cir.2006); see 42 U.S.C. § 405(g).


III

The reimbursement provision of the MSP Act provides:

[A] primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary ... with respect to an item or service if it is demonstrated that such a primary plan has or had a
responsibility to make payment with respect to such item or service.


Taransky contends that the MSP Act does not authorize the Government to be reimbursed for conditional Medicare payments from the proceeds of a tortfeasor's liability settlement. She advances three primary arguments on appeal. First, she contends that a tortfeasor cannot be considered a “primary plan” from which the Government may receive payment under the MSP Act. Next, she argues that the Government failed to prove that Larchmont had a “demonstrated responsibility” to pay her medical expenses, as the NJCSS prohibited her from obtaining damages for medical expenses as part of the tort settlement. Finally, she insists that the Government had to defer to the state court order apportioning the settlement to exclude medical expenses. We address each argument in turn.

A

[8] Taransky claims that a tortfeasor's liability settlement is not a “primary plan” within the meaning of the MSP Act, citing only one relevant case: Mason v. American Tobacco Co., 346 F.3d 36 (2d Cir.2003). In Mason, the Second Circuit found that an entity could be a primary plan under the MSP Act only if it had a preexisting obligation to provide health benefits—for example, via a contract to provide health insurance. Id. at 42. The court ruled that “the trigger for bringing a MSP claim is not the pendency of a disputed tort claim, but the established obligation to pay medical costs pursuant to a pre-existing arrangement to provide insurance benefits.” Id. at 43 (emphases added) (citation and internal quotation marks omitted). Following Mason, Taransky urges us to define “primary plan” to include only health insurance companies who have a preexisting contractual obligation to pay for medical expenses.

Although Taransky's description of Mason is accurate, she fails to acknowledge that the case was abrogated by the December 2003 amendments to the MSP Act, which explicitly broadened the definition of “primary plan” to include tortfeasors. FN5 See *314 Bio–Medical Applications of Tenn., Inc. v. Central States Se. & Sw. Areas Health & Welfare Fund, 656 F.3d 277, 289–90 (6th Cir.2011) (explaining Congress's intent to foreclose litigation on the definition of “primary plan” via the 2003 amendments). The statute as amended plainly includes tortfeasors and their insurance carriers in its definition of “primary plan”:


[T]he term “primary plan” [includes a] ... liability insurance policy or plan (including a self-insured plan) or no fault insurance.... An entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part. 42 U.S.C. § 1395y(b)(2)(A)(ii) (emphasis added). The tortfeasor in Taransky's case, Larchmont, is “[a]n entity that engages in a business, trade, or
profession,” and the record demonstrates that it had a liability insurance policy. Accordingly, despite not having a preexisting obligation to pay for Taransky's medical expenses, Larchmont is a primary plan from whose payments—the settlement amount—the Government may obtain reimbursement.\footnote{FN6}

\footnote{FN6. In a related argument, Taransky claims that the Government should not be reimbursed from her tort recovery, but should pursue a separate claim against Larchmont and its insurer. This is incorrect, however, because the MSP Act explicitly allows the Government to recoup payments either from the “primary plan” or “an entity that receives payment from a primary plan.” 42 U.S.C. § 1395y(b)(2)(B)(ii). Medicare’s “independent right of recovery [from the beneficiary] is separate and distinct from [its] right of subrogation.” Zinman, 67 F.3d at 845.}

\textbf{B}

Next, Taransky contends that the Government has failed to demonstrate, as a condition precedent for reimbursement, that Larchmont had a “responsibility to make payment” for her Medicare expenses. 42 U.S.C. § 1395y(b)(2)(B)(ii); see also Glover v. Liggett Grp., Inc., 459 F.3d 1304, 1309 (11th Cir.2006) ("[A]n alleged tortfeasor's responsibility for payment of a Medicare beneficiary's medical costs must be demonstrated before an MSP private cause of action for failure to reimburse Medicare can correctly be brought.") (emphasis in original).

The MSP Act provides that a beneficiary's reimbursement obligation may be demonstrated by settlement:

A primary plan's responsibility for such payment may be demonstrated by ... a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means.

42 U.S.C. § 1395y(b)(2)(B)(ii) (emphasis added); see also 42 C.F.R. § 411.22(b)(2). The Medicare Manual further provides: “Medicare policy requires recovering payments from liability awards or settlements ... without regard to how the settlement agreement stipulates disbursements should be made. That includes situations in which the settlements do not expressly include damages for medical expenses.” MSP Manual, Ch. 7, § 50.4.4 (emphasis added).\footnote{FN7}


\*315*[9][10] Like the other courts of appeals that have considered the issue, we hold that the fact of settlement alone, if it releases a tortfeasor from claims for medical expenses, is sufficient to demonstrate the beneficiary's obligation to reimburse Medicare. See Hadden v. United States, 661 F.3d 298, 302 (6th Cir.2011); Mathis v. Leavitt, 554 F.3d 731, 733 (8th Cir.2009). For this reason, we adopt the Sixth Circuit's analysis in Hadden, which held that “the scope of the plan's 'responsibility' for the beneficiary's medical expenses—and thus of [the beneficiary's] own obligation to reimburse Medicare—is ultimately defined by the scope of [the beneficiary's] own claim against
the third party” that is later released in settlement. 661 F.3d at 302 (emphasis in original). This rule comports with the text of the MSP Act and the Medicare Manual. It also ensures “a beneficiary cannot tell a third party that it is responsible for all of his medical expenses, on the one hand, and later tell Medicare that the same party was responsible for only [a compromise percentage] of them, on the other.” Id.

[11] Applying these principles, Taransky's settlement—which released Larchmont from all her claims, including those for medical expenses—renders her liable to the Government. In Mathis, the Eighth Circuit found that a beneficiary's obligation under the MSP Act was triggered even when the parties did not specifically address obligations to Medicare. 554 F.3d at 733. Here, Taransky's settlement agreement expressly anticipated Medicare's lien, and provided that reimbursement to the Medicare program would be “satisfied and discharged from the settlement proceeds.” JA at 271. There is also substantial evidence to support the agency's factual finding that the settlement included the costs of Taransky's medical care. Before entering into the settlement agreement, Taransky's counsel repeatedly contacted her Medicare contractor to determine the amount of the program's lien, so he could use the amount to justify her settlement demand. See, e.g., JA at 294 (stating counsel's intent to “negotiate this case using [an estimate of Medicare's benefits] as a basis for potential settlement”); JA at 295 (“I cannot negotiate the case unless I know the full amount of Medicare's claim.”). After the settlement, counsel certified that Taransky's lawsuit included “certain expenses for medical treatment,” and “[s]ome of the medical treatment for the personal injuries suffered by [Taransky] was paid for through the federal government's Medicare program.” JA at 267. Given the substantial evidence that Taransky was compensated for her medical costs, she cannot now hide behind the lump sum settlement to deprive the Government of the reimbursement it is owed.

In response, Taransky contends that her settlement amount could not have included her medical costs as a matter of law, as Medicare payments are a “collateral source” of benefits that may not be obtained from a tortfeasor under the NJCSS. It would follow that the MSP Act's reimbursement provision was never triggered, and that the Government's request—rather than preventing her from obtaining a double recovery—would strip her of any recoupment of her medical expenses.

*316 [12][13] The New Jersey Supreme Court has not considered whether the NJCSS operates to prevent a plaintiff from recovering Medicare payments in a tort suit; thus, “we must attempt to predict how that tribunal would rule.” U.S. Underwriters Ins. Co. v. Liberty Mut. Ins. Co., 80 F.3d 90, 93 (3d Cir.1996). In doing so, we may consider the decisions of state intermediate appellate courts, which, “[a]lthough not dispositive, ... should be accorded significant weight in the absence of an indication that the highest state court would rule otherwise.” Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1373 n. 15 (3d Cir.1996).

Several decisions by the New Jersey Appellate Division inform our analysis. In Lusby, the Appellate Division held that the NJCSS did not bar the plaintiff from recovering his medical expenses as part of tort damages, even though those costs had been provisionally covered by the state Medicaid program. 642 A.2d at 1061. The court rested its decision on the statutory purpose of the NJCSS:

The legislative determination ... was apparently not only to prevent plaintiffs from obtaining a double recovery but also ... to shift the burden, at least to some extent, from the liability and casualty insurance industry to health and disability third-party payers.
We think it plain, however, that neither of these purposes is advanced by application of the collateral source statute where, as here, a plaintiff could not in any case pocket a double recovery for medical expenses for the reason that his entire recovery is subject to Medicaid's reimbursement rights.

Id. (emphasis added). The court further emphasized that the NJCSS's purposes were not served "when the ultimate burden is shifted from the tortfeasor's liability carrier to a governmentally-funded secondary payer." Id. Since Lusby, panels of the Appellate Division have consistently found that application of the NJCSS turns on whether the government benefits provided are reimbursable: if they are, then the payments are considered conditional, and are not collateral benefits that may not be recovered pursuant to the statute. Compare Thomas v. Toys "R" Us, Inc., 282 N.J.Super. 569, 660 A.2d 1236, 1246 (App.Div.1995) (finding that Social Security payments are a collateral source of benefits under the NJCSS because the government has no right to their reimbursement), with Woodger v. Christ Hosp., 364 N.J.Super. 144, 834 A.2d 1047, 1051 (App.Div.2003) ("We have also held that benefits such as Medicaid, subject to reimbursement by the plaintiff to the payer from the proceeds of a negligence judgment or settlement, are similarly not includable as a collateral source because they do not constitute double recovery.") (emphasis added).

While Lusby involved a state Medicaid statute, its reasoning applies with equal force in the Medicare context. The MSP Act makes clear that Congress intended the Medicare program to serve only as a secondary payer: Medicare may pay a beneficiary's medical bills only if a primary plan cannot be expected to pay promptly, and beneficiaries are obligated to reimburse Medicare once a responsible primary plan has been identified. 42 U.S.C. § 1395y(b)(2)(B)(ii); Fanning v. United States, 346 F.3d 386, 388–89 (3d Cir.2003). Medicare's benefits, then, are reimbursable and conditional. For that reason, the NJCSS, which operates only when the beneficiary is "entitled to receive benefits" from another source, N.J. Stat. Ann. § 2A:15–97, is inapplicable.

FN8. Under the state-law provision considered in Lusby, any recipient of Medicaid funds who brought a tort action against a third party shall immediately reimburse the division in full from the proceeds of any settlement, judgment, or other recovery in any action or claim initiated against any such third party subject to a pro rata deduction for counsel fees, costs, or other expenses incurred by the recipient or the recipient's attorney.

FN9. There, in a case similar to Taransky's, the Medicare beneficiary sought an order from the motions judge that no portion of her personal injury settlement was attributable to
medical expenses. *Id.* at *1. On appeal, the Appellate Division affirmed the motions judge's denial. Analogizing *Lusby*, the court found that Medicaid liens were "virtually identical to Medicare liens," and that Medicare, as a secondary payer, "ha[d] a nearly unqualified right to reimbursement." *Id.* at *3. Because of this reimbursement right, the claimant, even if she were able to recover medical expenses from another source, "could not pocket them and hence cannot obtain the 'double recovery' that the collateral source statute is designed to avoid." *Id.* We predict that the New Jersey Supreme Court would adopt this sound reasoning when considering the NJCSS's application to Medicare liens.

FN9. While unpublished opinions are not binding on New Jersey courts, see *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 990 A.2d 650, 655 n. 4 (2010), we may refer to them when predicting state law. See *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1042 (3d Cir.1993).

By contrast, only one case supports Taransky's position: *Early v. Wal–Mart Stores, Inc.*, Civ. No. 01–cv–5531 (D.N.J. July 28, 2003), in which the district court, in an unpublished opinion, ruled that Medicare benefits constituted a collateral source under the NJCSS. *See* JA at 208. There, the court found that the plaintiff had already recovered the cost of the victim's medical treatment from Medicare, and concluded that the NJCSS precluded the plaintiff from obtaining the amount from the tortfeasor. *See* JA at 211.

While *Early* is certainly on point, we find the case unpersuasive for two reasons. First, the decision turned on a flawed simplification of New Jersey law: the district court, in predicting how the New Jersey Supreme Court would rule, held that the NJCSS "requires that tort judgments be reduced by the amount of any recovery from other sources." *Id.* (emphasis added). This conclusion contradicted the holdings of prior intermediate court decisions, such as *Lusby* and *Woodger*, which received no attention in the opinion. Instead, the court relied on the New Jersey Supreme Court's decision in *Perreira v. Rediger*, 169 N.J. 399, 778 A.2d 429, 432 (2001), which focused on a very different question: whether a health insurance company could recover funds from a tortfeasor pursuant to the NJCSS. *See* JA at 210–11. The *Perreira* court held that the NJCSS barred an insurance company's recovery because the statute aimed to shift the burden of payment from liability insurers to the health industry. *See* 778 A.2d at 436 (citing, *inter alia*, *Lusby*, 642 A.2d at 1061). However, as *Lusby* made clear, *318* this statutory purpose is not served when a beneficiary shifts the burden of payment from a tortfeasor to the government. *See* 642 A.2d at 1061. Second, the *Early* court relied in large part on the Fifth Circuit's decision in *Thompson v. Goetzmann*, 337 F.3d 489, 500 (5th Cir.2003), which held that the Medicare program could not be reimbursed from the proceeds of a tort settlement. *See* JA at 211. *Goetzmann*, however, relied on the Fifth Circuit's conclusion that tortfeasors were not a "primary plan" under the MSP Act—a conclusion that was abrogated by the 2003 amendments to the statute for the reasons we explained in Section III.A, *supra*.

Informed by the consistent line of Appellate Division decisions, and finding no persuasive rulings to the contrary, we predict that the New Jersey Supreme Court would hold that Medicare payments, because of their conditional nature, do not constitute a collateral source of benefits under the NJCSS. Accordingly, Taransky may not rely on the NJCSS to avoid reimbursing the Government for Medicare payments it has made on her behalf.\footnote{FN10. Because the NJCSS does not conflict with the MSP Act, the parties' arguments regarding whether the Act preempts the NJCSS are moot.}
[14] Taransky also argues that, regardless of our interpretation of the NJCSS, the Government must defer to the New Jersey Superior Court's apportionment order in accordance with Medicare's own regulations. Because the state court's order provides that no portion of the settlement recovery is attributable to medical expenses, Taransky claims that she has no obligation to pay.

Under the MSP Manual, “[t]he only situation in which Medicare recognizes allocations of liability payments to nonmedical losses is when payment is based on a court order on the merits of the case.” MSP Manual, Ch. 7, § 50.4.4 (emphasis added). Further, “[i]f the court or other adjudicator of the merits specifically designate[s] amounts ... not related to medical services, Medicare will accept the Court's designation.” Id. In deference to the court's substantive decision, “Medicare does not seek recovery from portions of court awards that are designated as payment for losses other than medical services.” Id.

As the ALJ correctly found, the Superior Court's apportionment order was not “on the merits,” and need not be recognized by the agency. A court order is “on the merits” when it is “delivered after the court has heard and evaluated the evidence and the parties' substantive arguments.” Black's Law Dictionary 1199 (9th ed.2009); cf. Greene v. Palakovich, 606 F.3d 85, 98 (3d Cir.2010) (finding, in a criminal case, that “on the merits” means the state court “acted on the substance of [the] claim”), aff'd sub nom. Greene v. Fisher, —— U.S. ———, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011); Thomas v. Horn, 570 F.3d 105, 115 (3d Cir.2009) (holding that state proceedings occur “on the merits” “when a state court has made a decision that 1) finally resolves the claim, and 2) resolves the claim on the basis of its substance”). Here, the state court did not adjudicate any substantive issue in the primary negligence suit. Indeed, in her motion for the order, Taransky clarified that she sought an apportionment not to resolve any outstanding issue in her suit, but “only to the extent necessary to obtain specified documentation relevant to anticipated administrative proceedings with the federal Centers for Medicare and Medicaid Services.” JA at 267. The state court, in effect, rubber stamped her request. Taransky's motion was uncontested, issued pursuant to a stipulation between Taransky and Larchmont, and prepared and *319 submitted by Taransky's counsel for the judge's signature. This order is the antithesis of one made on the merits.

Taransky counters with four arguments, none of which we find persuasive. First, she contends that the agency's definition of “on the merits” is improperly narrow because it ignores “‘merits' determinations,” such as dismissal and summary judgment orders, “that do not involve a trial to verdict.” Taransky Br. at 23. But these orders involve an adversarial exchange regarding the substance of a suit. By contrast, the allocation order in the present case was unopposed, the product of a prearranged agreement between Taransky and Larchmont. Taransky understandably wanted to maximize her recovery by excluding medical expenses from the settlement, and Larchmont, which had been insulated from further obligations pursuant to the terms of the settlement, was disinterested by that time.

Second, Taransky faults the Government for failing to contest her allocation motion, claiming that the Government cannot “rely on [its] own inaction as the sole basis for criticizing the court's ruling.” Taransky Br. at 25. We find this argument unavailing because, while Taransky notified her Medicare contractor of the motion, she never made the Government a party to her suit. Furthermore, neither the MSP Act nor its implementing regulations require the Government to intervene in state proceedings where such post-settlement allocation motions are made.

Third, Taransky notes that the Medicare Appeals Council's treatment of the Superior Court's allocation order is inconsistent with previous determinations by QICs and ALJs that have recognized the validity
of almost identical orders. But the Appeals Council is free to depart from these lower agency rulings without concern, as only its decisions have legal significance. “Nowhere does any policy or regulation suggest that the [Appeals Council] owes any deference at all to—much less is bound by—decisions of lower reviewing bodies addressing different disputes between different parties.” Almy v. Sebelius, 679 F.3d 297, 310 (4th Cir.2012). It is not arbitrary and capricious for the agency's highest body “to make final determinations that may [be] at odds with prior ... decisions that did not carry the full imprimatur of the Secretary's authority.” Id. at 311.

FN11. As indicated supra note 3, the QIC constitutes the second level of appeal in the Medicare administrative process. An unsatisfied claimant then proceeds to the ALJ, the third level of appeal.

Taransky's fourth argument—her strongest—cites Bradley v. Sebelius, 621 F.3d 1330 (11th Cir.2010), in which the Eleventh Circuit recognized a state court's post-settlement allocation order as a judgment “on the merits.” Id. at 1339 n. 22. In that case, the plaintiffs (the children of the decedent and the decedent's estate) challenged the Government's right under the MSP Act to recover medical costs from the proceeds of a liability settlement. Id. at 1330. In a demand letter, the decedent's children asserted claims for wrongful death against their father's nursing home, alleging abuse and neglect under state law; the decedent's estate separately sought damages for both wrongful death and medical costs. Id. at 1337 & n. 13.

The ensuing lump sum settlement of both suits was then apportioned between the children and the estate in a probate order. Id. at 1333–34.

The Eleventh Circuit held that the Medicare program could be reimbursed only from the children's settlement portion because their claims were distinct: they involved only “non-medical, tort property claims”—“a property right belonging to the child [not the Secretary.” Id. The Eleventh Circuit determined that the Government could not disregard the probate order, as it was an “allocation based on a court order.” Id. at 1339 & n. 22 (internal quotation marks omitted). In a footnote, it noted that there were adverse parties: “the estate and children on one hand, and the Secretary on the other.” Id. at 1339 n. 22. Similarly, the allocation decision was on the merits: “the merits of the Secretary's position versus the merits of those of the estate and children.” Id.

While this language in Bradley supports Taransky's legal argument, we find that case factually distinguishable from this one. Here, Taransky was the sole claimant of the settlement funds. Unlike the decedent's children in Bradley, Taransky pursued medical expenses as part of her tort suit. In addition, her motion sought to allocate her settlement among the various elements of damages in her suit, and not, as in Bradley, to apportion a lump sum amount between separate suits brought by distinct parties. Thus, unlike in Bradley, the state court here did not adjudicate a substantive issue (i.e., how funds should be divided between the parties before the court), and the Government here attempts only to be reimbursed from funds that were indisputably paid to a Medicare beneficiary.

For these reasons, we hold that the Medicare Appeals Council did not err in finding that the state court's order, which was entered upon a stipulation of the parties, did not constitute a court order on the merits of the case. Furthermore, given the substantial evidence supporting the Appeals Council's finding that Taransky's settlement included medical expenses, we conclude that she remains responsible for reimbursing the Government in spite of the Superior Court's allocation order.
IV

[15] Having addressed Taransky's colorable arguments, we turn only briefly to her remaining claims, which we dismiss out of hand for lack of jurisdiction. Taransky argues that, even if she is liable for her medical expenses, the “equity and good conscience” exception in 42 U.S.C. § 1395gg(c) provides that the Government would be entitled not to full recovery of its payments, but only to a proportionate share of her recovery. Because Taransky never raised this argument before the agency, the District Court rightly held that it lacked jurisdiction to adjudicate it. See 42 U.S.C. §§ 405(g)-(h); see Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 15, 120 S.Ct. 1084, 146 L.Ed.2d 1 (2000) (“§ 405(g) contains the nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court.”).

Taransky responds that this argument need not be exhausted because she has not made a novel “‘claim’ for any benefits,” but merely presented “an example of a judicially-endorsed method to resolve problems of equity and good conscience ...—an issue specifically identified by [her] counsel in the administrative appeals process.” FN12 Taransky Br. at 37 n. 10 (citation omitted). We disagree. During the administrative process, Taransky argued only that the Government could not recover*321 its expenses at all—not that it erred in calculating the amount of its recovery.

FN12. Taransky makes this jurisdictional argument in a footnote, which is another reason why we refuse to consider it on the merits. See John Wyeth & Bro. Ltd. v. CIGNA Int’l Corp., 119 F.3d 1070, 1076 n. 6 (3d Cir.1997) (“[A]rguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived.”).

[16] Second, Taransky argues that the District Court had jurisdiction over her due process claim pursuant to 28 U.S.C. § 1331, as the claim arises from the U.S. Constitution, not the Medicare Act. She clarifies that she is not challenging the agency's adverse determination, but its actions “in implementing that administrative process”—specifically, that the agency “consistently ignore[s] the limitations of the [MSP Act], disregard[s] its own policies and procedures, and routinely exceed[its] statutory authority by demanding repayment from beneficiaries without meeting the explicit statutory conditions required for reimbursement.” Taransky Br. at 53.

The Medicare Act prevents courts from exercising jurisdiction under 28 U.S.C. § 1331 when a claim “arises under” the statute—a concept that has been read broadly by the Supreme Court. See Heckler v. Ringer, 466 U.S. 602, 614–15, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984) (interpreting 42 U.S.C. §§ 1395ii and 405(h)). A constitutional claim “arises under” the MSP Act when the statute “provides both the standing and the substantive basis for the presentation of [the plaintiffs'] constitutional contentions.” Weinberger v. Salfi, 422 U.S. 749, 760–61, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975) (interpreting § 405(h) for the Social Security Act); Heckler, 466 U.S. at 615, 104 S.Ct. 2013 (extending Weinberger to the Medicare Act). FN13

FN13. A narrow exception to this general rule is when an agency provides “no review at all” for the claims at issue. See Ill. Council, 529 U.S. at 19, 120 S.Ct. 1084 (describing the exception to § 405(h) created by Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986)). The Michigan Academy exception does not apply here because administrative review of Taransky's due process claim was available under 42 U.S.C. § 405(g).

That is the case here. Taransky's constitutional claim is rooted in, and derived from, the Medicare Act. The premise of her constitutional claim—that the agency has “fail[ed] to follow the law controlling
Medicare's reimbursement rights," Taransky Br. at 53—is an artful attempt to rephrase her primary argument, namely, that the agency has misinterpreted its right to reimbursement under the MSP Act. “To contend that such an action does not arise under the Act whose benefits are sought is to ignore both the language and the substance of the complaint and judgment.” Weinberger, 422 U.S. at 761, 95 S.Ct. 2457.

Because Taransky's due process claim “arises from” the MSP Act, the District Court did not err in requiring her to exhaust the claim pursuant to 42 U.S.C. § 405(g) before seeking judicial review.\textsuperscript{FN14}

\textsuperscript{FN14} Taransky's reliance on Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), to establish federal question jurisdiction is also misplaced. That case does not, as Taransky contends, set forth a blanket rule exempting due process challenges from exhaustion. Rather, Mathews notes that the agency may be deemed to have waived the exhaustion requirement where the claimant's constitutional challenge (i.e., entitlement to a pre-deprivation hearing) was collateral to his substantive entitlement claim, and exhaustion (i.e., a post-deprivation hearing) rendered the constitutional argument futile. \textit{Id.} at 330–31, 96 S.Ct. 893. Here, Taransky's due process claim is almost identical to her substantive argument, and there is no evidence that the agency cannot review the claim in the administrative process.

V

For the reasons stated, we hold that the MSP Act authorizes the Government to seek reimbursement from Taransky's settlement, as she has received funds from a primary plan under the statute that has a demonstrated responsibility for her medical expenses. Taransky can invoke neither the NJCSS nor the Superior Court's allocation order to avoid her reimbursement obligation, for the NJCSS did not prevent her from obtaining damages for medical expenses from Larchmont, and the Government need not recognize the allocation order because it was not on the merits. Finally, we hold that the District Court properly determined that it did not have jurisdiction over Taransky's unexhausted proportionate payment and due process claims. We will affirm the District Court's order dismissing Taransky's suit.
Supreme Court of New Jersey.
Michael ROIG, Plaintiff-Respondent and Cross-Appellant,
v.
David T. KELSEY, Defendant-Appellant and Cross-Respondent.

Decided May 19, 1994.

Alleged tort-feasor sought declaratory judgment that he was not liable for injured motorist's medical expenses owed by reason of deductible and copayment provisions of personal injury protection (PIP) provisions of automobile insurance policy. The Superior Court, Law Division, Essex County, entered summary judgment for alleged tort-feasor, and injured motorist appealed. The Superior Court, Appellate Division, 262 N.J.Super. 579, 621 A.2d 540, reversed, and certification was granted. The Supreme Court, Garibaldi, J., held that Automobile Reparation Reform Act (no-fault law) prohibits injured party from recovering from tort-feasor medical-expense deductible and 20% copayment under personal injury protection (PIP) policy. N.J.S.A. 39:6A-12.

*500 **248 Vincent Jesuele, Westfield, argued the cause for appellant and cross-respondent (Kessler, DiGiovanni and Jesuele, attorneys).

Anthony Bartell, Newark, argued the cause for respondent and cross-appellant (McCarter and English, attorneys; Andrew T. Berry, of counsel).

**249 *501 Gerald H. Baker, Hoboken, argued the cause for amicus curiae, ATLA-NJ (Baker, Garber, Duffy and Pedersen, attorneys).

The opinion of the Court was delivered by

GARIBALDI, J.

The issue is whether N.J.S.A. 39:6A-12 of the New Jersey Automobile Reparation Reform Act, N.J.S.A. 39:6A-1 to -35 (No-Fault Law), prohibits an injured party from recovering from a tort-feasor the medical-expense deductible and twenty-percent copayment under a personal-injury-protection (PIP) policy. We conclude that the Legislature intended the No-Fault Law to bar that type of fault-based recovery.

I

On January 15, 1990, David Kelsey was a passenger in an automobile driven by his sister when it was struck from behind by an automobile driven by Michael Roig. Kelsey was injured and incurred medical expenses of $1,769. Kelsey, who lived with his sister, was eligible for PIP medical-expense benefits under his sister's automobile-insurance policy, which contained the basic $250 medical-expense deductible

The Automobile Reparation Reform Reform Act (no-fault law) prohibits injured party from recovering from tort-feasor medical-expense deductible and 20% copayment under personal injury protection (PIP) policy. N.J.S.A. 39:6A-12.
and twenty-percent copayment for medical expenses between $250 and $5,000. Because of the deductible and copayment, $553.80 of Kelsey's medical expenses were unpaid. Kelsey had no other health-insurance policy that would have paid those medical expenses, and therefore he sought recovery from Roig.

Roig refused to pay and filed a declaratory-judgment action seeking relief from payment of Kelsey's outstanding medical expenses. He also moved for summary judgment on the ground that N.J.S.A. 39:6A-12 (section 12) prohibited recovery of the deductible and copayment. Kelsey cross-moved for summary judgment, asserting that section 12 allowed payment of expenses incurred up to the deductible amount. The trial court, concluding that the Legislature's intent to bar recovery of the medical deductible and copayment under section 12 was so clear that any indication in the statute to the contrary must yield to it, granted Roig's motion.

The Appellate Division reversed the trial court and remanded the case for further proceedings. 262 N.J. Super. 579, 621 A.2d 540 (1993). That court held, however, that only if an injured party qualified to bring suit for non-economic losses under N.J.S.A. 39:6A-8 could that party include in that action against the tortfeasor the amount of the deductible and copayment not otherwise collectible from other insurance sources. Id. at 580-81, 621 A.2d at 540-41.

Kelsey sought certification, and Roig filed a cross-petition for certification. We granted both petitions, 133 N.J. 445, 446, 627 A.2d 1149, 1150 (1993).

II

No-Fault Law

The original No-Fault Law enacted in 1972, L.1972, c. 70, was largely the work of the Automobile Insurance Study Commission, created in 1970 by a joint resolution of the Senate and General Assembly. L.1970, J.Res. 4. The adoption of that law was hailed as a major innovation in tort and insurance law that would end high automobile-insurance rates and congestion-causing numbers of personal-injury suits.

The No-Fault Law's goal was “‘compensating a larger class of citizens than the traditional tort-based system and doing so with greater efficiency and at a lower cost.’” Oswin v. Shaw, 129 N.J. 290, 295, 609 A.2d 415, 417 (1992) (quoting Emmer v. Merin, 233 N.J. Super. 568, 572, 559 A.2d 845, 846 (App.Div.), certif. denied, 118 N.J. 181, 570 A.2d 950 (1989)). That “new approach” to automobile insurance was to result in the motoring public's securing protection at lesser cost, expediting the relief of the accident victim and his family from a frequently staggering and intolerable economic burden, and yet preserving that victim's right to full and adequate compensation in cases which involve more serious and disabling injury.

*503 In addition to bringing about an intended reduction in insurance premiums, another major benefit of the proposed system would be a reduction of the present court backlog. A substantial percentage of **250 civil court actions are automobile accident cases. Under the proposed plan, it is expected that many of these cases would be settled outside the court, thereby permitting other more serious and meritorious causes to be heard with more dispatch.

[Governor's Second Annual Message (January 11, 1972) (emphasis added).]

Although the movement to adopt no-fault legislation was the “result of ever-increasing automobile-insurance premiums,” Oswin, supra, 129 N.J. at 295, 609 A.2d at 417, it also arose from the recognition that the necessity of determining fault in a lawsuit before recovery of medical expenses resulted in great
hardship for many injured parties. See Governor's First Annual Message (January 12, 1971) (stating, “Too many injured persons must wait too long for an uncertain remedy while enduring physical and financial injury.”) Thus, the proponents of the legislation anticipated that the elimination of minor personal-injury claims from the court system not only would reduce insurance premiums but also would provide prompt payment of medical expenses to injured parties.

To achieve those purposes the Legislature created the no-fault statutory scheme. Under that scheme every automobile liability-insurance policy issued in New Jersey had to provide PIP coverage, including medical-expense benefits, “without regard to negligence, liability or fault of any kind, to the named insured and members of his family residing in his household who sustained bodily injury as a result of an automobile accident.” N.J.S.A. 39:6A-4. A person's no-fault insurance was to be an injured person's exclusive remedy for medical-expense claims arising out of an automobile accident. See Smelkinson v. Ethel & Mac Corp., 178 N.J.Super. 465, 467, 429 A.2d 422, 423 (App.Div.1981) (holding that right of plaintiff to recover medical expenses directly from tortfeasor's insurer was to substitute the plaintiff's right to recover from insured tortfeasor).

As a trade-off for the payment of medical expenses, regardless of fault, no-fault systems provided for “either a limitation on or the elimination of conventional tort-based personal-injury lawsuits.” *504 Oswin, supra, 129 N.J. at 295, 609 A.2d at 417. N.J.S.A. 39:6A-8 (section 8) provided such a limitation by holding that an injured person could file a lawsuit only if medical expenses exceeded a $200 threshold.

Section 12 also was part of the trade-off. In the original No-Fault Law, it read as follows:

Evidence of the amounts collectible or paid pursuant to sections 4 and 10 of this act to an injured person is inadmissible in a civil action for recovery of damages for bodily injury by such injured person.

N.J.S.A. 39:6A-4 (section 4) and N.J.S.A. 39:6A-10 (section 10) were the provisions allowing for PIP coverage. Section 12 therefore disallowed recovery of PIP benefits “collectible” or “paid” in a civil suit.

In frequent attempts to lower the cost of insurance and eliminate minor personal-injury claims, the Legislature amended the No-Fault Law again in 1983, 1988, and 1990. L.1983, c. 362; L.1988, c. 119; L.1990, c. 8. In the 1983 amendments, the insured was presented with a number of options for coverage. The first choice was between a $200 or a $1,500 medical-expense threshold before a personal-injury suit could be instituted. The second choice was the selection of either a $500, $1,000, or $2,500 medical-expense deductible. Ibid.; Cynthia M. Craig & Daniel J. Pomeroy, New Jersey Auto Insurance Law § 5:2-1b, at 49 (1994) (hereinafter Craig & Pomeroy).

Included in the legislative history for the 1983 amendment, the New Jersey Automobile Freedom of Choice and Cost Containment Act of 1984, N.J.S.A. 39:6A-1 to -35, is a sponsor statement that explains the options available to motorists for no-fault medical benefits. It states:

There would continue to be unlimited medical-expense benefits but insureds would have the option to choose, at reduced premiums stated as a percentage of the coverage premium, medical expense deductibles in amounts of $500, $1000 and $2500. This option would permit an insured to coordinate his automobile insurance coverage with other forms of health coverage.

[Sponsor Statement to Assembly Bill No. 3981, at
The Legislature hoped that those optional deductibles would reduce the cost of automobile insurance by shifting some of the rising medical-expense costs to alternative forms of health insurance. Ibid.

Under the heading “Tort Limitation Option,” that same Sponsor Statement posits that the statutory provision instituting monetary tort options of $200 or $1,500 would require insurers to offer all insureds the right to choose to limit their right to sue for general damages (pain and suffering) resulting from bodily injuries incurred in an auto accident... In return for electing the tort limitation option, an insured would receive a reduction in his bodily injury liability premium stated as a percentage of the coverage premium.

[Id. at 27 (emphasis added).]

Once again, motorists were presented with another trade-off option: lower premiums in exchange for increased tort thresholds.

The Legislature also provided that no new automobile-insurance policy could be issued after July 1, 1984, unless the application contained a written notice of all available policy coverages and an identification of which coverages were mandatory and which were optional, as well as all deductible, exclusion, set-off and tort-limitation options offered by the insurer. See N.J.S.A. 39:6A-23. That provision was known as the “buyers guide.” 262 N.J.Super. at 582-83, 621 A.2d at 541-42; Craig & Pomeroy, supra, at 50. Although the No-Fault Law did not require that insurance companies tell prospective policyholders required to choose a PIP deductible that they could recover their below-deductible expenses from a third party, it did require the companies to tell their policyholders that they should consider a high deductible if they “[were] already covered by a health insurance policy or a health maintenance organization” because “[i]n most cases, those plans [would] pay part of the medical bills which auto insurance [would] not pay.” N.J.A.C. 11:3-15.6.

The only other source of legislative history concerning the 1983 amendment is found in the Sponsor’s Statement under the heading “No-Fault and Related Clean-Up Provisions”. It states, “These provisions mainly are designed to tighten statutory eligibility requirements for personal injury protection coverage so as to comport with the original intent of the no-fault law.” Sponsor Statement to Assembly Bill No. 3981, at 27 (1983). Accordingly, the 1983 amendment should be construed in a manner consistent with the original intent of the no-fault law, which was: to reduce the cost of insurance, to eliminate minor tort claims from the judicial system, and to have medical expenses paid promptly.

As originally enacted, section 12 did not deal with medical-expense-benefit deductibles and copayments because the No-Fault Law did not offer those options. The Legislature amended section 12 in 1983 to include those items:

Evidence of the amounts collectible or paid... to an injured person, including the amounts of any deductibles or exclusions elected by the named insured pursuant to section 13 of this 1983 amendatory and supplementary act, otherwise compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person. (Emphasis added).

Deductibles were therefore specifically excluded from recovery. A final paragraph was also added:

Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of un-
compensated economic loss sustained by the injured party.

That paragraph has remained intact through the current 1990 version of the statute. No legislative history specifically addresses the purpose or intent of that final paragraph of section 12.

Despite the 1983 amendments the cost of automobile insurance “continued to spiral, however, resulting in New Jersey’s near lead position in the unenviable category of having the highest automobile insurance premiums in the country. This unenviable position led to consumer outrage and legislative efforts to enact legislation with significant premium reducing provisions.” Emmer, supra, 233 N.J.Super. at 573, 559 A.2d at 847. Hence the Legislature in 1988 again amended the No-Fault Law by enacting “An Act concerning**252 private passenger automobile insurance and revising parts of statutory law.” Id. at 574, 559 A.2d at 848. That Act contained a series of amendments to the No-Fault Law.

In the 1988 amendments, “the Legislature gave to the consumer the choice of a limited right to sue and a lower premium, or no *507 limitation and a higher premium.” Id. at 585, 559 A.2d 845. The insured was given the right to choose between two tort options under section 8. The first allowed recovery for non-economic losses (pain, suffering, and inconvenience) that fit into one of nine specified categories, and was known as the “verbal” or “lawsuit” threshold. The second choice was an unrestricted right to sue for recovery of non-economic damages. That option was referred to as a “zero dollar” or “no” threshold. Id. at 574-75, 559 A.2d at 848. The other significant change was to mandate a $250 medical deductible and a 20% copayment for medical expenses between $250 and $5,000. Id. at 585, 559 A.2d at 854. Thus, the Legislature guaranteed that in every automobile accident some medical expenses would not be paid by PIP.

The 1988 changes incorporated the mandatory copayments and deductibles into the wording of section 12:

[E]vidence of the amounts collectible or paid pursuant to [N.J.S.A. 39:6A-4 and N.J.S.A. 39:6A-10] ... to an injured person, including the amounts of any deductibles, copayments or exclusions ... otherwise compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person.

The court shall instruct the jury that, in arriving at a verdict as to the amount of the damages for noneconomic loss to be recovered by the injured person, the jury shall not speculate as to the amount of the medical expense benefits paid or payable under section 4 to the injured person.

Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss sustained by the injured party. (Emphasis added.)

That version of the statute forms the basis for Kelsey’s claim for recovery of his PIP medical deductible and copayment.

To curtail costs, the Sponsor Statement for the 1988 amendments stressed the promotion of available and affordable auto insurance. Sponsor Statement to Senate Bill No. 2637, at 44 (1988). Insureds were required to carry medical-expense coverage over $75,000 “for one year and by the Unsatisfied Claim and Judgment Fund or a contract servicer during subsequent years with payment for coverage made at the time of motor vehicle registration.” Ibid. The Statement reiterated that the purpose of that amendment was “to shift the costs of medical expenses to *508 available health insurance which is to become primary coverage for automobile related medical expenses.” Ibid.
The shift from automobile insurance to other forms of health insurance for auto-accident medical expenses was not enacted without notice to the public. At the public hearings on the proposed amendments, Dr. Steven Lamazow, co-chair of More Educated Doctors in Courts and Legislation (MEDICAL), voiced his objections to an earlier, harsher version of the amendment that would have eliminated PIP:

If some cost saving is necessitated within the PIP portion of the premium ... there should be at very least a minimum mandatory benefit, enough to cover the large majority of medical bills and a provision for catastrophic injury. The gap between these coverages would be taken up by alternative forms of health coverage, or the liability portion of the premium—should the person be the one who was injured in the accident and not be at fault.

[Senate Labor, Industry and Professions Committee on Auto Insurance Reform, Public Hearing, at 54-55 (June 15, 1988) (emphasis added).]

Dr. Lamazow's concern for potential unmet costs was focused on cases involving catastrophic injury or medical expenses that might exceed upper limits on insurance. His concern for the “innocent” victim seems to have been quelled by the availability of alternative forms of health coverage beyond PIP. The legislative history does not address Kelsey's situation, involving an insured whose injury is minor and not catastrophic, and who has no alternative health insurance coverage.

During the public hearings before the 1988 amendments, Senator Cardinale and Richard Anderson of the Commerce and Industry Association of New Jersey discussed the business community's concerns about its increased contributions toward health care under the proposed legislation.

Senator Cardinale: ... Suppose there were a compromise somewhere reached ... that the first “X” dollars would continue to be covered under PIP, and that there would then be some kind of gap that would be covered by health insurance, and that then we would have the catastrophic fund as we have today. No change, essentially, in the catastrophic fund ... Would you oppose that ...?

Mr. Anderson: Well, I would say probably generally not. I'd have to see it specifically, obviously. But there might be something that might be compromised on that. There's a possibility of that.

*509 Senator Cardinale: If we also included in that compromised portion a deductible and co-payment, which would bring it into line with what we have in Blue Cross and Blue Shield in many instances, or with other health policies, would that even more bring you on board with respect to that particular item?

Mr. Anderson: Well, let's take a look specifically at what we're talking about. I think we're open to any suggestions along that line, but we're opposed to just arbitrarily shifting the entire burden.

[Id. at 69-70 (emphasis added).]

The suggestion of the incorporation of deductibles and copayments “to bring [PIP] into line with what we have in Blue Cross and Blue Shield” indicates that the Legislature was aware that an insured would have to pay the below-deductibles under PIP just as an insured must pay such below-deductibles under Blue Cross and Blue Shield.

In its attempt to contain insurance costs, the Legislature reached a compromise in the 1988 amendments. PIP would provide for the prompt payment of most medical expenses, and the Unsatisfied Claim and Judgment Fund would provide pay-
ment for excessive amounts of medical expenses in the case of catastrophic injury. See N.J.S.A. 39:6A-4 (providing that insurer should pay reasonable medical expenses in excess of $75,000 but not in excess of $250,000 “in consultation with the Unsatisfied Claim and Judgment Fund Board and shall be reimbursable to the insurer from the Unsatisfied Claim and Judgment Fund”). However, by mandating the $250 deductible and the twenty-percent copayment, the Legislature guaranteed that in every automobile accident some medical expenses would not be paid under PIP. For those below-deductibles and copayments, the insured was responsible, either though the insured's other insurance coverage, or, if the insured had no other insurance, as in this case, out of the insured's own pocket.

In 1990, the Legislature once again amended the law. That amendment, L.1990, c. 8, entitled “Fair Automobile Insurance Reform Act of 1990,” still emphasized “economy” as one of the “principal goals” of the no-fault system. The Act noted that that goal had not yet been achieved. L.1990, c. 8, § 2d. Kelsey's *510 accident, however, occurred before the 1990 amendments, and therefore, this case is governed by the 1988 version of the law.

Governor Thomas Kean expressed in his Veto Message to Senate Bill No. 2637 his interpretation of the intent of the Legislature in enacting the 1988 amendments to the No-Fault Law. In his statement, the Governor noted that “a viable ‘no fault’ insurance system requires a significant limitation on lawsuits.” Governor's Veto Message to Senate Bill No. 2637 (Aug. 4, 1988). Further the Governor declared that “the bill's essential purpose of closing the courthouse door to all lawsuits except those involving bona fide serious injuries will be diluted and the bill's effectiveness will be greatly diminished.” Ibid.

Although emphasizing the importance of the prompt payment of medical costs, the Governor nonetheless stated:

I do agree, however, that medical benefits should be subject to reasonable cost containment. Accordingly I support the deductibles, co-payments and medical fee **254 schedule set forth in Senate Bill No. 2637 (3rd Reprint), except that the co-payment shall apply only to the first $5000 of coverage. Superimposing these traditional health system cost-containment mechanisms on PIP coverage will reduce fraud and over-utilization while maintaining the essential ingredient of providing adequate and complete health coverage without regard to fault.

[Ibid.]

The Governor obviously did not believe that the Legislature intended that every insured could go to court to recover below-deductible expenses, the maximum, assuming that the insured had incurred medical expenses of $5,000, being $3,000 (if the insured had chosen a $2,500 deductible), or $1,200 (if the insured had chosen a $250 deductible). See also Governor's First Annual Message, supra (stating, “The minor automobile negligence case, which ultimately results in a judgment of settlement under $3000, is a significant contributing factor to the backlog in the civil courts.”) Hence, from the inception of the no-fault statutory scheme, the Legislature intended to eliminate minor personal-injury-automobile-negligence cases from the court system. Kelsey's interpretation of section 12 would completely defeat that *511 purpose and would produce congestion in the court system once again with minor personal-injury claims, which here total $538.80.

III

No-Fault Case Law

Although we have not previously addressed this specific section 12 issue, both this Court and the lower courts have interpreted various other provisions of the No-Fault Law. An examination of those cases indicates that our courts have consistently recognized that the No-Fault Law was intended to be a trade-off be-
between the prompt payment of medical expenses, regardless of fault, and a restriction on the right of an injured party to sue a tortfeasor for minor personal injuries stemming from automobile accidents. Legislators had hoped that that trade-off would result in lower premiums and the elimination of a substantial number of cases from the calendar.

One of the earliest cases interpreting the No-Fault Law was Pennsylvania Manufacturers' Ass'n Insurance Co. v. Government Employees Insurance Co., 136 N.J.Super. 491, 347 A.2d 5 (1975), aff'd o.b., 72 N.J. 348, 370 A.2d 855 (1977). In that personal-injury case, the Appellate Division stated that the original legislation had been enacted to create an efficient and inexpensive method to reimburse victims for out-of-pocket expenses and to eliminate recovery for minor injury claims that did not involve more than the $200 threshold. Id. at 499, 347 A.2d at 9. Thus, the court recognized as major goals of the Legislature the elimination of minor claims and prompt aid to injured parties.

In Smelkinson, supra, 178 N.J.Super. at 467, 429 A.2d at 423, the Appellate Division reversed an order of the trial court that had barred plaintiff from recovering $4,500 worth of medical expenses. The court held that the plaintiff was entitled to recover PIP benefits, including medical expenses, because

[i]t is ... clear that the right thus afforded plaintiff by the No-Fault Law to recover her medical expenses directly from [the tortfeasor's insurer] was in substitution of her former right to recover them from the insured tortfeasor *512 himself and constituted, moreover, the exclusive remedy insofar as the medical expense claim arose out of the automobile accident.

[ Id. at 469, 429 A.2d at 424.]

Thus, the court recognized the significance of the trade-off between the right to sue the tortfeasor for direct payment of medical expenses and direct payment by the insurer under the No-Fault Law.

In Sotomayor v. Vasquez, 109 N.J. 258, 536 A.2d 746 (1988), this Court stated that mandatory automobile insurance providing basic PIP benefits for the occupants of each car and the owner of the car's family had been “designed to provide quick and easy reimbursement for the basic personal costs most people incur when they are involved in an automobile accident.” Id. at 261, 536 A.2d at 747. The Court stated that PIP's goal was the “early payment of bills without regard**255 to a driver's fault” to serve three interconnected goals: controlling the increasing spiral of automobile-negligence cases, curtailing rising auto-insurance premiums, and easing court congestion. Ibid.

In Aetna Insurance Co. v. Gilchrist Brothers, Inc., 85 N.J. 550, 428 A.2d 1254 (1981), the liability-insurance carrier, Aetna, initiated a suit against the tortfeasor seeking reimbursement of sums paid under the PIP endorsement. Citing to section 12, we interpreted the prohibition of the introduction of evidence of PIP payments as one that would “thereby prevent double recovery.” Id. at 564, 428 A.2d at 1261. The fear of double recovery, i.e., collecting PIP benefits and recovering through a civil action, had been the earliest concern about cost control before the cost of PIP itself became an issue in 1988.

Fears of double recovery resurfaced in Amaru v. Stratton, 209 N.J.Super. 1, 506 A.2d 1225 (1985), another personal-injury action. There, the Appellate Division cited section 12 and Smelkinson, supra, for the proposition that the Legislature intended no-fault insurance to be the exclusive remedy for claims arising out of an automobile accident. Id. at 8, 506 A.2d at 1228. The Appellate Division also reiterated the point made in Aetna, supra, and *513 Cirelli v. Ohio Casualty Insurance Co., 72 N.J. 380, 387, 371 A.2d 17, 21 (1977), that evidence of PIP benefits collectible or

In sum, courts have held that PIP benefits are strictly excluded from a civil suit by the injured party to serve a variety of goals: easing court congestion, lowering automobile-insurance premiums, and prohibiting double recovery of PIP expenses. Although Kelsey's case does not involve double recovery, we conclude that under no-fault the parties have traded lower premiums and prompt payment of medical expenses for a restriction on their right to sue.

IV Arguments of the Parties

Kelsey's main argument is that the plain language of section 12 “specifically and unequivocally provides that the injured party's right of recovery of uncompensated loss from the tortfeasor should not be limited * * *.” Also, Kelsey points to the plain language of section 8 to refute the Appellate Division's argument that the recovery of economic loss hinges on the ability to recover non-economic loss, defined in *N.J.S.A. 39:6A-2* as “pain, suffering and inconvenience.”

Kelsey's final argument in support of his reading of the No-Fault Law is an equitable one. According to Kelsey, the third *514 paragraph of section 12 demonstrates that the Legislature intended that an innocent victim should not suffer financially.

Roig contends, on the other hand, that Kelsey's position conflicts with the terms and the purposes underlying the No-Fault Law. He argues that the Legislature's purpose in enacting that law was to eliminate from an overburdened court system minor bodily-injury claims arising from automobile accidents and to reduce insurance premiums inflated by those claims. Roig warns that Kelsey's interpretation would completely defeat those goals and would bring every single one of those minor claims back into the court system.

If an insured chooses a $1,000 or $2,500 deductible in exchange for a premium reduction, the Legislature, clearly, did not intend that that insured would be able to sue the tortfeasor for the below-deductibles. Under that logic, insureds choosing the highest deductible would have the best deal: the lowest premium and the right to recover the excluded expenses in court against the tortfeasor. Although not as evident in the case of an insured like Kelsey's sister who had to take **256 the mandatory deductible and copayment as in the case of an insured who chose a higher deductible, the economic reality for both insureds is the same. Kelsey's sister, like all New Jersey motorists, paid a lower annual insurance premium because of the mandatory PIP medical deductible and copayment. To allow a claim for the deductible and the copayment would be antithetical to the entire No-Fault statutory scheme. That kind of recovery could be available only if the Legislature re-instituted a fault-based system.

As further support for his position, Roig refers to the No-Fault Laws of Kentucky and Florida, which prohibit an injured party from recovering below-deductible expenses from a third party. These comparisons are unpersuasive. Neither of those statutes is authoritative in the interpretation of the New Jersey No-Fault Law.
Although no express provision to compensate under-insured victims for their out-of-pocket expenses incurred through deductibles and copayments exists, we agree with Kelsey that the plain language of section 12 does suggest that the amount of the deductible and copayment “otherwise compensated” is inadmissible. We disagree, however, with Kelsey’s further assertion that the statute therefore permits recovery from the “tortfeasor” of the injured party’s unpaid medical expenses due to those deductibles and copayments. Such an interpretation is contrary to the clear legislative intent of the No-Fault Law.

Likewise, we conclude that the Appellate Division’s determination, which sought a middle ground between the positions of the parties, is contrary to the manifest intent of the Legislature. We believe that the Appellate Division’s interpretation must yield to the overriding theme evidenced in the legislative history of the No-Fault Law, especially in the 1988 amendments.

V
Legislative Intent Controls Over Plain Language

In the interpretation of a statute our overriding goal has consistently been to determine the Legislature’s intent in enacting a statute. Lesniak v. Budzash, 133 N.J. 1, 626 A.2d 1073 (1993). We are convinced that the Legislature did not intend that the insured could sue the tortfeasor for the minor amounts of unpaid deductibles and copayments.

Our conclusion is reinforced by Judge Learned Hand’s classic admonition that “[t]here is no surer way to misread any document than to read it literally.” Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944). As we observed in Schierstead v. Brigantine, supra [29 N.J. 220, 148 A.2d 591 (1959)], statutes are to be read sensibly rather than literally and the controlling legislative intent is to be presumed as ‘consonant to reason and good discretion.’” 29 N.J. [220] at 230, 148 A.2d [591 at 596] (quoting Morris Canal & Banking Co. v. Central R.R. Co., 16 N.J.Eq. 419, 428 (Ch.1863)).

As noted by the trial judge in the instant matter, we posited in Kimmelman v. Henkels & McCoy, Inc., that “[i]n discerning that [legislative] intent we consider not only the particular statute in question, but also the entire legislative scheme of which it is a part.” 108 N.J. 123, 129, 527 A.2d 1368, 1371 (1987). See also *516 New Jersey Builders, Owners, & Managers Ass’n v. Blair, 60 N.J. 330, 338, 288 A.2d 855, 859 (1972) (stating, “In reading and interpreting a statute, primary regard must be given to the fundamental purpose for which the legislation was enacted .”); Wollen v. Fort Lee, 27 N.J. 408, 418, 142 A.2d 881, 886 (1958) (stating, “The inquiry [into statutory meaning] in the ultimate analysis is [to determine] the true intention of the law; and, to this end, the particular words are to be made responsive to the essential principle of the law. It is not the words but the internal sense of the law that controls .”). We cannot lose sight of the overwhelming goals of reducing court congestion and lowering the cost of automobile insurance.

We are satisfied that the Legislature never intended to leave the door open for fault-based suits when enacting the No-Fault Law. If we adopted Kelsey’s reading of the statute, courts would again feel the weight of a new generation of congestion-causing suits, **257 and automobile-insurance premiums would again rise. If the Legislature disagrees with our interpretation of its intent, it is, of course, empowered to enact clarifying legislation.

We reverse the judgment of the Appellate Division.

For reversal—Chief Justice WILENTZ and Justices GARIBALDI, CLIFFORD, HANDLER, POLLOCK,
O'HERN, and STEIN-7.

Opposed-none.

Roig v. Kelsey
135 N.J. 500, 641 A.2d 248

END OF DOCUMENT
Effective: September 21, 2000

New Jersey Statutes Annotated Currentness
Title 59. Claims Against Public Entities (Refs & Annos)
   ° Subtitle 1. New Jersey Tort Claims Act (Refs & Annos)
   ° Chapter 9. Conditions of Suit and Judgment (Refs & Annos)
   ➡️ 59:9-2. Interest and limitations on judgments

a. No interest shall accrue prior to the entry of judgment against a public entity or public employee.

b. No judgment shall be granted against a public entity or public employee on the basis of strict liability, implied warranty or products liability.

c. No punitive or exemplary damages shall be awarded against a public entity.

d. No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00. For purposes of this section medical treatment expenses are defined as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant for such injury, sickness or disease, including prosthetic devices and ambulance, hospital or professional nursing service.

e. If a claimant receives or is entitled to receive benefits for the injuries allegedly incurred from a policy or policies of insurance or any other source other than a joint tortfeasor, such benefits shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award against a public entity or public employee recovered by such claimant; provided, however, that nothing in this provision shall be construed to limit the rights of a beneficiary under a life insurance policy. No insurer or other person shall be entitled to bring an action under a subrogation provision in an insurance contract against a public entity or public employee.

CREDIT(S)


COMMENT
The limitation on the recovery of damages in subparagraph (d) reflects the policy judgment that in view of the economic burdens presently facing public entities a claimant should not be reimbursed for non-objective types of damages, such as pain and suffering, except in aggravated circumstances—cases involving permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $1,000. The limitation that pain and suffering may only be awarded when medical expenses exceed $1,000 insures that such damages will not be awarded unless the loss is substantial.

The intent of subparagraph (e) is to prohibit the receipt of duplicate benefits by a claimant filing suit under the act. The phrase “any other source” is not intended to include a joint tortfeasor under the Joint Tortfeasors Contribution Law, N.J.S. 2A:53-1 et seq. Problems surrounding the applicability of that statute to situations where a public entity is a joint tortfeasor are dealt with in section 59:9-3 of this act.

Subrogation is prohibited in subparagraph (e) in an effort to limit the exposure to liability of public entities. This provision is consistent with the “no duplicate benefits” approach in the act and reflects a recognition that profit-making insurance companies are in a better position to withstand losses which they contract for than are the already economically burdened public entities. Precedent exists both in statutory law (N.J.S. 2A:48-1, as amended in 1968) and case law (A & B Auto Stores of Jones St., Inc. v. Newark, 59 N.J. 5, 20-28, 279 A.2d 693 (1971)) for the determination to bar subrogation against a public entity by an insurance company. In addition it must be understood that public entities may subject themselves to suit under whatever conditions they consider appropriate, particularly with respect to protecting the public Treasury.

LAW REVIEW AND JOURNAL COMMENTARIES


New Jersey and the verbal threshold: Imperfect together Marisa L. Ferraro, 54 Rutgers L. Rev. 707 (Spring 2002).


Tort Law-New Jersey Tort Claims Act-Plaintiff may not recover under the New Jersey Tort Claims Act for pain and suffering unless the sustained permanent loss of a bodily function is substantial-Brooks V. Odom Richard P. Earley, 28 Seton Hall L. Rev. 1396 (1997).

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C.J.S. Municipal Corporations §§ 814 to 816, 864 to 868, 870.
C.J.S. States §§ 584 to 585.

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44 ALR 6th 391, Physician's Liability for Patient's Addiction to or Overdose from Prescription Drugs.

25 ALR 5th 568, Nuisance as Entitling Owner or Occupant of Real Estate to Recover Damages for Personal Inconvenience, Discomfort, Annoyance, Anguish, or Sickness, Distinct From, or in Addition To, Damages for Depreciation in Value of Property or Its Use.

55 ALR 3rd 930, Attorney's Mistake or Neglect as Excuse for Failing to File Timely Notice of Tort Claim Against State or Local Governmental Unit.


37 ALR 658, Injury Incident to Notoriety or Publicity as an Element of Damages in Action for Malicious Prosecution.

87 ALR 1384, Measure of Owner's Damages for Temporary Appropriation of or Injury to Real Property by Municipality or Other Public Authority.

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2 N.J. Prac. Series R 4:42-11, Interest; Rate on Judgments; in Tort Actions.


26 N.J. Prac. Series § 5:8, Sample Answer to Automobile Complaint--Form With Comparative Negligence Defenses, Cross-Claims and Counterclaim.


26 N.J. Prac. Series § 3:168, Against Municipality and Policeman for Personal Injuries to Pedestrian Struck by Police
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Stein on Personal Injury Damages STATUTES TOC, Statutes and Rules.

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Stein on Personal Injury Damages Treatise § 9:7, Proving Impairment.

Stein on Personal Injury Damages Treatise § 19:41, Other Limitations on the Collateral Source Rule.

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1. Validity

Distinction between public entities and private parties in abrogation of collateral source rule by this section which permitted deduction of tort benefits from any award against public entity did not violate due process or equal protection rights; exposure of public entities to myriad claims constitutes compelling reason to treat them differently from private parties. Murray v. Nicol, 224 N.J.Super. 303, 540 A.2d 239 (A.D.1988). Constitutional Law \(\Rightarrow\) 3746; Constitutional Law \(\Rightarrow\) 4419; Damages \(\Rightarrow\) 59

This section of the Tort Claims Act was not unconstitutional as applied to private party who because of Act was forced to pay 70% of tort judgment entered against him even though he was only 15% negligent as provision served rational purpose of limiting recovery for pain and suffering against government to cases of more severe injury. Rivera v. Gerner, 89 N.J. 526, 446 A.2d 508 (1982). Constitutional Law \(\Rightarrow\) 3751; States \(\Rightarrow\) 112(2)

2. Construction and application

Legislative contemplation of unlikely disadvantage to public entities by subjecting them to workers' compensation liens in suits under Tort Claims Act should not be inferred absent clear statutory language. Furey v. County of Ocean, 273 N.J.Super. 300, 641 A.2d 1091 (A.D.1994), certification denied 138 N.J. 272, 649 A.2d 1291. Workers' Compensation \(\Rightarrow\) 2252
Provisions of Tort Claims Act should be read in conjunction with declared legislative policy, which shapes application and interpretation of Act; recovery against public entity may be had, but only within strict authority and policies guiding interpretation of Act. Dorn v. Transport of New Jersey, 200 N.J.Super. 159, 491 A.2d 1 (A.D.1984). Municipal Corporations 723.5

3. Law governing

Residents' bringing nuisance action against township arising from contamination of aquifer and loss of running water had adequate postdeprivation remedy under the New Jersey Tort Claims Act [N.J.S.A. 59:1-1 et seq.], in form of right of recovery for tortious conduct on part of public entity, and thus, residents were not entitled to recover from township under 42 U.S.C.A. § 1983 on theory that township and its officials, acting under color of state laws, had wrongfully taken property by without just compensation, contaminating residents' wells, even though residents, if allowed to proceed with their § 1983 claim, might have been awarded counsel fees pursuant to 42 U.S.C.A. § 1988. Ayers v. Jackson Tp., 202 N.J.Super. 106, 493 A.2d 1314 (A.D.1985), certification granted 102 N.J. 306, 508 A.2d 191, affirmed in part, reversed in part on other grounds 106 N.J. 557, 525 A.2d 287. Civil Rights 1071

Compensation carrier was not entitled to credit by reason of settlement which deceased employee's wife received in settlement of wrongful death and survivorship action brought against town and its employee where, for settlement purpose, the loss was valued at amount to be paid by town's insurer plus amount of compensation benefits; § 34:15-40 designed to shift burden of loss to other parties gave way to § 59:9-2 seeking to shift burden to third parties. Kramer v. Sony Corp. of America, 201 N.J.Super. 314, 493 A.2d 36 (A.D.1985). Workers' Compensation 934.11

4. Interest


Successful tort claimant, who was awarded attorney fees under federal civil rights attorney fees statute as prevailing plaintiff in suit against police officers, was not entitled to prejudgment interest on attorney fees. Maynard v. Mine Hill Tp., 244 N.J.Super. 298, 582 A.2d 315 (A.D.1990). Interest 39(2.45)


Transit company which was private corporation at time of 1980 accident causing injury to passenger and of which all stock was purchased a month later by legislatively created public transportation corporation was “public entity” at time of passenger's successful 1981 injury suit, for purposes of Tort Claims Act provision prohibiting assessment of

prejudgment interest against public entity, and therefore was not required to pay prejudgment interest on award to passenger. Dorn v. Transport of New Jersey., 200 N.J.Super. 159, 491 A.2d 1 (A.D.1984). Municipal Corporations 1002

Fact that insurer was insolvent and that judgment against insurer would be paid by insurance guaranty association did not preclude award of interest on judgment entered against insurer, in view of fact that such insurance guaranty association was not a public entity but a private, nonprofit, unincorporated legal entity. Muschette v. Gateway Ins. Co., 149 N.J.Super. 89, 373 A.2d 406 (A.D.1977), certification granted 75 N.J. 27, 379 A.2d 257, certification denied 75 N.J. 27, 379 A.2d 258, affirmed 76 N.J. 560, 388 A.2d 964. Interest 39(2.35)

5. Strict liability

Any municipal liability for solid waste deposited at landfill would attach in common-law tort only upon showing of negligence, inasmuch as strict liability was excluded as basis of recovery by Tort Claims Act; in addition if negligence were proven, any municipal liability for damages would be several and apportioned pursuant to principles of comparative negligence under Tort Claims Act. State of N.J., Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc., D.N.J.1993, 821 F.Supp. 999. Municipal Corporations 723; Municipal Corporations 855

Subdivision b of this section barring recovery against public entity or employee for strict products liability affords no basis for barring such recovery in favor of public entity. Holloway v. State, 239 N.J.Super. 554, 571 A.2d 1324 (A.D.1990), appeal granted 122 N.J. 194, 584 A.2d 252, appeal granted 122 N.J. 194, 584 A.2d 253, affirmed in part, reversed in part on other grounds 125 N.J. 386, 593 A.2d 716. Products Liability 19.1


6. Punitive or exemplary damages

Under New Jersey law, as predicted by the Court of Appeals, New Jersey's Law Against Discrimination (LAD) permits recovery of punitive damages against public entities; New Jersey's Tort Claims Act's (TCA) exclusion of punitive damages awards against public entities does not apply. Gares v. Willingboro Tp., C.A.3 (N.J.)1996, 90 F.3d 720. Civil Rights 1768

Under New Jersey law, punitive damages were not available for claims of false arrest, malicious prosecution and intentional infliction of emotional distress asserted against city. Santiago v. City of Vineland, D.N.J.2000, 107 F.Supp.2d 512. Damages 89(1); False Imprisonment 35; Malicious Prosecution 68

Punitive damages can be awarded against a county defendant with respect to claims brought under the Child Sexual Abuse Act (CSAA). J.H. v. Mercer County Youth Detention Center, 396 N.J.Super. 1, 930 A.2d 1223 (A.D.2007). Counties

Provision in Tort Claims Act that prohibited punitive damages awards against public entity did not preclude such damages for violations of Fair Housing Amendments Act and Law Against Discrimination by agents of housing authority, if handicapped tenant could show that agents were willfully or callously indifferent to tenant's rights by refusing to provide tenant with reasonable accommodations. Oras v. Housing Authority Of City Of Bayonne, 373 N.J.Super. 302, 861 A.2d 194 (A.D.2004). Civil Rights

Decedent's daughter's emotional distress at seeing city cemetery where decedent was buried turned into a dumping and storage ground was insufficient as a matter of law to sustain her specific claim for relief against city under the Tort Claims Act; although Act required daughter to allege medical expenses in excess of $1000, there was no evidence that daughter sustained medical expenses in excess of $1000, daughter was doing the same sort of things after her visit to cemetery as she did before her visit, and she had not sought regular psychiatric counseling. Lascurain v. City of Newark, 349 N.J.Super. 251, 793 A.2d 731 (A.D.2002). Municipal Corporations

In action against police officers, police department, and borough arising from arrest of husband for alleged assault of his wife, husband could assert claim for punitive damages against officers, even in absence of compensatory damages; factfinder, crediting husband's evidence, could have concluded that officers' conduct in arresting husband was wantonly reckless or malicious. Wildoner v. Borough of Ramsey, 316 N.J.Super. 487, 720 A.2d 645 (A.D.1998), certification granted 158 N.J. 75, 726 A.2d 938, reversed 162 N.J. 375, 744 A.2d 1146. Municipal Corporations

Punitive damages may be awarded in unlawful detention and false arrest case, against employees of municipality, even though municipality is immune; such damages may also be awarded even where there are no compensatory damages. Marion v. Borough of Manasquan, 231 N.J.Super. 320, 555 A.2d 699 (A.D.1989). Municipal Corporations

Conrail was not "public entity" for purposes of Tort Claims Act and, therefore, could be held liable for punitive damages in connection with discharge of employee on basis of race. Jackson v. Consolidated Rail Corp., 223 N.J.Super. 467, 538 A.2d 1310 (A.D.1988). Civil Rights

Even though the Tort Claims Act may have precluded residents alleging toxic wastes leached through municipal landfill and contaminated their well water from recovering punitive damages and deprived them from seeking other remedies available to them under civil rights law, that did not mean that state remedies available to them were not adequate to satisfy the requirement of due process. Ayers v. Jackson Tp., 189 N.J.Super. 561, 461 A.2d 184 (L.1983). Constitutional Law

Award of punitive damages against township entities is barred by Tort Claims Act. Woodsum v. Pemberton Tp., 172
Township board of education and individually named members of board, in their official capacities, were immune from punitive damages, in accordance with New Jersey Tort Claims Act (TCA) and § 1983. R.K. v. Y.A.L.E. Schools, Inc., D.N.J.2008, 621 F.Supp.2d 188, on reconsideration in part 2009 WL 1066125. Civil Rights 1465(2); Education 385


Injuries consisting of humiliation, mental pain and anguish fell within purview of “pain and suffering,” within meaning of New Jersey Tort Claims Act, and thus, police officers and local union could not recover for such injuries against township, police department and police directors based on claims of violation of right to privacy under New Jersey Constitution, and intrusion upon seclusion. PBA Local No. 38 v. Woodbridge Police Dept., D.N.J.1993, 832 F.Supp. 808. Municipal Corporations 743

Police officer's claims against city and police department for non-economic damages of pain and suffering, arising from alleged malicious prosecution, and emotional distress, arising from alleged invasion of privacy, were barred by injury threshold of Tort Claims Act (TCA). Thigpen v. City of East Orange, 408 N.J.Super. 331, 974 A.2d 1126 (A.D.2009). Municipal Corporations 743

To satisfy two-pronged test and vault the verbal threshold for recovering pain and suffering damages under Tort Claims Act, a plaintiff must show (1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial. Toto v. Ensuar, 196 N.J. 134, 952 A.2d 463 (2008). Municipal Corporations 743

To recover pain and suffering damages under the New Jersey Tort Claims Act (TCA), a plaintiff must have an objective permanent injury and a permanent loss of a bodily function that is substantial; the loss need not, however, be “total.” Hoag v. Brown, 397 N.J.Super. 34, 935 A.2d 1218 (A.D.2007). Municipal Corporations 743

Genuine issue of material fact existed as to whether social worker at correctional facility met the pain and suffering threshold of the New Jersey Tort Claims Act (TCA), thus precluding summary judgment for the State on social worker's negligent retention and supervision claim for noneconomic damages. Hoag v. Brown, 397 N.J.Super. 34, 935 A.2d 1218 (A.D.2007). Judgment 181(27)

Legislature intended that pain and suffering damages could be awarded under Tort Claims Act even if plaintiffs' ability to use their bodily parts efficiently is restored through pins, wires, lenses or any other artificial mechanisms or devices. Gilhooley v. County of Union, 164 N.J. 533, 753 A.2d 1137 (2000).


Under Tort Claims Act, to meet verbal threshold for pain and suffering damages, not only must there be verifiable objective manifestations of emotional distress, but those manifestations must be verified by physical examination and observation of physician. Randall v. State, 277 N.J.Super. 192, 649 A.2d 408 (A.D.1994).

Award of $5,396,940 for deterioration of township residents' “quality of life” during 20 months when they were deprived of potable water due to contamination of aquifer by pollutants leaching from township landfill did not constitute damages for “pain and suffering,” so as to be nonrecoverable from public entity, but rather represented compensation for inconvenience, discomfort and annoyance associated with damage to property. Ayers v. Jackson Tp., 106 N.J. 557, 525 A.2d 287 (1987).

“Pain and suffering” referred to in N.J.S.A. 59:9-2, subd. d, disallowing damages against public entity or employee for pain and suffering resulting from any injury, unless medical treatment expenses are in excess of $1,000, is not limited to that which accompany's direct physical injuries to plaintiff; emotional distress, if not “pain and suffering,” is at least “suffering.” Acevedo v. Essex County, 207 N.J.Super. 579, 504 A.2d 813 (L.1985).

Regardless of the amount of her medical expenses, provision of the Tort Claims Act relating to damages recoverable against a public entity for pain and suffering did not bar infant plaintiff's potential recovery against ownership for the permanent injuries she sustained as the result of fall from bicycle allegedly precipitated by a depression in street. Reale v. Wayne Tp., 132 N.J.Super. 100, 332 A.2d 236 (L.1975).

8. ---- Emotional injury, pain and suffering

Public elementary school and school officials were entitled to immunity under the New Jersey Tort Claims Act (NJTCA) from liability for compensatory damages, in student's claim for negligent infliction of emotional distress, arising out of officials' failure to protect student from alleged bullying by other students, where did not sustain physical injury resulting in medical treatment expenses exceeding $3600. Thomas v. East Orange Bd. of Educ., D.N.J.2014, 2014 WL 495133. Education 423; Education 808(3)

New Jersey Tort Claims Act barred school board employee's claim of intentional infliction of emotional distress.
against supervisor in his official capacity, where recovery for “pain and suffering” barred by the statute included employee's claims of mental anguish and emotional distress, and employee failed to allege medical expenses resulting from a permanent injury in excess of $3,600, as required to overcome the immunity provided by the statute. Gretzula v. Camden County Technical Schools Bd. of Educ., D.N.J.2013, 965 F.Supp.2d 478. Education

Allegations by mother, individually and on behalf of her minor son, that after mother announced her intent to file complaint with United States Department of Education's (USDOE) Office for Civil Rights, and initiated due process proceeding with Office of Administrative Law, as authorized by Individuals with Disabilities Education Act (IDEA), defendants fabricated false complaint of inappropriate sexual relationship to state Division of Youth and Family Services (DYFS), and filed false truancy complaint against mother and son with township police department, thereby causing mother and son extreme depression, were sufficient to state, under New Jersey law, intentional infliction of emotional distress claim against individual members of township's board of education; at motion to dismiss phase, court could not conclude that mother and did not suffer permanent loss or incur medical expenses in excess of amount required by verbal threshold provision of New Jersey Tort Claims Act. R.K. v. Y.A.L.E. Schools, Inc., D.N.J.2008, 621 F.Supp.2d 188, on reconsideration in part 2009 WL 1066125. Damages

Under New Jersey law, public high school student's allegations he was intentionally or negligently marked present upon groups' departure from tourist spot, and was forced to take taxicab back to hotel where students were staying, were insufficient to state state emotional distress claim against school and school officials upon which relief could be granted; student was required to allege distress “so severe that no reasonable man could be expected to endure it.” Carlino v. Gloucester City High School, D.N.J.1999, 57 F.Supp.2d 1, affirmed in part 44 Fed.Appx. 599, 2002 WL 1877011. Damages

Even if parents of public high school students had stated claim of negligent infliction of emotional distress against school and school officials, arising from students' having been excluded from graduation ceremonies for having consumed alcohol while on school trip, claim would be barred absent allegation of physical injury. Carlino v. Gloucester City High School, D.N.J.1999, 57 F.Supp.2d 1, affirmed in part 44 Fed.Appx. 599, 2002 WL 1877011. Damages

Under New Jersey law, even if public high school student's allegations he was intentionally or negligently marked present upon groups' departure from tourist spot, and was forced to take taxicab back to hotel where students were staying, had been sufficient to state emotional distress claim against school and school officials, claim would have been barred, absent allegation of physical injury. Carlino v. Gloucester City High School, D.N.J.1999, 57 F.Supp.2d 1, affirmed in part 44 Fed.Appx. 599, 2002 WL 1877011. Damages


Claimant's state law infliction of emotional distress and negligence claims against county and county officials based on defendants' imprisonment of him on arrest warrant issued for another individual were barred by the New Jersey Tort Claims Act; claimant did not allege that he sustained any physical injury or received any medical treatment

Psychological and emotional injuries should be treated the same as physical injuries under verbal threshold provision of Tort Claims Act when they arise in context similar to that which precipitated plaintiff's injuries; psychological injury involves mind, which is as much part of body as back, leg, hand, or finger. Collins v. Union County Jail, 150 N.J. 407, 696 A.2d 625 (1997). Damages 57.9

Emotional distress of township residents, characterized by such subjective symptoms as depression, fear and anxiety, as result of their deprivation of potable water due to contamination of aquifer by pollutants leaching from township landfill constituted “pain and suffering” and damages therefor were not recoverable from township, due to statutory bar. Ayers v. Jackson Tp., 106 N.J. 557, 525 A.2d 287 (1987). Municipal Corporations 845(7)

Parents' claims under this act, alleging negligent actions of State in placement, continued placement, and manner of placement of two children in foster home caused parents severe emotional stress, distress, anxiety, and embarrassment, were for injuries not within contemplation of the act, and were, therefore, noncompensable. Mercado v. State, 212 N.J.Super. 487, 515 A.2d 804 (L.1985). States 112.2(2)


9. ---- Malice, pain and suffering


When a public employee's actions constitute willful misconduct, plaintiff asserting claim against employee under Tort Claims Act need not satisfy the verbal threshold, which essentially requires an objective permanent injury, in order to recover damages, and may instead recover the full measure of damages applicable to a person in the private sector. Toto v. Ensuar, 196 N.J. 134, 952 A.2d 463 (2008). Municipal Corporations 743

Actual malice component of supermarket employees' causes of action for malicious prosecution, defamation, and false-light invasion of privacy relieved employees of restrictions of statutory pain and suffering threshold, in their action against chief of volunteer fire department resulting from chief's filing of criminal complaints against them, charging them with arson, and his dissemination of information to media in which he repeated arson accusation against employees and elaborated with facts that were untrue; employees were relieved of restrictions of statutory pain and suffering threshold by reason of statute providing that nothing in Tort Claims Act would exonerate public employee from full measure of recovery applicable to person in private sector if it was established that his conduct was outside scope of his employment or constituted actual malice, and “actual malice” proviso of Act encompassed actual

Former high school basketball player failed to establish that the board of education, the school district, or other defendants acted with malice in publishing yearbook photograph that partially depicted player's genitals, which would have allowed player to avoid the immunity provided to a public entity or a public employee under the Tort Claims Act; at most defendants were negligent in failing to act quickly enough when impounding copies of the yearbook once they discovered photograph. Bennett v. Board of Educ., Freehold Regional High School Dist., 2006 WL 1714349, Unreported (A.D.2006), certification denied 188 N.J. 491, 909 A.2d 726. Education 90; Education 423; Education 810

10. ---- Medical treatment expenses, pain and suffering

Public elementary school officials' failure to protect student from alleged bullying by other students could not support student's claim for negligent infliction of emotional distress, under New Jersey law, absent showing that student's adjustment disorder, trichotillomania, or other mental disorders were caused by or related to the alleged bullying at school. Thomas v. East Orange Bd. of Educ., D.N.J.2014, 2014 WL 495133. Damages 57.18

Pain and suffering damages were statutorily precluded under New Jersey law for student with cerebral palsy, who was allegedly assaulted by students at the supervision and approval of teacher, in claim against board of education and school district entities, given that medical treatment expenses for the post-traumatic stress disorder student allegedly suffered did not amount to $3,600. Ward v. Barnes, D.N.J.2008, 545 F.Supp.2d 400. Assault And Battery 38

Municipal corporation was immune from liability in connection with unlawful detention and arrest, even if police officers in question were liable, as users of beach who were detained at police station following issuance of summons for using beach without town badge did not allege medical treatment expenses, as required under this section. Marion v. Borough of Manasquan, 231 N.J.Super. 320, 555 A.2d 699 (A.D.1989). Municipal Corporations 747(3)

Cost of presymptom medical surveillance is a compensable item of damages in action based on exposure to toxic chemicals, where proofs demonstrate, through reliable expert testimony predicated on significance and extent of that exposure, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary. Ayers v. Jackson Tp., 106 N.J. 557, 525 A.2d 287 (1987). Damages 43; Damages 191

Former police officer and wife who indicated that officer was permanently disabled, but who failed to show that medical treatment expenses in excess of $1,000 were incurred, were not entitled to recover for pain and suffering against township and township administrator for alleged wrongful discharge in violation of prohibition against discrimination for seeking workmen's compensation benefits. Dlugosz v. Fred S. James & Co., 212 N.J.Super. 175, 514 A.2d 538 (L.1986). Municipal Corporations 743

Where plaintiff's complaints, apart from bruise of shoulder initially suffered in fall on housing authority's sidewalk, were purely subjective and her own doctor's report revealed full range of motion, reflexes and adequate grasp strength, and absence of any pathology in x-ray study, and where recovery for pain and suffering was precluded under the Tort Claims Act in that medical bills totaled less than $1,000, all recovery was precluded under the Act despite contention that Act did not bar recovery for permanent injury consisting of impairment of faculties, health and ability to participate in activity as distinguished from physical discomfort and distress. Labarrie v. Housing Authority of Jersey City, 143 N.J.Super. 61, 362 A.2d 624 (Co.1976). Municipal Corporations 743

Provision of this section which states that “No damages shall be awarded of this section against a public entity for pain and suffering resulting from any injury; provided, however that this limitation shall not apply in any cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $1,000,” does not preclude recovery for permanent injuries in cases in which there are less than $1,000 in medical expenses; such provision only restricts recovery for pain and suffering. Peterson v. Edison Tp. Bd. of Ed., 137 N.J.Super. 566, 350 A.2d 82 (A.D.1975). Education 202

Fact that, in suit brought against township by father and his infant daughter who was injured in a fall from bicycle allegedly caused by a depression in street, the girl's medical expenses had not reached $1,000 did not necessarily bar a recovery by her for pain and suffering, since her “necessary treatment” might well include considerable future expenditures. Reale v. Wayne Tp., 132 N.J.Super. 100, 332 A.2d 236 (L.1975). Damages 32

Plaintiff's cause of action against township for pain and suffering caused by injury allegedly inflicted by township police officers accrued at the time of the injury and not after plaintiff had incurred medical expenses over $1,000. Lutz v. Semcer, 126 N.J.Super. 288, 314 A.2d 86 (L.1974). Limitation Of Actions 55(4)

11. ---- Sexual molestation of child, pain and suffering

Elementary school students' allegations of sexual abuse or molestation by school principal, together with allegations that principal photographed students in a sexual manner, were aggravating circumstances sufficient, if accompanied by permanent and substantial post-traumatic stress disorder, to allege “permanent loss of a bodily function” even without any assertion of residual physical injury, and satisfied threshold requirement for recovery for pain and suffering in suit against board of education under state Tort Claims Act (TCA). Frugis v. Bracigliano, 351 N.J.Super. 328, 798 A.2d 614 (A.D.2002), reconsideration granted, certification granted 174 N.J. 194, 803 A.2d 1165, affirmed in part, reversed in part 177 N.J. 250, 827 A.2d 1040. Education 809(2)

Any factual dispute as to whether injuries alleged by elementary school students as having resulted from sexual abuse or molestation by school principal were sufficient to satisfy threshold requirements of state Tort Claims Act (TCA) was for jury, in students' negligence action against board of education. Frugis v. Bracigliano, 351 N.J.Super. 328, 798 A.2d 614 (A.D.2002), reconsideration granted, certification granted 174 N.J. 194, 803 A.2d 1165, affirmed in part, reversed in part 177 N.J. 250, 827 A.2d 1040. Education 820
Elementary school students, plaintiffs in negligence action against board of education based upon sexual abuse perpetrated by school principal, were required to prove, by a preponderance of the credible evidence, that they suffered substantial and permanent loss of a bodily function proximately caused by board's conduct, in order to satisfy threshold requirements of state Tort Claims Act (TCA) for recovery for pain and suffering. Frugis v. Bracigliano, 351 N.J.Super. 328, 798 A.2d 614 (A.D.2002), reconsideration granted, certification granted 174 N.J. 194, 803 A.2d 1165, affirmed in part, reversed in part 177 N.J. 250, 827 A.2d 1040. Education 809(2)

Sexual molestation of a child is presumed to result in physical injury, compensable under state Tort Claims Act, even when injury only manifests itself in psychological problems; this presumption may be rebutted at trial. A.C.R. by L.R. v. Vara, 264 N.J.Super. 565, 625 A.2d 41 (L.1992). States 112.2(2); States 209

12. Benefits from other sources--In general


Collateral source payments should have been deducted from jury's damages award, in Tort Claims Act action arising out of collision between motorcycle and township ambulance, before verdict was reduced to reflect motorcyclist's contributory negligence. Sikes v. Township of Rockaway, 138 N.J. 41, 648 A.2d 482 (1994). Damages 59

Collateral source payments should have been deducted from jury's damages award, in Tort Claims Act action arising out of collision between motorcycle and township ambulance, before verdict was reduced in accordance with motorcyclist's negligence, even though jury returned lump sum verdict which presumably included stipulated medical expenses and wage losses for which plaintiff received payments from collateral sources. Sikes v. Township of Rockaway, 269 N.J.Super. 463, 635 A.2d 1004 (A.D.1994), certification granted 136 N.J. 30, 641 A.2d 1041, affirmed 138 N.J. 41, 648 A.2d 482. Damages 59

Employee benefit plan was not entitled to reimbursement, out of proceeds participant received in settlement of his tort action against school district arising from injuries his daughter sustained on property owned by board, for funds it expended for daughter's medical expenses, notwithstanding reimbursement agreement between plan and participant, which was purportedly entered into to induce plan to continue to provide coverage to daughter, since agreement was unenforceable; there was no evidence that plan had any right to cease providing coverage, and permitting plan to assert such claim would be contrary to policy behind New Jersey Tort Claims Act. Hayes v. Pittsgrove Tp. Bd. of Educ., 269 N.J.Super. 449, 635 A.2d 998 (A.D.1994). Insurance 3503(3)

To extent that this section abrogates collateral source rule by allowing for deductions of benefits to tort claimants, such is applicable only with respect to award against public entity to public employee. Murray v. Nicol, 224 N.J.Super. 303, 540 A.2d 239 (A.D.1988). Damages 59
Even if township engineer who settled with residents in nuisance action was not joint tort-feasor, township was entitled to reduction of judgment against it by settlement amount engineer paid to residents pursuant to this section. Ayers v. Jackson Tp., 106 N.J. 557, 525 A.2d 287 (1987). Damages 63

With respect to conflict between this section, providing defendant with credit for collateral source of payments to plaintiff, and the medicaid assistance program (§ 30:4D-7.1), providing for deduction from tort award in favor of plaintiff and right of reimbursement for medical payments made by medicaid, reimbursement rights would prevail, with effect that plaintiff, in tort action against housing authority for injuries sustained in fall on allegedly defective apartment building steps, could include as part of her damage claim an amount for medical expenses, for which, if plaintiff was successful, medicaid would have to be reimbursed. Marmorino v. Housing Authority of City of Newark, 189 N.J.Super. 538, 461 A.2d 171 (L.1983). Damages 59; Health 496(2)

13. ---- Insurance, benefits from other sources

Landowners' claims against township, for losses attributable to township's grant of building permit and approval of minor subdivision, despite presence of subterranean culvert making property unsuitable for building, township's failure to record existence of easement in property's chain of title, and township's trespass on their land, as separate and distinct from loss associated with value of land, for which landowners were compensated under title insurance policy, were not barred by Tort Claims Act. Pinkowski v. Township of Montclair, 299 N.J.Super. 557, 691 A.2d 837 (A.D.1997). Municipal Corporations 723; Municipal Corporations 737

Provision of Tort Claims Act requiring that award against public entity or public employee be reduced by insurance received by claimant was inapplicable to determine respective liability of municipal self-insurance fund and public employee's insurer for uninsured motorist (UM) benefits for injury to employee while working. Prudential Property & Cas. Ins. Co. v. Monmouth County Mun. Joint Ins. Fund, 141 N.J. 235, 661 A.2d 785 (1995). Insurance 2806

Tort Claims Act did not render underinsured motorist (UIM) provisions of municipality's vehicle liability policy excess over UIM provisions of injured police officer's personal insurance; since claim of police officer, who was injured in accident with underinsured motorist, against municipality's insurer was based upon contract rather than tort responsibility of municipality, provision of Act requiring that collateral source benefits be deducted from award against public entity did not apply. Prudential Property and Cas. Ins. Co. v. Travelers Ins. Co., 264 N.J.Super. 251, 624 A.2d 600 (A.D.1993). Insurance 2800

Self-insured public entity is not required to provide uninsured motorist (UM) benefits to its employees on pro rata basis with their personal UM coverage; public policy limiting public entity liability outweighs public policy protecting victims of UM. State Farm Mut. Auto. Ins. Co. v. Township of Woodbridge, 251 N.J.Super. 373, 598 A.2d 252 (L.1991). Insurance 2777

City, as self-insurer, was entitled to have uninsured motorist benefits paid by private insurer to injured city policeman deducted from any payment for similar benefits by city, under subd. e of this section. Allstate Ins. Co. v. Alvarado, 227 N.J.Super. 152, 549 A.2d 905 (L.1988). Insurance 2806

14. ---- Workers' compensation, benefits from other sources

Workers' compensation received by driver's surviving spouse as collateral source had to be deducted from jury verdict against county before it was adjusted to reflect driver's contributory negligence. Furey v. County of Ocean, 273 N.J.Super. 300, 641 A.2d 1091 (A.D.1994), certification denied 138 N.J. 272, 649 A.2d 1291. Workers' Compensation 2243

Self-insured municipality, which was responsible for concurrent and pro rata share of reward rendered in favor of city detectives who were involved in motor vehicle accident with uninsured motorist, was entitled to reimbursement of worker's compensation payments made to the detectives from any award. Rox v. Allstate Ins. Co., 250 N.J.Super. 536, 595 A.2d 563 (L.1991). Insurance 2807

Party who sustains personal injuries as a result of joint negligence of individual and municipal defendants, and who enforces entire amount of judgment against municipal defendants, will have continuing right to future workers' compensation benefits without being obligated to reimburse State for any benefits previously provided, where individual defendant's liability insurance is insufficient to discharge State's workers' compensation lien and to pay proportionate share of judgment. Ortega v. State, 213 N.J.Super. 16, 516 A.2d 258 (A.D.1986). Workers' Compensation 2249

Municipal defendants, who were found to be 72 1/2 % negligent in personal injury action against municipal and other defendants, were entitled to have entire amount of workers' compensation benefits received by plaintiff credited against liability. Ortega v. State, 213 N.J.Super. 16, 516 A.2d 258 (A.D.1986). Workers' Compensation 2251

Workers' compensation insurer was not entitled to reimbursement for medical expenses and temporary disability compensation paid injured employee of insured employer where, even though employee recovered judgment against tort-feasor which exceeded amounts thus paid, tort-feasor was employee of public entity; fact that employee did not include claim for medical expenses or actual lost wages in suit against public entity and its employee had no significance. Travelers Ins. Co. v. Collella, 169 N.J.Super. 412, 404 A.2d 1250 (A.D.1979). Workers' Compensation 2251

15. Permanent loss--In general

Attorney violated Rule 11 by bringing frivolous civil rights action against police department and its employees under §§1981, Thirteenth Amendment, and state law; contract element of §§1981 claim was missing and all but one named plaintiffs were not racial minorities, no facts were proffered to support involuntary servitude element of Thirteenth Amendment claim, and state-law claims did not allege loss of permanent bodily function or disfigurement, as required by state's tort claims statute for recovery of damages against public entity or employee. Leuallen v. Borough of Paulsboro, D.N.J.2002, 180 F.Supp.2d 615. Federal Civil Procedure 2771(5)

Absent objective, medical evidence of a substantial, permanent loss of bodily function, plaintiff may not recover

Evidence in former juvenile detainee's action against county and its youth detention center failed to establish that juvenile suffered a permanent injury or that he would reach the monetary threshold of $3600 as a result of future medical treatment, and thus, detainee's common-law claims for negligence and the intentional infliction of emotional distress against county defendants were barred by the New Jersey Tort Claims Act (TCA). J.H. v. Mercer County Youth Detention Center, 396 N.J.Super. 1, 930 A.2d 1223 (A.D.2007). Counties 146; Damages 57.12; Infants 1457

Material issue of fact, precluding summary judgment, existed as to whether parents' psychological injuries from birth of stillborn baby were permanent and substantial as result of “public entity” physicians' alleged negligence in delivering baby and, thus, rose to a level sufficient to cross the threshold of the Torts Claim Act for pain and suffering damages from permanent loss of bodily function, permanent disfigurement, or dismemberment. Willis v. Ashby, 353 N.J.Super. 104, 801 A.2d 442 (A.D.2002), certification denied 174 N.J. 547, 810 A.2d 66. Judgment 181(27)

It is the nature or degree of the ongoing treatment that determines whether a specific injury meets the Tort Claims Act's threshold requirement for pain and suffering damages, i.e., that the injury caused permanent and substantial impairment. Newsham v. Cumberland Regional High School, 351 N.J.Super. 186, 797 A.2d 878 (A.D.2002). Municipal Corporations 743

Injury to motorist's knee requiring arthroscopic surgery, as result of being rear-ended by state transit bus, was not permanent and substantial loss of bodily function, as necessary for recovering pain and suffering damages from state under tort claims statute; evidence did not show a limitation on range of motion, impairment of gait, or restriction on ability to ambulate, there was no showing of permanent instability in knee, and motorist was not currently restricted because of knee in performing work duties, household chores, yard work, or weightlifting or biking activities. Ponte v. Overeem, 171 N.J. 46, 791 A.2d 1002 (2002). States 212

Fact question existed regarding whether motorist's knee injury, which resulted when his stalled vehicle was struck by transit bus, was substantial and permanent so as to overcome limitation in Tort Claims Act on recovery for pain and suffering, thus precluding summary judgment for transit system and bus driver in motorist's personal injury action. Ponte v. Overeem, 337 N.J.Super. 425, 767 A.2d 503 (A.D.2001), certification granted 168 N.J. 293, 773 A.2d 1156, reversed 171 N.J. 46, 791 A.2d 1002. Judgment 181(33)

By enacting Tort Claims Act section prohibiting recovery of pain and suffering damages unless the injured party can demonstrate either permanent loss of a bodily function, permanent disfigurement, or dismemberment, legislature intended to include within the notion of aggravated cases those involving permanent injury resulting in permanent loss of normal bodily function even if modern medicine can supply replacement parts to mimic natural function; when pins, wires, mechanisms and devices are required to make the plaintiff normal, the statutory standard is met. Gilhooley v. County of Union, 164 N.J. 533, 753 A.2d 1137 (2000). Municipal Corporations 743
Under Tort Claims Act, plaintiff may only recover for pain and suffering if medical expenses exceed $1,000 and plaintiff suffers permanent loss of bodily function, permanent disfigurement, or dismemberment, and to meet this threshold, permanent loss need not be total, but must be substantial. Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J.Super. 24, 744 A.2d 670 (A.D.2000). Municipal Corporations 743

In order to recover damages for pain and suffering under Tort Claims Act based on loss of bodily function, claimant must sustain a permanent loss of use of a bodily function that is substantial. Hammer v. Township of Livingston, 318 N.J.Super. 298, 723 A.2d 988 (A.D.1999). Municipal Corporations 743

In order to establish claim for damages for pain and suffering under Tort Claims Act based on disfigurement, claimant must demonstrate not only that she sustained a disfigurement but that disfigurement is both permanent and substantial. Hammer v. Township of Livingston, 318 N.J.Super. 298, 723 A.2d 988 (A.D.1999). Municipal Corporations 743

Genuine issue of material fact existed as to whether pedestrian had suffered permanent and substantial disfigurement, in the form of scarring, from collision with township fire department vehicle driven by department chief, precluding summary judgment in pedestrian's action against township and chief under Tort Claims Act for damages for pain and suffering. Hammer v. Township of Livingston, 318 N.J.Super. 298, 723 A.2d 988 (A.D.1999). Judgment 181(33)


“Potential” for permanency of some of employee's symptoms did not rise to level of permanent loss of bodily function that was substantial, for purpose of employee's claim under New Jersey Tort Claims Act, where only evidence of permanence was report of employee's psychiatrist stating that “[t]here is a potential permanency of about 15 to 20%, for some of [employee's] symptoms, due to many factors both internal and external”. Pascucci v. Township of Irvington, Irvington Police Dept., C.A.3 (N.J.)2002, 46 Fed.Appx. 114, 2002 WL 1723809, Unreported. Municipal Corporations 743

16. ---- Emotional or psychological injury, permanent loss

Emotional distress or psychological harm can qualify as a “permanent loss of a bodily function” for purposes of recovery under Tort Claims Act when caused by a physical assault such as a violent sodomy or rape, although the plaintiff must also show that the psychological injury is both permanent and substantial. Willis v. Ashby, 353 N.J.Super. 104, 801 A.2d 442 (A.D.2002), certification denied 174 N.J. 547, 810 A.2d 66. Municipal Corporations 743


Parents' claim of having sustained psychological and emotional injuries from stillborn birth caused by negligent medical care by “public entity” physicians constituted an objective and serious consequence, which satisfied the Tort Claim Act's (TCA) threshold for allowing pain and suffering damages from permanent loss of bodily function, permanent disfigurement, or dismemberment. Willis v. Ashby, 353 N.J.Super. 104, 801 A.2d 442 (A.D.2002), certification denied 174 N.J. 547, 810 A.2d 66. Health 830

When they arise in the context of a stillborn infant, psychological and emotional injuries should be treated the same as physical injuries under the Tort Claim Act's (TCA) threshold provision, allowing damages for pain and suffering damages only when they result from permanent loss of bodily function, permanent disfigurement or dismemberment. Willis v. Ashby, 353 N.J.Super. 104, 801 A.2d 442 (A.D.2002), certification denied 174 N.J. 547, 810 A.2d 66. Municipal Corporations 743

Plaintiff seeking to recover against county jail for emotional distress and for pain and suffering resulting from permanent psychological injury was not entitled to recover damages or medical expenses, despite fact that his medical expenses met statutory threshold; psychological impairment, absent evidence of physical injury, was not qualifying injury under applicable statute. Collins v. Union County Jail, 291 N.J.Super. 169, 677 A.2d 210 (A.D.1996), certification granted 146 N.J. 565, 683 A.2d 1161, reversed 150 N.J. 407, 696 A.2d 625. Damages 43; Damages 57.12

Damages for emotional distress are recoverable under Tort Claims Act if they result from permanent debilitating or disfiguring physical injury or if they result from permanent physical sequelae such as disabling tremors, paralysis or loss of eyesight; however, damages resulting from subjective symptoms of depression and anxiety without requisite indicia of permanent physical infirmity are not recoverable under Act. Srebnik v. State, 245 N.J.Super. 344, 585 A.2d 950 (A.D.1991). Damages 57.10

Psychologist's report that stated that police officer who was terminated suffered from mixed anxiety and depression and that some of his symptoms could be permanent was insufficient to establish that officer suffered an objective permanent injury, as required to establish negligent infliction of emotional distress claim under New Jersey law. Perez v. New Jersey Transit Corp., C.A.3 (N.J.)2009, 341 Fed.Appx. 757, 2009 WL 2461079, Unreported. Damages 57.58

Student who fractured his little finger as alleged result of hazing incident at school failed to establish substantial, permanent loss of function as would permit student to bring claim for pain and suffering against school board under Tort Claims Act (TCA); although doctor testified that residual pain and uncomfortability in the finger could be permanent and that such pain could limit student's range of motion, student's finger healed well and did not require surgery, student continued to play sports and musical instruments without limitation following injury, and there was no evidence student sustained any loss of motion or function in his finger that might be considered substantial. Lapp v. Jackson Tp. Bd. of Educ., 2006 WL 1585991, Unreported (A.D.2006). Damages 185(2); Evidence 571(10)

Genuine issue of material fact existed as to the extent of disfigurement suffered by student who fell and punctured her leg on bolt protruding from base of stored volleyball stanchion in school gym, precluding summary judgment in favor of school and school district on issue of whether scar was suitably disfiguring to be considered a permanent disfig-

17. ---- Injuries not constituting, permanent loss

An injury causing lingering pain, resulting in a lessened ability to perform certain tasks because of the pain, will not satisfy that threshold requirement under the Tort Claims Act that the injury be a permanent loss of bodily function that is substantial, as plaintiff may not recover damages for pain and suffering under the Tort Claims Act for mere subjective feelings of discomfort. Knowles v. Mantua Tp. Soccer Ass'n, 176 N.J. 324, 823 A.2d 26 (2003). Municipal Corporations 743

Permanent injury to motorist's cervical spine from motor vehicle accident involving municipal employee did not result in substantial loss of bodily function, as required to satisfy Tort Claims Act threshold for pursuing a claim for pain and suffering, even though motorist sustained a herniated cervical disc with radiculitis and had some restriction of neck movement, where she continued to play sports and do interval training, she could perform household chores to some extent, and she continued to work as a teacher, though no longer teaching emotionally disturbed children, with no loss of pay, benefits or opportunity for advancement. Heenan v. Greene, 355 N.J.Super. 162, 809 A.2d 836 (A.D.2002). Municipal Corporations

Former high school student failed to meet Tort Claims Act's threshold requirement for pain and suffering damages, in her action against school district and its employees that sought compensation for back injury she sustained while performing a cheerleading stunt, as she failed to establish a permanent and substantial impairment; while student experienced some pain and discomfort, the limitations on her activities were minor, where she returned to cheerleading, she was successfully taking at least eighteen credits of college courses while working as a waitress and bartender, and she exercised regularly. Newsham v. Cumberland Regional High School, 351 N.J.Super. 186, 797 A.2d 878 (A.D.2002). Education 805(8)

Thumb, back, shoulder, and psychiatric injuries that train passenger allegedly suffered when his hand became jammed between railroad car's sliding door and its emergency unlock mechanism handle did not rise to level of substantial permanent loss of bodily function that would support his claim for pain and suffering damages under Tort Claims Act against New Jersey Transit Railroad Operations, Inc. (NJT); while passenger's psychiatrist diagnosed “Mood Disorder Secondary to Medical Condition and probable Post Traumatic Stress Disorder,” he did not opine that passenger suffered from substantial permanent psychological injury, passenger's thumb had healed, except for scar which was not claimed to be substantial disfigurement, and his orthopedic injuries were confined to subjective complaints of pain. Rocco v. New Jersey Transit Rail Operations, Inc., 330 N.J.Super. 320, 749 A.2d 868 (A.D.2000). Damages


Mild level of anxiety or depression is not a sufficient impairment to constitute a substantial loss of a bodily function for purposes of Tort Claims Act, which provides that no damages shall be awarded against public entity for pain and
suffering resulting from injury except in cases of permanent loss of bodily function or disfigurement where the medical expenses are in excess of $1,000. Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J.Super. 24, 744 A.2d 670 (A.D.2000). Municipal Corporations 743

Pedestrian struck by automobile did not suffer loss of bodily function required to support claim for damages for pain and suffering under Tort Claims Act, where pedestrian's subjective complaints of pain were unaccompanied by objective medical evidence of such loss. Hammer v. Township of Livingston, 318 N.J.Super. 298, 723 A.2d 988 (A.D.1999). Municipal Corporations 743

Pedestrian struck by automobile did not suffer loss of bodily function required to support claim for damages for pain and suffering under Tort Claims Act based on psychiatrist's testimony that pedestrian had chronic, but mild, anxiety and depression as result of collision. Hammer v. Township of Livingston, 318 N.J.Super. 298, 723 A.2d 988 (A.D.1999). Damages 192

Since plaintiff, who had been assaulted by on-duty police officer and unjustifiably detained overnight in jail, did not present proof of permanent injury resulting from alleged false imprisonment, she failed to prove damages sufficient to permit recovery against city and police department under New Jersey Tort Claims Act. Denis v. City of Newark, 307 N.J.Super. 304, 704 A.2d 1003 (A.D.1998). Municipal Corporations 747(3)

Motorist who was injured when public bus struck her parked car did not sustain permanent loss of bodily function, so as to be entitled to recovery for pain and suffering under Tort Claims Act; while she continued to experience pain and had permanent limitation of motion in neck and back, she was still able to function both in her employment and as homemaker. Brooks v. Odom, 150 N.J. 395, 696 A.2d 619 (1997). Damages 32

Minor, who was sexually molested in swimming pool by volunteer instructor in school board sponsored swimming program, failed to establish that she sustained permanent loss of bodily function and, therefore, could not establish claim against board of education under Tort Claims Act; treating clinical psychologist never stated that minor's fears and sleep disturbances were long term, much less permanent in nature, rather, she noted problems experienced by minor were transitory and quickly resolved and minor demonstrated no physical sequelae of permanent nature. C.P. by J.P. v. Township of Piscataway Bd. of Educ., 293 N.J.Super. 421, 681 A.2d 619 (A.D.1997). Education 809(2)

Former high school student's eating disorder, amenorrhea, and emotional distress were not permanent and substantial, as necessary for recovery under New Jersey's Tort Claims Act for pain and suffering resulting from alleged actions of her basketball coach in telling her to lose weight and being verbally abusive; eating disorder and amenorrhea could be reversed with treatment that student had refused to obtain, and there was no objective evidence of permanent and substantial psychological harm resulting from the eating disorder, the amenorrhea, or coach's conduct. Besler v. Board of Educ. of West Windsor-Plainsboro Regional School Dist., 2008 WL 3890499, Unreported (A.D.2008), certification denied 198 N.J. 314, 966 A.2d 1079, certification granted 198 N.J. 314, 966 A.2d 1079, affirmed in part 201 N.J. 544, 993 A.2d 805. Damages 32; Damages 57.25(5)

18. ---- Permanent dismemberment or disfigurement, permanent loss
Back and neck injury of motorist, who was mistakenly arrested for soliciting prostitution, constituted permanent dismemberment or disfigurement, so as to entitle motorist to seek damages from police officers under Tort Claims Act, even though there was evidence that motorist had pre-existing neck injury and degenerative disease in spine; motorist underwent back and neck surgery requiring fusion of vertebrae, which changed structure of vertebral bodies and normal bodily function, and was thus subject to decreased mobility and increased susceptibility to damage to discs above and below fusions. Leopardi v. Township of Maple Shade, 363 N.J.Super. 313, 832 A.2d 943 (A.D.2003), certification granted 179 N.J. 370, 845 A.2d 1253, appeal dismissed 187 N.J. 486, 901 A.2d 951. Municipal Corporations

Similar to the requirements for a loss of bodily function, a disfigurement must also be substantial to meet the threshold of the Tort Claims Act, which provides that no damages shall be awarded against public entity for pain and suffering except in cases of permanent disfigurement where the medical expenses are in excess of $1,000. Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J.Super. 24, 744 A.2d 670 (A.D.2000). Municipal Corporations

Standing alone, superficial indentation to head of student, as result of attack by classmate, did not satisfy the threshold of the Tort Claims Act, which provides that no damages shall be awarded against public entity for pain and suffering except in cases of permanent disfigurement where medical expenses are in excess of $1,000; student's injury was not visible to the naked eye, it did not detract from her appearance in any way, and it was not significantly disfiguring. Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J.Super. 24, 744 A.2d 670 (A.D.2000). Education

Factors used to determine whether scar constitutes “disfigurement” as required to claim damages for pain and suffering under Tort Claims Act include scar's appearance, coloration, size, and shape, characteristics of surrounding skin, and any other factors that might be cosmetically important on case-by-case basis. Hammer v. Township of Livingston, 318 N.J.Super. 298, 723 A.2d 988 (A.D.1999). Municipal Corporations

19. ---- Post-traumatic stress disorder, permanent loss

Police officer's former wife and her current husband and children who were diagnosed with post-traumatic stress disorder, major depressive episodes, and panic disorders stemming from incident in which officer shot his way into former wife's residence and took wife, husband, and children hostage failed to show that they suffered from permanent loss of bodily function as result of this incident, and, thus, city and police investigator were not liable for victims' pain and suffering under New Jersey Tort Claims Act. Hansell v. City of Atlantic City, D.N.J.2001, 152 F.Supp.2d 589, affirmed 46 Fed.Appx. 665, 2002 WL 3101142. Municipal Corporations

Standing alone, posttraumatic stress disorder claim brought by student, who sustained injuries as result of attack by classmate, did not meet the threshold of the Tort Claims Act, providing that no damages shall be awarded against public entity for pain and suffering except in cases of permanent loss of bodily function where the medical expenses are in excess of $1,000; student's proofs did not demonstrate that this condition was a permanent loss of bodily function, and this was the fatal flaw in her argument. Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J.Super. 24, 744 A.2d 670 (A.D.2000). Education 808(3)

Since plaintiff, who had been assaulted by on-duty police officer, did not present proof that posttraumatic stress disorder resulting from assault was permanent, she failed to prove damages sufficient to permit recovery against city and police department under New Jersey Tort Claims Act. Denis v. City of Newark, 307 N.J.Super. 304, 704 A.2d 1003 (A.D.1998). Municipal Corporations 743

Rape of inmate by corrections officer was sufficiently aggravating circumstance to qualify permanent posttraumatic stress disorder, without residual physical injury, as “permanent loss of a bodily function,” within meaning of Tort Claims Act's verbal threshold provision. Collins v. Union County Jail, 150 N.J. 407, 696 A.2d 625 (1997). Damages 57.12

20. ---- Qualifying injuries, permanent loss

Township park patron's injuries, sustained when his car was struck by gate in park maintained by township, constituted “permanent loss of bodily function” that is substantial, as required to warrant recovery of damages for pain and suffering under Tort Claims Act, where electromyelograms (EMGs) were found to be abnormal, magnetic resonance imaging (MRI) showed disc herniation, and radiculopathy caused by disc herniation, patron's doctors concluded that his injuries were permanent, patron's injuries had significant adverse impact on his ability to engage in many of activities he previously enjoyed, he was unable to sit or stand comfortably, to referee, and to exercise, and he lost feeling in his leg. Knowles v. Mantua Tp. Soccer Ass'n, 176 N.J. 324, 823 A.2d 26 (2003). Municipal Corporations 743

Torn rotator cuff of pedestrian, who tripped and fell while crossing the street, constituted permanent injury resulting in a substantial loss of bodily function so as to entitle her to recover damages for pain and suffering under Tort Claims Act; reattachment of severed tendon in shoulder area shortened its length resulting in 40 per cent loss of range of motion in pedestrian's arm, and significant impairment in ability to use the arm to complete normal tasks as a secretary and at home despite alleviation of pain by successful surgery. Kahrar v. Borough of Wallington, 171 N.J. 3, 791 A.2d 197 (2002). Municipal Corporations 743

Reconstructed knee of pedestrian, who slipped and fell while leaving county jail, constituted permanent injury resulting in a substantial loss of bodily function so as to entitle pedestrian to recover damages for pain and suffering under Tort Claims Act; pedestrian's fractured patella was plainly an objective impairment, and accident caused her to lose forever the normal use of her knee that, thereafter, could not function without permanent pins and wires to re-establish its integrity. Gilhooley v. County of Union, 164 N.J. 533, 753 A.2d 1137 (2000). Counties 141
Nose injury sustained by student, as result of attack by classmate, constituted a prima facie case of a substantial permanent loss of a bodily function, and as such, Tort Claims Act's limitation on the recovery of pain and suffering damages did not apply, and thus, student could present evidence related to all of her alleged permanent injuries to the jury, despite fact that student's posttraumatic stress disorder and permanent disfigurement claims did not alone satisfy the threshold requirements of the Act. Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J.Super. 24, 744 A.2d 670 (A.D.2000). Education 808(3)

Student presented objective medical evidence of a permanent loss of bodily function, and thus, trial court erred in not permitting student, who suffered injuries as result of attack by classmate, to present her Tort Claims Act claims to jury; despite surgery, student had difficulty breathing through her nose and this was caused by a shifting of the nasal septum and doctor stated that student's injuries were permanent and that her symptomatology would most likely become worse. Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J.Super. 24, 744 A.2d 670 (A.D.2000). Judgment 185.3(21)

21. Verbal threshold requirement

The verbal threshold requirement, which limited damages against a public employee for pain and suffering resulting from any injury, applies only to claims of pain and suffering and not other elements of damages: effect of the verbal threshold is limited to pain and suffering claims, while economic or consequential damages are not limited by the Tort Claims Act. Kelly v. County of Monmouth, 380 N.J.Super. 552, 883 A.2d 411 (A.D.2005). Municipal Corporations 743; Officers And Public Employees 116

Genuine issue of material fact existed as to whether supervisor of county reclamation center committed an act of wilful misconduct when handshake between supervisor and county employee evolved into a “testosterone type thing” and supervisor touched county employee below the waist, which would preclude application of the verbal threshold requirement of Tort Claims Act, which limited damages against a public employee for pain and suffering resulting from any injury, to claim, thus precluding summary judgment in battery action. Kelly v. County of Monmouth, 380 N.J.Super. 552, 883 A.2d 411 (A.D.2005). Judgment 181(27)

In circumstances in which the public employee acts willfully or beyond the scope of his employment, the verbal threshold requirement of Tort Claims Act, which limits damages against a public employee for pain and suffering resulting from any injury, must not be applied. Kelly v. County of Monmouth, 380 N.J.Super. 552, 883 A.2d 411 (A.D.2005). Officers And Public Employees 116

Statute creating objective good faith defense to claim that a public employee acted improperly in execution or enforcement of state laws, but not exonerating public employees from liability for false arrest or false imprisonment, did not create blanket exception to verbal threshold requirement of Tort Claims Act, which limited damages against a public employee for pain and suffering resulting from any injury, as to claims of false arrest or false imprisonment. DelaCruz v. Borough of Hillsdale, 183 N.J. 149, 870 A.2d 259 (2005). False Imprisonment 34

Former detainee's false arrest and false imprisonment claims against police officers were barred by verbal threshold requirement of Tort Claims Act, which limited damages against a public employee for pain and suffering resulting
Evidence of substantial deterioration in motorist's physical condition following the summary judgment dismissal of his personal injury action against municipality and municipal employee, arising out of collision with an emergency vehicle driven by employee, warranted reversal and remand for a determination of whether there was now objective medical evidence of permanent injury to motorist sufficient to satisfy the verbal threshold of the Tort Claims Act. MacStudy v. Borough of Eatontown, 2006 WL 300528, Unreported (A.D.2006). Appeal And Error 1177(1)

22. False imprisonment and false arrest

Error in failing to instruct jury that good faith defense did not apply to claim for false arrest/false imprisonment was not harmless as to one of two sheriff's officers against whom plaintiff brought claims under Tort Claims Act for willful misconduct and false arrest/false imprisonment in connection with incident at courthouse where plaintiff had come to give expert testimony; that instruction, coupled with erroneous jury charge that verbal threshold for pain and suffering damages applied to claims of willful misconduct and false arrest, had the capacity to taint jury's entire verdict in favor of that officer and produce unjust result, requiring remand for new trial. Toto v. Ensuar, 196 N.J. 134, 952 A.2d 463 (2008). Appeal And Error 1067

False arrest and false imprisonment claims against municipalities and their public employees for pain and suffering must first vault the verbal threshold of the Tort Claims Act, which limited damages against a public employee for pain and suffering resulting from any injury, in order to be compensable. DelaCruz v. Borough of Hillsdale, 183 N.J. 149, 870 A.2d 259 (2005). False Imprisonment 34; Municipal Corporations 743

Effect of the verbal threshold of the Tort Claims Act on claims against municipalities and public employees for false arrest or false imprisonment is limited to pain and suffering claims; economic or consequential damages are not limited by the Tort Claims Act. DelaCruz v. Borough of Hillsdale, 183 N.J. 149, 870 A.2d 259 (2005). False Imprisonment 34; Municipal Corporations 743

23. Subrogation

Anti-subrogation provision of New Jersey Tort Claims Act, prohibiting any action under insurance contract subrogation provision against public entity or public employee, was preempted by Federal Employees Health Benefit Act (FEHBA), in context of whether federal employees' health plan could assert lien against settlement proceeds from injured federal employee's negligence suit against state-owned bus company. Aybar v. New Jersey Transit Bus Operations, Inc., 305 N.J.Super. 32, 701 A.2d 932 (A.D.1997). Insurance 1117(3); States 18.41

Under Tort Claims Act's subrogation provision, township was immune from title insurance company's claims for trespass and negligence, which were based on subterranean culvert on property making it unsuitable for building, to extent title company was seeking reimbursement for its payment to landowners under title insurance policy. Pinkowski v. Township of Montclair, 299 N.J.Super. 557, 691 A.2d 837 (A.D.1997). Municipal Corporations 736; Municipal Corporations 737
Tort Claims Act prohibits subrogation claims against governmental entities and employees arising out of any injuries for which governmental entity or employee may be held liable in tort. Pinkowski v. Township of Montclair, 299 N.J.Super. 557, 691 A.2d 837 (A.D.1997). Municipal Corporations 723; Officers And Public Employees 114

Under Tort Claims Act's subrogation provision, title insurance company, as subrogee, was prohibited from asserting rights of landowners for damages they might be entitled to for injuries they suffered, in addition to property's loss in value, as a result of subterranean culvert making property unsuitable for building. Pinkowski v. Township of Montclair, 299 N.J.Super. 557, 691 A.2d 837 (A.D.1997). Insurance 3515(1)

Under Tort Claims Act, insured may assert claim against municipality for injuries which insured suffered, and for which insured is uncompensated, so long as right of insured to assert such claim has not been subrogated to insurer. Pinkowski v. Township of Montclair, 299 N.J.Super. 557, 691 A.2d 837 (A.D.1997). Municipal Corporations 742(2)

Since employee benefit plan participant was barred under New Jersey Tort Claims Act from recovering from school board medical expenses incurred by his daughter, benefit plan could not recover funds it expended for medical expenses from school board under theory of subrogation. Hayes v. Pittsgrove Tp. Bd. of Educ., 269 N.J.Super. 449, 635 A.2d 998 (A.D.1994). Insurance 3519(2)

If public employees acted outside scope of their employment or were found guilty of willful misconduct by improperly issuing borough check, public employees would be without protection afforded by § 59:9-2 precluding surety from bringing action under subrogation provision in bond against public employees. Marley v. Borough of Palmyra, 193 N.J.Super. 271, 473 A.2d 554 (L.1983). Officers And Public Employees 116


New Jersey turnpike authority is a public entity within meaning of Tort Claims Act and thus the Act's prohibition against subrogation claims barred claims of motorist's employer. S.E.W. Friel Co. v. New Jersey Turnpike Authority, 73 N.J. 107, 373 A.2d 364 (1977). Turnpikes And Toll Roads 45

That public agency which owned automobile that was involved in collision was apparently insured did not render inapplicable this section of New Jersey Tort Claims Act which bars subrogation claims against a public employer or employee. Cucci v. Jaldini, 141 N.J.Super. 297, 358 A.2d 201 (A.D.1976). Counties

Subrogation action against New Jersey turnpike authority in which insurer was real party in interest was barred by this section of Tort Claims Act prohibiting an insurer from bringing an action under a subrogation provision in insurance contract against a public entity. Dependable Container Service, Inc. v. New Jersey Turnpike Authority, 135 N.J.Super. 238, 343 A.2d 118 (A.D.1975). Turnpikes And Toll Roads

Under § 2A:48-1 et seq. relating to liability of city for damage to property by reason of a riot, insurers of persons whose property was damaged during riots were not subrogated to rights of the property owners and insurers were not entitled to recover from the city for claims paid. A. & B. Auto Stores of Jones St., Inc. v. City of Newark, 59 N.J. 5, 279 A.2d 693 (1971). Insurance

24. Waiver or estoppel

Merely because municipal corporation did not plead this section, there was no waiver of defense of immunity or limitation of liability under this section, setting forth monetary threshold of $1,000 in medical expenses and severity threshold before liability would attach for pain and suffering and, under circumstances, answer asserting Tort Claims Act generally as affirmative defense was sufficient to raise defense. Rivera v. Gerner, 89 N.J. 526, 446 A.2d 508 (1982). Municipal Corporations

25. Burden of proof

Under New Jersey law, to recover pain and suffering damages on battery and intentional infliction of emotional distress claims against teacher who allegedly supervised and incited a beating against a student with cerebral palsy, student had to prove teacher acted with actual malice or willful misconduct. Ward v. Barnes, D.N.J.2008, 545 F.Supp.2d 400. Assault And Battery; Damages


Plaintiff's medical experts must provide proof of the permanency of her condition in order to sustain her burden of proving a permanent loss for purposes of her claim under Tort Claims Act, which provides that no damages shall be awarded against public entity for pain and suffering except in cases of permanent loss of bodily function where the medical expenses are in excess of $1,000. Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J.Super. 24, 744 A.2d 670 (A.D.2000). Municipal Corporations

To recover under Tort Claims Act for pain and suffering, plaintiff must prove by objective medical evidence that


26. Questions for jury

Trial court, in its gatekeeping function, determines whether there is sufficient evidence that plaintiffs crossed the injury threshold of the Tort Claims Act (TCA) to allow submission of the issue of negligence to the jury; however, as in all cases where there are factual disputes, the jury renders the ultimate decision, and it is the judge's function only to decide if a material dispute of fact exists as to whether plaintiffs crossed the threshold. Frugis v. Bracigliano, 351 N.J.Super. 328, 798 A.2d 614 (A.D.2002), reconsideration granted, certification granted 174 N.J. 194, 803 A.2d 1165, affirmed in part, reversed in part 177 N.J. 250, 827 A.2d 1040. Municipal Corporations 742(6)

In granting summary judgment for county and county sheriff's department on negligence claim brought by pedestrian, who slipped and fell while leaving county jail, trial court failed to apply appropriate summary judgment standard as it resolved dispute on the merits that should have been decided by jury, namely whether pedestrian's injuries met the threshold required by the Tort Claims Act, which prohibits recovery of pain and suffering damages unless injured party can demonstrate permanent disfigurement; court erroneously weighed evidence and applied its own personal standard. Gilhooley v. County of Union, 164 N.J. 533, 753 A.2d 1137 (2000). Judgment 185.3(21)

27. Limitations on damages

Under New Jersey law, in the absence of physical injury, a plaintiff cannot recover compensatory damages from public entities or public employees for mental or emotional distress. Thomas v. East Orange Bd. of Educ., D.N.J.2014, 2014 WL 495133. Damages 57.16(2)

Limitations on recoverable damages for intentional torts allegedly committed by school district employees were removed by plain language of Tort Claims Act (TCA) providing that nothing in TCA exonerated public employees from liability, or from “the full measure of recovery applicable to a person in the private sector[,]” should it be established that such conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct. Leang v. Jersey City Bd. of Educ., 399 N.J.Super. 329, 944 A.2d 675 (A.D.2008), certification granted 196 N.J. 87, 951 A.2d 1040, certification denied 196 N.J. 598, 960 A.2d 393, affirmed in part, reversed in part 198 N.J. 557, 969 A.2d 1097. Education 385

The application of the verbal threshold requirement, which limited damages against a public employee for pain and suffering resulting from any injury, and the consequence of a plaintiff's failure to vault it, do not preclude an award of nominal or punitive damages in circumstances where the tort is intentional and beyond the scope of employment. Kelly v. County of Monmouth, 380 N.J.Super. 552, 883 A.2d 411 (A.D.2005). Officers And Public Employees 116

Tort Claims Act section which limits damages recoverable for pain and suffering does not prevent plaintiff from

When plaintiff asserting claim for damages for pain and suffering under Tort Claims Act demonstrates prima facie case of either permanent loss of bodily function or permanent disfigurement that is substantial, Act's limitation on recovery of such damages does not apply, and plaintiff may present to jury evidence relating to all alleged permanent injuries. Hammer v. Township of Livingston, 318 N.J.Super. 298, 723 A.2d 988 (A.D.1999). Municipal Corporations $743


28. Review

New trial was necessary for sole purpose of procuring a jury determination on issue of proximate cause and damages in action against sheriff's officer under Tort Claims Act for willful misconduct arising from incident at courthouse, after jury determined at first trial that officer had engaged in willful conduct but was erroneously prevented from awarding damages based on plaintiff's failure to satisfy the inapplicable verbal threshold standard for pain and suffering damages. Toto v. Ensuar, 196 N.J. 134, 952 A.2d 463 (2008). Appeal And Error $1178(6)

Board of education would not be heard, on appeal from verdict for plaintiffs in negligence action, to complain that trial court ruled on issue of whether plaintiffs' claims satisfied threshold of Tort Claims Act (TCA) prior to hearing from board's expert, where ruling was made on board's motion and board moved for ruling before its expert testified. Frugis v. Bracigliano, 351 N.J.Super. 328, 798 A.2d 614 (A.D.2002), reconsideration granted , certification granted 174 N.J. 194, 803 A.2d 1165, affirmed in part , reversed in part 177 N.J. 250, 827 A.2d 1040. Appeal And Error $882(1)

When considering borough's motion for summary judgment with respect to Tort Claims Act suit brought by police officer who was injured at borough's firing range, trial court's failure to address officer's claim of permanent disfigurement under the Act violated rule requiring that, on every motion decided by written orders that are appealable as of right, the court shall, by an opinion or memorandum decision, find the facts and state its conclusions of law thereon. Oslacky v. Borough of River Edge, 319 N.J.Super. 79, 724 A.2d 876 (A.D.1999). Trial $397(1)

Until such time as police officer, who was injured at borough's firing range, was given reasonable opportunity to receive recommended treatment suggested by doctor, the issue of permanency of his disfigurement, for purposes of his Tort Claims Act suit, could not be determined, and thus, trial court's grant of summary judgment to borough was premature and had the effect of depriving officer of complete opportunity to present proof of prima facie case sufficient to withstand borough's motion. Oslacky v. Borough of River Edge, 319 N.J.Super. 79, 724 A.2d 876 (A.D.1999). Judgment $186

While superior court is empowered to grant leave to appeal nunc pro tunc from interlocutory order if appeal has been
taken within time period required for taking of appeal from final judgments, where motion for partial summary judgment in personal injury action was taken prematurely in face of inadequate record, and where parties on appeal raised issue which was never presented below, i.e., whether this section bars award for disability as distinguished from pain and suffering, appeal would be dismissed. Rendon v. Kassimis, 140 N.J.Super. 395, 356 A.2d 416 (A.D.1976).

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Current with laws effective through L.2014, c. 62 and J.R. No. 3.

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END OF DOCUMENT
Except as may be required in an action brought pursuant to section 20 of P.L. 1983, c. 362 (C. 39:6A-9.1), evidence of the amounts collectible or paid under a standard automobile insurance policy pursuant to sections 4 and 10 of P.L. 1972, c. 70 (C. 39:6A-4 and 39:6A-10), amounts collectible or paid for medical expense benefits under a basic automobile insurance policy pursuant to section 4 of P.L. 1998, c. 21 (C. 39:6A-3.1) and amounts collectible or paid for benefits under a special automobile insurance policy pursuant to section 45 of P.L. 2003, c. 89 (C. 39:6A-3.3), to an injured person, including the amounts of any deductibles, copayments or exclusions, including exclusions pursuant to subsection d. of section 13 of P.L. 1983, c. 362 (C. 39:6A-4.3), otherwise compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person.

The court shall instruct the jury that, in arriving at a verdict as to the amount of the damages for noneconomic loss to be recovered by the injured person, the jury shall not speculate as to the amount of the medical expense benefits paid or payable by an automobile insurer under personal injury protection coverage payable under a standard automobile insurance policy pursuant to sections 4 and 10 of P.L. 1972, c. 70 (C. 39:6A-4 and 39:6A-10), medical expense benefits under a basic automobile insurance policy pursuant to section 4 of P.L. 1998, c. 21 (C. 39:6A-3.1) or benefits under a special automobile insurance policy pursuant to section 45 of P.L. 2003, c. 89 (C. 39:6A-3.3) to the injured person, nor shall they speculate as to the amount of benefits paid or payable by a health insurer, health maintenance organization or governmental agency under subsection d. of section 13 of P.L. 1983, c. 362 (C. 39:6A-4.3).

Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss sustained by the injured party.

CREDIT(S)

HISTORICAL AND STATUTORY NOTES

Operative date of 1983 amendment, see Historical and Statutory Notes under N.J.S.A. § 17:28-1.1.

N.J.A.C. § 11:3-4.1 et seq., relating to personal injury protection benefits, medical protocols, and diagnostic tests, were adopted effective Dec. 21, 1998.

Effective date, see Historical and Statutory Notes under N.J.S.A. § 39:6A-1.

L.1998, c. 21, § 74, approved May 19, 1998, provides:

“[Section] 74. a. This act shall take effect 90 days following the establishment by the Commissioner of Banking and Insurance of basic benefits required to be provided pursuant to section 4 of P.L.1972, c. 70 (C.39:6A-4) or the adoption by rule of the professional boards of the designation of valid diagnostic tests pursuant to the provisions of section 12 of this act, whichever is later, except that 1: (1) sections 47 through 61 shall take effect on the 90th day after the date of enactment; (2) sections 1, 12, 26 through 46, 62 through 65 and 67 shall take effect immediately.

“b. Prior to the effective date of any section of this act, the Commissioner of Banking and Insurance may take those actions and promulgate those regulations necessary to implement the provisions of this act.”

L.2003, c. 89, § 86, approved June 9, 2003, provides:

“[Section] 86. This act shall take effect immediately, except that section 38 [17:33B-25] shall take effect on January 1, 2004, section 45 [39:6A-3.3] shall take effect on the earlier of the 120th day next following enactment or the adoption of regulations by the Commissioner of Banking and Insurance to implement that section, section 65 [17:29A-39] shall take effect upon the adoption of regulations by the Commissioner of Banking and Insurance, sections 83 [17:17-10] and 84 [17:33B-30] shall take effect on January 1, 2007, and section 79 [39:3-29.1a] shall take effect on 365th day next following enactment.”

Statements:


Governor's Reconsideration and Recommendation statement to Senate, No. 2637--L.1988, c. 119, see N.J.S.A. § 17:28-1.4.

Committee statement to Assembly, No. 1--L.1990, c. 8, see N.J.S.A. § 17:33B-1.

Committee statement to Senate, No. 63-L.2003, c. 89, see N.J.S.A. § 17:30A-2.1.
LAW REVIEW AND JOURNAL COMMENTARIES


LIBRARY REFERENCES

Automobiles 251.17, 251.19.
Damages 177, 182.
Trial 127.
C.J.S. Damages §§ 320, 323 to 324, 345 to 347.
C.J.S. Trial §§ 152 to 156, 259, 315 to 316.

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95 ALR 575, Compensation from Other Source as Precluding or Reducing Recovery Against One Responsible for Personal Injury or Death.

Treatises and Practice Aids

Automobile Liability Insurance § 95:2, New Jersey No-Fault Summary.


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1. Validity

Provision of this section that evidence of amounts collectible or paid pursuant to personal injury protection benefits to injured person is inadmissible in civil action for recovery of damages for bodily injury by such injured person bars civil recovery of out-of-pocket losses covered by personal injury protection benefits, and prevents use of evidence of covered losses as direct proof of extent of damages, but does not make evidence of covered losses inadmissible on any other legitimate issue to which such evidence might be relevant; as so limited, provision is not unconstitutional legislative invasion of Supreme Court's rule-making power. Rybeck v. Rybeck, 141 N.J.Super. 481, 358 A.2d 828 (L.1976), appeal dismissed on other grounds 150 N.J.Super. 151, 375 A.2d 269, certification denied 75 N.J. 30, 379 A.2d 261. Automobiles ⇆251.12; Constitutional Law ⇆2362

2. Construction and application

An insurer that pays personal injury protection (PIP) claims in the ordinary course should do so safe in the knowledge that the evidence of that payment will not be admissible in the event that there is a civil suit, in order to avoid creating an incentive to decline payment; by ensuring that the fact of a payment is inadmissible at trial, the insurer has every incentive to make payments and to do so by using a rather broad interpretation of the relationship between the claimed treatment and the underlying motor vehicle accident. Bardis v. First Trenton Ins. Co., 199 N.J. 265, 971 A.2d 1062

State Automobile Reparation Reform Act, which mandates that every automobile insurance policy must provide personal injury protection coverage, has limited ability of insured to recover damages from tort-feasor for amounts collectible or paid under personal injury protection. Aetna Ins. Co. v. Gilchrist Bros., Inc., 85 N.J. 550, 428 A.2d 1254 (1981). Automobiles 251.17

3. Purpose

The principal goal of statute making evidence of amounts paid or collectible pursuant to personal injury protection (PIP) insurance inadmissible in an ordinary suit for damages arising from an automobile accident is to avoid double recovery for a loss. Bardis v. First Trenton Ins. Co., 199 N.J. 265, 971 A.2d 1062 (2009). Damages 182


Intent of provision of Automobile Reform Act providing that evidence of amounts collectible or paid pursuant to provisions of Act pertaining to basic and supplemental personal injury protection benefits is inadmissible in civil action for recovery of damages for bodily injury by such injured person is to preclude possibility of double recovery for medical expenses already paid under PIP in a subsequent civil action. Bernick v. Aetna Life and Cas., 158 N.J.Super. 574, 386 A.2d 908 (1978). Damages 177

This section, making evidence of amounts collectible or paid pursuant to personal injury protection benefits for injured person inadmissible in civil action for recovery of damages for bodily injury by such injured person, was apparently intended to make personal injury protection benefits unrecoverable again in civil action and to silence trial witnesses on subject of out-of-pocket loss to extent that such loss is collectible or paid by personal injury protection carrier. Rybeck v. Rybeck, 141 N.J.Super. 481, 358 A.2d 828 (L.1976), appeal dismissed on other grounds 150 N.J.Super. 151, 375 A.2d 269, certification denied 75 N.J. 30, 379 A.2d 261. Damages 177

4. Inadmissibility examined

Evidence that insured received personal injury protection (PIP) benefits for injuries allegedly sustained in automobile accident was inadmissible at trial of insured's claim for underinsured motorist (UIM) benefits to establish that ins-
sured's injuries were caused by the accident; insurer's decision to pay PIP benefits was not probative of causation, as the individual authorizing payment lacked the necessary medical expertise to make such a determination, and making such evidence admissible would interfere with the PIP system's goal of ensuring prompt payment for medical care to injured insureds by giving insurers an additional incentive to avoid payment. Bardis v. First Trenton Ins. Co., 199 N.J. 265, 971 A.2d 1062 (2009). Damages 182; Insurance 2814

Trial judge was within his discretion in declining to permit defense counsel to question plaintiff on his receipt of personal injury protection coverage income continuation benefits in automobile negligence action arising from rear-end collision; counsel's purpose was to show that plaintiff had economic cushion which made him less anxious to return to work and counsel's cross-examination on general subject was thorough and effective, eliciting information that plaintiff was receiving benefits from some source, but that they were not, in plaintiff's view, sufficient to make up for his inability to work. Mellwig v. Kebo, 264 N.J.Super. 168, 624 A.2d 82 (A.D.1993), certification denied 134 N.J. 478, 634 A.2d 525. Damages 173(1)

Testimony as to amount of lost wages and medical expenses collected or paid as PIP benefits was inadmissible in suit brought pursuant to no-fault statutes. Clifford v. Opdyke, 156 N.J.Super. 208, 383 A.2d 749 (A.D.1978). Automobiles 251.19

5. Medical expenses

No Fault statute governing inadmissibility of evidence of losses collectible under personal injury protection coverage did not preclude recovery of uncompensated economic loss consisting of medical expenses beyond those collectible or paid under several available “Standard” Personal Injury Protection (PIP) plans, and therefore, evidence pertaining to insured's medical expenses above those payable by PIP was admissible. Wise v. Marienski, 425 N.J.Super. 110, 39 A.3d 947 (L.2011), entered 2011 WL 8183591. Damages 177

Where all potential sources of recovery of medical expenses from automobile accident, personal injury protection insurance benefits, workers' compensation benefits, and tort-feasor recovery conjoin, injured party may recover medical expenses from tort-feasor, even though recovery will be subject to a workers' compensation lien. Lefkin v. Venturini, 229 N.J.Super. 1, 550 A.2d 985 (A.D.1988). Workers' Compensation 2252

Medical bills for psychological treatment of patient between patient's automobile accident and his fall in supermarket were “collectible” under PIP provisions of the no-fault act, N.J.S.A. 39:6A-4, subd. a, 39:6A-12 and were thus inadmissible in patient's suit against driver of car. Amaru v. Stratton, 209 N.J.Super. 1, 506 A.2d 1225 (A.D.1985). Automobiles 251.19

Doctor's bills for psychological treatment of patient following patient's fall in supermarket, after automobile accident, were “not collectible” under No-Fault Act, N.J.S.A. 39:6A-4, subd. a, and were admissible as they did not constitute treatment for “personal injuries sustained in the automobile accident.”. Amaru v. Stratton, 209 N.J.Super. 1, 506 A.2d 1225 (A.D.1985). Automobiles 251.19

Evidence of medical bills incurred by person injured in an automobile accident for which personal injury protection benefits were collectible could not be introduced in damage action brought by injured person against another party if payment of bills was refused under personal injury protection benefits coverage on ground that medical procedures by which bills were rendered were for conditions unrelated to accident. Tullis v. Teial, 182 N.J.Super. 553, 442 A.2d 1039 (A.D.1982). Automobiles 251.19

Provision of Automobile Reform Act providing that evidence of amounts collectible or paid pursuant to provisions of Act pertaining to basic and supplemental personal injury protection benefits is inadmissible in civil action for recovery of damages for bodily injury by such injured person creates no evidential exclusion in a civil action of medical expenses paid by workers' compensation carrier. Bernick v. Aetna Life and Cas., 158 N.J.Super. 574, 386 A.2d 908 (1978). Damages 177

6. Future expenses

Although the Automobile Reparation Reform Act makes inadmissible evidence of amounts collectible or paid, it does not preclude testimony as to necessity for future medical treatments necessary to heal a plaintiff and his injury. Pitti v. Astegher, 133 N.J.Super. 145, 335 A.2d 598 (L.1975). Automobiles 251.19

7. Double recovery

In action against New Jersey resident, whose truck was registered and insured in New Jersey, by New York residents whose New York registered and insured automobile was struck by defendant's truck in New Jersey, plaintiffs' medical expenses and lost wages were compensable elements of damages, notwithstanding that those items were either paid or collectible as no-fault benefits under their New York policy. Lattimer v. Boucher, 189 N.J.Super. 33, 458 A.2d 528 (L.1983). Damages 64

Insofar as New Jersey accident involving insured New Jersey vehicles are concerned, reimbursement agreement of New Jersey insurer is invalid for all purposes, but where accident occurs outside state between New Jersey vehicle and vehicle from another jurisdiction, reimbursement and subrogation provisions of policy are valid as they safeguard against double recovery of medical and other expenses provided and paid for under personal injury protection benefits. Cirelli v. Ohio Cas. Ins. Co., 72 N.J. 380, 371 A.2d 17 (1977). Insurance 3507(1); Insurance 3509

8. Subrogation

No subrogation rights exist in a New Jersey accident where PIP benefits are paid, even when the tort-feasor is not covered by no-fault insurance. Lattimer v. Boucher, 189 N.J.Super. 33, 458 A.2d 528 (L.1983). Insurance 3521

Subrogation provision in automobile liability policy as to payments under personal injury protection endorsement was inoperative, since right of injured person to maintain action for personal injury protection payments had been extinguished by evidential exclusion rule. Aetna Ins. Co. v. Gilchrist Bros., Inc., 85 N.J. 550, 428 A.2d 1254 (1981). Insurance 3520
9. Unreimbursed economic losses

Plaintiff who is involved in automobile accident, and does not satisfy threshold requirements of statute that bars recovery for noneconomic loss in general, may nonetheless sue to recover unreimbursed income losses to extent that income loss is otherwise uncompensated by income continuation benefits or otherwise pursuant to statute that preserves right of recovery to persons injured in automobile accident. Bennett v. Hand, 284 N.J.Super. 43, 663 A.2d 130 (A.D.1995). Automobiles &gt; 251.17

10. Actions against tortfeasors

Under New Jersey law, amounts paid for medical treatment by injured driver for which driver's automobile insurer was liable were “collectible,” and thus inadmissible in tort action against other driver. D'Orio v. West Jersey Health Systems, D.N.J.1992, 797 F.Supp. 371. Damages &gt; 182

Evidence of damage items included in personal injury protection payments by an insurer is not admissible in an action brought by injured insured against a tort-feasor. Eckmeyer v. Colburn, 138 N.J.Super. 164, 350 A.2d 307 (L.1975). Damages &gt; 165

11. Uninsured motorists

Passenger, who was at least a beneficial owner of one or more uninsured family cars at time of accident, was barred from recovering his medical expenses, either as personal injury protection (PIP) benefits, or more generally as economic loss against driver of either vehicle involved in accident. Dziuba v. Fletcher, 382 N.J.Super. 73, 887 A.2d 732 (A.D.2005), certification granted 186 N.J. 363, 895 A.2d 450, affirmed 188 N.J. 339, 907 A.2d 427. Automobiles &gt; 251.17; Insurance &gt; 2825

Under No-Fault Law, uninsured motorist may not recover economic damages, in automobile negligence action, that would have been collectible as personal injury protection (PIP) benefits had he insured his vehicle. Monroe v. City of Paterson, 318 N.J.Super. 505, 723 A.2d 1266 (A.D.1999). Automobiles &gt; 251.13


12. Out-of-state residents


13. Trial practice and procedure

Amount of accident victim's personal injury protection benefits and of reduction in damages should have been determined by judge before trial, in that evidence of amounts collected by victim were inadmissible in personal injury action; judge could have deducted amount of personal injury protection benefits from verdict. Serratore v. Nardi, 237 N.J.Super. 566, 568 A.2d 573 (A.D.1990), certification denied 122 N.J. 131, 584 A.2d 206.

Evidence which is inadmissible under no-fault statutes should not be offered by counsel in first place and, if such evidence is improperly suggested, it should be stricken with an immediate charge instructing jury that case does not involve a claim for such losses and that they should not be considered as an element of damages. Clifford v. Opdyke, 156 N.J.Super. 208, 383 A.2d 749 (A.D.1978).

Comment in opening statement of alleged tortfeasor's attorney that fact that case would not involve either medical bills or lost income should tell jury something about nature and seriousness of claim was clearly contrary to statute rendering inadmissible any evidence of medical bills and lost wages reimbursed as no-fault personal injury protection (PIP) benefits, and thus jury instruction stating that jury could not speculate on medical bills or lost wages that motorist may have had, in its determination of reasonable amount of damages, was warranted following opening statements in personal injury action arising from automobile accident. Romero v. O'Reilly, 2007 WL 1119571, Unreported (A.D.2007).

14. Jury instructions

Under the no-fault statute, the judge must instruct the jury, in a personal injury action arising from an automobile accident, that the plaintiff is not entitled, as an element of damages, to medical expenses paid or payable by an insurer, even when the plaintiff does not offer proof of those expenses. Espinal v. Arias, 391 N.J.Super. 49, 916 A.2d 1081 (A.D.2007), certification denied 192 N.J. 482, 932 A.2d 32.

Trial court was required to instruct jury in personal injury action that automobile accident victim's claim against defendant motorist for non-economic damages did not include a request for medical expenses, as victim offered no evidence of medical expenses during trial, but rather only testified that he had received medical treatment. Espinal v. Arias, 391 N.J.Super. 49, 916 A.2d 1081 (A.D.2007), certification denied 192 N.J. 482, 932 A.2d 32.

15. Sufficiency of evidence

Damage verdict of $723,750 was not excessive and did not constitute miscarriage of justice in automobile negligence.
action arising from rear-end collision, despite possibility that defendant's evidence might have supported a considerably lower damage verdict; plaintiff had back problem which required surgery three years before accident, plaintiff needed more invasive back surgery after accident which was only partially successful, and orthopedic surgeon who performed both operations testified that further surgery would probably be required. Mellwig v. Kebalo, 264 N.J.Super. 168, 624 A.2d 82 (A.D.1993), certification denied 134 N.J. 478, 634 A.2d 525. Damages $127.33; Damages $127.42


Current with laws effective through L.2014, c. 62 and J.R. No. 3.

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END OF DOCUMENT
Effective: January 26, 2007

New Jersey Statutes Annotated Currentness
Title 34. Labor and Workmen's Compensation
   ▶ Chapter 15. Workmen's Compensation (Refs & Annos)
   ▶ Article 3. Definitions and General Provisions
      → 34:15-40. Liability of third party

Where a third person is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer or insurance carrier under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein. In the event that the employee or his dependents shall recover and be paid from the said third person or his insurance carrier, any sum in release or in judgment on account of his or its liability to the injured employee or his dependents, the liability of the employer under this statute thereupon shall be only such as is hereinafter in this section provided.

(a) The obligation of the employer or his insurance carrier under this statute to make compensation payments shall continue until the payment, if any, by such third person or his insurance carrier is made.

(b) If the sum recovered by the employee or his dependents from the third person or his insurance carrier is equivalent to or greater than the liability of the employer or his insurance carrier under this statute, the employer or his insurance carrier shall be released from such liability and shall be entitled to be reimbursed, as hereinafter provided, for the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents less employee's expenses of suit and attorney's fee as hereinafter defined.

(c) If the sum recovered by the employee or his dependents as aforesaid is less than the liability of the employer or his insurance carrier under this statute, the employer or his insurance carrier shall be liable for the difference, plus the employee's expenses of suit and attorney's fee as hereinafter defined, and shall be entitled to be reimbursed, as hereinafter provided for so much of the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents as exceeds the amount of such difference plus such employee's expenses of suit and attorney's fee.

(d) If at any time prior to the payment by the third person or his insurance carrier to the injured employee or his dependents, the employer or his insurance carrier shall serve notice, as hereinafter provided, upon such third person or his insurance carrier that compensation has been applied for by the injured employee or his dependents it shall thereupon become the duty of such third person or his insurance carrier, before making any payment to the injured employee or his dependents, to inquire from such employer or his insurance carrier the amount of medical expenses...
incurred and compensation theretofore paid to the injured employee or to his dependents. Where such notice shall have been served, it shall further become the duty of such third person or his insurance carrier, before making any payment as aforesaid, to inquire from such injured employee or his dependents the amount of the expenses of suit and attorney's fee, or either of them in the action or settlement of the claim against such third person or his insurance carrier. Thereafter, out of that part of any amount about to be paid in release or in judgment by such third person or his insurance carrier on account of his or its liability to the injured employee or his dependents, the employer or his insurance carrier shall be entitled to receive from such third person or his insurance carrier so much thereof as may be due the employer or insurance carrier pursuant to subparagraph (b) or (c) of this section. Such sum shall be deducted by such third person or his insurance carrier from the sum to be paid in release or in judgment to the injured employee or his dependents and shall be paid by such third person or his insurance carrier to the employer or his insurance carrier. Service of notice, hereinbefore required to be made by the employer or his insurance carrier upon such third person or his insurance carrier, shall be by registered mail, return receipt and in cases other than an individual shall be mailed to the registered office of such other third person or his insurance carrier.

(e) As used in this section, “expenses of suit” shall mean such expenses, but not in excess of $750 and “attorney's fee” shall mean such fee, but not in excess of 33 1/3 % of that part of the sum paid in release or in judgment to the injured employee or his dependents by such third person or his insurance carrier to which the employer or his insurance carrier shall be entitled in reimbursement under the provisions of this section, but on all sums in excess thereof, this percentage shall not be binding.

(f) When an injured employee or his dependents fail within 1 year of the accident to either effect a settlement with the third person or his insurance carrier or institute proceedings for recovery of damages for his injuries and loss against the third person, the employer or his insurance carrier, 10 days after a written demand on the injured employee or his dependents, can either effect a settlement with the third person or his insurance carrier or institute proceedings against the third person for the recovery of damages for the injuries and loss sustained by such injured employee or his dependents and any settlement made with the third person or his insurance carrier or proceedings had and taken by such employer or his insurance carrier against such third person, and such right of action shall be only for such right of action that the injured employee or his dependents would have had against the third person, and shall constitute a bar to any further claim or action by the injured employee or his dependents against the third person. If a settlement is effected between the employer or his insurance carrier and the third person or his insurance carrier, or a judgment is recovered by the employer or his insurance carrier against the third person for the injuries and loss sustained by the employee or his dependents and if the amount secured or obtained by the employer or his insurance carrier is in excess of the employee's obligation to the employee or his dependents and the expense of suit, such excess shall be paid to the employee or his dependents. The legal action contemplated hereinabove shall be a civil action at law in the name of the injured employee or by the employer or insurance carrier in the name of the employee to the use of the employer or insurance carrier, or by the proper party for the benefit of the next of kin of the employee. Where an injured employee or his dependents have instituted proceedings for recovery of damages for his injuries and loss against a third person and such proceedings are dismissed for lack of prosecution, the employer or insurance carrier shall, upon application made within 90 days thereafter, be entitled to have such dismissal set aside, and to continue the prosecution of such proceedings in the name of the injured employee or dependents in accordance with the provisions of this section.

(g) If such employee or his dependents effect a settlement with the third person or his insurance carrier or institute proceedings against the third person prior to the service of notice upon the third person or his insurance carrier of the
compensation obligation of the employer or his insurance carrier or prior to the institution of any proceedings against the third person by the employer or his insurance carrier for the injuries and loss sustained by such employee or his dependents, such employer or his insurance carrier is barred from instituting any action or proceedings against the third person for the injuries and loss sustained by such employee or his dependents.

The words “third person” as used in this section include corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals.

CREDIT(S)


HISTORICAL AND STATUTORY NOTES

The words “after the expenses of suit and attorney's fee or either of them, as hereinafter defined, have been deducted therfrom,” which formerly followed the introductory clauses of subparagraphs (b) and (c), were deleted by the 1951 amendment. In addition, the words “less employee's expenses of suit and attorney's fee as hereinafter defined” and “plus such employees expenses of suit and attorney's fee” were added at the end of subparagraphs (b) and (c), respectively, by the 1951 amendment.

Prior to the 1951 amendment, the third sentence of subparagraph (d) read: “Thereafter, out of that part of any amount about to be paid in release or in judgment by such third person or corporation on account of his or its liability to the injured employee remaining after deducting the employee's expenses of suit and attorney's fee, as hereinafter defined, the employer or his insurance carrier shall be entitled to receive from such third person or corporation, a sum equivalent to the medical expenses incurred and the compensation paid theretofore by the employer or his insurance carrier to the injured employee or his dependents, or so much thereof as may be due the employer or insurance carrier pursuant to subparagraph (c) of this section.”

Except for the use of the phrase “third person or corporation,” the third sentence of subparagraph (d) was rewritten by the 1951 amendment to read as it now appears.

The words “third person” or “third person or his insurance carrier” were substituted throughout for “third party or corporation” or “third person or corporation” by the 1956 amendment, which also added the definition of “third person” to subparagraph (g).

In addition, the provisions of subparagraph (d) relating to service of notice “in cases other than an individual” were rewritten by the 1956 amendment. Subparagraph (d) had formerly required that in the case of a corporation, the service of notice should be mailed to the registered office of the corporation.

L.2007, c. 23, § 1, in subsection (e), substituted “$750” for “$200”.

Comparative Laws:


Conn.--C.G.S.A. § 31-293.

Del.--19 Del.C. § 2363.


Fla.--West's F.S.A. § 440.39.

Ill.--S.H.A. 820 ILCS 305/5.

Iowa--I.C.A. § 85.22.


Mass.--M.G.L.A. c. 152, § 15.

Mich.--M.C.L.A. § 418.827.

Minn.--M.S.A. § 176.061.

Miss.--Code 1972, § 71-3-71.

Mo.--V.A.M.S. § 287.150.


N.Y.--McKinney's Workers' Compensation Law, § 29.

Okl.--85 Okl.St.Ann. § 44.

Pa.--77 P.S. § 671.
Wash.--West's RCWA 51.24.030.

Wis.--W.S.A. 102.29.

Source:

L.1911, c. 95, § 23, p. 144, amended by L.1913, c. 174, § 8, p. 311; L.1919, c. 93, § 9, p. 211 [1924 Suppl. § **236-32]; L.1931, c. 279, § 3, p. 705; L.1936, c. 162, § 1, p. 381.

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“Employee” and “Employer”, defined for the purpose of Chapter 15, see N.J.S.A. § 34:15-36. Uninsured employer's fund, see N.J.S.A. § 34:15-120.5.

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49 ALR 6th 505, Court Rules and Rules of Professional Conduct Limiting Amount of Contingent Fees or Otherwise Imposing Conditions on Contingent Fee Contracts.

33 ALR 5th 587, Right of Employer or Workers' Compensation Carrier to Lien Against, or Reimbursement Out Of, Uninsured or Underinsured Motorist Proceeds Payable to Employee Injured by Third Party.


159 ALR 912, Compensation of Attorneys for Services in Connection With Claim Under Workmen's Compensation Act.

106 ALR 1040, Workmen's Compensation: Rights and Remedies Where Employee was Injured by a Third Person's Negligence.

82 ALR 1244, Time to be Considered in Determining Whether a Case is Within the Earlier or Later Provisions of the Workmen's Compensation Act, as Regards Compensation Recoverable.

40 ALR 1473, Retroactive Effect of Provision for Reduction or Increase of Award Under Workmen's Compensation Act.

Forms

New Jersey Pleading and Practice Forms § 36:18, Statutory Authority.

New Jersey Pleading and Practice Forms § 85:124, in General--Employee's Failure to Effect Settlement With Third Party or Institute Proceedings for Recovery.
Treatises and Practice Aids

7 Causes of Action 2d 509, Cause of Action to Enforce Contractual Right to Indemnification Respecting Personal Injury Claim.

28 Causes of Action 2d 523, Cause of Action by Injured Worker Against Third-Party.

Modern Workers' Compensation § 103:1, Choice of Remedies for Injured Employee.


Modern Workers' Compensation § 206:8, Third Party Action Subrogation Liens--Amounts Subject to Lien.

Modern Workers' Compensation § 206:9, Third Party Subrogation Liens-Attorneys Fees.

Modern Workers' Compensation § 207:1, Social Security Offset--Generally.

Modern Workers' Compensation § 207:6, Statutes Governing Workers' Compensation Offsets.

Modern Workers' Compensation § 103:50, Joinder and Intervention.

Modern Workers' Compensation § 103:60, Division of Recovery Proceeds; Offsets.

Modern Workers' Compensation § 103:61, Division of Recovery Proceeds; Offsets--Insufficient Proceeds.


Modern Workers' Compensation § 206:12, Third Party Action Subrogation Liens--Notice of Lien to Third Party.

Modern Workers' Compensation § 206:13, Third Party Action Subrogation Liens--Demand to Employee to Effect Settlement or Institute Proceedings.

Modern Workers' Compensation § 206:15, Third Party Action Subrogation Liens--Release.

Modern Workers' Compensation § 206:16, Workers' Compensation Lien on Uninsured Motorist Coverage.

Modern Workers' Compensation § 206:18, Statutes Governing Workers’ Compensation Liens.


38 N.J. Prac. Series § 3.9, Coverage of Employments--New Jersey Horse Racing Injury Compensation Board.


39 N.J. Prac. Series § 34.4, Adequate Record Keeping Procedures.


39 N.J. Prac. Series § 17.17, Third Party Action Liens--Demand to Employee to Effect Settlement or Institute Proceedings.


Toxic Torts Practice Guide § 31:8, How Should Current and Former Employee Suits be Handled?

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Where the provisions of L.1911, c. 95, § 23, as amended in 1931 covering credit to be given employer on award against him, for employee's recovery against third party tort-feasor were changed by the 1936 act amending the pro-

visions of L.1911, c. 95, § 23, to impose attorney's fees in obtaining settlement with third party on employer rather than employee, such change was merely “procedural” and not “substantive,” and hence applying L.1911, c. 95, § 23, as amended to accident happening prior to amendment was not in violation of any contractual obligation of employer. Feinsod v. L. & F. Const. Co., 17 N.J. Misc. 65, 4 A.2d 692 (1939). See, also, Savitt v. L. & F. Const. Co., 17 N.J. Misc. 65, 4 A.2d 692 (1939) certiorari dismissed 123 N.J.L. 149, 8 A.2d 110.

Where, after employees were injured by third person, and before employees settled with third person, the provisions of this section as amended in 1931 were changed by the amendatory act of 1936 to provide that if sum recovered by employee from third person “after attorney's fees were deducted” was greater than employer's liability, employer would be relieved, whereas under prior statute attorney's fees would be chargeable to employees, changed section was not unconstitutional as denial of due process or impairing contractual obligation of employer. Feinsod v. L. & F. Const. Co., 17 N.J. Misc. 65, 4 A.2d 692 (1939). See, also, Savitt v. L. & F. Const. Co., 17 N.J. Misc. 65, 4 A.2d 692 (1939) certiorari dismissed 123 N.J.L. 149, 8 A.2d 110.

That this section providing for method of calculating deduction of attorney's fees in determining amount of credit to be given employer on award against him, for employee's recovery against a third party tort-feasor, creates a mathematical impossibility where employer is entitled to actual reimbursement of money already paid to employee, would not be considered as affecting statute's constitutionality or construction where no actual reimbursement was involved. Feinsod v. L. & F. Const. Co., 17 N.J. Misc. 65, 4 A.2d 692 (1939); Savitt v. L. & F. Const. Co., 17 N.J. Misc. 65, 4 A.2d 692 (1939) certiorari dismissed 123 N.J. Eq. 149, 8 A.2d 110.

Where after employee was injured by third person and before employee settled with third person, provisions, now carried forward into this section, were changed by P.L.1936, c. 162, § 1, p. 381, to provide that if sum recovered by employee from third person “after attorney's fees were deducted” was greater than employer's liability, employer would be relieved, whereas under P.L.1931, c. 279, § 3, p. 705, attorney's fees would be chargeable to employees, provisions of this section as amended in 1936 were not repugnant to contract clauses of U.S.C.A.Const. Art. 1, § 8, and N.J.S.A.Const. Art. 4, § 7, par. 3, nor to the due process clause of U.S.C.A.Const. Amend. 14. Savitt v. L. & F. Const. Co., 124 N.J.L. 173, 10 A.2d 728 (1940). Constitutional Law 2751; Constitutional Law 4186; Workers' Compensation 17

Where after employee was injured by third person and before employee settled with third person, the provisions of L.1911, c. 95, § 23, as amended in 1931 were changed by the act of 1936, amending the section to provide that if sum recovered by employee from third person after attorney's fees have been deducted is greater than employer's liability employer should be relieved, while under the provisions of the section prior to such amendment attorney's fees were chargeable to employees, the section as so amended was not unconstitutional as infringing upon contractual or vested right of the employer, and impairing obligation of contract under Const. Art. 4, § 7, par. 3. Savitt v. L. & F. Const. Co., 123 N.J.L. 149, 8 A.2d 110 (1939), modified 124 N.J.L. 173, 10 A.2d 728. Constitutional Law 2755; Constitutional Law 4186; Workers' Compensation 26

The provision of this section as amended in 1936 releasing employer or its insurance carrier only to the extent of recovery by injured employee from third parties after expenses of suit, not to exceed $200, and attorney's fees, not to exceed 33 1/3 per cent., have been deducted therefrom, did not change the substantive rights of the parties when
applied to a compensation case based on injury which occurred about five months before the provision became law
and for which injured employee had a cause of action at common law against third parties, nor did it impair any ob-
A.2d 692, certiorari dismissed 123 N.J.L. 149, 8 A.2d 110, modified on other grounds 124 N.J.L. 173, 10 A.2d 728.
Constitutional Law 2736; Workers' Compensation 15; Constitutional Law 2752; Constitutional Law 2770

Laws 1931, p. 704, c. 279, § 3, which amended the provisions of L.1911, c. 95, § 23, and title to which purported to
regulate procedure for determination of liability of employer to employee injured in course of his employment, was
not unconstitutional on ground that provision in body of act authorizing employer or insurer to sue at law third party
responsible for injury, if injured employee or dependents fail to do so within six months after accident, was not ex-
pressed in title, since such action is a “procedure for determination of liability” within fair intendment of the title. U.S.

2. Purpose of law

Legislative scheme in respect of uninsured and underinsured motorist coverage is intended to be basically congruent
in affording insured contractual right against his own insurer to compensate at least in part for tort-feasor's insurance
inadequacy; whether inadequacy is no insurance at all or underinsurance has no conceptual consequence. Stabile v.

Workmen's Compensation Act was enacted to provide aid to injured employees, and it was not enacted for
536 (Co.1966), affirmed 93 N.J.Super. 286, 225 A.2d 707, certification granted 48 N.J. 578, 227 A.2d 136, affirmed
51 N.J. 254, 239 A.2d 241. Workers' Compensation 11

The purpose of this section giving employer or insurance carrier right of subrogation against third person causing
employee's injury, was to set up a comprehensive plan for regulating and marshaling rights and responsibilities of
parties, with retention by injured employee or his dependents of right of common law action against such third person,
and to provide for reimbursement of employer or insurance carrier out of proceeds of any such recovery from or
Compensation 11

One of basic purposes of the 1936 amendment of L.1911, c. 95, § 23, covering credit to be given employer on award
against him for employee's recovery against third party tort-feasor was to impose attorney's fees in obtaining settle-
ment with third party on employer, for whose benefit the third party recovery primarily goes as a credit. Feinsod v. L.
& F. Const. Co., 17 N.J. Misc. 65, 4 A.2d 692 (1939), certiorari dismissed 123 N.J.L. 149, 8 A.2d 110, modified 124
N.J.L. 173, 10 A.2d 728. See, also, Savitt v. L. & F. Const. Co., 17 N.J. Misc. 65, 4 A.2d 692 (1939)certiorari dis-
missed 123 N.J.L. 149, 8 A.2d 110. Workers' Compensation 2247

3. Construction and application
This section clarifying declaration of compensation claimant's right to sue at common law a third-party cotort-feasor, being in derogation of the common law, must be strictly construed. *Belfatto v. Massachusetts Bonding & Ins. Co.*, 39 N.J.Super. 507, 121 A.2d 431 (Ch.1956). *Workers' Compensation* 2158

This section relating to reimbursement to employer or insurance carrier is remedial in nature and must be liberally construed. *Travelers Ins. Co. v. Lumber Mut. Cas. Ins. Co. of N. Y.*, 20 N.J.Super. 265, 89 A.2d 717 (Ch.1952).

This section must be strictly construed. *Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson*, 139 N.J. Eq. 318, 51 A.2d 218 (Ch.1947).

Provision of this section as amended in 1931, which authorized employer or insurer to “proceed legally” against third person who had caused injuries to employee who had received compensation but had not brought suit within six months from injuries against third person, which did not expressly confer right on employer or insurer to institute suit in their own names, should not have been construed to imply such right, since the statute was in derogation of the common law and should have been strictly construed. *U.S. Cas. Co. v. Hyrne*, 117 N.J.L. 547, 189 A. 645 (1937). *Workers' Compensation* 2220

The provisions of L.1911, c. 95, § 23 as amended in 1919, providing for reimbursement of employer from wrongdoer injuring employee, for moneys paid to employee was required to be liberally construed. *Henry Steers, Inc. v. Turner Const. Co.*, 104 N.J.L. 189, 139 A. 42 (1927). *Workers' Compensation* 2188

4. Construction with other laws

Compensation carrier was not entitled to credit by reason of settlement which deceased employee's wife received in settlement of wrongful death and survivorship action brought against town and its employee where, for settlement purpose, the loss was valued at amount to be paid by town's insurer plus amount of compensation benefits; § 34:15-40 designed to shift burden of loss to other parties gave way to § 59:9-2 seeking to shift burden to third parties. *Kramer v. Sony Corp. of America*, 201 N.J.Super. 314, 493 A.2d 36 (A.D.1985). *Workers' Compensation* 934.11

By enactment of the Guaranty Association Act, § 17:30A-1 et seq., the legislature did not intend to disturb the carefully articulated scheme of workers' compensation which reserves to the injured employee his cause of action against the third-party tortfeasor, and has created a right of reimbursement in the employer. *Arnone v. Murphy*, 153 N.J.Super. 584, 380 A.2d 734 (L.1977). *Workers' Compensation* 2158


5. Conflicts of law

As the disability policies under which benefits were paid to New Jersey residents, who were employed in New York, were issued in New York to New York employers, and as it was New York law which regulated the premiums payable, which created the respective insurance carrier's subrogation right against employee's recovery from third-party, and which specified the amount of recovery of the lien, New York's interests were such that choice-of-law principles dictated recognition of all aspects of the insurers' liens--the nature, extent of recovery and condition thereof and, more particularly, their recovery without deduction for attorneys' fees and costs. Breslin v. Liberty Mut. Ins. Co., 134 N.J.Super. 357, 341 A.2d 342 (A.D.1975), certification granted 68 N.J. 282, 344 A.2d 316, affirmed 69 N.J. 435, 354 A.2d 635. Public Assistance

Where place of employment was New York, workmen's compensation benefits were paid to injured employees by reason of New York employment and pursuant to New York statutes, New York's disability benefits law, providing for full subrogation of total amount of benefits paid to employee in any recovery by employee against third party, governed existence vel non of right of carriers' subrogation with respect to benefits paid to New Jersey residents who recovered against third parties in actions commenced in New Jersey for injuries sustained in New Jersey automobile accidents. Breslin v. Liberty Mut. Ins. Co., 125 N.J.Super. 320, 310 A.2d 527 (L.1973), reversed on other grounds 134 N.J.Super. 357, 341 A.2d 342, certification granted 68 N.J. 282, 344 A.2d 316, affirmed 69 N.J. 435, 354 A.2d 635. Social Security And Public Welfare

Where New Jersey defendant contracted in Pennsylvania with association for repair work and subcontracted part of the work in New Jersey and plaintiff, a New Jersey resident, and employee of New Jersey subcontractor was injured by fall on scaffold erected by defendant, and plaintiff received workmen's compensation under New Jersey Compensation Act, plaintiff could not maintain common-law tort action against defendant who under Pennsylvania Compensation Act became the statutory employer of plaintiff, since there is no substantial difference between an immediate employer-subcontractor who is obligated to provide compensation coverage for his employees, and a general contractor, who, under law of state of injury, is substituted in employment relation for immediate employer and becomes primarily liable for workmen's compensation to employees of the immediate employer, and application of Pennsylvania law was not against public policy of New Jersey. Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958). Courts

Where injured employee was awarded $1,123.40 in New York compensation proceeding, and award was paid by employer's insurance carrier, and thereafter employee brought action in New Jersey under New York Workmen's Compensation Law against third parties to recover for same injuries, and action was settled for $3,000, and draft for $1,123.40 was drawn to order of employee's attorney and carrier to reimburse carrier for compensation payments to employee, New York Workmen's Compensation Law was controlling, and carrier was entitled to draft without deductions, and petition of employee's attorney to impress attorney's lien on the $1,123.40 would be dismissed. Privetera v. Hillcrest Homes, Inc., 29 N.J.Super. 591, 103 A.2d 55 (L.1954). Workers' Compensation
Where employee received an award of compensation for injuries sustained in New Jersey while demonstrating New York employer's goods in a New Jersey store, such equities as existed in favor of New York employer and its insurance carrier were beyond reach of Workmen's Compensation Board, in absence of showing that claimant had received any compensation under New Jersey act in addition to initial award, the equity arising from which was recognized and enforced in prior litigation. Bach v. Hampden Sales Ass'n (3 Dept. 1947) 271 A.D. 1036, 68 N.Y.S.2d 88, appeal denied 272 A.D. 842, 71 N.Y.S.2d 727. Workers' Compensation 1105

6. Payment

“Payment”, in this section, means act of paying, that is, to discharge indebtedness for; to make disposal of money; to make compensation for; but not settlement. Wager v. Burlington Elevators, Inc., 116 N.J.Super. 390, 282 A.2d 437 (L.1971). Payment 1(1)

7. Liability, generally

Word “liability,” within this section reciting that in the event of the payment of any sum to the employee by the third person on account of its liability to the employee, “the liability of the employer under this statute thereupon shall be only such as is hereafter in this section provided,” includes the measure of damages as well as the substantive fact of liability. Schweizer v. Elox Division of Colt Industries, 70 N.J. 280, 359 A.2d 857 (1976). Workers' Compensation 934.11

Under provision of this section relating to reimbursement of employer and insurance carrier on account of compensation paid to employee where a third person or corporation is “liable”, the quoted word means legally liable. Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson, 139 N.J. Eq. 318, 51 A.2d 218 (Ch.1947). Workers' Compensation 2251

8. Compensation

The payments of benefits by the Two Per Cent Fund are payments of “compensation” within this section preserving right of employee to sue third-party tort feasor, notwithstanding that the injuries for which he seeks recovery are also compensable. Bello v. Commissioner of Dept. of Labor and Industry, 106 N.J.Super. 405, 256 A.2d 63 (A.D.1969), certification granted 54 N.J. 561, 258 A.2d 13, reversed on other grounds , 56 N.J. 41, 264 A.2d 222. Workers' Compensation 2158

9. Time of determination of rights of parties

Where after employee was injured by third person, the provisions of this section as amended in 1931 were changed by the act of 1936 amending the provisions of this section to provide that if sum recovered by employee from third person after attorney's fees have been deducted was greater than employer's liability, employer should be relieved, while under the provisions of this section as amended in 1931, attorney's fees were chargeable to employees, statute in effect
on date that payment was actually made by third person to employee controlled in computing employer's liability to employee and not statute in effect on day employee sustained injury. Savitt v. L. & F. Const. Co., 123 N.J.L. 149, 8 A.2d 110 (1939), modified 124 N.J.L. 173, 10 A.2d 728. Constitutional Law 4186; Workers' Compensation 26

Where injured employee had cause of action at common law against third parties for injuries, rights of employee and employer under Compensation Act were to be determined under this section as amended in 1936, releasing employer or its insurance carrier only to extent of recovery from third parties after expenses of suit, not to exceed $200, and attorney's fees, not to exceed 33 1/3 per cent., have been deducted therefrom, notwithstanding the amendment did not become law until five months after the accident, in view of fact that amendment was in force at time employee made settlement with the third parties and when employee received compensation award. Feinsod v. L. & F. Const. Co., 16 N.J. Misc. 514, 2 A.2d 357 (1938), affirmed 17 N.J. Misc. 65, 4 A.2d 692, certiorari dismissed 123 N.J.L. 149, 8 A.2d 110, modified on other grounds 124 N.J.L. 173, 10 A.2d 728. Workers' Compensation 55

Where injured employee had cause of action at common law against third parties for injuries, rights of employee and employer under Compensation Act were to be determined as of date either of payment to employee by third parties or of entry of compensation award by Workmen's Compensation Bureau, and not as of date of accident, as respects applicability of provision of this section as amended in 1936, releasing employer or its insurance carrier only to extent of recovery by employee from third parties after making certain deductions therefrom, which provision became law subsequent to accident, but prior to dates of payment or of entry of award. Feinsod v. L. & F. Const. Co., 16 N.J. Misc. 514, 2 A.2d 357 (1938), affirmed 17 N.J. Misc. 65, 4 A.2d 692, certiorari dismissed 123 N.J.L. 149, 8 A.2d 110, modified 124 N.J.L. 173, 10 A.2d 728. Workers' Compensation 55

Where, after employee was injured by third person, and before employee settled with third person, this section was changed by 1936 amendment to provide that if sum recovered by employee from third person “after attorney's fees were deducted” was greater than liability of employer, employer should be relieved, credit to which employer and its insurance carrier was entitled was to be determined by statute in effect when settlement was made. Savitt v. L. & F. Const. Co., 16 N.J. Misc. 462, 1 A.2d 752 (1938), modified on other grounds 17 N.J. Misc. 65, 4 A.2d 692, certiorari dismissed 123 N.J.L. 149, 8 A.2d 110, modified on other grounds 124 N.J.L. 173, 10 A.2d 728. Workers' Compensation 55

Where, after employee was injured by third person, and before employee settled with third person, this section was changed by the amendment of 1936 to provide that if sum recovered by employee from third person “after attorney's fees were deducted” was greater than liability of employer, employer would be relieved, changed statute was not unconstitutional as impairing obligation of contract, since changed law did not enlarge employer's liability to pay compensation which had always existed, and if changed statute effected any change in the law, it was merely procedural or remedial change. Savitt v. L. & F. Const. Co., 16 N.J. Misc. 462, 1 A.2d 752 (1938), modified on other grounds 17 N.J. Misc. 65, 4 A.2d 692, certiorari dismissed 123 N.J.L. 149, 8 A.2d 110, modified on other grounds 124 N.J.L. 173, 10 A.2d 728. Constitutional Law 2751; Workers' Compensation 26; Constitutional Law 2749

10. Election of remedies
Law bars double recoveries from workers' compensation and third party recoveries, and it does not matter if the recovery is as a result of medical or legal malpractice or if the source of the recovery is from private insurance, such as uninsured or underinsured motorist protection. Rosales v. State Dept. of Judiciary, 373 N.J.Super. 29, 860 A.2d 929 (A.D.2004), certification denied 182 N.J. 630, 868 A.2d 1033. Damages \( \Rightarrow \)15; Insurance \( \Rightarrow \)2807; Workers' Compensation \( \Rightarrow \)934.11; Workers' Compensation \( \Rightarrow \)2248; Workers' Compensation \( \Rightarrow \)2253

The employee is guaranteed recovery for his common-law damages against contributing third-party tort-feasors or for his compensation award, whichever is greater, but he may not duplicate those recoveries. Schweizer v. Elox Division of Colt Industries, 70 N.J. 280, 359 A.2d 857 (1976). Workers' Compensation \( \Rightarrow \)2171

11. Third person rights


12. Liability of third persons--In general

Employer who had made voluntary payment to claimant was entitled to lien, pursuant to section of Workers' Compensation Act governing the liability of third parties, against workers' compensation claimant's settlement with third-party tortfeasor regarding workplace injury, regardless of whether injury was ultimately determined to be compensable, where intent of section was to prevent an injured employee from recovering and retaining workers' compensation payments, while at the same time recovering and retaining the full damages resulting from a third-party tort suit, nothing in section conditioned reimbursement on whether the benefits paid by the employer were ultimately determined to be owed in the first place, and allowing reimbursement without regard to compensability encouraged employer to make prompt voluntary payments. Greene v. AIG Cas. Co., 433 N.J.Super. 59, 77 A.3d 515 (A.D.2013). Workers' Compensation \( \Rightarrow \)2252

Personal injury protection insured, injured in an automobile accident while in course of his employment, could not recover medical expenses collected or collectible from insurer, as workers' compensation already provided recovery, though insured could recover those expenses from the tort-feasor. Lefkin v. Venturini, 229 N.J.Super. 1, 550 A.2d 985 (A.D.1988). Insurance \( \Rightarrow \)2847

Where all potential sources of recovery of medical expenses from automobile accident, personal injury protection insurance benefits, workers' compensation benefits, and tort-feasor recovery conjoin, injured party may recover medical expenses from tort-feasor, even though recovery will be subject to a workers' compensation lien. Lefkin v. Venturini, 229 N.J.Super. 1, 550 A.2d 985 (A.D.1988). Workers' Compensation \( \Rightarrow \)2252

The intention of the legislature in enacting the employer-subrogation provisions of the Workmen's Compensation Act is too clearly expressed in the legislation itself to permit a judicial construction that will allow a third-party tort-feasor to reduce his liability pro tanto by any payments in compensation made by employer if latter's negligence contributed...

The Workmen's Compensation Act is neutral insofar as the third-party tort-feasor is concerned, leaving him with his common-law liability to the injured employee, or, if the latter has been recompensed therefor to any extent by compensation payments, to the statutorily subrogated employer who has made those payments. Schweizer v. Elox Division of Colt Industries, 70 N.J. 280, 359 A.2d 857 (1976). Workers' Compensation 2158; Workers' Compensation 2189

Fact that subcontractor's employee, who was allegedly injured when scaffold upon which he was working broke, had pursued his workmen's compensation remedies against his employer, the subcontractor, did not bar employee's suit against owner, general contractor, and safety inspector as third parties allegedly liable for employee's injuries. Wood v. Dic/Underhill & Universal Builders Supply Co., 136 N.J.Super. 249, 345 A.2d 382 (L.1975), affirmed 144 N.J.Super. 364, 365 A.2d 723, certification denied 73 N.J. 65, 372 A.2d 330. Workers' Compensation 2178

Employer or his carrier may recover workmen's compensation paid to employee for injuries caused by wrongful act of third person, but third person is protected from paying double damages by requiring employer or carrier to serve notice of compensation lien on tort-feasor before he pays employee. Wager v. Burlington Elevators, Inc., 116 N.J.Super. 390, 282 A.2d 437 (L.1971). Workers' Compensation 2188; Workers' Compensation 2252

Workmen's compensation carrier which maintains and operates its own clinic for treatment of injured workmen, and which is alleged to have negligently caused serious injury and death to workman in course of treating him for injuries, is not rendered immune from action at law for damages by reason of its status as carrier for employer. Mager v. United Hospitals of Newark, 88 N.J.Super. 421, 212 A.2d 664 (A.D.1965), certification granted 45 N.J. 600, 214 A.2d 33, affirmed 46 N.J. 398, 217 A.2d 325. Workers' Compensation 2087

The “third party” provision of the Workmen's Compensation Act becomes operative only where a third party is liable for the same injury for which an employer is liable under the Act, but does not extend to other injuries. Schmidt v. Revolvator Co., 46 N.J.Super. 232, 134 A.2d 507 (Co.1957). Workers' Compensation 1108

Since employee's original substantive industrial injury was not caused by employer's plant physicians' negligence in treatment of injury, but was at best aggravated thereby, employee could not recover damages from physicians for malpractice under rule permitting employee to recover damages from third party tort-feasor. Burns v. Vilardo, 26 N.J. Misc. 277, 60 A.2d 94 (1948). Workers' Compensation 2168.1(2)


13. ---- United States, liability of third persons

The employer and insurance carrier were not entitled to reimbursement on account of compensation paid to an em-
ployee injured by United States where at time of injury United States had not consented to be sued for torts, since this section provides for reimbursement only where a third person or corporation is legally liable. Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson, 139 N.J. Eq. 318, 51 A.2d 218 (Ch.1947). Workers' Compensation 2251

14. ---- Corporations, liability of third persons

Wholly owned subsidiary corporation, which was merged into parent corporation, was not manufacturer, seller or supplier of punch-press die machine by virtue of merger, and thus employee of parent corporation who was injured while using machine could not maintain third-party products liability action against absorbed subsidiary corporation free of exclusivity of Workers' Compensation Act remedy. Vega v. Standard Machinery Co. of Auburn, Rhode Island, 290 N.J.Super. 434, 675 A.2d 1194 (A.D.1996). Workers' Compensation 2161

Having obtained, by incorporating, immunity from liability for obligations incurred by corporation, including liability under workers' compensation laws, attorney could not avoid being a “third person” amenable to suit under this section governing liability of third party for his individual acts of negligence but, as a landlord, had same liability for injuries suffered by employees of tenant, even his own professional corporation, as for injuries suffered by employees of any other tenant. Lyon v. Barrett, 89 N.J. 294, 445 A.2d 1153 (1982). Landlord And Tenant 1246; Landlord And Tenant 1248; Landlord And Tenant 1255; Workers' Compensation 2161; Workers' Compensation 2163


15. ---- Fellow employees, liability of third persons


The provisions of this section as enacted in 1913 did not deprive an employee of his right of action for negligence against a fellow employee, a fellow employee coming within the meaning of the term “third” person. Churchill v. Stephens, 91 N.J.L. 195, 102 A. 657 (1917).

Under the provisions of L.1911, c. 95, § 23, as amended in 1913, the legislature by the term “third person,” intended to
include fellow-servants and immediate superintendents in the work of doing the master's business, who, under our law, are also fellow-servants of employees of the common master working under them. Churchill v. Stephens, 39 N.J.L.J. 163 (1916).

16. ---- Partnerships, liability of third persons

Immunity provided under workers' compensation election of remedies statute did not bar workers' third-party tort suit against general partnership, which leased parking lot on which worker slipped and fell, even though worker received workers' compensation benefits from her employer, a partner in that partnership; Revised Uniform Partnership Act (RUPA) provided that a partnership was an entity distinct from its partners and may be sued separately from its partners in same action, partnership, in agreeing to defend and indemnify parking lot owner, answered for owner's alleged negligence and stood in owner's shoes, and, restricting statutory immunity to partner alone was consistent with plain language and policy goal of Workers' Compensation Act allowing an injured worker to sue a third person. Whitfield v. Bonanno Real Estate Group, 419 N.J.Super. 547, 17 A.3d 855 (A.D.2011). Partnership ⚫200; Workers' Compensation ⚫2161

Partners are not entities separate from partnership, but are personally liable for partnership obligations, including obligation to pay workers' compensation benefits. Lyon v. Barrett, 89 N.J. 294, 445 A.2d 1153 (1982). Partnership ⚫165

17. Negligence of employer, generally


18. Joint liability of employer and third person

There is no joint liability of the employer and the third-party tort-feasor to the injured employee. Schweizer v. Elox Division of Colt Industries, 70 N.J. 280, 359 A.2d 857 (1976). Workers' Compensation ⚫2084

Injury sustained in auto accident while traveling between job sites in three hour period during eight hour day she put in five hours of work for self-insurer as a blood processor in a bloodmobile were work related and, as such, obligated employer to reimburse PIP insurance carrier for medical and income replacement paid on employee's behalf without regard to liability of any third party; however, employee would have to honor employer's lien against any third party coverage she might receive. Brown v. American Red Cross, 95 N.J.A.R.2d (WCC) 181, 1995 WL 675835, Unreported (1995).

19. Injury during treatment

Where worker' compensation claimant is injured through some negligence occurring during actual treatment of
compensable injury, claimant may file third-party action against negligent doctor or negligent driver of other vehicle, and employer will be entitled to reimbursement. Camp v. Lockheed Electronics, Inc., 178 N.J.Super. 535, 429 A.2d 615 (A.D.1981), certification denied 87 N.J. 415, 434 A.2d 1090. Workers' Compensation §2251; Workers' Compensation §2253; Workers' Compensation §2254

Injured employee's recovery of award under Workmen's Compensation Act for temporary disability and permanent injury to left arm as result of accident arising out of and in course of her employment did not preclude recovery of damages from physician for alleged malpractice which allegedly resulted in permanent disability to employee's arm. Dettman v. Goldsmith, 11 N.J.Super. 571, 78 A.2d 626 (Co.1951). Workers' Compensation §2253

Since employee's original substantive industrial injury was not caused by employer's plant physicians' negligence in treatment of injury, but was at best aggravated thereby, employee could not recover damages from physicians for malpractice under rule permitting employee to recover damages from third party tort-feasor. Burns v. Vilardo, 26 N.J. Misc. 277, 60 A.2d 94 (1948). Workers' Compensation §2168.1(2)

20. Release of or payment by employer

In an action against a jitney driver for injuring a messenger boy, the court properly withdrew from the jury's consideration amounts paid as compensation by the boy's employer, since, under the provisions of L.1911, c. 95, § 23, as amended in 1913, it in no wise affected the driver's direct liability. Jacoby v. Kelley, 1924, 296 F. 590. Workers' Compensation §2243

Employer was entitled to receive credit as against workers' compensation award for payment made in settlement of employee's common-law action. Tremonte v. Jersey Plastic Molders, Inc., 190 N.J.Super. 597, 464 A.2d 1193 (A.D.1983). Workers' Compensation §934.11

Under this section there is no double recovery or payment by the employer. Eckert v. New Jersey State Highway Dept., 1 N.J. 474, 64 A.2d 221 (1949).

Where purchase price for all the capital stock of a bus company was paid to trustee to be used to discharge obligations of company existing prior to sale and the balance to be delivered to seller of stock, and out of such fund trustee paid workmen's compensation to bus driver injured prior to the sale, neither the bus company nor its assignee was entitled to reimbursement for such compensation payments out of judgment recovered by bus driver against third party tort-feasor, since compensation payments were made by seller of the stock under his agreement to indemnify the purchasers and the company against all claims outstanding at the time of transfer of the stock and were not paid by the employer bus company. Standard Sur. & Cas. Co. of N.Y. v. Murphy, 129 N.J. Eq. 284, 19 A.2d 229 (1941). Workers' Compensation §2251

Servant's release for injury, entitling him, under the Workmen's Compensation Act, to compensation, irrespective of master's negligence, did not release defendant as a joint tort-feasor, and, where there was no joint liability, did not affect the liability of defendant. Jacowicz v. Delaware, L. & W. R. Co., 87 N.J.L. 273, 92 A. 946 (1915). Release
21. Release of or payment by third person

Prior to the taking effect of the provisions of this section as amended in 1913, where a workman was injured by an accident in the course of his employment, and a tort-feasor, other than his employer, was also responsible therefor, a right to compensation under this section as originally enacted was not lost by settlement with the tort-feasor and his release. Newark Paving Co. v. Klotz, 1914, 85 N.J.L. 432, 91 A. 91 (1914) affirmed 86 N.J.L. 690, 92 A. 1086; Houghton v. W.G. Root Construction Co., 35 N.J.L.J. 332 (1912); Perlsburg v. Miller, 35 N.J.L.J. 202 (1912).

Proceeds received by a claimant in settlement of a malpractice suit against a doctor arising out of his treatment of claimant's injury, did not extinguish employer's compensation liability for the original injury on theory that malpractitioner was a “third party” within meaning and contemplation of this section, but, employer was entitled to be credited out of such settlement only for alleged compensation liability arising out of the malpractice. Schmidt v. Revolvator Co., 46 N.J.Super. 232, 134 A.2d 507 (Co.1957).

Money received by an employee from a “third party” tort-feasor is not a fund out of which an employer may be credited for any compensable injury, but an employer may only be credited and released from its workmen's compensation obligation for an injury for which an employee has already been paid by a “third party” tort-feasor. Schmidt v. Revolvator Co., 46 N.J.Super. 232, 134 A.2d 507 (Co.1957).

Upon receipt of damages by an employee in a tort action against third-party and reimbursement of employer, employer was discharged from its liability for further payment of preexisting award, and satisfaction of such claim precluded it from serving as basis of an existing unsatisfied judgment, even though there was a contingent liability of employer for additional compensation, incapable of present adjudication. Caputo v. Best Foods, 30 N.J.Super. 552, 105 A.2d 445 (A.D.1954), certification granted 16 N.J. 193, 107 A.2d 834, modified 17 N.J. 259, 111 A.2d 261.

Injured employee could not recover from employer's insurer balance of compensation due at time of settlement between insurer of third party tort-feasor and employee as against contention that under the provisions of L.1911, c. 95, § 23, as amended in 1919 only employer's compensation insurer and not employer was released by settlement, where settlement exceeded compensation payable, employer had served third party with required statutory notice before settlement, and employer was primarily liable for payment of compensation and insurer had merely guaranteed its payment. Stampone v. Travelers' Ins. Co., 114 N.J.L. 374, 176 A. 704 (1935).

A release of a claim against the tort feasor, a third party, for damages for the death of the employee could not bar the right to compensation from the employer under the original Employers' Liability Act of 1911, p. 134, incorporated in this chapter. Newark Paving Co. v. Klotz, 37 N.J.L.J. 165 (1914).

Where, respondent maintained that plaintiff's release of a third person, who contributed to his injury, operated as a release of respondent from liability for compensation, they being joint tort feasors, the parties were not joint tort feasors, or jointly liable, one of them being liable ex contractu, the other liable ex delicto, and consequently the release

22. Lien of employer

Workers' compensation dependency benefits paid to surviving spouse of firefighter were, in part, to redress monetary loss of firefighter's companionship and society, and thus city's lien was not limited to amount of wrongful death recovery allocated to lost wages damages, but rather attached to entire amount of wrongful death award paid to surviving spouse, given that wrongful death action was single claim, not collection of separate causes of action, and statute did not exempt portion of recovery from lien, but rather attached lien to any sum recovered. DeLane ex rel. DeLane v. City of Newark, 343 N.J.Super. 225, 778 A.2d 511 (A.D.2001). Workers' Compensation

City had no lien against damages collected on survival claim by firefighter's estate, except for recovery for any emergency room expenses that were paid by city, as workers' compensation medical payment benefit, even though, if firefighter had survived and received pain and suffering benefits, city's lien would attach to recovery, where survival claim sought damages for pain and suffering that firefighter experienced from time of first electrocution until death, firefighter did not file workers' compensation claim petition for that injury, nor did he receive any temporary or permanent disability benefits, and it was mere coincidence that personal representative and heir was also recipient of dependency workers' compensation benefits. DeLane ex rel. DeLane v. City of Newark, 343 N.J.Super. 225, 778 A.2d 511 (A.D.2001). Workers' Compensation

Personal judgment in favor of workers' compensation carrier should not have been entered against attorney who was holding statutorily requisite two-thirds of workers' compensation claimant's tort recovery in his trust account, absent some equitable basis, as attorney had not disbursed funds held in trust, and attorney did not make any false representations to carrier. Liberty Mut. Ins. Co. v. Cressman, 336 N.J.Super. 67, 763 A.2d 785 (A.D.2000). Workers' Compensation


Employer or its workers' compensation insurance carrier that had paid workers' compensation benefits was entitled to reimbursement from recovery obtained by employee from third-party tort-feasor even though statutorily created lien had not been perfected before right to reimbursement came into existence. Danesi v. American Mfrs. Mut. Ins. Co., 189 N.J.Super. 160, 459 A.2d 686 (A.D.1983), certification denied 94 N.J. 544, 468 A.2d 194. Workers' Compensation

Under this section imposing lien in favor of an employer or his workmen's compensation insurer against proceeds of third-party recovery obtained by an injured workman or arising out of his death, lien is exercisable to the fullest extent possible, whether the third-party recovery be less than, equal to or greater than the lienor's compensation exposure.

Under this section imposing a lien in favor of an employer or his workmen's compensation insurer against proceeds of a third-party recovery obtained by an injured workman or arising out of his death, where the third-party recovery equals or exceeds the total compensation exposure, amount on which fee is calculated is the total compensation exposure of the lienor on account of the injury or death, and not merely the amount of workmen's compensation paid to the date of third-party recovery. McMullen v. Maryland Cas. Co., 127 N.J. Super. 231, 317 A.2d 75 (A.D. 1974), affirmed 67 N.J. 416, 341 A.2d 334. Workers' Compensation

Provision of this section that if employee effects settlement with third person prior to service of notice upon third person of compensation obligation of employer or his carrier, employer or his carrier is barred from instituting any action merely prevents employer from bringing subrogation-type action against negligent third party, when employee has done so, and does not bar employer from recovering on lien for compensation paid for failure to file timely notice of lien before settlement. Wager v. Burlington Elevators, Inc., 116 N.J. Super. 390, 282 A.2d 437 (L. 1971). Workers' Compensation

Where carrier sent notice of its compensation lien by certified mail to all interested parties before tort-feasors paid amount of settlement to employee, such lien should be honored by all parties, even though notice of lien was not filed before settlement. Wager v. Burlington Elevators, Inc., 116 N.J. Super. 390, 282 A.2d 437 (L. 1971). Workers' Compensation

23. Lien of insurer

In a multi-defendant case, brought by an injured worker, with some Property-Liability Insurance Guaranty Association funds due to an insurer's insolvency and some non-Association funds, if the non-Association funds are inadequate to satisfy the workers' compensation lien, any loss suffered by the compensation carrier can be pursued against the insolvent insurer's receiver. Primus v. Alfred Sanzari Enterprises, 372 N.J. Super. 392, 859 A.2d 452 (A.D. 2004), certiorari denied 182 N.J. 430, 866 A.2d 987. Insurance; Workers' Compensation

Workers' compensation insurance company did not lose the benefit of its statutory lien under law of tender simply by exercising its right to reject a check from claimant's attorney that it believed was insufficient to satisfy the lien. In re Frost, 171 N.J. 308, 793 A.2d 699 (2002). Tender; Workers' Compensation

Worker's compensation insurer could institute action against employee's uninsured motorist (UM) carrier and recover UM proceeds to satisfy lien, even though the employee rejected the offer of UM benefits and abandoned the UM claim and obtained a default judgment against the tort-feasor within one year of the accident; the employee could not frustrate the insurer's statutory right to recovery, instituted a meaningless action against an uninsured and unrepresented tort-feasor, and then failed to pursue the available UM claim. Hartman v. Allstate Ins. Co., 345 N.J. Super. 101, 783 A.2d 745 (A.D. 2001). Workers' Compensation

Judgment that workers' compensation lien shall not include insurer's portion of claimant's attorney and expert witness fees, employer's or insurer's expenses for defense medical examination, or expenses for rehabilitative nursing services unless they primarily benefitted claimant and were reasonably necessary for claimant's recovery was appropriately applied retroactively only to named plaintiffs and claimants whose liens remained unresolved by judgment or agreement as of date of trial court's decision; to apply judgment retroactively to already litigated proceedings would have resulted in reopening of potentially thousands of cases long since resolved. Kuhnel v. CNA Ins. Companies, 322 N.J.Super. 568, 731 A.2d 564 (A.D.1999), certification denied 163 N.J. 12, 746 A.2d 458, certiorari denied 121 S.Ct. 61, 531 U.S. 819, 148 L.Ed.2d 27. Courts 2252

Workers' compensation insurers were not liable for fraud in connection with their including in workers' compensation liens charges for insurer's portion of claimant's attorney and expert witness fees, expenses for defense medical examination, or expenses for rehabilitative nursing services, absent competent evidence raising a factual question as to whether insurers knew lien charges were inappropriate yet asserted them anyway. Kuhnel v. CNA Ins. Companies, 322 N.J.Super. 568, 731 A.2d 564 (A.D.1999), certification denied 163 N.J. 12, 746 A.2d 458, certiorari denied 121 S.Ct. 61, 531 U.S. 819, 148 L.Ed.2d 27. Workers' Compensation 1072

Workers' compensation insurers' lien claim for expenses for insurer's portion of claimant's attorney and expert witness fees, employer's or insurer's expenses for defense medical examination, or expenses for rehabilitative nursing services was not negligently asserted, as there were no clear guidelines predating the instant cases which suggested that the charges were improper. Kuhnel v. CNA Ins. Companies, 322 N.J.Super. 568, 731 A.2d 564 (A.D.1999), certification denied 163 N.J. 12, 746 A.2d 458, certiorari denied 121 S.Ct. 61, 531 U.S. 819, 148 L.Ed.2d 27. Workers' Compensation 1072

Workers' compensation claimant was not entitled to bring declaratory judgment action to determine allocation of proceeds of third-party settlement between himself and his wife; because it was to their mutual advantage to have largest possible amount attributed to wife's per quod claim, there was no real adversity between the positions of claimant and his wife, and complaint was little more than thinly-veiled attempt to circumvent carrier's statutory workers' compensation lien. Weir v. Market Transition Facility of New Jersey, 318 N.J.Super. 436, 723 A.2d 1231 (A.D.1999), certification denied 160 N.J. 477, 734 A.2d 792. Declaratory Judgment 172

Supreme Court's holdings that workers' compensation lien attaches to proceeds of legal malpractice action brought to recover damages from attorney who failed to institute action against third-party tort-feasor, that lien is imposed on third party recoveries that are the functional equivalent of recovery against the direct tort-feasor regardless of whether employee has been fully compensated for his injuries, and that carrier need not institute suit against third-party tort-feasor to secure lien apply retroactively. Frazier v. New Jersey Mfrs. Ins. Co., 142 N.J. 590, 667 A.2d 670 (1995). Courts 100(1)

Workers' compensation lien attaches to proceeds of underinsured motorist coverage (UIM) paid by injured worker's
personal automobile insurance carrier if and to the extent those proceeds, together with compensation benefits and

Claimant's attorney owed fiduciary duty to third-party tort-feasor to satisfy workers' compensation lien from proceeds
of tort settlement where attorney knew that workers' compensation carrier had perfected its lien against third party,
third party could have to pay amount of lien twice, and attorney may have induced tort-feasor to send entire amount of
settlement in reliance on attorney's assurance that attorney would satisfy workers' compensation lien. Selective Ins.

Workers' compensation carrier was entitled to recapture employee's medical expenses from attorneys, who repre-
sented common-law wife of employee, who received settlement proceeds from tractor manufacturer, and who were
well aware of carrier's prior payments and were put on notice of carrier's asserted lien almost three years before ul-
timately negotiating settlement with manufacturer. Aetna Life and Cas. v. Estate of Engard, 218 N.J.Super. 239, 527
A.2d 497 (L.1986). Attorney And Client 2252

Workers' compensation lien attached to proceeds of claimant's own uninsured motorist policy, where uninsured mo-
torist coverage exceeded full amount of claimant's damages. Midland Ins. Co. v. Colatrella, 102 N.J. 612, 510 A.2d 30
(1986). Workers' Compensation 2252

Workers' compensation carrier for employer of deceased employee could assert lien on amount paid in settlement of
widow's wrongful death action by homeowner's insurance carrier for city police officer who accidentally shot and
killed decedent, since officer was acting outside of his employment with city when decedent was shot, and thus was
not entitled to immunity under Tort Claims Act, § 59:1-1 et seq. Wunschel v. City of Jersey City., 208 N.J.Super. 234,
505 A.2d 204 (A.D.1986), certification denied 104 N.J. 427, 517 A.2d 421. Workers' Compensation 2252

Regardless of whether employee pays for his uninsured motorist coverage, workers' compensation carrier is still
entitled to lien on any recovery claimant has under insurance benefits for accident for which he also received workers'

Burden of paying workers' compensation carrier's lien on third-party settlement awarded to widow and her daughte
was, upon widow's remarriage, limited to amount which daughter herself was entitled to receive from the settlement
and did not encompass the total third-party recovery. Brumfield v. Gallo Wine Sales of New Jersey, Inc., 183

Where workers' compensation carrier's lien on proceeds of third-party settlement paid to widow and daughter was
23% of the total settlement, only 77% of amount of daughter's net distributive share of proceeds of the settlement
would be exposed to carrier's asserted lien against her future dependency benefits since carrier's compromise was a
forbearance of any claim accrued to that date against the tort recovery to proportionate extent its lien had ripened
Workers' Compensation 2252

Where it was not evident that Rule 1:21-7 setting forth contingent fee schedule for attorneys was intended to modify this section imposing a lien in favor of an employer or his workmen's compensation insurer against the proceeds of a third-party recovery obtained by an injured workman or arising out of his death, this section should control, and lienor could not be made to pay more than 33 1/3 % of the lien or any portion thereof as an attorney fee. McMullen v. Maryland Cas. Co., 127 N.J.Super. 231, 317 A.2d 75 (A.D.1974), affirmed 67 N.J. 416, 341 A.2d 334. Workers' Compensation 2252

Where insurance carrier paying compensation to New York workman in accordance with New York statutes served notice of claim of lien against any recovery in subsequent action brought in federal District Court in New Jersey by compensation claimant against tort-feasor who entered into settlement of action without making any provision for lien placed upon litigation by insurance carrier, tort-feasor would be held responsible for failure to conform with notice of lien, and judgment would be rendered against tort-feasor in favor of insurance carrier for amount paid by it to compensation claimant for hospitalization, etc. Liberty Mut. Ins. Co. v. Mahieu Const. Co., 26 N.J. Misc. 12, 55 A.2d 907 (1947). Workers' Compensation 2252

24. Notice by employer

Actual notice that helicopter manufacturers, their subsidiary, and operator were served with copy of memorandum setting forth intentions of passengers' employers to assert claim for workers' compensation did not satisfy New Jersey's statutory requirement to serve notice of lien by registered mail with return receipt requested. Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A., D.N.J.1991, 761 F.Supp. 1143, affirmed 958 F.2d 365, certiorari denied 113 S.Ct. 84, 506 U.S. 826, 121 L.Ed.2d 47. Workers' Compensation 2252

A negligent third party's receipt of compensation agreement between employer and injured employee by registered mail was a sufficient “filing” of the agreement with the negligent third party under this section, as it existed prior to the 1936 amendment, requiring negligent third party to deduct from amount paid to injured employee of another, and pay to employer, amount paid by employer under agreement. Travelers Ins. Co. v. Gardner, 129 N.J.L. 159, 28 A.2d 507 (1942). Workers' Compensation 2199

Under the provisions of L.1911, c. 95, § 20, as amended in 1919, employer was not required to sign notice of compensation award it filed with third party wrongdoer, but employer might authorize insurer to act for it. Erie R. Co. v. Michelson, 111 N.J. Eq. 541, 162 A. 764 (1932). Workers' Compensation 2199

Under the provisions of L.1911, c. 95, § 23, as amended in 1919, employer on filing requisite notice with third party was entitled to subrogation to rights of employee for compensation paid employee. Warner-Quinlan Co. v. Byram, 106 N.J. Eq. 82, 150 A. 212 (Ch.1930). Workers' Compensation 2199

Under the provisions of L.1911, c. 95, § 23, as amended in 1919, employer not filing written statement of compensation agreement or award with third person injuring employee was not entitled to reimbursement. Brenner v. Mount,
25. Attorney's fees and expenses of suit

Retired state trooper's pro rata share of attorney fees from recovery in third party workers' compensation action was not a “periodic benefit” that the Board of Trustees of the State Police Retirement System could offset from trooper's accidental disability retirement allowance, rather, employer was statutorily obligated to pay a share of the fees, although trooper could have received the attorney fees payment from his employer in the form of a credit; form of credit did not change legal status and convert the payment into a periodic benefit, and the legal services provided by the trooper inured to the benefit of the employer by way of employer's recovery of workers' compensation benefits paid or to be paid to the trooper. Baracia v. Board of Trustees of State Police Retirement System, 420 N.J.Super. 1, 18 A.3d 220 (A.D.2011). States 64.1(3); Workers' Compensation 2247

Computation of the employer's pro rata share of counsel fees in third-party recovery is measured by the amount of worker's compensation liability from which the employer has been released, whether actually paid or not. Baracia v. Board of Trustees of State Police Retirement System, 420 N.J.Super. 1, 18 A.3d 220 (A.D.2011). Workers' Compensation 2247

Employer's attorney fees contribution to expenses of suit and attorney fees incurred by injured employee in obtaining recovery of damages from responsible third party may be an incident of the Workers' Compensation Act, but it is not a monetary benefit provided by the Act to compensate an employee for his injury. Baracia v. Board of Trustees of State Police Retirement System, 420 N.J.Super. 1, 18 A.3d 220 (A.D.2011). Workers' Compensation 2247

Where employee suffered a compensable injury and instituted a third-party common-law action against owner of premises where injury occurred, and a settlement was had with the owner's insurer, attorney for employee was entitled to have the proposed settlement paid into court and his fees paid therefrom and the balance paid to the employer's compensation insurer for release of its lien for the compensation payments made by it upon the third-party cause pursuant to the compensation statute. Belfatto v. Massachusetts Bonding & Ins. Co., 39 N.J.Super. 507, 121 A.2d 431 (Ch.1956). Workers' Compensation 2248


26. Reimbursement--In general

Employer was entitled to be reimbursed for its workers' compensation lien when employee collected less than full amount of common-law damages from third-party tort-feasor because tort-feasor was underinsured; reimbursement lien attaches to any payment made to employee by third-party tort-feasor or his or her carrier. Laureano v. New Jersey Transit Bus Operations, Inc., 220 N.J.Super. 295, 531 A.2d 1361 (A.D.1987), certification denied 110 N.J. 176, 540 A.2d 174. Workers' Compensation 2252


Where suit of injured employee and his wife against third-party tortfeasor, who was defended by the Guaranty Association due to the insolvency of his liability insurer, was settled by payment of the $15,000 policy limits into the registry of the court, said fund was properly to be disbursed to the plaintiffs, not to the Guaranty Association or to the worker's compensation insurer from whom the employee had received a total award of $28,039. Arnone v. Murphy, 153 N.J.Super. 584, 380 A.2d 734 (L.1977). Workers' Compensation 2248

Town which paid for medical services required subsequent to retirement of public employee on disability pension following work-connected injury had right under this section to reimbursement from monies received by employee from third-party tortfeasor. Saly v. Town of Kearny, 90 N.J.Super. 144, 216 A.2d 418 (A.D.1966). Workers' Compensation 2251

Payments made to pensioned public employee because of disability for medical expenses incurred by him with reference to his injury are “compensation” covered by the general reimbursement section of the Workmen's Compensation Act, and town making such payments is entitled to credit or setoff against balance of moneys received by retired employee from third-party tort-feasor. Saly v. Town of Kearny, 85 N.J.Super. 586, 205 A.2d 475 (Co.1964), affirmed 90 N.J.Super. 144, 216 A.2d 418. Workers' Compensation 2251

The provision of Workmen's Compensation Act for reimbursement of employer or insurance carrier is in derogation of common law, and hence must be strictly construed. General Home Imp. Co. v. American Ladder Co., 26 N.J. Misc. 24, 56 A.2d 116 (1947). Workers' Compensation 2188

A corporate employer, failing to bring itself within the provisions by which employer may secure reimbursement, could not recover amount of compensation awarded employee, injured by fall when rung of ladder being used by him broke, from manufacturer and seller of ladder as damages for breach of warranty of fitness thereof for its intended purpose. General Home Imp. Co. v. American Ladder Co., 26 N.J. Misc. 24, 56 A.2d 116 (1947). Workers' Compensation 2188

Injured employee was entitled to recover amount paid as compensation by employer's insurer and for which insurer had been reimbursed out of settlement made by insurer of third party tort-feasor to employee, as against contention that payment was made as result of a mistake of law, where employee was not a party to the arrangement and em-
ployer's insurer was without right of subrogation under the provisions of L.1911, c. 95, § 23, as amended in 1919. Stampone v. Travelers' Ins. Co., 114 N.J.L. 374, 176 A. 704 (1935). Workers' Compensation

Under L.1911, c. 95, § 23, as amended in 1931, employer's insurance carrier was entitled to reimbursement out of damages recovered by injured employee from tort-feasor for compensation paid by insurer to employee. Scheno Trucking Co. v. Bickford, 115 N.J. Eq. 380, 170 A. 881 (Ch.1934), affirmed 116 N.J. Eq. 586, 174 A. 548. Insurance

Notwithstanding the provisions of L.1918, c. 149, § 5 (see, now § 34:15-51), prior to amendment in 1931, payment of compensation by insurer was not payment by employer within the provisions of L.1911, c. 95, § 23, as amended in 1919, so as to entitle employer to reimbursement from third party wrongdoer. Erie R. Co. v. Michelson, 111 N.J. Eq. 541, 162 A. 764 (1932).

Under the provisions of L.1911, c. 95, § 23 as amended in 1919, employer was not entitled to reimbursement from third party wrongdoer for compensation that employer's insurance carrier paid directly to employee's dependents for death. Erie R. Co. v. Michelson, 111 N.J. Eq. 541, 162 A. 764 (1932). Workers' Compensation

Under the provisions of L.1911, c. 95, § 23, as amended in 1919, that employee's dependents accepted compensation directly from insurer raised no implied contract that dependents would reimburse insurer out of judgment recovered against third party wrongdoer. Erie R. Co. v. Michelson, 111 N.J. Eq. 541, 162 A. 764 (1932). Workers' Compensation

Under the provisions of L.1911, c. 95, § 23, as amended in 1919, employer's insurer paying compensation to injured employee was not entitled to reimbursement out of damages recovered by employee from tort-feasor. Degler v. Domejka, 112 N.J. Eq. 588, 165 A. 583 (Ch.1933). See, also, Fidelity & Casualty Co. of New York v. Sisters of St. Joseph of Peace, 112 N.J. Eq. 579, 165 A. 430 (1933). Workers' Compensation

27. ---- Purpose of reimbursement

Provision of this section authorizing reimbursement to employer in event employee recovers damages from a third party tort-feasor, is not for purpose of eliminating employee's cause of action against a third party wrongdoer but merely to effect reimbursement to employer in such an event and common law right of a person wronged to recover

against wrongdoer is not negated by recovery of compensation by employee from employer and that holds true where treating physician allegedly commits a wrong against an injured employee, thereby aggravating his injury. Dettman v. Goldsmith, 11 N.J.Super. 571, 78 A.2d 626 (Co.1951). Workers' Compensation 2179; Workers' Compensation 2251; Workers' Compensation 2253

28. ---- Right of reimbursement

Under New Jersey law helicopter manufacturers, their subsidiary, and helicopter operator were not required to reimburse passengers' employers for workers' compensation paid to passengers' beneficiaries, even if manufacturers, subsidiary, and operator had actual notice prior to settlement that employees had applied for workers' compensation; employers did not serve written notice of lien by registered mail and request return receipt before beneficiaries settled with manufacturers, subsidiary, and operator. Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A., D.N.J.1991, 761 F.Supp. 1143, affirmed 958 F.2d 365, certiorari denied 113 S.Ct. 84, 506 U.S. 826, 121 L.Ed.2d 47. Workers' Compensation 2252


If third-party claim is successful for same injury for which employer has paid employee workmen's compensation, employer may be reimbursed for its expenditure. Brum v. International Terminal Operating Co., Inc., 125 N.J.Super. 558, 312 A.2d 507 (A.D.1973). Workers' Compensation 2251

Employer, who was liable for compensation for burn injury to employee's leg, producing chronic condition, was entitled to reimbursement in amount of employee's recovery (less expenses and attorney's fees) from third person on account of accident, 22 years after burn, which aggravated condition and resulted in employee's death. Szpera v. Mohican Refining Corp., 121 N.J.Super. 569, 298 A.2d 281 (A.D.1972), certification denied 62 N.J. 574, 303 A.2d 327. Workers' Compensation 2251

The Workmen's Compensation Act evinces a clear legislative intent to establish scheme for compensation of injured employee or his dependants by employer or his insurance carrier and to confer on latter a right to reimbursement for compensation paid by them out of recovery against third party tort-feasor who is liable for employee's injuries. U. S. Cas. Co. v. Hercules Powder Co., 4 N.J. 157, 72 A.2d 190 (1950). See, also, Prudential Ins. Co. of America v. Laval, 131 N.J. Eq. 23, 23 A.2d 908 (1942). Workers' Compensation 2188

An employer's or insurance carrier's right of reimbursement for compensation paid injured employee or his dependents out of recovery against third party tort-feasor liable for employee's injuries, is derived from employer's or carrier's statutory subrogation, and is limited to rights which those entitled to compensation under the Act would have had against such third party. U. S. Cas. Co. v. Hercules Powder Co., 4 N.J. 157, 72 A.2d 190 (1950). Workers' Compens-

The right of employer and insurance carrier for reimbursement on account of compensation paid to employee injured by a third person is purely statutory. Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson, 139 N.J. Eq. 318, 51 A.2d 218 (Ch.1947). Workers' Compensation 2251

An employer's or insurance carrier's right of reimbursement for compensation paid an injured employee or his dependents out of recovery against a third-party tort-feasor who is liable for employee's injuries is derived from the employer's or carrier's statutory subrogation under the Workmen's Compensation Act and is necessarily limited to rights which those entitled to compensation under the act themselves would have had to share in benefits of third-party recovery. Prudential Ins. Co. of America v. Laval, 131 N.J. Eq. 23, 23 A.2d 908 (Ch.1942). Workers' Compensation 2188

The right of an employer who has paid workmen's compensation award, to reimbursement therefor out of any judgment recovered against a third party tort-feasor on account of injury to employee is purely statutory, and hence the requirements of this section such as that the employer seeking reimbursement actually made the compensation payments, must be strictly met. Standard Sur. & Cas. Co. of N.Y. v. Murphy, 129 N.J. Eq. 284, 19 A.2d 229 (1941). Workers' Compensation 2251

An employer's right of reimbursement under Compensation Act, based on injured employee's recovery at common law from third parties, was an action in rem, the right of the employer was against the moneys collected by injured employee from third parties, and therefore the law in effect at the time of the creation of the res was applicable as respects employer's right to reimbursement under L.1911, c. 95, § 23, as amended in 1936, which became law subsequent to time of accident but prior to employee's recovery from third parties. Feinsod v. L. & F. Const. Co., 16 N.J. Misc. 514, 2 A.2d 357 (1938), affirmed 17 N.J. Misc. 65, 4 A.2d 692, certiorari dismissed 123 N.J.L. 149, 8 A.2d 110, modified on other grounds 124 N.J.L. 173, 10 A.2d 728. Workers' Compensation 55

Under the provisions of L.1911, c. 95, § 23, as amended in 1919, right of employer to reimbursement from third party tort-feasor for compensation that employer paid to employee's dependents for death was purely statutory. New York, S. & W. R. Co. v. Huebschmann, 111 N.J. Eq. 547, 162 A. 767 (1932). Workers' Compensation 2188

29. ---- Exclusiveness of remedy, reimbursement

Remedy provided by this section for reimbursement of an insurer against a third party tort-feasor who caused the employee's injuries is not exclusive remedy of insurer for reimbursement. New Amsterdam Cas. Co. v. Popovich, 18 N.J. 218, 113 A.2d 666 (1955). Workers' Compensation 2190

30. ---- Negligence of employer, reimbursement
The restrictive rights and liabilities of employee, employer and third person would be altered substantially if the employer-subrogation provisions of the Workmen's Compensation Act were modified by the condition that the rights of the employer vis-a-vis the third person were cancellable upon a judicial determination that the negligence of the employer contributed to the accidental injury. Schweizer v. Elox Division of Colt Industries, 70 N.J. 280, 359 A.2d 857 (1976). Workers' Compensation 2212

This section providing that the employer or his compensation carrier is subrogated to the injured employee's cause of action in tort against the third-party tort-feasor to the extent of compensation payments made by the employer or its carrier does not operate to extinguish the employer's right of reimbursement from the third-party recovery by allowing the third-party tort-feasor to reduce his liability pro tanto by any payments in compensation made by employer if the latter's negligence contributed to the employee's injury. Schweizer v. Elox Division of Colt Industries, 70 N.J. 280, 359 A.2d 857 (1976). Workers' Compensation 2243


31. ---- Amount of reimbursement


Workers' compensation insurer was entitled to dollar-for-dollar reimbursement of benefits paid to injured worker from settlement of worker's intentional tort claim against employer; employer was functional equivalent of “third party” who paid tort damages to worker from which workers' compensation levy attached, and intent of levy statute require worker to choose from workers' compensation benefits or tort damages, but not both, rather than to require reimbursement only after it was determined that worker was fully compensated for his injuries. Calalpa v. Dae Ryung Co., Inc., 357 N.J.Super. 220, 814 A.2d 1130 (A.D.2003), certification denied 176 N.J. 278, 822 A.2d 608. Workers' Compensation 2251

Any recovery by store employee on his negligent spoliation of evidence claim against store, which was based on its failure to preserve pallet on which doors had been loaded, and which had fallen from forklift and struck employee, would be reduced by amount of store's workers' compensation lien, as lien would have been imposed on any recovery by employee against manufacturer of doors, which was claim employee alleged was hindered by failure to preserve pallet. Callahan v. Stanley Works, 306 N.J.Super. 488, 703 A.2d 1014 (L.1997). Workers' Compensation 2252
Employer was entitled to reimbursement from employee's recovery in third-party action for that portion of the full salary paid to employee during the period of disability which was equivalent to the temporary disability benefits which would have been payable under the Workers' Compensation Act, even though the payment of full salary was pursuant to collective bargaining agreement, as the only benefit received from the collective bargaining agreement was that portion of the salary which exceeded the temporary disability payments to which he was statutorily entitled. Gorski v. Town of Kearney, 236 N.J.Super. 213, 565 A.2d 415 (A.D.1989). Workers' Compensation

Where widow's wrongful death action arising out of death of workman was settled for $250,000, under this section imposing lien in favor of employer or his workmen's compensation insurer against proceeds of a third-party recovery obtained by an injured workman or arising out of his death the lienor insurer owed 33 1/3 % of the total compensation exposure of $39,450, which equaled $13,150, plus $200 toward litigation expenses, while the widow, under Rule 1:21-7 setting forth a contingent fee schedule for attorney fees, owed $28,397.67 in fees and $1,190 in litigation costs. McMullen v. Maryland Cas. Co., 127 N.J.Super. 231, 317 A.2d 75 (A.D.1974), affirmed 67 N.J. 416, 341 A.2d 334. Workers' Compensation

Workmen's compensation benefits are subject to credit or reimbursement in event of recovery by employee against third party tortfeasor, based on total amount of recovery, even though third party recovery may include items not compensable under Workmen's Compensation Act. Szpera v. Mohican Refining Corp., 121 N.J.Super. 569, 298 A.2d 281 (A.D.1972), certification denied 62 N.J. 574, 303 A.2d 327. Workers' Compensation

Two Per Cent Fund is entitled to reimbursement and credit out of a third-party recovery for injury giving rise to workmen's compensation liability and such reimbursement and credit is not limited to compensable items but is based on total amount of recovery regardless of component elements. Bello v. Commissioner of Dept. of Labor and Industry, 56 N.J. 41, 264 A.2d 222 (1970). Workers' Compensation

Credit available to employer by reason of claimant's recovery from third-party tort-feasor was available not only as against total permanent disability award for 450-week period but was likewise available as against continuing monetary benefits otherwise payable because Rehabilitation Commission certified that, at expiration of period, rehabilitation was not feasible; the Legislature in providing for such continuing benefits did not intend to sanction double recovery by claimant. Caputo v. Best Foods, Inc., 39 N.J. 371, 189 A.2d 1 (1963). Workers' Compensation

Under this section, amount to be considered as the award in determining whether employer should be reimbursed, is the maximum amount awarded under § 34:15-12, exclusive of the payments which might become due because of continued permanent disability after submission to rehabilitation. Caputo v. Best Foods, Inc., 27 N.J.Super. 571, 99 A.2d 668 (Co.1953), remanded 30 N.J.Super. 552, 105 A.2d 445, certification granted 16 N.J. 193, 107 A.2d 834, modified 17 N.J. 259, 111 A.2d 261.

Where employee had recovered from third party an amount in excess of liability of employer for medical expenses and compensation payments for total permanent disability for statutory maximum of 450 weeks, employer was entitled to be released from liability and to be reimbursed for payments made, even though employer might possibly be required to continue payments should the employee survive the 450 weeks and not be rehabilitated at time when weekly payments were stopped.

Where deceased employee's executrix sued third-party tort-feasors on two separate counts, one based upon provisions of Death Act and the other upon provisions of the Executors and Administrators Act, § 2:26-9 [see, now, § 2A:15-3], and jury returned a separate verdict for executrix on each count, the amount of verdict rendered on each count, and not the total amount of judgment entered on both, was to be used in ascertaining the total amount which deceased's employer or his insurance carrier was entitled to have credited against liability, where employee's dependent widow alone was entitled to compensation. Prudential Ins. Co. of America v. Laval, 131 N.J. Eq. 23, 23 A.2d 908 (Ch.1942). Workers' Compensation

Where widow and ten children survived deceased employee but only widow and four children were allowed workmen's compensation as total dependents, and recovery was thereafter had from third-party tort-feasors responsible for employee's death in which widow and all ten children were entitled to share, only such portion of the recovery to which the widow and the four children were entitled could be used as a base for computing the employer's credit in reduction of liability for workmen's compensation. D'Amore v. City of Newark, 19 N.J. Misc. 532, 21 A.2d 630 (1941). Workers' Compensation

32. ---- Items for which employer or insurer entitled to reimbursement

Employer's workers' compensation carrier which had paid workers' compensation benefits to injured employee was entitled to workers' compensation lien against recovery by employee in legal malpractice action against attorney based on attorney's negligence in connection with unsuccessful suit against third-party tort-feasor which had caused employee's injuries. Utica Mut. Ins. Co. v. Maran & Maran, 142 N.J. 609, 667 A.2d 680 (1995). Workers' Compensation


Lump-sum payment made by workers' compensation carrier in settlement with common-law wife of employee was exempt from carrier's general lien for reimbursement out of proceeds paid by the third person and could not be recovered out of proceeds received from settlement with tractor manufacturer; payments made in lump-sum settlement of controversy between employer and employee or dependents of employee were recognized payments of workers' compensation benefits for insurance rating purposes only. Aetna Life and Cas. v. Estate of Engard, 218 N.J.Super. 239, 527 A.2d 497 (L.1986). Workers' Compensation

Worker's compensation lien goes no further than payments actually made by third person whose tortious conduct contributed to happening of industrial accident; thus, worker's compensation carrier had no lien upon settlement fund recovered in legal malpractice action brought against attorney who had neglected to bring third-party product liability
action within limitations period against manufacturer of machine on which worker was working at time of accident. Wausau Ins. Companies v. Fuentes, 215 N.J.Super. 476, 522 A.2d 440 (A.D.1986). Workers' Compensation 2252

Party who sustains personal injuries as a result of joint negligence of individual and municipal defendants, and who enforces entire amount of judgment against municipal defendants, will have continuing right to future workers' compensation benefits without being obligated to reimburse State for any benefits previously provided, where individual defendant's liability insurance is insufficient to discharge State's workers' compensation lien and to pay proportionate share of judgment. Ortega v. State, 213 N.J.Super. 16, 516 A.2d 258 (A.D.1986). Workers' Compensation 2249

Employer, who paid workmen's compensation benefits to employee after overhead door fell on his right foot and fractured four of his toes and after large toe and part of another were amputated due to gangrene, was entitled to be reimbursed from judgment, which was obtained in employee's action to recover against physician for malpractice in treatment of employee's injuries, but only to extent that amount of disability and expenses paid by employer were for injury caused by malpractice. Brum v. International Terminal Operating Co., Inc., 125 N.J.Super. 558, 312 A.2d 507 (A.D.1973). Workers' Compensation 2254

One who has paid or become liable to pay compensation to injured employee is entitled to credit or reimbursement only as to such items as the employee may be entitled to recover against third party whose negligence occasioned his injuries. Bello v. Commissioner of Dept. of Labor and Industry, 106 N.J.Super. 405, 256 A.2d 63 (A.D.1969), certification granted 54 N.J. 561, 258 A.2d 13, reversed on other grounds 56 N.J. 41, 264 A.2d 222. Workers' Compensation 1108; Workers' Compensation 2251

If workmen's compensation carrier were held liable in action at law for having negligently caused serious injury and death to workman in course of treating him for employment injuries in its own clinic, it would be entitled to set off compensation payments against amount of recovery. Mager v. United Hospitals of Newark, 88 N.J.Super. 421, 212 A.2d 664 (A.D.1965), certification granted 45 N.J. 600, 214 A.2d 33, affirmed 46 N.J. 398, 217 A.2d 325. Workers' Compensation 2207

Where 17 year old girl was illegally employed, without working papers, to take care of employer's children during the summer, and girl was injured in course of employment in automobile accident and she was awarded workmen's compensation and employer was required to match amount paid by insurance carrier in view of illegality of employment and girl's suit against owners of automobiles was settled, employer was not entitled to reimbursement out of the settlement moneys of the extra compensation paid by him by way of penalty for violating the child labor laws. Houlihan v. Raymond, 49 N.J.Super. 85, 139 A.2d 37 (L.1958). Workers' Compensation 2251

Where recovery was had from a third person for the death of an employee, an employer, who had paid a sum toward the funeral bill of deceased employee under the Workmen's Compensation Act, was not entitled to be reimbursed for that amount, since funeral expense was not in the purview of the term “compensation”. O'Brien v. New Jersey State Highway Dept., 11 N.J.Super. 548, 78 A.2d 717 (A.D.1951). Workers' Compensation 2251

An employer or his insurance carrier, against whom compensation is awarded, is chargeable only with difference between amount of award to employee's sole dependent and amount of dependent's share of damages recovered by employee's representatives from a third-party tort-feasor, less attorneys' fees and expenses of suit, not exceeding maximum prescribed by this section, and is entitled to reimbursement for so much of medical expenses and compensation payments theretofore paid to dependent as exceeds amount of such difference. Prudential Ins. Co. of America v. Laval, 131 N.J. Eq. 23, 23 A.2d 908 (Ch.1942). Workers' Compensation 1108; Workers' Compensation 2251

Only so much of third-party recovery as equals the workmen's compensation due one may be employed in arriving at the base for computing employer's credit. D'Amore v. City of Newark, 19 N.J. Misc. 532, 21 A.2d 630 (1941). Workers' Compensation 1108

Employer was entitled under provisions of L.1911, c. 95, § 23, as amended in 1919 to reimbursement from wrongdoer injuring employee for expenses of medical and hospital services furnished in view of the provisions of L.1911, c. 95, § 14 (see, now, § 34:15-15), as amended in 1919. Henry Steers, Inc. v. Turner Const. Co., 104 N.J.L. 189, 139 A. 42 (1927). Workers' Compensation 2251

33. ---- Greater sum recovered than amount of employer's liability, reimbursement


Where employer did not seek to reduce workmen's compensation payments by amount of pension it agreed to pay retired employees, but by its pension plan committed itself to see that each retired employee received a fixed amount of money monthly, to compensate partially for wages lost due to inability to continue the employment by reason of age, and if such was not forthcoming in whole or in part from specified sources, such as public pension, pension contributed by the employer, social security benefits, private or statutory severance pay or workmen's compensation benefits from employer or other employer, committed itself to pay the specified amount, and such plan had no particular relationship to workmen's compensation benefits, provision in such plan for reduction of pension by amount of workmen's compensation benefits would not be deemed invalid on theory that it contravened the basic purposes of the Workmen's Compensation Act and public policy. Renshaw v. U. S. Pipe & Foundry Co., 30 N.J. 458, 153 A.2d 673 (1959). Labor And Employment 219

“Reimbursement” referred to is that portion of sum received from third party as is the equivalent of the whole of employer's liability, whether actually paid or not, if recovery exceeds that liability. Werthman v. Prudential Ins. Co. of America, 19 N.J. Misc. 604, 22 A.2d 197 (1941).

Where net allowance received by claimant under settlement of claimant's common-law action against a third party exceeded the amount of compensation to which claimant was entitled from employer, employer was released from liability to claimant on account of accident, and claimant's petition for compensation would be dismissed. Rosa v.
Kaplan, 19 N.J. Misc. 300, 19 A.2d 202 (1941). Workers' Compensation 1107

Under provisions of this section giving employer credit for sum received by injured employee from a third party tort-feasor after deducting expenses of suit and attorney's fees and making base for calculation of fees part of amount paid by third party to which employer or his insurer shall be entitled in reimbursement, the term "reimbursement" refers to such part of the sum received from the third party as is the equivalent of the whole of employer's liability under the Workmen's Compensation Act, whether actually paid or not, if the recovery exceeds that liability. Savitt v. L. & F. Const. Co., 124 N.J.L. 173, 10 A.2d 728 (1940). Workers' Compensation 1108

Under provision of this section that if sum recovered by employee from third party tort-feasor after attorney's fees have been deducted is greater than employer's liability, employer should be relieved, employer on account of his liability towards his employee is given credit only for the amount which the employee actually received from third party tort-feasor less the attorney's fees. Savitt v. L. & F. Const. Co., 123 N.J.L. 149, 8 A.2d 110 (1939), modified 124 N.J.L. 173, 10 A.2d 728. Workers' Compensation 1108

Under this section as amended in 1931, employer or his insurer had no interest in amount recovered by injured employee from tort-feasor above compensation actually paid to employee, since recovery by employee from tort-feasor released employer's compensation obligation. Scheno Trucking Co. v. Bickford, 115 N.J. Eq. 380, 170 A. 881 (Ch.1934), affirmed 116 N.J. Eq. 586, 174 A. 548. Insurance 3517; Subrogation 23(1); Workers' Compensation 2190


34. ---- Lesser sum recovered than amount of employer's liability, reimbursement

Workers' compensation lien did not apply to proceeds of underinsured motorist coverage (UIM) paid by injured worker's personal automobile insurance carrier where worker's net recovery of $115,464.07 was less than his loss of $125,000; UIM provision provided coverage in amount of $100,000, $10,000 payment received by worker from tort-feasor was deducted from this amount and forwarded to workers' compensation carrier, and thus worker received $90,000 from automobile insurer and $25,464.07 from workers' compensation carrier. Stabile v. New Jersey Mfrs. Ins. Co., 263 N.J.Super. 434, 623 A.2d 252 (A.D.1993). Workers' Compensation 2252

Where an injured employee received in settlement of his claims against a third party $5,000, of which one-third plus costs of $200 went to his attorneys, employer was entitled to receive a credit on account of his liability to employee under compensation act in the amount of $3,133.33. Ernst v. Rust Engineering Co., 17 N.J. Misc. 280, 8 A.2d 212 (1939). Workers' Compensation 1108

Where before employee's settlement with third party tort-feasor employer paid $1,382 compensation to employee who received in settlement $12,000 less $4,000 attorney's fees and § 200 costs, and employee was awarded compensation in the sum of $10,190, employer was not entitled to reimbursement for the amount paid employee, since the difference between the compensation award and the amount received by the employee in settlement was not exceeded by employer's payment, but employer was entitled to credit on the difference in the sum of amount paid employee by employer. Savitt v. L. & F. Const. Co., 123 N.J.L. 149, 8 A.2d 110, (1939), modified on other grounds 124 N.J.L. 173, 10 A.2d 728. Workers' Compensation 1108

Employer was entitled to deduct from total award of compensation for death of employee the amount previously recovered by third party action. Bove v. Highwood Coal Co., 17 N.J. Misc. 131, 5 A.2d 728 (1939). Workers' Compensation 934.11

An employer could not deduct, from award of compensation, the amount of judgment obtained by injured employee in suit instituted under this section covering credit to be given to employer on award against him for employee's recovery against third party tort-feasors, where payment of judgment had not been made to employee. Adolph v. Breen Iron Works, 17 N.J. Misc. 101, 5 A.2d 310 (1939). Workers' Compensation 1108

Where injured employee recovered from third party tort-feasors for injuries, in employee's compensation proceeding against employer, employer was entitled to credit, on compensation award, for money paid out by employer's insurance carrier because of employee's injuries. Feinsod v. L. & F. Const. Co., 16 N.J. Misc. 514, 2 A.2d 357 (1938), affirmed 17 N.J. Misc. 65, 4 A.2d 692, certiorari dismissed 123 N.J.L. 149, 8 A.2d 110, modified on other grounds 124 N.J.L. 173, 10 A.2d 728. Workers' Compensation 1108

Where injured employee recovered a sum from third party tort-feasors, compensation payments by employer for disability were deferred until exhaustion of net proceeds, which had already been received by employee from tort-feasors and from employer's insurance carrier, by application thereof, from date of accident, at the weekly rate, on the compensation award. Feinsod v. L. & F. Const. Co., 16 N.J. Misc. 514, 2 A.2d 357 (1938), affirmed 17 N.J. Misc. 65, 4 A.2d 692, certiorari dismissed 123 N.J.L. 149, 8 A.2d 110, modified on other grounds 124 N.J.L. 173, 10 A.2d 728. Workers' Compensation 1109

Under the provisions of L.1911, c. 95, § 23, as amended in 1919, insurance carrier obligated to pay compensation award was entitled to credit thereon for amount recovered by claimant from third party responsible for injury, where such amount was less than award. Deuchar v. Standard Acc. Ins. Co., 117 N.J.L. 375, 189 A. 61 (1937). Workers' Compensation 934.11

Under the provisions of L.1911, c. 95, § 23, as amended in 1919, credit to which insurance carrier was entitled because of compensation claimant's recovery from third party responsible for injury was the amount paid by third party in settlement thereof, notwithstanding that portion thereof had been paid to claimant's attorney. Deuchar v. Standard Acc. Ins. Co., 117 N.J.L. 375, 189 A. 61 (1937). Workers' Compensation 934.11
Under the provisions of L.1911, c. 95, § 23, as amended in 1919, employer was entitled to deduction of amount of judgment recovered by employee's widow against third party tort-feasor from total amount of compensation award, where payments under award had been held up pending suit against third party. Fecsik v. William Spencer & Sons Corp., 114 N.J.L. 303, 176 A. 196 (1935). Workers' Compensation

35. ---- Uninsured motorist insurance proceeds, reimbursement

Statute establishing workers' compensation lien prevents worker from retaining any workers' compensation benefits that have been supplemented by recovery against liable third party, even if recovery and benefits when combined would leave worker less than fully compensated; under statute, workers' compensation carrier is entitled to reimbursement, whether or not employee is fully compensated. Utica Mut. Ins. Co. v. Maran & Maran, 142 N.J. 609, 667 A.2d 680 (1995). Workers' Compensation

Any proceeds, whether recovered from the direct third person tort-feasor or from a functionally equivalent source such as uninsured motorist insurance proceeds or legal malpractice proceeds, are subject to workers' compensation liens and the same “no double recovery” rule applies for both recoveries and recoveries that are not directly from tort-feasor are subject to a lien even when employee is not fully compensated; overruling Charnecky v. American Reliance Ins. Co., 249 N.J.Super. 91, 592 A.2d 17. Frazier v. New Jersey Mfrs. Ins. Co., 142 N.J. 590, 667 A.2d 670 (1995). Workers' Compensation


Receipt of workers' compensation benefits by police officer who was injured when a “hit-and-run” vehicle struck a police car that he was operating in course of employment did not preclude officer from obtaining uninsured motorist benefits under city's self-insurance program or recovering uninsured motorist benefits under officer's own policy; however, city was entitled to a lien on any uninsured motorist benefits payable to the officer. Christy v. City of Newark, 102 N.J. 598, 510 A.2d 22 (1986). Insurance


(A.D.1985). Workers' Compensation 2251


Where an employee who was injured in a worker-related automobile accident with an uninsured motorist was awarded $14,500 pursuant to the employer's uninsured motorist coverage, the employer was entitled to a lien against the uninsured motorist recovery for the $2,750 worker's compensation award made to the employee. Montedoro v. City of Asbury Park, 174 N.J.Super. 305, 416 A.2d 433 (A.D.1980). Workers' Compensation 2252

36. ---- State fund, reimbursement

Two Per Cent Fund was entitled to reimbursement from total amount employee obtained as cash settlement from third-party tort-feasor in release of latter's liability for employee's injury, which also gave rise to workmen's compensation liability for total and permanent disability, notwithstanding that recovery from fund was for 25% disability attributable to preexisting partial disability and that recovery from tort-feasor was only for work-related injury, constituting 75% disability. Bello v. Commissioner of Dept. of Labor and Industry, 56 N.J. 41, 264 A.2d 222 (1970). Workers' Compensation 2251

Two Per Cent Fund may be entitled to credit or reimbursement from third-party recovery of employee. Bello v. Commissioner of Dept. of Labor and Industry, 106 N.J.Super. 405, 256 A.2d 63 (A.D.1969), certification granted 54 N.J. 561, 258 A.2d 13, reversed on other grounds 56 N.J. 41, 264 A.2d 222. Workers' Compensation 1108; Workers' Compensation 2251

37. ---- Dependency benefits, reimbursement

Where employee recovered permanent disability benefits for occupational disease, brought a successful third-party tort action and then died as a result of occupational disease, portion of this section providing that if sum recovered in third-party tort action by employee is equivalent to or greater than liability of employer or insurance carrier under compensation statute that employer or carrier is released from liability did not release employer or insurance carrier from liability to widow and children for dependency payments. Roberts v. All Am. Engineering Co., 104 N.J.Super. 1, 248 A.2d 280 (A.D.1968), certification denied 53 N.J. 351, 250 A.2d 753. Workers' Compensation 1105

Employer was not entitled to set-off, against dependency benefits, the amount of a third-party award to injured employee who later died of disease he contracted during his employment. Roberts v. All Am. Engineering Co., 99 N.J.Super. 291, 239 A.2d 284 (Co.1968), affirmed 104 N.J.Super. 1, 248 A.2d 280, certification denied 53 N.J. 351, 250 A.2d 753. Workers' Compensation

38. ---- Future expenses, reimbursement

Workers' compensation order providing that employer shall be responsible for its proportionate share of future medical expenses incurred by totally and permanently disabled employee who had obtained third-party recovery which expenses were to be reimbursed as they accrued was proper and thus for purposes of determining the payment due to employer from the third-party recovery, computation of employer's pro rata share of attorney fee in third-party recovery did not include a presumed medical benefit for the employer. Rivera v. Metropolitan Maintenance Co., 197 N.J.Super. 629, 485 A.2d 1076 (A.D.1984). Workers' Compensation

39. ---- Interest, reimbursement

Where compensation carrier had paid injured employee a total of $8,778.25 and thereafter employee had brought action for damages against third-party tort-feasors and had obtained judgment for $48,000, and subsequently, after dispute had arisen as to amount payable to compensation carrier, insurer of third-party tort-feasors had paid into court sum to be disputed in interpleader action, and compensation carrier was, in that action, entitled to be reimbursed for full amount of its expenditures, compensation carrier was also entitled to interest from date of entry of judgment against tort-feasors. Fireman's Fund Indem. Co. v. Batts, 11 N.J.Super. 242, 78 A.2d 293 (A.D.1951). Workers' Compensation

40. ---- Voluntary contributions, reimbursement

Where employee was injured by the United States when United States had not consented to be sued for torts and was paid workmen's compensation by employer's insurance carrier, any moneys paid to injured employee by the United States would be a voluntary contribution from one who was under no legal liability to make it, and employer and insurance carrier would not be entitled to reimbursement out of such contribution. Dugan Bros. of N. J., for Use and Benefit of Maryland Cas. Co., v. Robinson, 139 N.J. Eq. 318, 51 A.2d 218 (Ch.1947). Workers' Compensation

41. ---- Employees of public entities, reimbursement

Public entity was entitled to indemnification from general contractor for 85% of $1.5 million settlement in case involving workplace injury on public property, although contractor argued indemnification was valid only when a judgment was rendered, not in settlement situation; contractor was 85% at fault and was not liable for entity's negligence, indemnity claim was based on valid, pre-existing indemnitor/indemnitee relationship, public entity faced potential liability for the claims underlying the settlement, and settlement amount was reasonable. Serpa v. New Jersey
Workers' compensation insurer was not entitled to reimbursement for medical expenses and temporary disability compensation paid injured employee of insured employer where, even though employee recovered judgment against tort-feasor which exceeded amounts thus paid, tort-feasor was employee of public entity; fact that employee did not include claim for medical expenses or actual lost wages in suit against public entity and its employee had no significance. Travelers Ins. Co. v. Collella, 169 N.J.Super. 412, 404 A.2d 1250 (A.D.1979). Workers' Compensation

42. ---- General contractors, reimbursement

General contractor's payment of workers' compensation to employee did not entitle contractor to reimbursement from public entity that had settled employee's personal injury action and sought indemnity from contractor; employer's statutory right to reimbursement from third person did not apply to public entities, and entity had statutory right to credit for the workers' compensation payments. Serpa v. New Jersey Transit, 401 N.J.Super. 371, 951 A.2d 208 (A.D.2008). Workers' Compensation

Under New Jersey Compensation Act, a general contractor is liable for payment of compensation to employees of a subcontractor only in event subcontractor has failed to secure workmen's compensation insurance, and if general contractor becomes liable for compensation payments he is granted right of reimbursement from derelict subcontractor, but where subcontractor takes out compensation insurance, general contractor is treated as a third party and is not granted immunity from common-law negligence suit by employee of subcontractor. Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958). Workers' Compensation

43. ---- Attorney's fees and expenses of suit, reimbursement

Workman's attorney who received as a fee a percentage of amount paid by tort-feasor, was not entitled to collect as an additional fee a percentage of amount received by employer for reimbursement for amount of compensation paid to workman. Dante v. William T. Gotelli, Inc., 17 N.J. 254, 111 A.2d 267 (1955); Caputo v. Best Foods, 17 N.J. 259, 111 A.2d 261 (1955).

Where third-party tort recovery is had by injured workman entitled to compensation for the ensuing disability under the Workmen's Compensation Act, the provision of this section making the employer assessable for employer's proportionate share of the workman's attorney's fee, but not in excess of 33 1/3 % of the portion of the recovery which inured to the employer, means the total compensation liability of the employer under the Act, however much the obligation may remain unfulfilled at time of the third-party recovery, rather than compensation payments then actually made to the workman. Dante v. William T. Gotelli, Inc., 17 N.J. 254, 111 A.2d 267 (1955); Caputo v. Best Foods, 17 N.J. 259, 111 A.2d 261 (1955).

Where injured workman settled third-party tort action for $60,000 and paid his attorneys $10,000, or one-sixth of
amount of recovery, and employer, which had paid compensation to workman, was held entitled to reimbursement in
the amount of $17,304.50 for its compensation liability, employer could be assessed up to one-third of the $17,304.50,
in accordance with this section for employer's proportionate share of workman's attorney's fees, and assessment was
not required to be limited to one-sixth merely because workman paid his attorney only one-sixth of amount of re-

Under this section “attorneys' fee” for purpose of statutory deduction is composed of one-third of the amount of re-
imbursment to employer of actual amount already paid to employee, and the actual fee charged on balance of re-
covery from third party which is used as credit to reduce employer's liability. Feinsod v. L. & F. Const. Co., 17 N.J.
Misc. 65, 4 A.2d 692 (1939); Savitt v. L. & F. Const. Co., 17 N.J. Misc. 65, 4 A.2d 692 (1939); certiorari dismissed 123
N.J.L. 149, 8 A.2d 110.

This section providing that employer be assessed for his pro rata share of the attorney fee payable to workers' com-
pensation claimant's attorney for services in the third-party proceeding while speaking only in terms of allowing a fee
against the employer on the sum to which it is entitled to reimbursement, also requires calculation of the fee on sums
for which the employer would be liable under the compensation award but from which it had been released by reason
Workers' Compensation

Computation of employer's pro rata share of attorney fee in third-party recovery should not take into account the
possibility that workers' compensation claimant may receive an extension of benefits beyond the ordinary period of
450 weeks for the payment of compensation to a totally and permanently disabled employee. Rivera v. Metropolitan

Computation of employer's pro rata share of attorney's fee in third-party recovery should be based on potential
compensation liability from which employer has been released and does not depend on happenstance of whether such
liability might terminate prematurely; employer was not entitled to pay pro rata share of attorney's fee over 450-week
period, nor was employer entitled, on theory that liability for attorney fee was spread over 450 weeks, to have amount
Workers' Compensation

Where there has been a third-party tort recovery by injured employee which releases employer in whole or in part from
liability for workmen's compensation, employer can be assessed for its pro rata share of attorney fees in third-party tort
recovery measured by benefit accruing to it which is the medical expenses incurred and compensation paid to injured
1298 (A.D.1977). Workers' Compensation

Where there was settlement of third-party tort recovery by employee, injured in course of employment rendering
employer liable for workmen's compensation, benefit to employer arising out of settlement was discharge of em-
ployer's statutory obligation to pay the Blue Cross and Blue Shield liens filed against it, and employer's pro rata share
of attorney fees must be based on the actual amount paid to discharge liens and not on the original sums for which the

Workmen's compensation statutes require pro rata sharing by compensation insurance carrier of attorney's fee incurred by workman in asserting third-party claim, and pro rata reimbursement of injured worker for such attorney's fee; where injured workman incurred attorney's fee of 26% of amount recovered from third-party tort-feasor for work-related accident, therefore division of workmen's compensation acted properly in later workmen's compensation proceedings arising out of same accident, in awarding “counsel fee” to workman in amount of 26% of amount of compensation carrier's lien and in directing compensation carrier to pay workman 26% of amount that weekly compensation benefits would have been had there been no third-party recovery, and 26% of all sums paid by workman for medical care and treatment. Pagan v. Hillside Metal Products, Inc., 140 N.J.Super. 154, 355 A.2d 690 (A.D.1976). Workers' Compensation  1109

Under the New York disability statute, as interpreted by the courts of New York, the insurer is entitled to recover its full lien without deduction for attorneys' fees and expenses, provided the employee's total third-party recovery, less attorneys' fees, exceeds the amount of disability benefits paid; in contrast, New Jersey's temporary disability statute contains no specific provision granting subrogation rights to an insurance carrier in that context. Breslin v. Liberty Mut. Ins. Co., 134 N.J.Super. 357, 341 A.2d 342 (A.D.1975), certification granted 68 N.J. 282, 344 A.2d 316, affirmed 69 N.J. 435, 354 A.2d 635. Public Assistance  207

Under this section imposing lien in favor of an employer or his workmen's compensation insurer against the proceeds of third-party recovery obtained by an injured workman or arising out of his death, the lienor must pay the successful plaintiff's attorney in the third-party action a fee not to exceed one-third of the amount of the lien, and must contribute toward litigation expenses an amount not to exceed $200. McMullen v. Maryland Cas. Co., 127 N.J.Super. 231, 317 A.2d 75 (A.D.1974), affirmed 67 N.J. 416, 341 A.2d 334. Workers' Compensation  2252

Under this section imposing a lien in favor of an employer or his workmen's compensation insurer against the proceeds of a third-party recovery obtained by an injured workman or arising out of his death, where the fee arrangement between plaintiff and his attorney is for a fee, whether contingent or on a fee for service basis, which equals a percentage of less than one-third of the recovery, insurer would pay only that lesser percentage of its lien as a fee. McMullen v. Maryland Cas. Co., 127 N.J.Super. 231, 317 A.2d 75 (A.D.1974), affirmed 67 N.J. 416, 341 A.2d 334. Workers' Compensation  2252

Where employer of deceased workman benefited from third-party tort recovery, and where employer made no contribution toward legal expenses incurred in third-party proceeding, employer's pro rata share of such expenses should be calculated on the basis of benefit it received, and where attorney fee allowed in third-party proceeding had already been paid to counsel the employer should be assessed for its pro rata share of attorney fee, calculated at rate of 28.14%, which was percentage of attorney fee awarded in the third-party settlement, and order should also direct that such amount be paid by employer by way of reimbursement to the dependent's beneficiaries in the third-party settlement. Teller v. Major Sales, Inc., 64 N.J. 143, 313 A.2d 205 (1974). Workers' Compensation  2248

In determining extent to which an employer was entitled to credit for its alleged compensation liability arising out of a
malpractice injury for which workman's compensation claimant received a settlement, employer would be required to bear its proportionate share of counsel fees incurred in obtaining such settlement, and the amount deducted from such settlement for counsel fees and costs would have to be itemized. Schmidt v. Revolvator Co., 46 N.J.Super. 232, 134 A.2d 507 (Co.1957). Workers' Compensation

Any mistake or willful avoidance by third-party tort-feasor's insurance carrier of its statutory duty to inquire of workman as to counsel fees and suit expenses in negligence action before paying the subrogated compensation insurance carrier the full amount of latter's lien for compensation benefits paid did not relieve latter of its burden of sharing such suit expenses and counsel fees, or confer upon it any greater right than it was entitled to under statute, and, in event of such mistake or willful avoidance, compensation carrier was unjustly enriched and liable to make restitution. McDermott v. Standard Acc. Ins. Co., 40 N.J.Super. 119, 122 A.2d 371 (A.D.1956). Workers' Compensation

Where injured workman settled third-party tort action for $60,000 and paid his attorneys $10,000, or one-sixth of amount of recovery, and employer, which had paid compensation to workman, was held entitled to reimbursement in the amount of $17,304.50, for its compensation liability, employer could be assessed only one-sixth of the $17,304.50, in accordance with provisions of the Workmen's Compensation Act, for employer's proportionate share of workman's attorney's fees. Caputo v. Best Foods, 17 N.J. 259, 111 A.2d 261 (1955). Workers' Compensation

Fee of attorney who represented employee in third-party suit based upon full extent of liability under workmen's compensation judgment, subject to maximum 33 1/3 per cent stipulated in statute would be deducted from moneys to which insurer was entitled in reimbursement. Travelers Ins. Co. v. Lumber Mut. Cas. Ins. Co. of N. Y., 20 N.J.Super. 265, 89 A.2d 717 (Ch.1952).

Where compensation carrier paid its insured's employee total of $8,778.25, and employee subsequently brought action for damages against third-party tort-feasors and obtained judgment for $48,000, and insurer of third-party tort-feasors paid into court sum to be disputed in interpleader action, compensation carrier was entitled to be reimbursed for its total expenditure of $8,778.25 without deduction for legal services of attorney representing employee in action against tort-feasors. Fireman's Fund Indem. Co. v. Batts, 11 N.J.Super. 242, 78 A.2d 293 (A.D.1951). Workers' Compensation

Where compensation carrier paid injured employee compensation of $3,575 and incurred medical expenses of $5,203.25, making a total of $8,778.25, and employee brought an action for damages against third party tort-feasors and obtained a judgment for $48,000, and after affirmance of judgment there was due thereon $53,505.23, and insurer of third party tort-feasors paid into court the sum of $9,657.52 in interpleader action, compensation carrier was entitled to be reimbursed for the sum of $8,778.25 expended by it plus interest from date of entry of judgment to date on which fund was paid into court, and attorney for employee was not entitled to one third of amount that compensation carrier had paid. Fireman's Fund Indem. Co. v. Batts, 8 N.J.Super. 519, 73 A.2d 640 (Ch.1950), affirmed 11 N.J.Super. 242, 78 A.2d 293. Workers' Compensation

Employer who paid workmen's compensation was entitled to recover out of proceeds of suit brought by injured employee against third-party tort-feasor only net amount of such payments to employee after payment of attorney's fees
and expenses of suit in the action against such third-party. Lucas v. U. S. Guarantee Co., 135 N.J. Eq. 543, 39 A.2d 493 (Ch. 1944). Workers' Compensation 2251

Under Workmen's Compensation Act, employer is not entitled to credit for face amount of injured employee's recovery of damages from or settlement with third party tort-feasor without deductions for attorney's fees paid by employee, but must bear burden of such fees and expenses of suit to extent not exceeding one-third of his total compensation liability. McClare v. Tasty Baking Co., 127 N.J.L. 492, 23 A.2d 275 (1941), affirmed 129 N.J.L. 98, 28 A.2d 118. Workers' Compensation 1108

The object of the compensation act provisions giving employer credit for sum received by injured employee from third party tort-feasor after deducting expenses of suit and attorney's fees as defined by act should be first reserved out of recovery before employer is entitled to any of it, and in that respect burden of fees and expenses is on employer, but that burden is limited by act and is employer's responsibility only until calculation made by third party shows that sum recovered by employee is equivalent to or greater than liability of employer or his insurance carrier. Werthman v. Prudential Ins. Co. of America, 19 N.J. Misc. 604, 22 A.2d 197 (1941). Workers' Compensation 2251

Where award of compensation to injured employee exceeded amount of recovery from third party tort-feasor, attorney's fee in suit against third party was properly deducted from amount of recovery in the ascertainment of amount of credit in accordance with statute. Feinsod v. L. & F. Const. Co., 126 N.J.L. 66, 11 A.2d 95 (1940). Workers' Compensation 1108

Where an employee injured allegedly by negligence of a third party agreed to pay his attorneys one-third of any settlement received from third party and also expenses not to exceed $200, the agreed fees and expenses were reasonable under this section providing for crediting amount recovered by an employee from third parties against liability of employer for injuries of employee. Ernst v. Rust Engineering Co., 17 N.J. Misc. 280, 8 A.2d 212 (1939). Workers' Compensation 1108

44. ---- Waiver of attorney's fees and expenses of suit, reimbursement

Right of injured employee, who has made recovery from third-party tort-feasor, to recover share of suit expenses and counsel fee incurred in negligence case from subrogated workmen's compensation insurance carrier, should not be taken away unless burden of showing voluntary waiver by the employee is sustained by adequate proof. McDermott v. Standard Acc. Ins. Co., 40 N.J.Super. 119, 122 A.2d 371 (A.D.1956). Workers' Compensation 2249

45. Actions at law--In general

This section clarifying declaration of compensation claimant's right to sue at common law a third-party cotort-feasor does not confer upon the insurance carrier or employer any control over the common-law action, except where the workman, having failed to bring it within one year, fails also to bring it within ten days following service upon the employee of a written demand that he do so. Belfatto v. Massachusetts Bonding & Ins. Co., 39 N.J.Super. 507, 121
Where an employee is injured in an accident arising out of and in course of his employment, and subsequently a tort-feasor causes aggravation to said injury, and employee recovers compensation from employer for all his injuries, employee may still maintain an action against tort-feasor. Dettman v. Goldsmith, 11 N.J.Super. 571, 78 A.2d 626 (Co.1951).

Where employee's injuries arose out of an accident which was admittedly the result of actionable negligence of third party tort-feasors, employee was not barred of right of action at law against tort-feasors. Savitt v. L. & F. Const. Co., 123 N.J.L. 149, 8 A.2d 110 (1939), modified on other grounds 124 N.J.L. 173, 10 A.2d 728.


46. ---- Misappropriation of funds, actions at law

Evidence was sufficient to support finding that attorney “knowingly” misappropriated $79,000 in funds belonging to a workers' compensation insurance company when he came into possession of company's funds as a result of settlement of his client's third-party lawsuit; fact that attorney borrowed the funds from his client after his check was returned to him as insufficient to satisfy the company's lien substantiated attorney's awareness that the funds did not belong to him or his client, and thus, he had a duty to safeguard the funds and deposit them in his escrow account rather than use them for his benefit pursuant to a “loan” from his client. In re Frost, 171 N.J. 308, 793 A.2d 699 (2002).

47. ---- Impleading employer, actions at law

Where workman, having been injured in job-related accident and having been paid workmen's compensation, brought action against alleged third-party tort-feasors, who impleaded employer, seeking recovery over to extent they were found liable to workman, such third-party complaints against employer for recovery over were not subject to dismissal on ground that, as between employer and employee, incident was industrial accident compensable under workmen's compensation statutes. Holt v. Ferdon Equipment Co., D.C.N.J.1976, 72 F.R.D. 564.

48. ---- Settlement, actions at law

No matter how atypical or novel the nature of a settlement agreement between a workers' compensation claimant and a third-party tortfeasor, the statutory lien against recoveries from third parties will attach to a payment received by a claimant that is derivative of the employee's demand, claim, or suit against a third party tortfeasor. Pool v. Morristown Memorial Hosp., 400 N.J.Super. 572, 948 A.2d 712 (A.D.2008).
Workers' Compensation Security Fund's statutory lien against recoveries from future third-party tortfeasors who were deemed jointly liable for claimant's injuries attached to $100,000 payment made to claimant by medical malpractice defendants in accordance with “verdict risk limiting” agreement, which had guaranteed, regardless of jury's verdict, that claimant would receive no less than $100,000 and no more than $3,500,000, even though jury rendered “no cause” verdict; despite verdict, payment constituted a settlement made in contemplation of claimant's medical malpractice suit. 


The common-law action sanctioned by this section conferring on a compensation claimant right to sue at common law a third party cotortfeasor is an independent substantive thing, and the right to settle such an action by the employee is integrally a part of the right to bring it. Belfatto v. Massachusetts Bonding & Ins. Co., 39 N.J.Super. 507, 121 A.2d 431 (Ch.1956). Workers' Compensation

--- Mitigation of damages, actions at law

Where employee was injured through negligence of third party tort-feasor, latter was not entitled to set up in mitigation of damages fact that employee received compensation payments from employer. Goldenberg v. Reggio, 112 N.J.L. 440, 171 A. 677 (1934). Damages

In the case of Houghton v. W. G. Root Construction Co., 1912, 35 N.J.L.J. 332, the court said: “The same section was construed by Judge Cole, sitting in the Camden Circuit, in the case of Donaldson v. Public Service Railway Company (opinion filed Sept. 12, 1912). The plaintiff was employed by the Camden Coke Company and, while in the course of his employment, was injured by the Public Service Railway Company. Compensation was made by the Camden Coke Company under the Employers' Liability Act, and afterwards suit was brought by Donaldson against the actual wrongdoer, the defendant, for damages. The defendant pleaded, among other things, that the plaintiff had been compensated by the Camden Coke Company under the Employers' Liability Act. A demurrer, challenging the legal sufficiency of the plea, was sustained, the court holding in effect that the defendant was not relieved from the consequences of its alleged wrongful act.”

--- Effect of recovery on compensation award, actions at law


Proceedings by employer or insurer--In general

An insured employee cannot frustrate the worker's compensation insurer's statutory right to recovery by refusing to accept a proffered settlement of a claim for uninsured motorist (UM) benefits; such an action would penalize the insurer through no fault of its own and unjustly enrich the UM carrier whose coverage exists for the precise purpose of


Where the employee unilaterally elects to abandon a viable claim that could reimburse the compensation carrier, that carrier may step into the employee's shoes and pursue the claim directly. Hartman v. Allstate Ins. Co., 345 N.J.Super. 101, 783 A.2d 745 (A.D.2001). Workers' Compensation \(\text{Page 2188}\)

Uninsured motorist (UM) carrier's offer to pay the policy limits bound it to pay the limits to the worker's compensation insurer and precluded the carrier from contesting damages or obtaining arbitration, even though the offer did not create a binding settlement; although physician's reports suggested a viable issue as to damages, the carrier had those reports for more than two and one-half years before offering its full UM coverage in settlement, and the matter would have ended if the insurer had known of the offer and the carrier had recognized the insurer's rights. Hartman v. Allstate Ins. Co., 345 N.J.Super. 101, 783 A.2d 745 (A.D.2001).

Insurance carrier for borough which had compensated policeman for injuries sustained when he was struck by motorist was not entitled under L.1911, c. 95, § 23, as amended in 1931, to bring suit against motorist in its own name, where policeman did not do so within six months from date of injury. U.S. Cas. Co. v. Hyrne, 117 N.J.L. 547, 189 A. 645 (1937). Workers' Compensation \(\text{Page 2193}\)

Provision of L.1911, c. 95 § 23, as amended in 1931, which authorized employer or insurer after six months from date of injuries sustained by employee who had been compensated for such injuries to “proceed legally” against third person who had caused his injuries, where employee did not, attempted to create a separate right of action distinct from action of employee. U.S. Cas. Co. v. Hyrne, 117 N.J.L. 547, 189 A. 645 (1937).

Insurance carrier for borough which had compensated policeman for injuries sustained when he was struck by motorist was not entitled under L.1911, c. 95, § 23, as amended in 1931, to bring suit against motorist in its own name, where policeman did not do so within six months from date of injury. U.S. Cas. Co. v. Hyrne, 117 N.J.L. 547, 189 A. 645 (1937). Workers' Compensation \(\text{Page 2220}\)

L.1911, c. 95, § 23, as amended in 1931, authorizing employer or insurer to proceed legally against third person causing injuries to employee, where employee fails to bring suit against such person within six months after the injuries and compensation has been paid, was not invalid as tending to split the cause of action by reason of a right being

52. ---- Jurisdiction, proceedings by employer or insurer

Workmen's Compensation Division did not have jurisdiction of proceedings by insurer of employer against whom judgment was rendered, for determination that third person was joint employer. Conway v. Mister Softee, Inc., 91 N.J.Super. 179, 219 A.2d 536 (Co.1966), affirmed 93 N.J.Super. 286, 225 A.2d 707, certification granted 48 N.J. 578, 227 A.2d 136, affirmed 51 N.J. 254, 239 A.2d 241. Workers' Compensation 1075

53. ---- Subrogation, proceedings by employer or insurer


In the absence of a statute, where an insurer's subrogation rights arise by contract, but the contract is silent as to attorneys' fees, equitable principles dictate that the insurer pay a proportional share of attorney's fees and expenses incurred by the insured in a successful third-party action. Breslin v. Liberty Mut. Ins. Co., 134 N.J.Super. 357, 341 A.2d 342 (A.D.1975), certification granted 68 N.J. 282, 344 A.2d 316, affirmed 69 N.J. 435, 354 A.2d 635. Insurance 3528

In event injured workman who is receiving benefits from Two Per Cent Fund fails to institute suit against third-party tortfeasor, Two Per Cent Fund would be entitled to institute suit against third party. Bello v. Commissioner of Dept. of Labor and Industry, 106 N.J.Super. 405, 256 A.2d 63 (A.D.1969), certification granted 54 N.J. 561, 258 A.2d 13, reversed on other grounds 56 N.J. 41, 264 A.2d 222. Workers' Compensation 2195

Employer or its insurance carrier had a right to reimbursement for compensation paid by them to injured employee or his surviving dependents from any sums which might be recovered from third-party tort-feasor liable for employee's injuries or resultant death, and this right to reimbursement was derived from employer's or his insurance carrier's statutory subrogation. Roberts v. All Am. Engineering Co., 104 N.J.Super. 1, 248 A.2d 280 (A.D.1968), certification denied 53 N.J. 351, 250 A.2d 753.

After death of employee as result of occupational disease for which he had already received permanent disability benefits and which formed basis for his successful third-party tort action, employer, independently and separately from obligation to employee, became obligated to widow and children for dependency payments, and since widow, and children had no legal rights to recovery by employee in third-party action employer had no right to be subrogated.

to any part of fund for any dependency payments made to widow and children. Roberts v. All Am. Engineering Co., 104 N.J.Super. 1, 248 A.2d 280 (A.D.1968), certification denied 53 N.J. 351, 250 A.2d 753. Workers' Compensation 450.2; Workers' Compensation 2251

Right of injured employee's employer or its compensation carrier to subrogation or reimbursement for workmen's compensation paid to employee who recovers from third party is purely statutory and statute must be strictly construed. Bello v. Commissioner of Dept. of Labor and Industry, 103 N.J.Super. 180, 246 A.2d 759 (Co.1968), affirmed 106 N.J.Super. 405, 256 A.2d 63, certification granted 54 N.J. 561, 258 A.2d 13, reversed on other grounds 56 N.J. 41, 264 A.2d 222. Workers' Compensation 2189

Employer's and insurance carrier's right of subrogation for injuries to employee by third party is restricted to method of reimbursement provided for by this section through right of injured employee or his dependents against third party in tort, and employer has no direct cause of action against such third party ex contractu for breach of implied warranty. U. S. Cas. Co. v. Hercules Powder Co., 4 N.J. 157, 72 A.2d 190 (1950). Workers' Compensation 2191

An employer or his subrogee, the insurance carrier, may maintain any primary cause of action which employer may have directly in own right against third party tort-feasor injuring employee, specifically against seller of article for breach of warranty of fitness for particular use known to seller and which breach proximately results in injury to or death of purchaser's employee, but damages so recoverable may not include compensation payments made under Workmen's Compensation Act. U. S. Cas. Co. v. Hercules Powder Co., 4 N.J. 157, 72 A.2d 190 (1950). Workers' Compensation 2245

Generally, the principle of subrogation applies in favor of insurer against employers' liability so as to permit insurer, after payment of a loss for which the employer is liable, to enforce the right of the employer against one primarily liable for the injury. U.S. Cas. Co. v. Hercules Powder Co., 4 N.J.Super. 444, 67 A.2d 880 (A.D.1949), certification granted 3 N.J. 373, 70 A.2d 536, reversed on other grounds 4 N.J. 157, 72 A.2d 190. Insurance 3517; Subrogation 23(1)

The word “assignment” in New York Workmen's Compensation Act, § 29, providing that where injured workman elects to take compensation rather than to bring suit against third party claimed to be liable for his injuries, such right of action “shall operate as an assignment” for benefit of employer, insurance carrier, or whoever was liable for payment of compensation, does not mean an “assignment” within rule of New Jersey that no assignment of choses in action arising from tortious injury to person or property are recognized, but is rather a “subrogation” for benefit, not only of insurance carrier or others liable for payment of compensation, but also for benefit of injured workman. Zurich General Acc. & Liability Ins. Co. v. Ackerman Bros., 124 N.J.L. 187, 11 A.2d 52 (1940). Subrogation 31(1); Workers' Compensation 2189

Indorsement by injured employee of check, in satisfaction of judgment, from third party tort-feasor was voluntary and employee was not entitled to recover its value from employer's insurer who received it from tort-feasor under mistake of law that insurer was entitled to subrogation for compensation paid employee, though employee indorsed check only as condition of receiving use of another check for balance of compensation payments, since condition did not amount to duress, as employee could have invoked legal remedy to compel satisfaction of judgment. Sutton v. Metropolitan
Cas. Ins. Co. of New York, 117 N.J.L. 21, 186 A. 465 (1936). Implied And Constructive Contracts 22; Payment 87(2)

Under the provisions of L.1911, c. 95, § 23, as amended in 1919, employer's insurance carrier paying compensation awarded to employee's dependents for death was not subrogated to employer's rights as against third party tort-feasor. New York S. & W. R. Co. v. Huebschmann, 109 N.J. Eq. 40, 156 A. 330 (Ch.1931), affirmed 111 N.J. Eq. 547, 162 A. 767. Workers' Compensation 2251

Prior to the taking effect of the provisions of L.1911, c. 95, § 23, as amended in 1913, an employer had no right by way of subrogation, to the claim of the workman against the tort-feasor. Newark Paving Co. v. Klotz, 85 N.J.L. 432, 91 A. 91 (1914), affirmed 86 N.J.L. 690, 92 A. 1086. Subrogation 23(1); Workers' Compensation 2189

Where an employee was injured prior to taking effect of the provisions of L.1911, c. 95, § 23, as amended in 1913, through the negligence of one not his employer, under such circumstances as entitled him to compensation from his employer, the employer could not recover from the tort-feasor for the compensation paid by the employer. Interstate Telephone & Telegraph Co. v. Public Service Electric Co., 86 N.J.L. 26, 90 A. 1062 (1914). Workers' Compensation 2188

The right to compensation under the Workmen's Compensation Act of 1911, p. 134, as originally enacted, incorporated in this chapter, and the right to recover damages of a tort-feasor were of so different a character that the employer had no right by way of subrogation, to the claim of the workmen against the tort-feasor; and, while the amendment of 1913, P.L. p. 311, § 8, incorporated in this section changed the law in this respect, the accident for which this suit was brought occurred prior to this amendment, and, therefore, it did not apply. Race v. Petry's Express & Delivery, Inc., 38 N.J.L.J. 265 (1915).

Where deceased was run over by one of the cars of the Public Service Street Railway Company, which accident arose out of and in the course of his employment, his administratrix released the Public Service Street Railway Company upon the payment to her of eight hundred dollars, and she then instituted proceedings under Compensation Act for herself, children and stepchildren, actual dependents of the deceased, against his employer, the administratrix might recover, and the employer was not entitled to be subrogated to her rights against the Public Service Street Railway Company. Klotz & Klotz v. Newark Paving Co., 36 N.J.L.J. 271 (1913).

54. ---- Waiver, subrogation, proceedings by employer or insurer

Statutory requirement that employer or workers' compensation carrier make written demand upon injured employee or his dependents, to either effect settlement or institute proceedings against third-party tort-feasor, before initiating subrogation action is for benefit of employee and may be waived by employee. Errickson v. Supermarkets General Corp., 246 N.J.Super. 457, 587 A.2d 1322 (A.D.1991). Workers' Compensation 2198

Parties to workmen's compensation insurance may, by agreement, waive or limit the right to subrogation, and the subrogee in effect steps into the shoes of the insured, and can only recover if insured likewise could have recovered.
55. ---- Demand, proceedings by employer or insurer

In absence of statutorily required written demand served upon injured employee or his dependents, neither employer nor workers' compensation carrier has right or power to institute proceedings against third-party tort-feasor for either employee's or dependents' injuries and loss. Errickson v. Supermarkets General Corp., 246 N.J.Super. 457, 587 A.2d 1322 (A.D.1991). Workers' Compensation

Requirement of written demand under subparagraph (f) of this section is for benefit of injured employee, and he may waive it. Poetz v. Mix, 7 N.J. 436, 81 A.2d 741 (1951).

Where insurer started action against alleged tortfeasor in name of injured employee, but insurer did not make written demand on employee, and employee did not disavow or repudiate the action, but approved thereof, action by insurer could be maintained. Poetz v. Mix, 7 N.J. 436, 81 A.2d 741 (1951). Workers' Compensation

56. ---- Limitations, proceedings by employer or insurer

Suit by insurance carrier in name of employee against Port of New York Authority, in which defendant asserted defense of sovereign immunity, for injuries sustained by employee while engaged in work for employer on premises of port authority commenced within one year and seven months after injury under this section, arose out of provision of workmen's compensation law and was within exemption of §§ 32:1-163, 32:1-164 providing that the one-year limitation to claims against the port authority shall not apply to claims arising out of the provisions of any workmen's compensation law and suit was not barred. Feeley v. Port of New York Authority, 53 N.J.Super. 233, 147 A.2d 105 (Co.1958). States

Under statute authorizing insurer paying compensation to injured employee to maintain an action against the third party tort-feasor which restricts the insurer's right of action to that of the injured employee, compensation insurer's suit against the third party tort-feasor was barred by limitations where the employee's suit was barred. Walker v. Steneck, 23 N.J. Misc. 156, 42 A.2d 382 (1945). Workers' Compensation

L.1911, c. 95, § 23, as amended in 1931, authorizing employer or insurer to proceed legally against third person who injures employee, where compensation was paid employee and employee had not brought suit within six months from date of injuries, was not invalid as establishing a new statute of limitations, since the six-month period was merely a requisite for the maturity of a right in the employer or his insurer and did not limit employee's cause of action. U.S. Cas. Co. v. Hyrne, 117 N.J.L. 547, 189 A. 645 (1937). Workers' Compensation

57. Review

Although neither doctrine of res judicata nor collateral estoppel barred workers' compensation carrier from relitigating amount of actual damages sustained by worker in work-related automobile accident which was determined in arbi-
RATION proceeding regarding worker's claim for underinsured motorist benefits, interests of justice militated against remanding damage question to lower court, in light of workers' compensation carrier's apparent acquiescence in reasonableness of $125,000 in damages fixed by arbitrators; carrier did not raise this point in declaratory judgment action, alleging that compensation lien attached to UIM proceeds, and never suggested that amount of damages set by arbitrators was excessive or unreasonable. Stabile v. New Jersey Mfrs. Ins. Co., 263 N.J.Super. 434, 623 A.2d 252 (A.D. 1993). Workers' Compensation 2242

N. J. S. A. 34:15-40, NJ ST 34:15-40

Current with laws effective through L.2014, c. 62 and J.R. No. 3.

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Effective:[See Text Amendments]

New Jersey Statutes Annotated Currentness
Title 2A. Administration of Civil and Criminal Justice (Refs & Annos)
Subtitle 4. Civil Actions
☞ Chapter 15. Civil Actions Generally (Refs & Annos)
☞ Article 13. Payments to Potential Plaintiffs

2A:15-97. Personal injury or wrongful death actions; benefits from sources other than joint tortfeasor; disclosure; deduction from plaintiff's award

In any civil action brought for personal injury or death, except actions brought pursuant to the provisions of P.L.1972, c. 70 (C. 39:6A-1 et seq.), if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable. Any party to the action shall be permitted to introduce evidence regarding any of the matters described in this act.

CREDIT(S)

L.1987, c. 326, § 1.

HISTORICAL AND STATUTORY NOTES

Section 2 of L.1987, c. 326, approved Dec. 18, 1987, provides:

“This act shall take effect immediately and shall apply to all causes of actions arising on or after that date.”

Title of Act:

An Act concerning the award of damages in personal injury and wrongful death actions in certain cases and supplementing Title 2A of the New Jersey Statutes. L.1987, c. 326.

LIBRARY REFERENCES
DAMAGES

Westlaw Topic No. 115.
C.J.S. Damages § 96.

RESEARCH REFERENCES

2014 Electronic Update

ALR Library


49 ALR 5th 685, Valuing Damages in Personal Injury Actions Awarded for Gratuitously Rendered Nursing and Medical Care.

74 ALR 4th 32, Validity and Construction of State Statute Abrogating Collateral Source Rule as to Medical Malpractice Actions.

73 ALR 3rd 1140, Right of “Blue Cross” or “Blue Shield,” or Similar Hospital or Medical Service Organization, to be Subrogated to Certificate Holder’s Claims Against Tortfeasor.

95 ALR 575, Compensation from Other Source as Precluding or Reducing Recovery Against One Responsible for Personal Injury or Death.

Forms


Treatises and Practice Aids

American Law of Products Liability 3d PS STATESTATS, State Statutes.


26 N.J. Prac. Series § 5:6, Sample Answer to Automobile Complaint.

26 N.J. Prac. Series § 5:7, Sample Answer to Automobile Complaint--Form With Cross-Claims.


3A N.J. Prac. Series § 17:249, Collateral Sources.

3C N.J. Prac. Series § 31:14, Complaint for Contribution from Joint Tortfeasors.


55 N.J. Prac. Series § 10:228, Motion to Exclude Evidence of Collateral Source Payments.

Stein on Personal Injury Damages STATUTES TOC, Statutes and Rules.

Stein on Personal Injury Damages Treatise § 13:2, Rationale.


Stein on Personal Injury Damages Treatise § 13:5, What Kinds of Payments Qualify?

Stein on Personal Injury Damages Treatise § 13:13, Relation to Worker's Compensation.

NOTES OF DECISIONS
In general

1. In general

New Jersey's collateral source statute, which contained anti-subrogation rule, “related to” health insurance plans, which were governed by ERISA, although statute did not mention subrogation, reimbursement, or health insurance plans, and thus statute was preempted by ERISA, unless ERISA's savings clause applied; in passing statute, New Jersey legislature understood and intended that statute would effect health insurers. Carducci v. Aetna U.S. Healthcare, D.N.J.2003, 247 F.Supp.2d 596, stay granted, motion to certify appeal granted 285 F.Supp.2d 552, reversed 402 F.3d 156, certiorari denied 126 S.Ct. 747, 546 U.S. 1054, 163 L.Ed.2d 611. Insurance ¶1117(3); States ¶18.51

Health plan beneficiary did not have standing to seek compensatory relief from health insurer for insurer's alleged actions of trying to collect subrogation lien on beneficiary's settlement with third-party tortfeasor after such liens were determined to be unlawful under New Jersey's collateral source rule by New Jersey's Supreme Court in Perreira v. Rediger; beneficiary did not suffer injury in fact from insurer's actions, in that beneficiary never paid on lien or incurring expenses because of it, and beneficiary could not be provided redress for amounts taken pursuant to subrogation lien, where none were taken. Carducci v. Aetna U.S. Healthcare, D.N.J.2003, 247 F.Supp.2d 596, stay granted, motion to certify appeal granted 285 F.Supp.2d 552, reversed 402 F.3d 156, certiorari denied 126 S.Ct. 747, 546 U.S. 1054, 163 L.Ed.2d 611. Labor And Employment ¶678; Labor And Employment ¶706

New Jersey Supreme Court's holding in Perreira v. Rediger that state's collateral source statute contained anti-subrogation rule, which prevented health insurers from recouping benefits from insureds through subrogation or reimbursement liens upon insureds' recovery from third-party tortfeasors, applied retrospectively; decision was not new and unanticipated, although it was different from regulation promulgated by Commissioner of Insurance, and retroactive application would not thwart purpose of anti-subrogation rule. Carducci v. Aetna U.S. Healthcare, D.N.J.2003, 247 F.Supp.2d 596, stay granted, motion to certify appeal granted 285 F.Supp.2d 552, reversed 402 F.3d 156, certiorari denied 126 S.Ct. 747, 546 U.S. 1054, 163 L.Ed.2d 611. Courts ¶100(1)

Statutory collateral source rule's broad language is only curtailed by its own statutory exceptions that include workers' compensation benefits and life insurance proceeds or when necessitated by an actual conflict with other statutory
schemes that either preempt its operation by law or evince a countervailing legislative policy. County of Bergen Employee Benefit Plan v. Horizon Blue Cross Blue Shield of New Jersey, 412 N.J.Super. 126, 988 A.2d 1230 (A.D.2010), certification denied 202 N.J. 45, 994 A.2d 1040. Damages 59; Damages 64; Workers’ Compensation 934.1

Because the damages that the injured insured may recover in a personal injury action do not include amounts paid by collateral sources, the third-party health insurers that paid those benefits have no right of recovery or subrogation from their insureds' personal injury awards or settlements. County of Bergen Employee Benefit Plan v. Horizon Blue Cross Blue Shield of New Jersey, 412 N.J.Super. 126, 988 A.2d 1230 (A.D.2010), certification denied 202 N.J. 45, 994 A.2d 1040. Insurance 3502; Insurance 3519(2)

The statutory collateral source rule which reduces a tort judgment or settlement by duplicative benefits from any other source prohibits health insurers from recovering subrogation or reimbursement out of tort judgment or settlement in favor of the insured; allowing health insurers to recover funds expended pursuant to an insurance contract either by way of subrogation or contract reimbursement would reallocate the benefit accorded by the statutory collateral source rule in contravention of the underlying legislative intent. Perreira v. Rediger, 169 N.J. 399, 778 A.2d 429 (2001). Insurance 3502; Insurance 3519(2)

Insurance Commissioner's regulations authorizing subrogation and reimbursement provisions in health insurance contracts are limited to cases in which the statutory collateral source rule does not apply. Perreira v. Rediger, 169 N.J. 399, 778 A.2d 429 (2001). Insurance 3502; Insurance 3519(2)

The statutory collateral source rule which reduces a tort judgment or settlement by duplicative benefits from any other source eliminates double recovery to plaintiffs, allocates the benefit of that elimination to liability insurers, and leaves health insurers in the same position they had been in before its enactment, i.e., with no right to recover paid benefits from the insured or from the tort-feasor. Perreira v. Rediger, 169 N.J. 399, 778 A.2d 429 (2001). Insurance 3502; Insurance 3503(1); Insurance 3519(2)

Phrase “if a plaintiff ... is entitled to receive benefits,” as used in collateral source statute, refers only to those benefits to be paid postjudgment to which plaintiff has established, enforceable legal right when judgment is entered and which are not subject to modification based on future unpredictable events or conditions, and in other words, future collateral benefits are deductible under collateral source statute only to extent that they can be determined with reasonable degree of certainty. Parker v. Esposito, 291 N.J.Super. 560, 677 A.2d 1159 (A.D.1996), certification denied 146 N.J. 566, 683 A.2d 1162. Damages 59

Whenever there is statutory conflict involving the collateral source statute and other tort schemes, the overriding legislative intent must be determined on case by case basis. Lusby By and Through Nichols v. Hitchner, 273 N.J.Super. 578, 642 A.2d 1055 (A.D.1994). Damages 59

Remand to district court was warranted, so that it could consider effect, if any, of New Jersey's collateral source rule on husband's mitigation of his damages under Consolidated Omnibus Budget Reconciliation Act (COBRA) through
enrollment of wife in his healthcare plan, since issue was not addressed in first instance by district court, and it was analyzed only superficially in briefs submitted to Court of Appeals. Emilien v. Stull Technologies Corp., C.A.3 (N.J.)2003, 70 Fed.Appx. 635, 2003 WL 21675343, Unreported. Federal Courts 947

2. Purpose of law

A purpose of the New Jersey Collateral Source Statute (NJCSS) is to prevent a tort plaintiff from recovering damages from both a collateral source of benefits and a tortfeasor. Taransky v. Secretary of U.S. Dept. of Health and Human Services, C.A.3 (N.J.)2014, 2014 WL 3719158. Damages 59

A purpose of the New Jersey Collateral Source Statute (NJCSS) is to shift the burden of medical costs related to tort injuries, whenever possible, from liability insurers to health insurers, and thereby keep liability insurance premiums down. Taransky v. Secretary of U.S. Dept. of Health and Human Services, C.A.3 (N.J.)2014, 2014 WL 3719158. Damages 64

New Jersey's collateral source statute, which contained anti-subrogation rule that related to ERISA health plan, was saved from preemption under ERISA's savings clause, as it was state law which regulated insurance; the statute, although it did not refer to health insurance or to subrogation and reimbursement clauses, was directed towards insurance industry and had intentional impact on industry, rule had effect of transferring or spreading policyholder's risk, rule was integral part of policy relationship between insurer and insured, and rule was limited to entities within insurance industry. Carducci v. Aetna U.S. Healthcare, D.N.J.2003, 247 F.Supp.2d 596, stay granted , motion to certify appeal granted 285 F.Supp.2d 552, reversed 402 F.3d 156, certiorari denied 126 S.Ct. 747, 546 U.S. 1054, 163 L.Ed.2d 611. Insurance 1117(3); States 18.41

The purpose the statutory collateral source rule is twofold: (1) eliminate the double recovery to plaintiffs that flowed from the common-law collateral source rule and (2) allocate the benefit of that change to liability insurers. County of Bergen Employee Benefit Plan v. Horizon Blue Cross Blue Shield of New Jersey, 412 N.J.Super. 126, 988 A.2d 1230 (A.D.2010), certification denied 202 N.J. 45, 994 A.2d 1040. Damages 15; Damages 59; Damages 64

The primary purpose of statutory collateral source rule is to disallow double recovery to plaintiffs. Cockerline v. Menendez, 411 N.J.Super. 596, 988 A.2d 575 (A.D.2010), certification denied 201 N.J. 499, 992 A.2d 793. Damages 15; Damages 59


The purpose the statutory collateral source rule is twofold: (1) eliminate the double recovery to plaintiffs that flowed from the common-law collateral source rule and (2) allocate the benefit of that change to liability insurers. Perreira v. Rediger, 169 N.J. 399, 778 A.2d 429 (2001). Damages 59

Purpose of collateral source statute is to prevent plaintiffs from obtaining double recovery and, except where personal

injury protection (PIP) payments are involved, to shift burden, at least to some extent, from liability and casualty insurance industry to health and disability third-party payers. Fayer v. Keene Corp., 311 N.J.Super. 200, 709 A.2d 808 (A.D.1998). Damages 59; Damages 64

Policies underlying collateral source statute do not require court to find that sums paid by insurers to compensate plaintiff for past economic loss duplicate jury verdict for future lost wages, as would entitle defendant to credit under statute, since to do so would award defendant or his insurance carrier what would, in essence, be a windfall. Adamson v. Chiovaro, 308 N.J.Super. 70, 705 A.2d 402 (A.D.1998). Damages 64

Purpose of collateral source statute is to prevent double recovery, thereby giving some relief from increasing costs of liability insurance, and this purpose is furthered by requiring deduction of future benefits. Parker v. Esposito, 291 N.J.Super. 560, 677 A.2d 1159 (A.D.1996), certification denied 146 N.J. 566, 683 A.2d 1162. Damages 59

Focus of statute providing for reduction of award by amount of duplicate benefits received by plaintiff is to protect and relieve burden placed on insurance companies when plaintiff's benefits are cumulative. Thomas v. Toys R Us, Inc., 282 N.J.Super. 569, 660 A.2d 1236 (A.D.1995), certification denied 142 N.J. 574, 667 A.2d 191. Damages 59


Overriding legislative intent of legislature in adopting statutory collateral source rule was to prevent claimant from receiving benefits beyond damages awarded under judgment entered and to relieve defendants and insurance companies from having to compensate plaintiffs for damages in excess of total amounts of their losses. Kiss v. Jacob, 268 N.J.Super. 235, 633 A.2d 544 (A.D.1993), certification granted 137 N.J. 165, 644 A.2d 613, reversed on other grounds 138 N.J. 278, 650 A.2d 336. Damages 59

3. Choice of law

Under New Jersey choice of law rules, New Jersey law of damages, which prevented tort plaintiffs from recovering compensation greater than their actual losses, rather than Virginia law, which allowed large damage awards, or Michigan law, which allowed moderate awards, applied to Virginia construction worker's personal injury action filed in New Jersey against New Jersey trucking company and its driver, which alleged that driver backed company's truck into worker at Michigan construction site; New Jersey had interest in protecting its citizens from inflated damage awards. Slater v. Skyhawk Transp., Inc., D.N.J.1999, 77 F.Supp.2d 580. Damages 2

3.5. Preemption

New Jersey's anti-subrogation statute was not specifically directed toward insurance industry, and thus did not fall within scope of savings clause in ERISA preemption provision, even though legislative history and state supreme
court decision interpreting statute indicated intent to lighten burden on liability insurance industry, where statute
governed all civil actions, not merely those involving insurance companies, and state supreme court recognized that
primary purpose of statute was to disallow double recovery by tort plaintiffs. Levine v. United Healthcare Corp.,
1117(1); States 18.41

Group health plan beneficiaries' claim that their ERISA plan wrongfully sought reimbursement of previously paid
health benefits was claim for benefits due, and thus federal subject matter jurisdiction under ERISA's civil enforc-
ment provision was appropriate, even though beneficiaries' claim was based on state law provision barring health
insurance policies from including reimbursement and subrogation clauses. Levine v. United Healthcare Corp., C.A.3
Labor And Employment 407; States 18.51

District court would certify for interlocutory appeal the issue of whether antisubrogation rule contained in New Jersey
collateral source statute, as interpreted by that state's Supreme Court in Perreira, applied to health insurers because it
was not conflict-preempted under Employee Retirement Income Security Act (ERISA) because it was “saved” as state
law that regulated insurance; there was substantial ground for difference of opinion about court's resolution of that

New Jersey's collateral source statute, which contained anti-subrogation rule that related to ERISA health plan, was
saved from preemption under ERISA's savings clause, as it was state law which regulated insurance; the statute,
although it did not refer to health insurance or to subrogation and reimbursement clauses, was directed towards in-
surance industry and had intentional impact on industry, rule had effect of transferring or spreading policyholder's
risk, rule was integral part of policy relationship between insurer and insured, and rule was limited to entities within
L.Ed.2d 611. Insurance 1117(3); States 18.41

Statutory collateral source rule did not conflict with anti-assignment clause of the federal social security law so as to
preempt collateral source rule, and thus, rule applied to widow's receipt of social security survivor and death benefits.
Cockerline v. Menendez, 411 N.J.Super. 596, 988 A.2d 575 (A.D.2010), certification denied 201 N.J. 499, 992 A.2d
793. Damages 60; Death 8.5; States 18.15

Statutory collateral source rule was only preempted by ERISA to the extent that it precluded reimbursement to health
insurers for amounts paid pursuant to benefit plans governed by ERISA, and thus, statute still applied to widow's
receipt of social security survivor and death benefits. Cockerline v. Menendez, 411 N.J.Super. 596, 988 A.2d 575
(A.D.2010), certification denied 201 N.J. 499, 992 A.2d 793. Damages 64; Death 8.5; States 18.15

New Jersey's collateral source statute was preempted by ERISA's explicit preemption clause because it “related to” an
ERISA plan and did not even purport to regulate insurance within the meaning of the savings clause. Board of Trustees
4152308, Unreported. Damages 59; Insurance 1117(1); Labor and Employment 407; States 18.51
4. Source of payments

Under the New Jersey Collateral Source Statute (NJCSS), a tort plaintiff cannot recover damages from a defendant when she has already received funding from a different source. Taransky v. Secretary of U.S. Dept. of Health and Human Services, C.A.3 (N.J.) 2014, 2014 WL 3719158. Damages 59

As used in New Jersey's collateral source rule making future collateral benefits deductible from judgment awarded to personal injury plaintiff, phrase “if a plaintiff...is entitled to receive benefits” refers only to those benefits to be paid postjudgment to which plaintiff has an established, enforceable legal right when judgment is entered, and which are not subject to modification based on future, unpredictable events or conditions. Mandile v. Clark Material Handling Co., D.N.J.2004, 303 F.Supp.2d 531, affirmed 131 Fed.Appx. 836, 2005 WL 1164209. Damages 60

New Jersey Collateral Source Rule, providing for deduction from personal injury plaintiff's award of benefits received from source other than tort-feasor, was preempted by ERISA, where ERISA plan had paid medical expenses of plaintiff's child after accident involving postal vehicle, where plain language of plan expressly entitled plan to seek reimbursement from damages recovered by individual as result of legal action, and where plan sought reimbursement from any recovery by plaintiff in his Federal Tort Claims Act suit arising from accident; application of New Jersey's prohibition against double recovery in instant case would have impermissible effect of interfering with claims by an employee benefits plan operating under ERISA. Danowski by Danowski v. U.S., D.N.J.1996, 924 F.Supp. 661. Damages 59; States 18.15

While patient, who prevailed in medical malpractice action, was not entitled to a credit against the collateral-source deduction of her social security disability benefits for all the contributions she had made over her working life, patient was entitled to a credit for the maximum social security contributions due from a taxpayer for the same period for which her disability payments had been deducted as collateral source payments. Woodger v. Christ Hosp., 364 N.J.Super. 144, 834 A.2d 1047 (A.D.2003). Damages 60

Amounts deducted from recovery in tort case because of the statutory collateral source rule which reduces a tort judgment or settlement by duplicative benefits from any other source were not received by tort victims, and, thus, their health insurer had no contractual right to reimbursement. Perreira v. Rediger, 169 N.J. 399, 778 A.2d 429 (2001). Insurance 3503(3)

Collateral source statute was limited in its application to civil actions for personal injury or death, and did not apply, to require reduction of jury's damages verdict in appraiser malpractice case, based on plaintiff's pretrial settlement with mortgage company; appraiser malpractice case was patently not a “civil action for personal injury or death.” Johnson v. American Homestead Mortg. Corp., 306 N.J.Super. 429, 703 A.2d 984 (A.D.1997). Damages 59; Damages 63; Death 91

Even assuming that collateral source statute applied in appraiser malpractice case, statute would not require reduction in jury's damages verdict based on settlement proceeds which plaintiff received from named defendant who was not
found to be liable at trial; such proceeds did not constitute benefits of kind which the statute required to be deducted from verdict. Johnson v. American Homestead Mortg. Corp., 306 N.J.Super. 429, 703 A.2d 984 (A.D.1997). Damages

Plaintiff's sick pay and compensation for personal days and family illness days were not benefits within contemplation of collateral source statute, and thus could not be used as setoff against any compensation plaintiff may receive from her lost wages claim. Meola v. Ziman, 297 N.J.Super. 304, 687 A.2d 1099 (L.1996). Damages

Plaintiff's future entitlement to disability or social security benefits starting more than three years after date of judgment was uncertain and dependent on facts not capable of being determined at time of entry of judgment, and trial court erred in holding portion of award to plaintiff in personal injury action in escrow pending later review and could not deduct amounts, where there was substantial evidence that plaintiff could be gainfully employed, although not at salary he earned prior to accident. Parker v. Esposito, 291 N.J.Super. 560, 677 A.2d 1159 (A.D.1996), certification denied 146 N.J. 566, 683 A.2d 1162. Damages

Statute providing for reduction of personal injury award by amount of duplicate benefits received by plaintiff applies to social security benefits; no federal mandate exists for social security benefits, that is, they are not reimbursable to federal government if recipient receives replacement benefit. Thomas v. Toys R Us, Inc., 282 N.J.Super. 569, 660 A.2d 1236 (A.D.1995), certification denied 142 N.J. 574, 667 A.2d 191. Damages

“Benefits,” for purposes of New Jersey's collateral-source statute, did not include proceeds of plaintiff's settlement with defendant who was later found to bear no liability and, thus, amount of that settlement was not to be deducted from damages award against nonsettling defendant; legislature's essential concern in enacting collateral-source statute was insurance-type benefits, and nonspecific nature of settlement amount renders unreliable any conclusion that legislature intended to include “settlements” in meaning of “benefits” as used in statute. Kiss v. Jacob, 138 N.J. 278, 650 A.2d 336 (1994). Damages

Collateral source statute does not apply to reimbursable benefits paid by Medicaid, as purpose of collateral source statute is inapplicable because plaintiff could not obtain double recovery for medical expenses, because his entire recovery is subject to the lien and reimbursement provisions of Medicaid statute, under which plaintiff would be required to repay Medicaid; and given supremacy and preemption of federal Medicaid reimbursement scheme. Lusby By and Through Nichols v. Hitchner, 273 N.J.Super. 578, 642 A.2d 1055 (A.D.1994). Damages

Collateral source provision of Tort Claims Act entitles public entity to credit for workers' compensation paid to claimant, even though subsequently enacted statute permits plaintiff in any civil action for personal injury or death to receive workers' compensation duplicating damages; nothing indicated that legislature intended to shift to public entity substantial burden of being subjected to workers' compensation lien. Furey v. County of Ocean, 273 N.J.Super. 300, 641 A.2d 1091 (A.D.1994), certification denied 138 N.J. 272, 649 A.2d 1291. Workers' Compensation

5. Offsets
The New Jersey Collateral Source Statute (NJCSS), as predicted by the Court of Appeals, did not prevent a Medicare recipient from recovering medical expenses as part of her damages in tort suit, even though the medical expenses had been provisionally paid by Medicare, since Medicare was entitled to reimbursement for those expenses under the Medicare as Secondary Payer Act. Taransky v. Secretary of U.S. Dept. of Health and Human Services, C.A.3 (N.J.)2014, 2014 WL 3719158. Damages 64; Health 545

If, without satisfactory explanation, plaintiff does not fulfill his statutory obligation under collateral source statute, trial court must infer that he is unable to disprove his entitlement to collateral benefits which would offset part of his damages which is compensation for medical expenses. Fayer v. Keene Corp., 311 N.J.Super. 200, 709 A.2d 808 (A.D.1998). Damages 163(2)

In determining by what amount, if any, damages should be reduced under collateral source statute, it should be borne in mind that only those benefits to be paid post-judgment to which plaintiff has established, enforceable legal right when judgment is entered and which are not subject to modification based on future unpredictable events or conditions should be treated as offsets; in other words, future collateral benefits are deductible only to extent that they can be determined with reasonable degree of certainty. Fayer v. Keene Corp., 311 N.J.Super. 200, 709 A.2d 808 (A.D.1998). Damages 59

Motorist who was awarded damages in products liability claim against minivan manufacturer was not entitled to offset for deductibles and co-payments for insurance in connection with court's calculation of remittitur, under collateral source rule, for future medical expenses equal to the amounts that would be covered by collateral sources such as insurance. Dresdner v. Meehan, 2006 WL 910893, Unreported (A.D.2006). Damages 64

Neonatologist and hospital were not entitled to a reduction in child's damages award based on child's future entitlement to health insurance, social security, and other government benefits, in medical malpractice case; there was no indication that child's social security or medicare benefits were fixed and certain at the time of trial, and there was no evidence that child's medical insurance was reasonably certain to continue due to possible job loss, job change, or policy changes. Puzio ex rel. Puzio v. Mimms, 2005 WL 3691527, Unreported (A.D.2006). Damages 60; Damages 64

Deliveryman's compensation from landlord in personal injury action against store tenant and landlord for damages suffered when he fell on loading dock while delivering bakery goods should have been determined, under the collateral source statute, by reducing the total jury award of $150,000 for lost wages by the $53,593 in social security disability benefits received during the same period before the adjustment was made to reflect fault apportionment; the jury award and the social security benefits were duplicate benefits for the same lost wages. Langone v. Food-A-Rama, 2005 WL 3691199, Unreported (A.D.2006). Damages 60

6. Deductible benefits

Plaintiff awarded judgment in products liability action was entitled to credit, for social security contributions paid,

Insufficiency of evidence showing that products liability plaintiff had established, enforceable legal right to receive social security benefits after his worker's compensation benefits ceased approximately one year after trial, or that any such benefits would not be modified based on future reviews by government of plaintiff's disability determination, precluded deduction from plaintiff's judgment for any such future social security benefits pursuant to New Jersey's collateral source rule. *Mandile v. Clark Material Handling Co.*, D.N.J.2004, 303 F.Supp.2d 531, affirmed 131 Fed.Appx. 836, 2005 WL 1164209. Damages ☐ 60

Pursuant to New Jersey's collateral source rule, gross judgment awarded to plaintiff in products liability action had to be reduced by amount of social security benefits that admittedly were payable to plaintiff. *Mandile v. Clark Material Handling Co.*, D.N.J.2004, 303 F.Supp.2d 531, affirmed 131 Fed.Appx. 836, 2005 WL 1164209. Damages ☐ 60

Under New Jersey's collateral source rule, a tort-feasor may not benefit because of payments to or for the injured party from a collateral source, although New Jersey also has a strong public policy against permitting double recoveries, and, under collateral source statute, court may deduct any duplicative award from a plaintiff's recovery. *Ronson v. David S. Talesnick, CPA*, D.N.J.1999, 33 F.Supp.2d 347. Damages ☐ 59

There is no evidence to suggest that the Legislature intended to favor public entities under statutory collateral source rule or that it was not intended to apply to amounts received by a tort plaintiff from public sources; the plain language of statute states that it applies to “benefits” received by a tort plaintiff from “any” source, and, unlike workers' compensation benefits and the proceeds from a life insurance policy, amounts received from public sources, such as a self-funded county health plan, are not excepted from the statute. *County of Bergen Employee Benefit Plan v. Horizon Blue Cross Blue Shield of New Jersey*, 412 N.J.Super. 126, 988 A.2d 1230 (A.D.2010), certification denied 202 N.J. 45, 994 A.2d 1040. Damages ☐ 59; Damages ☐ 60


Pursuant to statutory collateral source rule, widow's damages award in wrongful death action brought against truck driver and driver's employer was required to be reduced by the amount of personal injury protection (PIP) death benefit she received, even though the damages award was for alimony and child support, where the support awards she received were based upon the income decedent would have earned had he not been killed. *Cockerline v. Menendez*, 411 N.J.Super. 596, 988 A.2d 575 (A.D.2010), certification denied 201 N.J. 499, 992 A.2d 793. Death ☐ 91

Social security survivor and death benefits widow received were not excluded from statutory collateral source rule and
were required to be deducted from damages award in wrongful death suit against truck driver and driver's employer stemming from fatal accident; it made no difference that her award consisted of alimony and child support rather than the more traditional award of the decedent's lost earnings, since both compensated for the loss of monetary contributions which the decedent reasonably might have been expected to make to the survivors. Cockerline v. Menendez, 411 N.J.Super. 596, 988 A.2d 575 (A.D.2010), certification denied 201 N.J. 499, 992 A.2d 793. Death 91

Benefits the Legislature intended to cover by the statutory collateral source rule include those from health insurance policies, from employment contracts, from statutes such as the Federal Employers' Liability Act, from gratuities, from social legislation such as social security and welfare, and from pensions under special retirement acts. Cockerline v. Menendez, 411 N.J.Super. 596, 988 A.2d 575 (A.D.2010), certification denied 201 N.J. 499, 992 A.2d 793. Damages 59; Damages 60; Damages 64

Social security disability payments are included under the statutory collateral source rule to the extent they are neither contingent nor speculative nor subject to change or modification. Cockerline v. Menendez, 411 N.J.Super. 596, 988 A.2d 575 (A.D.2010), certification denied 201 N.J. 499, 992 A.2d 793. Damages 60

Because patient's tort recovery against hospital and physical therapist in medical malpractice action was being reduced by five years worth of social security disability benefits, five years worth of social security contributions should be credited against that deduction pursuant to collateral source rule, and most reasonable, direct and fair accommodation was to credit patient with patient's social security contribution at the maximum employee contribution rate for each year of the five years for which the disability benefit deduction had been made. Woodger v. Christ Hosp., 364 N.J.Super. 144, 834 A.2d 1047 (A.D.2003). Damages 60

Under collateral source statute, defendant in action arising from automobile accident was entitled to credit for amounts received by plaintiff under her automobile policies, and from State disability benefits program, for her past lost wages, but not for amounts intended to make plaintiff whole for her medical expenses or other past economic loss. Adamson v. Chiovaro, 308 N.J.Super. 70, 705 A.2d 402 (A.D.1998). Damages 64

Lost income damages awarded in wrongful death were subject to deduction of social security survivor benefits awarded to decedent's children, as benefits and lost income damages were both available on the basis of the death and were awarded for loss of decedent's contributions to children. Rider v. Township of Freehold, 2008 WL 2699805, Unreported (A.D.2008), certification denied 196 N.J. 599, 960 A.2d 394. Death 91

7. Subrogation

New Jersey's collateral source statute, which contained anti-subrogation rule, “related to” health insurance plans, which were governed by ERISA, although statute did not mention subrogation, reimbursement, or health insurance plans, and thus statute was preempted by ERISA, unless ERISA's savings clause applied; in passing statute, New Jersey legislature understood and intended that statute would effect health insurers. Carducci v. Aetna U.S. Healthcare, D.N.J.2003, 247 F.Supp.2d 596, stay granted, motion to certify appeal granted 285 F.Supp.2d 552, reversed 402 F.3d 156, certiorari denied 126 S.Ct. 747, 546 U.S. 1054, 163 L.Ed.2d 611. Insurance 1117(3); States
Under New Jersey law, health insurer which paid benefits on behalf of insured may not recoup those funds through subrogation or reimbursement lien upon insured's recovery from a third-party tortfeasor, and any such subrogation provision in New Jersey insurance contract is void. Carducci v. Aetna U.S. Healthcare, D.N.J.2003, 247 F.Supp.2d 596, stay granted , motion to certify appeal granted 285 F.Supp.2d 552, reversed 402 F.3d 156, certiorari denied 126 S.Ct. 747, 546 U.S. 1054, 163 L.Ed.2d 611. Insurance 3503(1); Insurance 3519(2)

Subrogation provisions in health-care policies or plans only apply to cases that do not involve the collateral-source rule. O'Brien v. Two West Hanover Co., 350 N.J.Super. 441, 795 A.2d 907 (A.D.2002). Insurance 3519(2); Subrogation 27

Remand of union member's personal injury action against company was required, for determination whether, under ERISA, state collateral-source rule applied to claim in intervention by union fund and insurer, and thus, whether fund and insurer could assert a right to subrogation, where stipulation was inadequate to make this determination. O'Brien v. Two West Hanover Co., 350 N.J.Super. 441, 795 A.2d 907 (A.D.2002). Appeal And Error 1178(1)

A right of subrogation may arise either by way of an express agreement between the insured and insurer as set forth in the contract of insurance, by statute, or through the judicial device of equity to compel the ultimate discharge of an obligation by the one who in good conscience ought to pay it. Perreira v. Rediger, 330 N.J.Super. 455, 750 A.2d 126 (A.D.2000).

Collateral source rule in statute which requires the plaintiff in a personal injury action to disclose insurance benefits and requires the court to deduct them from damages did not abrogate a health insurer's common-law right to reimbursement from its insureds or to subrogation against the tort-feasors. Perreira v. Rediger, 330 N.J.Super. 455, 750 A.2d 126 (A.D.2000).

Under collateral source statute, where plaintiff in action arising from automobile accident did not challenge determination of her disability insurer that she was not entitled to further disability payments, and plaintiff obtained recovery against defendant, defendant would, upon payment of judgment, be subrogated to plaintiff's right to proceed against insurer to challenge denial of benefits, and have right to receive any amounts for future economic loss received by plaintiff from insurer, up to amount of benefits for future economic loss paid by insurer. Adamson v. Chiovaro, 308 N.J.Super. 70, 705 A.2d 402 (A.D.1998). Subrogation 32

8. Hearing

In resolving disputes under statute providing for reduction of personal injury award by amount of duplicate benefits received by plaintiff, plenary hearing will be the exception, and is warranted only where plaintiff has fully complied with good-faith disclosure requirements implicated by statute, but fact issue remains; such holding is based on fact that evidence concerning plaintiff's benefits can be proven through documents. Thomas v. Toys R Us, Inc., 282 N.J.Super. 569, 660 A.2d 1236 (A.D.1995), certification denied 142 N.J. 574, 667 A.2d 191. Damages 59
9. Instructions

Trial court committed reversible error when it instructed jury that the most it could award personal injury plaintiff, whose medical expenses totaled $106,006.67, was $29,900.63, which was the amount not covered by insurance; statute required that adjustment in plaintiff's ultimate recovery be made by court after jury had considered the full amount incurred. Dias v. A.J. Seabra's Supermarket, 310 N.J.Super. 99, 707 A.2d 1391 (A.D.1998). Appeal And Error 1064.1(7); Damages 214

10. Standing

Health plan beneficiary did not have standing to seek compensatory relief from health insurer for insurer's alleged actions of trying to collect subrogation lien on beneficiary's settlement with third-party tortfeasor after such liens were determined to be unlawful under New Jersey's collateral source rule by New Jersey's Supreme Court in Perreira v. Rediger; beneficiary did not suffer injury in fact from insurer's actions, in that beneficiary never paid on lien or incurred expenses because of it, and beneficiary could not be provided redress for amounts taken pursuant to subrogation lien, where none were taken. Carducci v. Aetna U.S. Healthcare, D.N.J.2003, 247 F.Supp.2d 596, stay granted, motion to certify appeal granted 285 F.Supp.2d 552, reversed 402 F.3d 156, certiorari denied 126 S.Ct. 747, 546 U.S. 1054, 163 L.Ed.2d 611. Labor And Employment 678; Labor And Employment 706

Health plan beneficiary's claims for prospective relief against insurer, which allegedly asserted unlawful subrogation lien on beneficiary's settlement with third-party tortfeasor, was moot, after insurer voluntarily released lien, liens were determined by New Jersey Supreme Court to be unlawful under state's collateral source statute, which eliminated any reasonable expectation that violation would recur, and beneficiary switched health insurers. Carducci v. Aetna U.S. Healthcare, D.N.J.2003, 247 F.Supp.2d 596, stay granted, motion to certify appeal granted 285 F.Supp.2d 552, reversed 402 F.3d 156, certiorari denied 126 S.Ct. 747, 546 U.S. 1054, 163 L.Ed.2d 611. Federal Courts 2162

Health plan beneficiary lacked standing to pursue claims for injunctive relief against insurer, which allegedly asserted unlawful subrogation lien on beneficiary's settlement with third-party tortfeasor; although insurer did not inform beneficiary that lien had been withdrawn before beneficiary filed suit, insurer had in fact done so, after such liens were determined by New Jersey Supreme Court in Perreira v. Rediger to be unlawful under state's collateral source statute. West v. Health Net of the Northeast, D.N.J.2003, 217 F.R.D. 163. Labor And Employment 706

Health plan beneficiaries did not have standing to seek compensatory relief from health insurers for insurers' alleged actions of trying to collect subrogation liens on beneficiaries' settlements with third-party tortfeasors on basis that such liens were unlawful under New Jersey's collateral source statute; beneficiaries never actually paid anything to insurers pursuant to the plans' reimbursement and subrogation provisions. West v. Health Net of the Northeast, D.N.J.2003, 217 F.R.D. 163. Labor And Employment 706

Health plan beneficiary had standing to seek declaration that insurer's allegedly unlawful subrogation lien on beneficiary's settlement with third-party tortfeasor was void, because such liens were determined by New Jersey Supreme
Court in *Perreira v. Rediger* to be unlawful under state's collateral source statute; lien was still in place and not abandoned by insurer at time that beneficiary filed suit. *West v. Health Net of the Northeast*, D.N.J.2003, 217 F.R.D. 163. Labor And Employment 706


Current with laws effective through L.2014, c. 62 and J.R. No. 3.

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Defendant Drew N. Lavista appeals from a judgment for $506,301.38 entered against him following a jury verdict finding that plaintiff Julie Ann Kimble sustained a permanent injury proximately caused by a motor vehicle accident on November 13, 2008. Defendant argues that plaintiff’s counsel made “improper and inflammatory” comments in his opening and summation; that the verdict was “grossly excessive” requiring a new trial on damages; and that the trial judge erred in permitting plaintiff to introduce into evidence “outstanding medical bills in violation of N.J.S.A. 39:6A–12.”

Plaintiff cross-appeals and argues the trial judge erred in dismissing the case as against defendant Anna Lupo, Lavista’s grandmother and the owner of the car he drove at the time of the collision, because the defense “stipulated liability.” We consider these claims in light of the record and applicable principles of law.

FN1 We refer to plaintiff Julie Ann Kimble in the singular despite the fact that her husband and her daughter were also named as plaintiffs in the complaint. We do this for ease of reference, given that Ms. Kimble was the only party to whom an award was given. The jury did not award anything to plaintiff’s husband on his per quod claim, and no proofs were offered on behalf of the daughter.

I.

We discern the following facts from the trial record.

On November 13, 2008, the forty-year-old plaintiff was driving on Stanhope Road in Sparta, when defendant Lavista pulled out from a side street onto Stanhope Road and thereby caused a collision between the two vehicles. The airbags deployed in plaintiff’s vehicle upon impact, which she described as “tremendous” and “very heavy.”

Plaintiff said she momentarily lost consciousness...
upon impact, and felt “immediate pain” in her neck, back, right hip and right ankle. An ambulance squad arrived on the scene and plaintiff was immobilized on a back board and taken to Newton Memorial Hospital. At the hospital, plaintiff was examined and x-rays were taken, which revealed no fractures. She was released that day with a neck brace and was given a cane to assist her in walking.

Plaintiff was sore and in pain after she returned home and she remained “bedridden” for two days. On November 18, 2008, plaintiff began treatments for her neck and back pain with Dr. David Simon, a chiropractor. Dr. Simon referred plaintiff to physical therapy for injuries to her ankle and hip.

Plaintiff said she had no physical problems before the accident, and skied and enjoyed other physical activities without restriction. However, after the accident, plaintiff said she suffered daily pain in her neck, back, hip and ankle; was unable to undertake her usual activities; was restricted in her movements; and was unable to perform many chores she formerly performed, both at home and at the elementary school where she taught.

Plaintiff was referred to Dr. David Basch, an orthopedic surgeon, on November 26, 2008, who undertook an orthopedic examination of plaintiff and thereafter saw her six or seven times over the course of the next nine months. Dr. Basch opined that plaintiff sustained chronic cervical and lumbar strains, right ankle strain with lateral ligament instability, left knee and right hip bursitis, and “dis[ec] injuries” in her neck and back, all of which are “permanent.”

*2 Dr. Basch said he “did discuss with [plaintiff], on multiple occasions, surgery for her conditions.” He explained that plaintiff “would need” arthroscopic surgery to the right ankle to assess potential cartilage damage, as well as a “reconstruction of the [torn] ligaments on the outside ... of the ankle.” He added that plaintiff “would need” an anterior cervical discectomy and “fusion of the involved levels.” Dr. Bach explained that such surgery entailed removal of the intervertebral discs within the “involved” part of the cervical spine, replacement of the discs with “bone” and then fusing the area with a plate and screws. He generally described the risks of surgery as including infection, nerve damage, “failure to heal,” paralysis and death, among others. FN2 Dr. Basch last saw plaintiff on August 12, 2009, three years prior to trial.

FN2. Plaintiff testified without objection that Dr. Basch “recommended that surgery be done” if after “less invasive things” plaintiff was still “having pain.” However, Dr. Basch never testified that he had ever, in fact, recommended surgery to plaintiff.

Dr. Simon, a chiropractor, treated plaintiff from November 2008 through October 2009, and referred plaintiff to Dr. Basch and to a pain management specialist. Dr. Simon also referred plaintiff for a magnetic resonance imaging (MRI) study which was completed in January 2009. Dr. Simon examined the MRI films which he explained showed that plaintiff had three cervical disc herniations and one lumbar herniation, as well as a loss of the normal lordotic curvature of the spine. He explained that all these conditions, plus plaintiff's left carpal tunnel syndrome, were permanent injuries caused by the accident.

Dr. Ramundo, a pain management physician, testified that he first examined plaintiff on August 21, 2010, at which time plaintiff complained of pain radiating down her arm, numbness, and radiating back pain. He explained to plaintiff that given the length of time she had tried to address, without success, her pain through chiropractic adjustments and physical therapy, those modalities would likely be ineffective thereafter. Dr. Ramundo then administered epidural injections to plaintiff's spinal area to diminish her pain. He opined that plaintiff's prognosis was “not
good” and that “if she doesn't respond to the injec-
tions, she is looking at spinal surgery.”

Plaintiff's final expert witness was a radiologist, Dr. Brownstein, who reviewed plaintiff's MRI films and confirmed the presence of the herniations on the films. Plaintiff also was permitted to adduce evidence that she had incurred $12,744.00 in medical expenses that were “reasonable and necessary” as a conse-
quence of her injuries.

Defendant's expert, an orthopedic surgeon, ex-
amined plaintiff and reviewed her MRI films. He opined that the MRI films showed no herniations in either the cervical or lumbar spines, but did show significant disc degeneration in those areas unrelated to the accident. He added that he found no objective medical evidence supporting the claim that plaintiff suffered a permanent injury proximately caused by the accident.

During the course of trial, the trial judge denied defendant's motion to strike plaintiff's claim for un-
reimbursed medical expenses of $12,744.00 in excess of the $15,000 personal injury protection (PIP) limit in her automobile insurance policy. The judge deter-
mined that such expenses as exceeded plaintiff's $15,000 PIP limit were not reimbursable and thus could be presented to the jury as part of plaintiff's damage claim.

*3 Following deliberations, the jury returned its verdict finding that plaintiff had, in fact, sustained a permanent injury in the accident and awarding her $459,062.50 for her pain, suffering, disability, impairment and loss of enjoyment of life, as well as $12,744 in medical expenses. Judgment was thereafter entered for plaintiff on the verdict for $506,301.38—a figure that included interest.

II.

Relying largely on Henker v. Prebylowski, 216 N.J.Super. 513 (App.Div.1987), defendant argues that remarks made by plaintiff's counsel during his open-
ning and closing statements to the jury were so “im-
proper and inflammatory” that a new trial is war-
ranted. Because defendant's trial counsel did not ob-
ject at any point to the statements, defendant's appel-
late counsel argues that the failure of the trial judge to have intervened was “plain error.”

Defendant also argues that the verdict is excessive and that the trial judge erred in denying a motion for a new trial. Having reviewed these arguments in light of the record and applicable law, we affirm.

With respect to the comments of plaintiff's counsel, defendant adverts to his reference on opening that defendant “comes out” of a side street, notwithstanding that his line of travel was controlled by a stop sign, and then “doesn't make the turn in time” causing a collision. Defendant argues that because liability was stipulated, the facts attendant upon the accident had “nothing to do” with plaintiff's injuries and only served to inflame the jury.

Defendant adds that plaintiff's counsel, during both his opening and summation, stated that plaintiff “waited four years” for the defendant to “even admit” that he caused the accident, and that “they still don't admit they injured her in any way [sic].” Defendant argues that the latter statement was untrue and that, overall, the comments of plaintiff's counsel amounted to “illegitimate advocacy” warranting a new trial.

Because there was no objection to any of plaintiff's counsel's comments, we review counsel's comments only for plain error. Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 493 (2001). Plain error is error clearly capable of producing an unjust result. R. 2:10–2. The rationale underlying the plain error rule is that a court should not countenance an unjust result because of the oversight of the advocate. Jurman v.
Samuel Braen, Inc., 47 N.J. 586, 591 (1966). If a reviewing court upon canvassing the record harbors reasonable doubt “as to whether the error led the jury to a result it otherwise might not have reached,” a new trial must be ordered. State v. Macon, 57 N.J. 325, 336 (1971); Szczecina v. PV Holding Co., 414 N.J.Super. 173, 184 (App.Div.2010).

In Henker, we reversed a plaintiffs’ verdict and remanded for a new trial because of a host of improprieties by plaintiffs' counsel, including making a “golden rule” argument to the jury, and inviting them to “award damages in the amount that they would want for their own pain and suffering”; by improperly suggesting a formula for the award of damages; and by improperly disparaging defense counsel. Supra, 216 N.J.Super. at 519–20. With respect to the latter, we noted with disapproval counsel's statement that the defense “forced” plaintiffs to trial by “challeng[ing] them on liability” and “challeng[ing] us on our injuries with no evidence.” Id. at 518. We explained that such an argument was improper because there was “no evidence that defendant acted in bad faith in either the liability or damages trial.” Ibid.

Attorneys have broad latitude in making closing statements, but “[s]ummations must be fair and courteous, grounded in the evidence and free from any ‘potential to cause injustice.’ “ Risko, supra, 206 N.J. at 522 (quoting Jackowitz v. Lang, 408 N.J.Super. 495, 505 (App.Div.2009)). Counsel must not say things that would undermine the jury's deliberations. Id. at 522–23. Indeed, “counsel may argue from the evidence any conclusion which a jury is free to arrive at” so long as the language used does not go beyond the bounds of legitimate argument. Spedick v. Murphy, 266 N.J.Super. 573, 590–91 (App.Div.), certif. denied, 134 N.J. 567 (1993). Moreover, “counsel may draw conclusions even if the inferences that the jury are asked to make are improbable, perhaps illogical, erroneous or even absurd.” Ibid. Applying these standards, we find no plain error at trial.

We next turn to defendant's argument that the verdict was excessive. We begin by stating some general principles that guide our analysis. We will not reverse a trial court's decision to deny a motion for a new trial “unless it clearly appears that there was a miscarriage of justice under the law.” R. 2:10–1. That inquiry requires employing a standard of review substantially similar to that used at the trial level, except that the appellate court must afford “due deference” to the trial court's “ ‘feel of the case,' “ with regard to the assessment of intangibles, such as witness credibility. Jastram v. Kruse, 197 N.J. 216, 230 (2008) (quoting Feldman v. Lederle Labs., 97 N.J. 429, 463 (1984)). See also Carrino v. Novotny, 78 N.J. 355, 360 (1979); Baxter v. Fairmont Food Co., 74 N.J. 588, 597–98 (1977); Dolson v. Anastasia, 55 N.J. 2, 6–8 (1969).

Because juries have broad latitude to determine damages, “the standard for granting a new trial... is
necessarily high.” Johnson v. Scaccetti, 192 N.J. 256, 281 (2007). “A trial court should not order a new trial or remit a jury's damages award unless it is so clearly disproportionate to the injury and its sequela that it may be said to shock the judicial conscience.” Ibid. A court “must be ‘clearly and convincingly’ persuaded that it would be manifestly unjust to sustain the award.” Id. at 281 (citing R. 4:49–1(a)).

In determining whether the denial of remittitur or a new trial was proper, this court is bound by the same standards as a trial court. Jastram, supra, 197 N.J. at 228–231, 235; Baxter, supra, 74 N.J. at 598; McRae v. St. Michael's Med. Ctr., 349 N.J.Super. 583, 597 (App.Div.2002). Unless a jury's award of damages is so disproportionate to the injury and resulting disability, the trial judge should not disturb the award. Jastram, supra, 197 N.J. at 230; Baxter, supra, 74 N.J. at 595. Thus, to qualify for remittitur or a new trial, as we have noted, “the jury's award must shock the judicial conscience.” McRae, supra, 349 N.J.Super. at 597 (citing Baxter, supra, 74 N.J. at 596); Ming Yu He v. Miller, 207 N.J. 230, 252 (2011).

Here, the trial judge's ruling is clearly supported by the record, and does not amount to an abuse of discretion. The jury verdict in this case did not constitute a miscarriage of justice nor did the jury's award of damages “shock the judicial conscience.” McRae, supra, 349 N.J.Super. at 597. Here, “the evidence in support of the jury verdict [was] not insufficient[,]” and the trial judge's decision to deny the motion for a new trial, or in the alternative, a remittitur, should not be disturbed. Crego v. Carp, 295 N.J.Super. 565, 572 (App.Div.1996), certif. denied, 149 N.J. 34 (1997); Amaru v. Stratton, 209 N.J.Super. 1, 7 (App.Div.1985).

We note that plaintiff's evidence showed that a physically active forty-year-old woman without any impairments sustained three cervical disc herniations, a lumbar disc herniation, ankle and hip injuries and carpal tunnel syndrome in the accident. Plaintiff sought chiropractic treatment and physical therapy to improve her condition and reduce her pain. She then underwent epidural injections when the more conservative modalities proved ineffective in reducing her pain and restrictions, and, according to the testimony of her orthopedic surgeon, “would need” a discectomy and fusion as well as arthroscopic surgery as surgical alternatives to her prior treatments. Plaintiff and other lay witnesses testified to the limitations and restrictions plaintiff now faces as a consequence of her injuries, and the impact these limitations have had upon her life.

FN3. The testimony respecting surgery was, as we noted earlier, not objected to by defendant.


Assigning a monetary award to pain and suffering, however, is difficult because that kind of harm is not easily quantified. Caldwell v. Haynes, 136 N.J. 422, 442 (1994). Nonetheless, our system of justice presumes the correctness of a jury verdict, Baxter, supra, 74 N.J. at 598, which is only overcome when there is clear and convincing evidence of a miscarriage of justice. Rule 4:49–1(a). In other words, juries are “given wide latitude in which to operate.” Johnson, supra, 192 N.J. at 280.

Thus, a trial court should only disturb a jury's damage award when it is “so disproportionate to the injury and resulting disability as to shock the conscience” and when to sustain the award would be “manifestly unjust.” Baxter, supra, 74 N.J. at 604 (internal quotation marks omitted). The trial judge should not substitute his or her judgment for that of the
jury, Johnson, supra, 192 N.J. at 281, and the verdict is to be set aside only when it is “wide of the mark” and pervaded by a sense of “wrongness...” Ibid. (internal quotation marks omitted). Given plaintiff's evidence at trial, which the jury was clearly entitled to accept, we do not find the verdict to be either “wide of the mark” or pervaded by a sense of wrongness.

III.

We next address defendant's claim that the trial judge erred in permitting the jury to consider an “economic loss” $12,744 in medical costs incurred by plaintiff over the amount of the $15,000 PIP limit in her automobile insurance policy.

The statutes governing this question are N.J.S.A. 39:6A–2(k) (“Economic loss” is defined as “uncompensated loss of income or property, or other uncompensated expenses, including, but not limited to, medical expenses.”); and N.J.S.A. 39:6A–12 (stating that evidence of amounts collectible or paid to an injured person under a standard automobile insurance policy, or for medical expense benefits under a basic automobile insurance policy is inadmissible in a civil action for recovery of damages for bodily injury, but that “[n]othing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss sustained by the injured party”). In Wise v. Marienski, 425 N.J.Super. 110, 126 (Law Div. 2012), the court held that N.J.S.A. 39:6A–12 does not preclude recovery of medical expenses beyond those collectible or paid under a statutory PIP plan, and noted

[ it is incongruous that a standard policyholder, who had chosen a lower option provided for by the Legislature, and accepted the risk of indebtedness to medical providers, would be prohibited from entering his or her expenses into evidence as well. There is little evidence that the

Legislature intended to make such a distinction between those who can afford maximum coverage and those who cannot... [ T]he provision for lesser amounts of coverage was to enable lower-income drivers to enter the no-fault system, not have them take on potentially insurmountable medical bills in the event of a serious accident, with no means of recovery.

[Ibid.]

We agree. We perceive no error in the trial court's denial of defendant's motion to restrict these proofs.

The remaining arguments raised by defendant, as well as plaintiff's arguments on the cross-appeal, are without sufficient merit to warrant discussion in a written opinion. R. 2:11–3(e)(1)(E).

Affirmed.

Kimble v. Lavista

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Superior Court of New Jersey, Law Division.
Bergen County
Jung Hwan KIM, Plaintiff,
v.
Jong KIM, Defendant.
No. BER-L-5471-08.
May 24, 2010.

Opinion


Menelaos W. Toskos, J.S.C.
The Court presently has before it a motion to bar plaintiff's use of medical bills in a scheduled trial, the genesis of which was an accident which occurred on August 13, 2007. The police were not called to the scene. It was not until one week later that plaintiff contacted the defendant and both agreed to meet at the police station to file a report. Although defendant's moving papers characterize the accident as “minor”, to date plaintiff accrued $48,358.87 in medical expenses. Following payments made under plaintiff's PIP coverage, there remains approximately $38,004 in unpaid bills. Defendant brings this motion pursuant to N.J.S.A. 39:6A-12 to bar admission into evidence of any of the unpaid bills. That statute provides in part:

... evidence of the amounts collectible or paid under a standard automobile insurance policy pursuant to sections 4 and 10 ... (N.J.S.A. 39:6A-4 and 39:6A-10), amounts collectible are paid for medical expense benefits under a basic automobile insurance policy pursuant to ... N.J.S.A. 39:6A-3.1 and amounts collectible are paid for benefits under a special automobile insurance policy pursuant to N.J.S.A. 39:6A-3.3, to an injured person, including the amounts of any deductibles, copayments or exclusions, including exclusions pursuant to ... N.J.S.A. 39:6A-4.3, otherwise compensated as inadmissible in a civil action for recovery of damages for bodily injury by such injured person.

The court shall instruct the jury that ... the jury shall not speculate as to the amount of the medical expense benefits paid or payable by an automobile insurer under personal injury protection coverage payable under a standard automobile insurance policy pursuant to ... N.J.S.A. 39:6A-4.

Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss sustained by the injury party.

There is no question that an economic loss includes medical expenses. N.J.S.A. 39:6A-2(k). Therefore, plaintiff argues that it should be entitled to pursue payment for the unpaid medical bills against the defendant.
New Jersey requires that every owner of an automobile registered or principally garaged in this State, must maintain either a standard or basic automobile liability insurance policy. Our State's statutory framework requires certain minimum limits of coverage for bodily injury, death or property damage. Plaintiff purchased the standard policy required under N.J.S.A. 39:6A-4. Pursuant to N.J.S.A. 39:6A-4.3 “with respect to personal injury protection coverage provided on an automobile in accordance with ... N.J.S.A. 39:6A-4 ... the automobile insurer shall provide the following coverage options:”. Among the options listed are those in subsection e from which plaintiff chose to pay for $15,000 in PIP coverage. Plaintiff, therefore, seeks to collect the medical bills that exceeded the $15,000 PIP coverage from the defendant tortfeasor. Defendant argues that under the statutory framework and case law, the bills are not “collectible”.

Pursuant to N.J.S.A. 39:6A-4, a standard automobile policy automatically includes PIP coverage of $250,000. N.J.S.A. 39:6A-4.3 offers various coverage options to a person purchasing a standard policy which will reduce premium payments. The coverage options that can be chosen range from $150,000 to $15,000 per person per accident.

As previously stated under N.J.S.A. 39:6A-12 an amount “collectible” or paid under a standard automobile policy, “including exclusions pursuant to ...” N.J.S.A. 39:6A-4.3 are inadmissible in a civil action. Under the present New Jersey statutory no-fault scheme, it is the insured who determines the premium by selecting from the options available. Roig v. Kelsey, 135 N.J. 500, 514 (1994). In Roig, the Supreme Court dealt with deductibles that had not been compensated which the insured sought to recover from the tortfeasor. In that regard, Justice Garibaldi stated the following: If an insured chooses a $1,000 or $2,500 deductible in exchange for a premium reduction, the Legislature, clearly, did not intend that the insured would be able to sue the tortfeasor for the below-deductibles. Under that logic, insureds choosing the highest deductible would have the best deal: the lowest premium and the right to recover the excluded expenses in court against the tortfeasor.

To allow a claim from the deductible and the copayment would be antithetical to the entire No-Fault statutory scheme. That kind of recovery could be available only if the Legislature reinstituted a fault-based system.

We are satisfied that the Legislature never intended to leave the door open for fault-based suits when enacting the No-Fault Law.

The Roig statutory construction continued to be followed even after the adoption of the Automobile Insurance Cost Reduction Act of 1998 (AICRA). In Daloia v. Georges, 372 N.J. Super. 246 (A.D. 2004), the Appellate Division noted that the Legislature amended the definition of economic loss under N.J.S.A. 39:6A-2(k) to include “medical expenses”. However, relying on the Roig analysis, it still found that PIP co-payments and deductibles were not recoverable against the tortfeasor.

Under N.J.S.A. 39:6A-12 only uncompensated economic losses may be recovered. An insured's option for lower premiums is a choice to forego coverage for medical expenses which would be eligible for compensation. Furthermore, it is clear that these amounts are “collectible” and, therefore, compensable under the standard policy available and are only excluded from PIP coverage pursuant to the option chosen under N.J.S.A. 39:6A-4.3. Consequently, in this instance, the plaintiff cannot recover economic damages against the tortfeasor that would have been collectible as

This is not a situation in which the maximum amount of PIP coverage available to an insured is $15,000. Rather, this is a situation in which the insured chose to reduce the amount of medical bills the insured could collect in return for lower premiums.

“A consumer could elect certain automobile coverages which would provide greater or lesser rights. The trade-off was in premiums paid. Greater rights required higher premiums; lesser rights generated lower premiums. Roig, supra, 135 N.J. at 506-07, 641 A.2d 248.”

Furthermore, our courts have recognized that the No-Fault statutory framework does require an insured to be responsible for certain medical payments.

“by mandating the $250 deductible and the twenty-percent copayment, the Legislature guaranteed that in every automobile accident, some medical expenses would not be paid under PIP. For those below-deductibles and copayments, the insured was responsible, either through the insured's other insurance coverage, or, if the insured had no other insurance coverage, .. out of the insured's own pocket.” Id. at 509, 641 A.2d 248.

Had the plaintiff not chosen to trade off lower premiums for PIP coverage of $15,000, he could have received medical payments up to the maximum permitted by the standard automobile insurance policy of $250,000. To allow plaintiff to recover these medical bills would be contrary to the purpose of the legislative policy. The courts have consistently and emphatically insisted that the overall purpose of the various automobile insurance laws has been to limit third-party claims in favor of a system that provides a tradeoff: lower premiums and faster payments of claims in exchange for the surrender of the right to sue a tortfeasor. Gambino v. Royal Globe Ins. Cos., 86 N.J. 100, 105-06, 429 A.2d 1039, 1041-42 (1981); Mody v. Brooks, 339 N.J. Super. 392, 397, 772 A.2d 21, 24-25 (2001); Rojas v. DePaolo, 357 N.J. Super. 115, 119, 813 A.2d 1288, 1290 (Law Div. 2002). Patterson v. Adventure Trails, 364 N.J. Super. 444, 448-49 (Law Div. 2003).

Plaintiff purchased a standard automobile policy pursuant to N.J.S.A. 39:6A-4 under which $250,000 in PIP payments were collectible. Plaintiff chose to elect to exclude a portion of those medical payments in return for lower premiums paid. Relying on the holdings in Roig and D'alioia, this Court determines that the medical bills which plaintiff seeks to recover from the tortfeasor, which are less than $250,000 but exceed the $15,000 PIP coverage plaintiff chose, are barred from being introduced at the time of trial. Defendant's motion is, therefore, granted.

Kim v. Kim
2010 WL 2220599 (N.J.Super.L. ) (Trial Order )
Customer brought slip and fall action against grocery store. The Superior Court, Law Division, Union County, entered judgment for customer, and appeal was taken. The Superior Court, Appellate Division, Wefing, J.A.D., held that trial court committed reversible error when it instructed jury that the most it could award personal injury plaintiff, whose medical expenses totaled $106,006.67, was $29,900.63, which was the amount not covered by insurance; statute required that adjustment in plaintiff's ultimate recovery be made by court after jury had considered the full amount incurred. N.J.S.A. 2A:15-97.

**1392*100 Christopher L. Musmanno, Chatham, for plaintiffs-appellants (Malooft, Lebowitz, Connahan & Oleske, attorneys; Mr. Musmanno, on the brief).

Paul Spina, for defendant-respondent (Paul Seligman, Roseland, attorney; Mr. Seligman and Manuel J. Almeida, on the brief).

**1392*100 Before Judges BAIME, WEFING and BILDER.

The opinion of the court was delivered by

WEFING, J.A.D.

Plaintiff appeals from a judgment for $17,500 entered in her favor on April 30, 1997. We agree with her contention that the trial court erred in its instructions to the jury and we reverse.

Plaintiff Ilda Dias and her husband Manuel went to A.J. Seabra's Supermarket on Lafayette Street in Newark, New Jersey on January 25, 1996. The day
was clear and cold. There had been a large snow storm
two weeks earlier and it had rained the previous day.
On the day in question, the temperature had not gotten
above freezing.

*101* When they finished their marketing and left
the store, Mr. Dias told his wife to wait with the
shopping cart while he went to retrieve their car from
the parking lot. He pulled up to the curb and began to
load the parcels. He told Mrs. Dias to get into the car.
She went to do so and slipped and fell, apparently on a
patch of ice that had accumulated on the sidewalk.
Both Mr. and Mrs. Dias, and John Santos, a store
employee who came to her aid, testified that water was
dripping from an overhang on the store's roof onto the
sidewalk. Santos testified that he had, sometime earlier,
spread salt on the ice which had formed.

Mrs. Dias suffered a *comminuted fracture* of her
right knee at the tibial plateau. She underwent surgery
at St. James Hospital to repair the fracture; her hos-
pital stay, however, was extended for nearly two
months when she developed an infection. After her
release from the hospital, she had a second surgery to
remove the screws that had been used in the first
surgery. She was left with a limp and required the aid
of a cane. The parties stipulated to her medical ex-

cpenses of $106,006.67; of that amount, $29,900.63
was not covered by insurance.

We are satisfied that when the trial court told the
jury that the most it could award plaintiffs for these
medical bills was $29,900.63, rather than
$106,006.67, it erred and that that error had the ca-
pacity to prejudice the plaintiffs.

*N.J.S.A. 2A:15-97* provides in pertinent part:

In any civil action brought for personal injury ... if
a plaintiff receives ... benefits for the injuries ... from
any other source other than a joint tortfeasor, the
benefits *102* ... shall be disclosed to the court and the
amount thereof which duplicates any benefit con-
tained in the award shall be deducted from any award
recovered by the plaintiff....

The purpose of the statute is clear: to prevent a
double recovery, in excess of a party's actual loss.

**1393** *Adamson v. Chiovaro, 308 N.J.Super. 70,
“R” Us, Inc., 282 N.J.Super. 569, 584, 660 A.2d 1236
(App.Div.), certif. denied, 142 N.J. 574, 667 A.2d 191

We consider the procedure contemplated by the
statute to be equally clear. The statute places no re-
striction on a party introducing, for the jury's consid-
eration, evidence of the total amount of medical bills
incurred. Any required adjustment in a party's ultimate
recovery is to be made by the court, after the jury has
considered the full amount incurred. *Thomas v. Toys
“R” Us, Inc., supra,* is an example of the correct
methodology. In that case the trial court, after return of
the jury's verdict, modified the sums awarded by the
jury, which were based on total losses, not just un-
reimbursed losses.

The Legislature chose when it enacted *N.J.S.A.
2A:15-97* to adopt the procedure of post-verdict
modification, rather than simply declaring that evi-
dence of such reimbursed expenses would be inad-
missible, the procedure which it had earlier selected
for Personal Injury Protection benefits, *N.J.S.A. 39:6A-12*. We are not free to disregard the distinction the Legislature has so clearly drawn.

We are satisfied that this error did have the capacity to prejudice the jury's fair consideration of plaintiffs' injuries. We reach this conclusion in light of the fact that plaintiffs' counsel opened to the jury on the basis that his clients' medical expenses were in excess of $106,000. Although he tried, in his summation, after the trial court made its ruling, to explain the disparity, we have little doubt that the jury could well have been left with the impression that plaintiffs had been improperly seeking more than they were entitled to in terms of their medical expenses. Such an impression was unwarranted.

*103* The court's error goes only to the amount of damages plaintiffs are entitled to receive. Since it does not affect the verdict on liability, the new trial shall be on damages only.

Reversed and remanded for further proceedings.

Dias v. A.J. Seabra's Supermarket
310 N.J.Super. 99, 707 A.2d 1391

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Superior Court of New Jersey, Appellate Division.
COUNTY OF BERGEN EMPLOYEE BENEFIT PLAN and the county of Bergen, Plaintiffs-Respondents,
v.


Background: County brought action against administrator of self-insured benefits plan for county employees and subcontractor hired by administrator to handle subrogation issues alleging breach of contract, breach of fiduciary duty, and negligence in failing to pursue county's claimed right of subrogation to recover from third-party tortfeasors. The Superior Court, Law Division, Bergen County, denied defendants' motion to dismiss. Defendants appealed.

Holding: The Superior Court, Appellate Division, Parrillo, J.A.D., held that statutory collateral source rule precluded subrogation or reimbursement by county of amount county paid to insureds for healthcare expenses.

Reversed.

West Headnotes

[1] Damages 115

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k15 k. Nature and theory of compensation. Most Cited Cases

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k64 k. Reduction of loss by insurance. Most Cited Cases

The purpose the statutory collateral source rule is twofold: (1) eliminate the double recovery to plaintiffs that flowed from the common-law collateral source rule and (2) allocate the benefit of that change to liability insurers. N.J.S.A. 2A:15-97.

[2] Insurance 217

217 Insurance
217XXX Recovery of Payments by Insurer

The traditional notion of subrogation allows for substitution of a health insurer in place of the plaintiff insured to whose rights he or she succeeds in relation to the debt and gives to the substitute all the rights, priorities, remedies, liens, and securities of the person for whom he or she is substituted.

Because the damages that the injured insured may recover in a personal injury action do not include amounts paid by collateral sources, the third-party health insurers that paid those benefits have no right of recovery or subrogation from their insureds' personal injury awards or settlements. N.J.S.A. 2A:15-97.

A subrogee has no better rights than its subrogor.

A subrogee has no better rights than its subrogor.

Because the damages that the injured insured may recover in a personal injury action do not include amounts paid by collateral sources, the third-party health insurers that paid those benefits have no right of recovery or subrogation from their insureds' personal injury awards or settlements. N.J.S.A. 2A:15-97.

A subrogee has no better rights than its subrogor.
Statutory collateral source rule's broad language is only curtailed by its own statutory exceptions that include workers' compensation benefits and life insurance proceeds or when necessitated by an actual conflict with other statutory schemes that either preempt its operation by law or evince a countervailing legislative policy. N.J.S.A. 2A:15-97.

[6] Insurance 217 3502

Insurance 217 3519(2)

Statutory collateral source rule precluded subrogation or reimbursement by county of amount county paid to insureds under county's self-insured benefits plan for county employees for health care expenses; county's payment constituted benefits under the statute. N.J.S.A. 2A:15-97.

[7] Insurance 217 1117(1)

Although ERISA preempts a state law that “relates to” an employee welfare plan, state laws that regulate insurance companies are saved from preemption. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[8] Damages 115 59

There is no evidence to suggest that the Legislature intended to favor public entities under statutory collateral source rule or that it was not intended to apply to amounts received by a tort plaintiff from public sources; the plain language of statute states that it applies to “benefits” received by a tort plaintiff from “any” source, and, unlike workers' compensation
benefits and the proceeds from a life insurance policy, amounts received from public sources, such as a self-funded county health plan, are not excepted from the statute. N.J.S.A. 2A:15-97.

**1232** Edward S. Wardell, Haddonfield, argued the cause for appellant Horizon Blue Cross Blue Shield of New Jersey (Wardell, Craig, Annin and Baxter, LLP, attorneys; Mr. Wardell and Ekta Patel, on the brief).

Lorin M. Subar (Sumner, Schick and Pace) of the Texas bar, admitted pro hac vice, argued the cause for appellants ACS Recovery Services, Inc., and Primax Recovery Services, Inc. (McCarter & English, LLP, attorneys; David J. Cooner, of counsel; Mr. Subar and Natalie S. Watson, Newark, on the brief).

Leonardo M. Tamburello argued the cause for respondents County of Bergen Employee Benefit Plan and the County of Bergen (Kalison, McBride, Jackson & Hetzel, PC, attorneys; Mr. Tamburello, of counsel; Mr. Tamburello and Rebecca M. Szec, on the brief).

Before Judges CARCHMAN, PARRILLO and LIHOTZ.

The opinion of the court was delivered by

PARRILLO, J.A.D.

*128* We granted leave to appeal to determine whether plaintiffs' claims against defendants, for failure to pursue subrogation actions*129* to recover medical expenses plaintiffs paid to certain insureds who brought personal injury claims against third-party tortfeasors, are barred by the Collateral Source Rule, N.J.S.A. 2A:15-97 (Section 97). For reasons that follow, we conclude that the trial court erred in denying defendants' Rule 4:6-2(e) motion to dismiss plaintiffs' complaint and therefore reverse.

Plaintiff Bergen County (County) is a public entity of the State which, pursuant to N.J.S.A.

40A:10-6(e), established plaintiff County of Bergen Employee Benefit Plan (Plan), a self-insured benefits plan for its employees' and their dependents' healthcare. Effective July 1, 2006, defendant Horizon Blue Cross Blue Shield of New Jersey (Horizon) and the County entered into an Administrative Services Agreement (ASA) pursuant to which Horizon became the Plan's Administrator. In this role, Horizon provided claims processing, adjudication, and other services related to the Plan. Although Horizon was the Plan's Administrator, it subcontracted subrogation issues to defendants Affiliated Computer Services, Inc. (ACS) and Primax Recoveries, Inc. (Primax) (jointly ACS/Primax). The Plan's insuring agreement contains a provision permitting it to recover amounts paid to its insureds as a result of third-party negligence:

FN1. Prior to Horizon, defendant Insurance Design Administrators (IDA) acted as the Plan administrator from July 1, 1995 to June 30, 2006. Although a defendant in this action, IDA did not move for dismissal of plaintiffs' complaint and did not file a brief in this appeal. References in this opinion to defendants do not include IDA unless otherwise noted.

If you or your dependent incur medical expenses as a result of the actions of a Third Party (anyone other than you) or the Plan and that Plan has made payment for those expenses, the Plan has the right to recoup those payments.

This means that if your medical expenses are reimbursed by a Third Party, satisfied judgment or other means, you are required to return any health benefits paid for illness, Accidental Injury, Biologically-based Mental Illness and Non-Biologically Based Medical Illness or substance abuse to the Plan

....
This repayment agreement will be binding whether the payment received from the Third Party is the result of a legal judgment, arbitration award, a compromise settlement, or any other arrangement, or whether the Third party has admitted liability for the payment.

The instant lawsuit arose out of plaintiffs' efforts to seek reimbursement for medical expenses they paid under the Plan on behalf of an employee, Andres Tineos. In August of 2002, his wife, Wanda, became pregnant and advised her physician that she was predisposed to bear a child inflicted with myotubular myopathy (MTM), “a congenital muscular disease which causes severe physical disability.” Wanda underwent an amniocentesis procedure to detect MTM and other abnormalities. Justin was born on April 7, 2003, with MTM.

In 2004, the Tineos filed a medical malpractice lawsuit, alleging that due to the negligence of physicians, laboratory workers, and possibly others, the test samples were either not tested or reported to be false-negative for MTM. In February 2007, a jury returned a verdict for $28,000,000, and the case was settled, post-judgment, for $18,000,000.

The Plan paid approximately $575,701.91 in net benefits associated with Justin Tineos' care. In December 2003, the Tineos' inquired of Horizon and IDA as to any lien they intended to pursue on plaintiffs' behalf, on the Tineos' recovery. Horizon forwarded counsel's request to its subrogation consultant, ACS/Primax. In February and May 2006, ACS/Primax advised the Tineos' counsel that it would not seek subrogation against any recovery from the medical malpractice litigation.

In 2004, the Tineos filed a medical malpractice lawsuit, alleging that due to the negligence of physicians, laboratory workers, and possibly others, the test samples were either not tested or reported to be false-negative for MTM. In February 2007, a jury returned a verdict for $28,000,000, and the case was settled, post-judgment, for $18,000,000.

Here, the essential issue is whether the Collateral Source Rule bars plaintiffs, who expended funds on behalf of their insured, to recoup those payments through subrogation or contract reimbursement when the insured recovers against a tortfeasor in a post-verdict settlement. Statutory interpretation is a question of law for the court, subject to independent review. In re Liquidation of Integrity Ins. Co., 193 N.J. 811, 823 (2014).

*132 Ultimately, "our goal is to interpret the statute consistent with the intent of the Legislature." Oberhand v. Dir., Div. of Taxation, 193 N.J. 558, 568, 940 A.2d 1202 (2008). Under well-settled rules of statutory construction, we give a statute's "words and phrases" their usual and ordinary meaning, N.J.S.A. 1:1-1, because the words of a statute ordinarily provide the most reliable indication of legislative intent. We also construe the language of the statute in light of the entire statute and the overall statutory scheme. Burnett v. County of Bergen, 198 N.J. 408, 421, 968 A.2d 1151 (2009) (quoting Bedford v. Riello, 195 N.J. 210, 224, 948 A.2d 1272 (2008)). We also interpret the statutory language in context, examining other legislation on the same subject to determine the Legislature's probable intent. See American Fire and Cas. Co. v. New Jersey Div. of Taxation, 189 N.J. 65, 81, 912 A.2d 126 (2006); Lloyd v. Vermeulen, 22 N.J. 200, 204, 125 A.2d 393 (1956). When the language in a statute "is clear and unambiguous, and susceptible to only one interpretation," we presume the Legislature meant what it said and that the plain meaning governs. Burnett, supra, 198 N.J. at 421, 968 A.2d 1151 (quoting Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522, 842 A.2d 156 (2004)). However, "if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.' " DiProspero v. Penn, 183 N.J. 477, 492-93, 874 A.2d 1039 (2005) (quoting Cherry Hill Manor Assocs. v.

Faugno, 182 N.J. 64, 75, 861 A.2d 123 (2004) (internal citations omitted)). Courts "may also resort to extrinsic evidence if a plain reading of the statute leads to an absurd result." Id. at 493, 874 A.2d 1039.

Governed by these principles, we now turn to the statute in question. Prior to 1987, New Jersey followed the common-law collateral source rule, which prohibited a tortfeasor from reducing payment of a tort judgment by the amount of money received by an injured party from other sources. In effect, the common-law collateral source rule "allow[ed] an injured party to recover the value of medical treatment from a culpable party, irrespective of *133 payment of actual medical expenses by the injured party's insurance carrier." Perreira, supra, 169 N.J. at 406, 778 A.2d 429 (internal citation omitted).

In 1987, New Jersey abrogated the common-law rule by enacting N.J.S.A. 2A:15-97, which provides:

In any civil action brought for personal injury or death, ... if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable. Any party to the action shall be permitted to introduce evidence regarding any of the matters described in this act.

[1] Section 97's purpose is twofold: "to eliminate the double recovery to plaintiffs that flowed from the

common-law collateral source rule and to allocate the benefit of that change to liability carriers.” Perreira, supra, 169 N.J. at 403, 778 A.2d 429. The latter goal was clearly the containment of spiraling liability insurance costs. Id. at 410, 778 A.2d 429. By reducing a plaintiff's tort judgment by the amount of benefits already received (with limited statutory exceptions not here relevant), the Legislature intended to reduce the burden to liability carriers, rather than health insurers. Id. at 410-11, 778 A.2d 429. “As the legislative history reveals, the choice was made to favor liability carriers.” Id. at 411, 778 A.2d 429. See also Kiss v. Jacob, 138 N.J. 278, 282, 650 A.2d 336 (1994) (stating that intent of the Legislature was to control spiraling automobile-insurance costs); Lusby v. Hitchner, 273 N.J.Super. 578, 591, 642 A.2d 1055 (App.Div.1994) (stating that legislative determination “was apparently not only to prevent plaintiffs from obtaining a double recovery but also, except where [personal injury protection] payments are involved, to shift the burden, at least to some extent, from the liability and casualty insurance industry to health and disability third-party payers.”). Thus, in enacting Section 97, “the Legislature eliminated double recovery to plaintiffs, reduced the burden on the tortfeasors' liability carrier and left health insurers in the same position as they were prior to the enactment of N.J.S.A. 2A:15-97.” Perreira, supra, 169 N.J. at 411, 778 A.2d 429.

In Perreira, supra, the Court held that Section 97 barred the plaintiffs' health care carrier, Oxford Health Plans, from recovering medical expenses by reimbursement or subrogation. Id. at 414-16, 778 A.2d 429. Like the Plan in this case, the Oxford policies contained a reimbursement provision which stated that Oxford could recover expended health care costs from a settlement or judgment against the tortfeasor. Id. at 414, 778 A.2d 429. That policy provision was pursuant to the Insurance Commissioner's authorization, via regulation, of subrogation and reimbursement provisions in health insurance contracts. Id. at 416, 778 A.2d 429. Despite the presence of this provision in the insurance contract, the Court nevertheless concluded that Section 97 eliminated double recoveries by the beneficiary and required a court to deduct from any tort judgment any amount received by a plaintiff from a collateral source, other than workers compensation and life insurance. Id. at 409, 778 A.2d 429. Because the plan beneficiaries could not recover the medical expenses from the tortfeasor, the health care carrier had no right to subrogation or contract reimbursement. Id. at 418, 778 A.2d 429. Moreover, “[i]n allocating the benefit of no-double-recovery to liability carriers, N.J.S.A. 2A:15-97, in turn, barred the Commissioner of Insurance from enacting a different allocation scheme.” Ibid.

[2][3][4] With the nullification of the contractual undertaking, which would have allowed direct recovery against its insured, plaintiffs instead rely on the traditional notion of subrogation, which “substitutes a health insurer in place of the plaintiff insured to whose rights he or she succeeds in relation to the debt and gives to the substitute all the rights, priorities, remedies, liens, and securities of the person for whom he or she is substituted[.]” **1236 Id. at 408 n. 1, 778 A.2d 429 (internal citations omitted). Thus, plaintiffs, as subrogees, are subrogated to the rights of the Tineos, as subrogors, to recover sums the Plan paid for healthcare on their behalf. However, a subrogee has no better rights than its subrogor. M & B Apartments, Inc. v. Teitler, 328 N.J.Super. 265, 273, 745 A.2d 586 (App.Div.), certif. denied, 165 N.J. 133, 754 A.2d 1210 (2000); Hanover Ins. Co. v. Borough of Atl. Highlands, 310 N.J.Super. 599, 603, 709 A.2d 328 (Law Div.1997), aff'd, 310 N.J.Super. 568, 709 A.2d 236 (App.Div.), certif. denied, 156 N.J. 383, 718 A.2d 1212 (1998); Mayfair Fabrics v. Henley, 101 N.J.Super. 363, 368, 244 A.2d 344 (Law Div.1968). Because the damages that the injured insured may recover in a personal injury action do not include amounts paid by collateral sources, the third-party health insurers that paid those benefits have no right of recovery or subrogation from their insureds' personal injury awards or settlements. Cf. Standard Accident Ins. Co. v. Pellecchia, 15 N.J. 162, 172, 104 A.2d 288

[5] Section 97's broad language is only curtailed by its own statutory exceptions (workers' compensation benefits and life insurance proceeds), which are not applicable here, or when necessitated by an actual conflict with other statutory schemes that either preempt its operation by law or evince a countervailing legislative policy. For example, in Lusby, supra, we determined that “benefits” under Section 97 do not include reimbursable benefits paid by Medicaid, in large part due to the conflict between Section 97 and the Medicaid lien and reimbursement statute, N.J.S.A. 30:4D-7.1 (Section 7.1).\footnote{273 N.J.Super. at 590-92, 642 A.2d 1055.} We held that because a “state's Medicaid lien and reimbursement provisions are required by federal law, principles of supremacy and preemption would ... apply.” \textit{Id.} at 592, 642 A.2d 1055. A state *136 statute “could not, even if that were its intent, defeat the federal reimbursement scheme by the simple expedient of making medical expenses already paid by Medicaid deductible from a tort recovery against the tortfeasor.” \textit{Ibid.} For this reason, Section 97 yielded to Section 7.1.

\footnote{2. Section 7.1(b) provides:}

When a recipient ... brings an action for damages against a third party, written notice shall be given to the Director of the Division of Medical Assistance and Health Services. In addition, every recipient

... shall promptly notify the division of any recovery from a third party \textit{and shall immediately reimburse the division in full from the proceeds of any settlement, judgment, or other recovery in any action or claim initiated against any such third party}.\footnote{[ (Emphasis added).]}

In \textit{Lusby}, we also noted that neither of Section 97's twin purposes-preventing double recovery and reducing the cost of liability coverage-are realized by including Medicaid as a “benefit” under its provisions. \textit{Id.} at 591, 642 A.2d 1055. Applying the analogous holding of \textit{Marmorino v. Housing Authority of Newark}, 189 N.J.Super. 538, 461 A.2d 171 (Law Div.1983)\footnote{3. In \textit{Marmorino, supra}, the Law Division held that the collateral source rule of the Tort Claims Act (TCA) did not apply to Medicaid payments. 189 N.J.Super. at 541-42, 461 A.2d 171. In language very similar to Section 97, the TCA requires a deduction from a plaintiff's recovery of duplicative benefits received “from a policy or policies of insurance or any other source other than a joint tortfeasor...” \textit{N.J.S.A.} 59:9-2(e). The court held that the TCA did not apply to Medicaid payments because (1) plaintiff would not receive double recovery due to the Medicaid reimbursement rule; and (2) the Legislature did not intend to benefit commercial insurance companies at the expense of publicly-funded Medicaid. \textit{Marmorino, supra}, 189 N.J.Super. at 542, 461 A.2d 171.}

FN3. In \textit{Marmorino, supra}, the Law Division held that the collateral source rule of the Tort Claims Act (TCA) did not apply to Medicaid payments. 189 N.J.Super. at 541-42, 461 A.2d 171. In language very similar to Section 97, the TCA requires a deduction from a plaintiff's recovery of duplicative benefits received “from a policy or policies of insurance or any other source other than a joint tortfeasor...” \textit{N.J.S.A.} 59:9-2(e). The court held that the TCA did not apply to Medicaid payments because (1) plaintiff would not receive double recovery due to the Medicaid reimbursement rule; and (2) the Legislature did not intend to benefit commercial insurance companies at the expense of publicly-funded Medicaid. \textit{Marmorino, supra}, 189 N.J.Super. at 542, 461 A.2d 171.

Likewise, in \textit{Kiss, supra}, the Court found that “‘benefits[,]’ as used in [Section 97] [does not] include the proceeds of a plaintiff's settlement with a defendant later found to bear no liability.” 138 N.J. at 281-82, 650 A.2d 336. This is because of the “awkward” relationship between Section 97 and \textit{N.J.S.A.} 2A:15-5.2 (Section 5.2), New Jersey's comparative negligence law, under which “the trier of fact would determine not only the full value of the personal-injury
plaintiff's damages but also the extent, in the form of a percentage, of each party's causative negligence.” Kiss, supra, 138 N.J. at 283-84, 650 A.2d 336. If “benefits” includes a settlement from a defendant later found to be not at fault, a defendant later found to be one-hundred percent liable for the plaintiff's injuries could theoretically pay nothing in damages. This would violate the basic tenet of Section 5.2, that “‘[e]ach tortfeasor is liable for the same percentage of negligence found attributable to him.’” Id. at 284, 650 A.2d 336 (quoting Rogers v. Spady, 147 N.J.Super. 274, 277, 371 A.2d 285 (App.Div.1977)). Therefore, the Kiss Court allowed a limited exception to Section 97, rather than contravene Section 5.2. Id. at 283-84, 650 A.2d 336.

[6] Here, of course, there is neither a statutory exception nor conflict necessitating an exception to the Collateral Source Rule. Undoubtedly, plaintiffs' payment to the Tineos in the amount of $575,701.91 for Justin's healthcare constitutes “benefits” under Section 97 and is neither exempted workers' compensation benefits nor the proceeds from a life insurance policy. FN4 That amount is, therefore, not recoverable through subrogation or reimbursement.

FN4. The Legislature intended that “benefits” under Section 97 were to include “insurance-type benefits[,]” such as life-or health-insurance policies, social security, welfare payments, and pension benefits. Kiss, supra, 138 N.J. at 282, 650 A.2d 336 (1994) (citing Statement to Senate Bill No. 2708 (Nov. 23, 1987)).

[7] Nor is there any conflict between Section 97 and any other statutory provision which would compel exclusion from the Collateral Source Rule's proscription. Indeed, plaintiffs acknowledge as much, but essentially argue that there is an implicit exemption for a self-insured municipality. FN5 Contrary to plaintiffs' argument, *138 nothing in Perreira, supra, suggests the rule applies only to non-taxpayer-funded health insurers. Simply put, there is no statutory exception for a self-insured municipality. To the contrary, Section 97 draws no distinction between a publicly-funded payment source and a private, for-profit health insurer.


**1238** Plaintiffs' contrary argument relies heavily on policy. In this regard, plaintiffs contend that “public entities have received historically preferential treatment when it comes to ‘shifting of losses’ upon, and being shielded from paying, commercial insurers.” In support, plaintiffs claim that the Legislature intended to favor public entities over commercial

insurers, especially since the cost of providing health coverage is becoming increasingly expensive. Plaintiffs argue that if Section 97 is interpreted literally, then plaintiffs “and the public employees and taxpayers who stand behind them would be relegated to the ranks of those beneath the status of liability insurers. . . ."

[8] There is no evidence to suggest that the Legislature intended to favor public entities under Section 97 or that it was not intended to apply to amounts received by a tort plaintiff from public sources. The plain language of Section 97 states that it applies to “benefits” received by a tort plaintiff from “any” source, and, unlike workers’ compensation benefits and the proceeds from a life insurance policy, amounts received from public sources, such as a self-funded County health plan, are not excepted from Section 97.

As noted, it is well established that “the best indicator of [Legislative] intent is the statutory language.” Burnett, supra, 198 N.J. at 421, 968 A.2d 1151 (quoting DiProspero, supra, 183 N.J. at 492, 874 A.2d 1039). When a statute is plain on its face, we do not “interpret [it] to achieve a different end.” Perreira, supra, 169 N.J. at 418, 778 A.2d 429. “Our judgment is not on the wisdom of the legislative enactment, but only on its meaning.” Ibid. The Legislature, not the courts, is best suited to address such policy arguments. See Lewis v. Harris, 188 N.J. 415, 460, 908 A.2d 196 (2006).

In reviewing defendants’ motion to dismiss pursuant to Rule 4:6-2(e), “our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint.” Banner v. Hoffmann-La Roche Inc., 383 N.J.Super. 364, 374, 891 A.2d 1229 (App.Div.2006) (quoting Printing Mart-Morrisstown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)), certif. denied, 190 N.J. 393, 921 A.2d 447 (2007). We must search the complaint “in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.” Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165, 876 A.2d 253 (2005) (quoting Printing Mart-Morrisstown, supra, 116 N.J. at 746, 563 A.2d 31) (internal quotations and citations omitted)). However, “if the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate remedy.” Id. at 166, 876 A.2d 253 (quoting Pressler, Current N.J. Court Rules, comment 4.1 on R. 4:6-2 (2005) (internal citation omitted)).

Measured against this standard, the trial court erred in denying defendants’ motion to dismiss plaintiffs’ complaint. The only basis for plaintiffs’ claims of breach of contract, breach of fiduciary duty, and negligence is that defendants failed to pursue subrogation against the Tineos to recoup plaintiffs’ payments for Justin’s medical expenses. Since Section 97 bars subrogation or reimbursement by plaintiffs, there is no recovery source from whom to seek reimbursement, hence no duty is owed plaintiffs by defendants, and plaintiffs suffered no resultant harm.

Reversed.

County of Bergen Employee Benefit Plan v. Horizon Blue Cross Blue Shield of New Jersey
412 N.J.Super. 126, 988 A.2d 1230

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Superior Court of New Jersey, Appellate Division.


Background: Widow of deceased motorist brought wrongful death action against truck driver and his employer with regard to fatal accident. The Superior Court, Law Division, Union County, entered judgment on a jury verdict in favor of widow.

Holdings: On cross-appeals, the Superior Court, Appellate Division, Wefing, P.J.A.D., held that:
(1] trial court erred in instructing the jury on res ipsa loquitur;
(2] defendants were entitled to have the jury apportion fault to phantom vehicles;
(3] adverse inference instruction was warranted regarding truck driver's employer's failure to preserve data from truck's in-vehicle information system;
(4] social security survivor and death benefits widow received were not excluded from statutory collateral source rule;
(5] damages award was required to be reduced by the amount of personal injury protection death benefits widow received; and
(6] statutory collateral source rule was only preempted by ERISA to extent that it precluded reimbursement to health insurers for amounts paid pursuant to plans governed by ERISA.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Negligence 272 202

272 Negligence
2721 In General
272k202 k. Elements in general. Most Cited Cases

To prevail on a claim of negligence, a plaintiff must establish that the defendant breached a duty of reasonable care, which constituted a proximate cause of the plaintiff's injuries.

[2] Negligence 272 1550

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)1 Burden of Proof
272k1550 k. In general. Most Cited Cases
Ordinarily, negligence is a fact which must be proved and which will never be presumed.

[3] Negligence 272 1612

Ordinarily, negligence is a fact which must be proved and which will never be presumed.

[4] Negligence 272 1619

Ordinarily, negligence is a fact which must be proved and which will never be presumed.

[5] Negligence 272 1610

The principle of “res ipsa loquitur” creates an allowable inference of the defendant's want of due care, with respect to an injury-producing occurrence, upon a showing that: (1) the occurrence itself ordinarily bespeaks negligence; (2) the instrumentality causing the injury was within the defendant's exclusive control; and (3) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect.

Res ipsa loquitur is not a theory of liability; rather, it is an evidentiary rule that governs the adequacy of evidence in some negligence cases.

Negligence 272 ◄ 1617

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)3 Res Ipsa Loquitur
272k1611 Elements or Conditions of Application
272k1617 k. Cause of injury, and parties' relation thereto. Most Cited Cases

Negligence 272 ◄ 1614

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)3 Res Ipsa Loquitur
272k1611 Elements or Conditions of Application
272k1614 k. Control or management of instrumentality. Most Cited Cases

Negligence 272 ◄ 1615

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)3 Res Ipsa Loquitur
272k1611 Elements or Conditions of Application
272k1615 k. Defendant's superior knowledge or means of knowledge. Most Cited Cases

Res ipsa loquitur is grounded in probability and the sound procedural policy of placing the duty of producing evidence on the party who has superior knowledge or opportunity for explanation of the causative circumstances; this foundational premise for res ipsa loquitur rests upon one of the doctrine's elements, that the instrumentality causing the injury was within the defendant's exclusive control.

Automobiles 48A ◄ 246(60)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak246 Instructions
48Ak246(60) k. Presumptions and burden of proof. Most Cited Cases

Trial court erred in instructing the jury on res ipsa loquitur since it was impossible to conclude from the evidence that the instrumentality causing the injury was within defendant truck driver's exclusive control; multiple factors were at work in the vehicle accident, including the weather, the phantom tractor-trailer that sideswiped the defendant's truck, and the phantom car stopped perpendicular to the flow of traffic which caused rear-ended driver to stop in a lane of traffic, and it was unclear from the record what led to driver going over the barrier on the shoulder of roadway or if he was still standing on the shoulder as truck driver attempted to control his tractor-trailer and bring it to a stop.

Negligence 272 ◄ 1612

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)3 Res Ipsa Loquitur
272k1611 Elements or Conditions of Application
272k1612 k. In general. Most Cited Cases
Negligence 272

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)3 Res Ipsa Loquitur
272k1618 Operation and Effect of

Doctrine
272k1621 k. Burden of proof or going forward. Most Cited Cases

Before the doctrine of res ipsa loquitur operates to shift the burden of persuasion to the defendant in a negligence case, the plaintiff first must meet all of the elements of the three-part res ipsa loquitur test, and a plaintiff's failure to prove any one of those elements by a preponderance of the evidence renders the doctrine and its concomitant burden-shifting unavailable to that plaintiff.

[10] Appeal and Error 30

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)18 Instructions
30k1064 Prejudicial Effect
30k1064.1 In General
30k1064.1(2) Particular Cases
30k1064.1(3) k. Automobile cases in general. Most Cited Cases

Trial court's jury instruction on res ipsa loquitur, which erroneously stated that jury could infer that the negligence of truck driver was a proximate cause of the death of other driver if they found that truck driver had exclusive control of the instrumentality, that the incident would not have occurred if he had exercised reasonable care, and that other driver's actions did not contribute to the occurrence, warranted reversal; proximate cause was a critical issue and the instruction had the clear capacity to affect the jury's deliberations.


272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)3 Res Ipsa Loquitur
272k1618 Operation and Effect of

Doctrine
272k1620 k. Creation of inference or presumption. Most Cited Cases

If res ipsa loquitur is applicable, it only permits the jury, if it deems it appropriate, to infer that a defendant was negligent; res ipsa loquitur does not permit an inference of proximate cause, which is a wholly separate issue.

[12] Negligence 272

272 Negligence
272XVI Defenses and Mitigating Circumstances
272k545 Effect of Others' Fault
272k549 As Grounds for Apportionment; Comparative Negligence Doctrine
272k549(4) Scope and Application of

Doctrine
272k549(10) k. Effect of determination on recovery; methods of apportionment. Most Cited Cases

New Jersey's comparative fault system is intended to ensure the distribution of loss in proportion to the respective faults of the parties causing that loss.

[13] Negligence 272

272 Negligence
272XVI Defenses and Mitigating Circumstances
272k545 Effect of Others' Fault
272k549 As Grounds for Apportionment;
Comparative Negligence Doctrine

272k549(4) Scope and Application of Doctrine

272k549(8) k. Whose acts or fault may be considered; non-parties. Most Cited Cases

A non-settling defendant has the right to have a settling defendant's liability apportioned by the jury.

[14] Compromise and Settlement 89 15(1)

89 Compromise and Settlement

89k14 Operation and Effect

89k15 In General

89k15(1) k. In general. Most Cited Cases

When one defendant settles, the remaining codefendant or codefendants are chargeable with the total verdict less that attributable to the settling defendant's percentage share.

[15] Negligence 272 549(8)

272 Negligence

272k545 Effect of Others' Fault

272k549 As Grounds for Apportionment; Comparative Negligence Doctrine

272k549(4) Scope and Application of Doctrine

272k549(8) k. Whose acts or fault may be considered; non-parties. Most Cited Cases

Defendant truck driver and his employer were entitled to have the jury apportion fault to phantom vehicles allegedly involved in automobile accident, even though widow of deceased motorist settled claim for uninsured motorists (UM) benefits based on the actions of the phantom vehicles. N.J.S.A. 2A:15–5.2(a), 2A:15–53.
The uninsured motorists (UM) statute was designed to provide maximum remedial protection to the innocent victims of financially irresponsible motorists and to reduce the drain on the financially troubled Unsatisfied Claim and Judgment Fund; its purpose is to make the victim whole, but not provide a windfall or to allow a double recovery. N.J.S.A. 17:28–1.1.

Spoliation of evidence in a prospective civil action occurs when evidence pertinent to the action is destroyed, thereby interfering with the action's proper administration and disposition.

The existence of a duty to preserve evidence is a question of law to be determined by the court; such a

duty arises when there is pending or likely litigation between two parties, knowledge of this fact by the alleged spoliating party, evidence relevant to the litigation, and the foreseeability that the opposing party would be prejudiced by the destruction or disposal of this evidence.

[21] Evidence 157

157 Evidence

157II Presumptions

157k74 Evidence Withheld or Falsified

157k78 k. Suppression or spoliation of evidence. Most Cited Cases

Pretrial Procedure 307A

307A Pretrial Procedure

307All Depositions and Discovery

307All(E) Production of Documents and Things and Entry on Land

307All(E)6 Failure to Comply; Sanctions

307Ak435 k. In general. Most Cited Cases

The selection of the appropriate sanction for spoliation of evidence is left to the trial court's discretion and will not be disturbed if it is just and reasonable in the circumstances; an appropriate sanction is one that properly takes into account the spoliator's level of intent, and is adequate and effective, but not excessive.

[22] Pretrial Procedure 307A

307A Pretrial Procedure

307All Depositions and Discovery

307All(E) Production of Documents and Things and Entry on Land

307All(E)6 Failure to Comply; Sanctions

307Ak435 k. In general. Most Cited Cases

The spoliation inference permits the jury to infer that the evidence destroyed or concealed would not have been favorable to the spoliator.

[23] Evidence 157

157 Evidence

157II Presumptions

157k74 Evidence Withheld or Falsified

157k78 k. Suppression or spoliation of evidence. Most Cited Cases

Torts 379

379 Torts

379II Tortious Interference

379II(D) Obstruction of or Interference with Legal Remedies; Spoliation

379k303 Spoliation, Destruction, or Loss of Evidence

379k304 k. In general. Most Cited Cases

Depending on the circumstances, spoliation can result in dismissal, a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence.

[24] Trial 388

388 Trial

388II Instructions to Jury

388II(B) Necessity and Subject–Matter

388k211 k. Failure of party to testify or to call witness or produce evidence. Most Cited Cases

If a plaintiff can make a threshold showing that a defendant's recklessness caused the loss of relevant evidence, the jury should be so instructed; the jury is
free, however, to accept or reject the inference.

[25] Trial 388

388 Trial
388VII Instructions to Jury
388VII(D) Applicability to Pleadings and Evidence
388k249 Application of Instructions to Case
388k252 Facts and Evidence
388k252(22) k. Failure of party to testify or call witness or produce evidence. Most Cited Cases

Adverse inference instruction was warranted regarding truck driver's employer's failure to preserve data from truck's in-vehicle information system (IVIS) after fatal automobile accident; evidence indicated that employer allowed the IVIS data to be purged even though it usually looked at the data even in the case of a minor accident, and proof of truck driver's speed and braking was crucial since widow of deceased driver had almost no evidence from which to reconstruct the accident, truck driver's estimates of his speed varied, and the IVIS data could have undercut truck driver's claims that he was unable to brake after being side-swiped by a phantom truck.

[26] Damages 115

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

The primary purpose of statutory collateral source rule is to disallow double recovery to plaintiffs. N.J.S.A. 2A:15–97.

[27] Damages 115

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k59 k. Matter of mitigation; collateral source rule in general. Most Cited Cases

Damages 115

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)(1) In General
115k15 k. Nature and theory of compensation. Most Cited Cases

Damages 115

115 Damages

115III Grounds and Subjects of Compensatory Damages
115III(B) Aggravation, Mitigation, and Reduction of Loss
115k64 k. Reduction of loss by insurance. Most Cited Cases

Benefits the Legislature intended to cover by the statutory collateral source rule include those from health insurance policies, from employment contracts, from statutes such as the Federal Employers' Liability Act, from gratuities, from social legislation such as social security and welfare, and from pensions under special retirement acts. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.; N.J.S.A. 2A:15–97.

[28] Damages 115 – 60

115 Damages
  115III Grounds and Subjects of Compensatory Damages
    115III(B) Aggravation, Mitigation, and Reduction of Loss
      115k60 k. Benefits incident to injury. Most Cited Cases

Social security disability payments are included under the statutory collateral source rule to the extent they are neither contingent nor speculative nor subject to change or modification. N.J.S.A. 2A:15–97.

[29] Death 117 – 91

117 Death
  117III Actions for Causing Death
    117III(H) Damages or Compensation
      117k91 k. Mitigation or reduction of damages. Most Cited Cases

Pursuant to statutory collateral source rule, widow's damages award in wrongful death action brought against truck driver and driver's employer was required to be reduced by the amount of personal injury protection (PIP) death benefit she received, even though the damages award was for alimony and child support, where the support awards she received were based upon the income decedent would have earned had he not been killed. N.J.S.A. 2A:15–97.


361 Statutes
  361VIII Validity
    361k1532 Effect of Partial Invalidity; Severability
      361k1533 k. In general. Most Cited Cases
        (Formerly 361k64(1))

Where the principal object of the statute is constitutional, and the objectionable provision can be excised without substantial impairment of the general purpose, the statute is operative.

[32] Damages 115 – 64

115 Damages
  115III Grounds and Subjects of Compensatory Damages
Statutory collateral source rule was only preempted by ERISA to the extent that it precluded reimbursement to health insurers for amounts paid pursuant to benefit plans governed by ERISA, and thus, statute still applied to widow's receipt of social security survivor and death benefits. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.; N.J.S.A. 2A:15–97.

West Codenotes
Recognized as Invalid N.J.A.C. 11:4–42.10.


**580 Elizabeth H. Hamlin argued the cause for respondent/cross-appellant (Garrity, Graham, Murphy, Garofalo & Flinn, attorneys; Ms. Hamlin, on the brief).

Karen L. Jordan, Deputy Attorney General, argued the cause for intervenor/cross-respondent State of New Jersey (Anne Milgram, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Ms. Jordan, on the brief).

Before Judges WEFING, GRALL and LEWINN.
The opinion of the court was delivered by

WEFING, P.J.A.D.

*604 Plaintiff filed a wrongful death action following the death of Mark Cockerline on January 2, 2003. The jury returned a verdict in plaintiff's favor, and the trial court entered a judgment in the aggregate amount of $2,331,536.27 against defendants Kevin Clark and his employer, United Parcel Service, Inc. ("UPS"). That sum included $1,500,000 for pain and suffering; the balance represented the jury's award for economic loss and amounts permissible under Rule 4:58, offer of judgment. Defendants Clark and UPS have appealed from that judgment. Plaintiff has cross-appealed, challenging the trial court's post-trial ruling with respect to the validity of the collateral source statute, N.J.S.A. 2A:15–97. After reviewing the record in light of the contentions advanced on appeal, we reverse the judgment and remand for further proceedings; with respect to the cross-appeal, we affirm.

*605 I

The underlying lawsuit was filed to recover damages following the death of Mark Cockerline on the evening of January 2, 2003. The circumstances immediately surrounding Mr. Cockerline's death were unclear as the only person who may have possessed direct knowledge, Brigitte Nguyen, did not testify at trial, and she was not deposed. Her answers to interrogatories were singularly uninformative. Ms. Nguyen had filed her own action for damages, which was consolidated with this lawsuit. It was dismissed, however, when she did not appear for her deposition. Certain statements she made immediately following the accident were admissible at trial as excited utterances. N.J.R.E. 803(c)(2). That ruling is not challenged on appeal.

Ms. Nguyen was a passenger in Mr. Cockerline's car, a blue Audi, as they were driving north on the eastern spur of the Turnpike, toward Secaucus. There was testimony that it had drizzled during the day, but in the evening hours, the drizzle turned to freezing rain, making the roadway slick. At some point, in the vicinity of milepost 110, Cockerline pulled his vehicle onto the shoulder of the Turnpike, closely abutting the right-hand barrier. There was no direct testimony explaining what led Cockerline to pull his car off the roadway.

Kevin Clark was employed as a tractor-trailer driver for UPS. He was working on January 2 and picked up his last load between 7:00 p.m. and 7:15 p.m. He testified that it was drizzling as he headed out to deliver his load to the UPS facility in Secaucus and was driving in the right lane of the Turnpike at fifty to fifty-five miles per hour. He said that shortly after he picked up that load, the precipitation had turned to freezing rain, and he reduced his speed to between thirty and forty miles per hour. Clark said he was heading up a hill toward milepost 110 on the Turnpike, in the right lane, with another tractor-trailer to his left. As he crested the hill, he saw the lights of another vehicle some **581 distance ahead, and he said he applied his brakes to slow down. He said the driver of the tractor-trailer to his left did as well and that when *606 the driver did so, that vehicle slid to its right, sideswiping the cab of Clark's UPS truck. Clark said he counter-steered to maintain control of his tractor-trailer and that the two trucks again came into contact. Clark said that because he needed both hands on the wheel to control his vehicle, he was not able to downshift. Despite his efforts, Clark was not able to stop his truck, and he hit the rear of the car he had been trying to avoid, a Honda, which was driven by Erika Menendez.

Ms. Menendez testified that she had been driving north on the Turnpike from Newark to Secaucus with her sister-in-law and her two young children, both of whom were in car seats in the rear. She said she was driving approximately thirty miles per hour because of the freezing rain and that when she came over the crest of the hill, she saw a car some distance in front of her that was perpendicular to the roadway, in her lane. She also saw another car, a blue Audi, pulled off the road
and next to the barrier on the side. She testified that she thought those two vehicles had been involved in an accident and she brought her vehicle to a stop to avoid hitting the car in her lane. She was then struck in the rear by the UPS truck and pushed forward into the car that had blocked her lane. Her car was so severely damaged in this accident that it could not be repaired. FN1

FN1. The description Ms. Menendez gave at trial varied from the description she provided in her answers to plaintiff's interrogatories, which are included in the record before us. There she stated that she had been driving in the center lane and another vehicle which was later determined to have been operated by Mark R. Cockerline was in the right lane. Our vehicles slid on ice and we sideswiped each other. My vehicle stopped in the center lane and Mr. Cockerline's vehicle slid into the shoulder and struck the right shoulder barrier. Shortly thereafter I was struck in the rear by a truck later determined to have been operated by defendant, Kevin Clark, and owned by defendant, UPS. I was pushed towards the right lane and right shoulder and the truck came to a stop behind me, also in the right shoulder and right lane.

When Ms. Menendez testified at trial, however, she was not confronted with this interrogatory answer, and it was not offered into evidence.

*607 Both the driver of the car that Ms. Menendez struck and the driver of the tractor-trailer that side-swiped Clark's UPS truck, departed the scene; they were never identified. Throughout the course of the proceedings, both vehicles were referred to as phantom vehicles.

There was testimony that the UPS truck jackknifed, with its trailer going into the shoulder. Clark denied that his truck jackknifed. He said that the trailer swung to the right but did not jackknife. The trailer came to rest near Cockerline's Audi that was stopped on the shoulder.

Clark said he ran from his truck to check on the condition of the people in the Honda and that none appeared to be injured. At that point, Ms. Nguyen came up to Clark and to Joseph Fazio, a passing motorist who stopped to render assistance. Both Clark and Fazio said that Ms. Nguyen was crying and appeared distraught and that she asked them to help her find her boyfriend.

Fazio testified that Nguyen said her boyfriend had jumped over the barrier. He looked over the barrier and saw what appeared to be the body of a man. Fazio called down and received no response. He said he did not tell Ms. Nguyen what he observed but put her in a nearby car to try to calm her down.

At about that time, Trooper Michael Rohrman arrived, having been dispatched in response to a call of several accidents near Turnpike milepost 110. Rohrman also testified that he was approached by a distraught Ms. Nguyen. She told him that she and her boyfriend, Mark Cockerline, had been driving home in his blue Audi when they were involved in an accident and ended up on the shoulder of the road. Their car was so close to the barrier on the right side that she could not open the passenger door. She said that Cockerline got out of the car and was standing near the headlight on the driver's side when he began to yell at her to get out of the car. Rohrman testified that Ms. Nguyen told him that she saw Cockerline move toward the barrier and then jump over it. Plaintiff established that the bridge was approximately one hundred feet from the ground at that point. Rohrman looked over the barrier and saw Cockerline lying...
face up on soft, marshy ground directly below the Audi and the UPS truck. He immediately summoned an ambulance.

Rohrman examined the UPS truck, Cockerline’s Audi and Menendez’s Honda. He saw signs that Cockerline’s Audi had been sideswiped on the driver’s side and that it had been damaged on the passenger’s side when it came in contact with the barrier. The UPS truck had damage to the left side of the cab, in the area in which Clark said he had been sideswiped by the other tractor-trailer. The UPS truck also had damage to its front end from striking the Menendez car. The Menendez car had significant rear-end damage from being hit by the UPS truck as well as damage on its right side. No part of the UPS tractor-trailer was touching the Cockerline car, and Rohrman did not see any sign that the UPS tractor-trailer had struck the Cockerline car.

Based upon his visual inspection of the vehicles, Rohrman concluded that Menendez had slid on the ice and struck the Cockerline car and that the accident between Menendez and Cockerline occurred before the accident between Menendez and Clark. He did not believe there was any contact between Clark’s truck and the Audi nor that there was any connection between Clark’s truck and Cockerline’s death. Because of the weather conditions, and the number of accidents at the scene, he did not take any measurements that night.

Plaintiff presented an expert on liability, Steven Schorr, a professional engineer. Although Schorr had experience in accident reconstruction, he did not qualify as an expert in that field in this case. Because of the lack of physical evidence, he was unable to reconstruct the circumstances of Cockerline’s death. Schorr limited his testimony to Clark’s sight distance as he approached the crest of the hill and the amount of time required for Clark to bring his truck to a halt after seeing the Menendez vehicle ahead of him. Schorr said Clark, at 100 feet from the crest of the incline, would have had a sight distance of 1,000 feet and that if he had been driving forty miles an hour, he should have been able to *609 stop the truck within 385 to 625 feet. He also testified that if Clark had been driving thirty miles an hour, he could have brought his truck to a stop within 283 to 389 feet. Schorr did not express an opinion directly on the question of whether Clark had been negligent in his operation of the tractor-trailer. Nor did he express any opinion on whether the extent of the damage to Menendez’s vehicle, or the fact that its occupants evidently were not severely injured, was an indication of Clark’s speed at the time of impact.

An autopsy was performed on Cockerline. This revealed that he had multiple rib fractures, that both his femurs were broken, and that his aorta had been completely ruptured. While his skull was not **583 damaged, there was a hematoma to one portion of the brain.

Plaintiff retained Haresh G. Mirchandani, M.D., as an expert in forensic pathology. Dr. Mirchandani reviewed the results of the autopsy and issued a report in which he stated his opinion that Cockerline’s legs were broken when he was struck from behind by a vehicle as he was walking. He further stated that these fractures could not have occurred as a result of a fall from such a height.

In his testimony, Dr. Mirchandani said the rupture to the aorta was caused by Cockerline’s fall from such a height and that his death was the result of the internal bleeding from the ruptured aorta. He said Cockerline would survive ten to fifteen minutes before bleeding to death. He also explained that Cockerline’s chest was crushed and that both his lungs were punctured, depriving him of the ability to breathe. He agreed that the resultant loss of oxygen would lead to death in a shorter time. Dr. Mirchandani explained that the femurs are the strongest bones in the body; this, combined with the fact that there were no fractures to Cockerline’s ankles, shin bones or knees, led him to
conclude that the fractures to the femurs were not the result of Cockerline’s fall. He also testified that Cockerline, with two *fractured femurs*, would not have been able to move toward the barrier and jump over it.

At the time of the accident, Cockerline was married to Virginia Cockerline, and they had two children who were thirteen and twelve years old when their father died. Cockerline was separated from his wife, and the two were engaged in divorce proceedings when the accident occurred. Plaintiff’s claims for economic loss thus encompassed the alimony and child support she would have received if the divorce litigation had proceeded to its anticipated conclusion, as well as the children’s claims for the loss of their father’s services.

The tractor-trailer that Clark was driving was equipped with an “in-vehicle information system” or “IVIS,” which, among other things, recorded the vehicle’s speed and brake applications. The UPS protocol called for that information to be stored on a UPS computer for thirty days unless the vehicle had been involved in a “serious” accident. In the case of a “serious” accident, the IVIS data was to be printed out and retained, and no repairs were to be made to the particular vehicle. Clark’s truck was repaired several days after the accident and the IVIS data was purged after thirty days.

After the accident, plaintiff notified Cockerline’s insurance carrier, Clarendon, of a claim for uninsured motorists (UM) benefits based on the actions of the phantom vehicles on the evening of January 2. When plaintiff filed her suit, she included Erika Menendez as a defendant, as well as a number of John Doe defendants. She also included a claim for spoliation of evidence and fraudulent concealment, based upon UPS’s failure to retain the IVIS data.

Clarendon was given leave to intervene in this action. At some point during the pendency of the litigation, plaintiff settled her claim against Menendez. She also settled with Clarendon for UM benefits of $185,000. As part of that settlement, Clarendon agreed to forego any reimbursement from whatever recovery plaintiff might achieve in the litigation. When the matter was finally submitted to the jury, neither Ms. Menendez nor the phantom vehicles were included on the verdict sheet. After deliberations, which spanned four days, the jury returned its verdict.

II

Defendants raise a number of issues on appeal, the first group of which deal with the instructions given to the jury. They contend that the trial court erred in three respects in its charge: its decision to include res ipsa loquitur; its refusal to include the question of the comparative negligence, if any, of the phantom vehicles and Menendez; and its decision to instruct the jury that it could draw an adverse inference from UPS’s failure to preserve the IVIS data. For the following reasons we agree with defendants with respect to their first two contentions but not with respect to the third.

A


[3][4][5] The principle of res ipsa loquitur, however, creates “an allowable inference of the defendant’s want of due care,” with respect to an injury-producing occurrence, upon a showing that “(a) the occurrence itself ordinarily bespeaks negligence; (b)
the instrumentality [causing the injury] was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect.”


[7] “Res ipsa loquitur is grounded in probability and the sound procedural policy of placing the duty of producing evidence on the party who has superior knowledge or opportunity for explanation of the causative circumstances.” Buckelew, supra, 87 N.J. at 526, 435 A.2d 1150 (citing Bornstein, supra, 26 N.J. at 269, 139 A.2d 404). This foundational premise for res ipsa loquitur rests upon one of the doctrine's elements, that the instrumentality causing the injury was within the defendant's exclusive control. Jerista v. Murray, 185 N.J. 175, 192, 883 A.2d 350 (2005); Myrlak, supra, 157 N.J. at 95, 723 A.2d 45.

At the conclusion of plaintiff's case, defendants moved for a directed verdict, contending that plaintiff had not established a prima facie case of negligence. Plaintiff opposed this motion and asserted that she had established five potential scenarios under which defendants would be liable: that Cockerline was so frightened by the UPS truck swerving toward him that he jumped over the barrier; that some portion of the UPS truck struck Cockerline directly and propelled him over the barrier; that some portion of the UPS truck hit Cockerline's Audi and pushed it into him, propelling **585 him over the barrier; that some portion of the UPS truck hit Menendez's car and pushed it into Cockerline, propelling him over the barrier; or some portion of the UPS truck hit Menendez's car and pushed it into Cockerline's car which in turn struck him, propelling him over the barrier.

During the course of the argument, the trial court ruled that there was no evidence that the UPS truck hit Cockerline or his car and it struck those theories of liability. It held that the only theories of liability supported by the evidence were that Cockerline had jumped out of fear or that the UPS truck hit Menendez's car and pushed it either into Cockerline or into his Audi. As the parties have framed the issues before us, we are not called upon to consider whether the trial court's action was correct.

Further, during the argument, the trial court concluded that plaintiff was entitled to have the jury receive a res ipsa charge. Accordingly, at the end of the case, the trial court gave the following instruction to the jury.

Now with respect to that doctrine of res ipsa loquitur. In any case in which there is a claim that the defendant was negligent, it must be proven to you that the defendant breached the duty of reasonable care which was a proximate cause of the plaintiff's injuries. Generally, the mere fact that an accident happened with nothing more does not provide proof that the accident was a result of negligence.

In a negligence case, the plaintiff must prove that there was some specific negligent act or omission
by the defendant which proximately caused the accident. However, in certain circumstances the very happening of an accident may be an indication of negligence. Thus, the plaintiff may, by providing facts and circumstances, establish negligence by circumstantial evidence. If the instrumentality causing the injury was in the exclusive control of the defendant and if the circumstances surrounding the happening were of such a nature that in the ordinary course of events the incident would not have occurred if the person having control of the instrumentality had used reasonable care under the circumstances, the law permits but does not require the jury to infer negligence from the happening of the incident.

Plaintiff's voluntary act or negligence contributing to the occurrence prevents the inference from being drawn.... The mere fact that Mark Cockerline was present, does not defeat the inference. Rather you must find that Mark Cockerline's action or negligence was a proximate cause of the occurrence to prevent an inference.

... 

In summary, if you find by the greater weight of the evidence that at the time of the incident the defendant had exclusive control of the instrumentality causing the occurrence, that the circumstances were such that in the ordinary course of events the incident would not have occurred if the defendant had exercised reasonable care and that the plaintiff's voluntary act or negligence did not contribute to the occurrence, then you may infer that the defendant was negligent.

[8] We agree with defendant that under the evidence presented at trial, res ipsa loquitur was inapplicable because it is impossible to conclude that the instrumentality causing the injury was within defendant's exclusive control. Indeed, it is not even clear what was the instrumentality that caused the injury. Multiple factors were at work, not all of them human; a non-exclusive list includes, in addition to Clark's operation of the UPS truck: the weather; the phantom tractor-trailer that sideswiped the UPS truck, interfering with Clark's ability to bring it to a stop; and the phantom car stopped perpendicular to the flow of traffic which caused Menendez to stop in a lane of traffic.

Further, not only is it unclear from this record what led to Cockerline going over the barrier, it is also unclear when he went over the barrier. There is no evidence that he was still standing on the shoulder as Clark attempted to control his tractor-trailer and bring it to a stop. Ms. Nguyen's statements related during the trial did not include any mention of hearing or seeing a careening tractor-trailer before she saw Cockerline go over the barrier.

[9] Plaintiff's failure to establish this critical element of the doctrine of res ipsa loquitur is fatal to its application to her case. “[B]efore the doctrine of res ipsa loquitur operates to shift the burden of persuasion to the defendant in a negligence case, the plaintiff first must meet all of the elements of the three-part res ipsa loquitur test, and ... a plaintiff's failure to prove any one of those elements by a preponderance of the evidence renders the doctrine and its concomitant burden-shifting unavailable to that plaintiff.” Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 389–90, 874 A.2d 507 (2005).

entitled to your verdict. But if giving fair weight to all of the **586 worthwhile evidence you decide that it is more likely than not that the defendant was negligent, then your verdict should be for the plaintiff.
We are satisfied that in the context of this case, it was reversible error for the trial court to have given a charge on res ipsa loquitur. Our research has led us to two modern reported New Jersey cases in which a trial court gave a res ipsa loquitur charge in circumstances where none was warranted, and yet it was found not to be reversible error: Stackenwalt v. Washburn, 42 N.J. 15, 198 A.2d 454 (1964), and Plant v. River Road Service Co., 5 N.J.Super. 290, 68 A.2d 876 (App.Div.1949). In each case, the reviewing court concluded that it was necessary to view the charge in its entirety. 42 N.J. at 26–28, 198 A.2d 454, 5 N.J.Super. at 293, 68 A.2d 876. Only after doing so, did it conclude that the error was not prejudicial. 42 N.J. at 28–30, 198 A.2d 454, 5 N.J.Super. at 294, 68 A.2d 876.

FN2. We note for the sake of completeness O'Connor v. Adekman, 96 N.J.L. 537, 540, 115 A. 369 (E. & A.1921), in which the Court of Errors and Appeals reversed a judgment because the trial court erroneously applied the principles of res ipsa loquitur. Applying that standard to the record before us, we are unable to come to the same conclusion. The trial court instructed the jury three times with respect to the question of res ipsa loquitur. The first, as part of its overall charge, we have set forth earlier in this opinion, and it was unremarkable in its content. At the conclusion of that charge, there was a sidebar conference at which plaintiff excepted to the charge. At the conclusion of that sidebar conference, the trial court repeated its charge on res ipsa loquitur but concluded it with the following statement:

In summary, if you find by the greater weight of the evidence that at the time of the incident, the defendant had exclusive control of the instrumentality causing the occurrence and that the circumstances were such that in the ordinary course of events the incident would not have occurred if the defendant had exercised reasonable care and plaintiff's voluntary act or negligence did not contribute to the accident, then you may infer that the negligence of Kevin Clark was a proximate cause of the death of Mark Cockerline.

This charge is incorrect. If res ipsa loquitur is applicable, it only permits the jury, if it deems it appropriate, to infer that a defendant was negligent. Res ipsa loquitur does not permit an inference of proximate cause, which is a wholly separate issue.

Our research has not revealed a reported New Jersey case that links the doctrine of res ipsa loquitur to proximate cause. Several other jurisdictions have rejected such a linkage, including North Dakota.

Res ipsa loquitur has no application to proximate cause and does not dispense with the requirement that the act or omission on which the defendant's liability is predicated be established as the proximate cause of the plaintiff's injury. Only after proximate cause has been established is res ipsa loquitur available to raise an inference of negligence.

[ Victory Park Apartments, Inc. v. Axelson, 367 N.W.2d 155, 161 n. 4 (N.D.1985) (citation omitted) (landlord sued for damages to apartment caused by fire, which started from smoldering cigarette left in a couch; trial court erroneously charged res ipsa loquitur when it was uncertain which of three smokers was responsible).]

See also Donnelly v. Nat'l R.R. Passenger Corp. (Amtrak), 16 F.3d 941, 946 (8th Cir.1994) (plaintiff alleged defendant was negligent in not locking doors to train from which plaintiff's decedent fell; res ipsa loquitur would not establish proximate cause); Martin v. City of Washington, 848 S.W.2d 487, 495 (Mo.1993) (“[R]es ipsa loquitur carries the plaintiff
over the breach hurdle. It cannot, however, leap over
the causation hurdle.”); Downs v. Longfellow Corp.,
351 P.2d 999, 1006 (Okla.1960) (“[I]t is negligence,
not causation, that is inferred under the doctrine [of res
ipsa loquitur.”); J.D. Lee & Barry A. Lindahl, Mod-
ern Tort Law § 15.20 (rev ed. 1994) (“Res ipsa lo-
quitur, where applicable, will only supply evidence of
negligence, and not of causation.”).

During the course of the jury’s deliberations, it
asked several questions, one of which requested the
definition of proximate cause. The trial court re-
sponded by repeating the definition of proximate
cause it had originally provided to the jury. It then
went on to again instruct the jury on the concept of res
ipsa loquitur, again telling the jury that if they found
that Clark had “exclusive control of the instrument-
ality,” that “the incident would not have occurred if
Kevin Clark had exercised reasonable care,” and that
plaintiff’s actions did not contribute to the occurrence,
“you may infer that the negligence of Kevin Clark was
a proximate cause of the death of Mark Cockerline.”

*617 Erroneous instructions constitute reversible
error “only if the jury could have come to a different
result had it been correctly instructed.” Victor v. State,
173 N.J. 1, 18, 800 A.2d 826 (2002)). In this matter,
proximate cause was a critical issue. Absent such an
instruction, it is entirely conceivable that this jury
could have come to a different result. This instruction
had the clear capacity to affect the jury’s deliberations,
and defendants are entitled to a new trial.

**588 B

Because this matter must be retried, we consider
the balance of defendants’ arguments with respect to
the trial court’s instructions for its guidance in any
future proceedings. We agree with defendants that the
trial court erred when it deprived them of their statu-
tory right to seek an apportionment of negligence from
the “John Doe” defendants named in place of the
drivers of the phantom car and phantom truck. Defen-
dants also contend that the trial court erred when it
did not permit them to seek such apportionment from
the former co-defendant Menendez. The record does
not support this latter contention.

[12] New Jersey’s comparative fault system is
intended to ensure “the distribution of loss ‘in pro-
portion to the respective faults of the parties causing
that loss.’ ” Brodsky v. Grinnell Haulers, Inc., 181
v. Andrich, 124 N.J. 90, 107, 590 A.2d 222 (1991)).
N.J.S.A. 2A:15–5.2(a) provides that in all negligence
actions in which liability is disputed, the trier of fact
must decide the “extent in the form of a percentage,
of each party's negligence or fault.” A defendant will
only be held responsible for that portion of the verdict
according to its own percentage of fault, provided
it is less than sixty percent. N.J.S.A. 2A:15–53.

[13][14][15][16] A “non-settling defendant has
the right to have a settling defendant's liability apportioned by the jury.” *618 Mort v. Besser Co., 287
“When one defendant settles, the remaining code-
fendant or codefendants are chargeable with the total
verdict less that attributable to the settling defendant's
percentage share.” Cartel Capital Corp. v. Fireco of
N.J., 81 N.J. 548, 569, 410 A.2d 674 (1980). The right
of a non-settling defendant to have the jury apportion
the liability of a settling defendant is dependent upon
the non-settling defendant proving the liability of the
The fact of settlement does not prove the liability of
the settling defendant. Mort, supra, 287 N.J.Super. at
431–32, 671 A.2d 189.

[17] We noted earlier in our opinion that plaintiff
settled her UM claim, based upon the phantom ve-
hicles, for $185,000. In pretrial motions, the trial court
ruled that defendants were not entitled to have the jury apportion any fault to the phantom vehicles, and they were not included on the verdict sheet or addressed in the court's instructions.

Both parties find support for their respective positions in Riccio v. Prudential Property and Cas. Ins. Co., 108 N.J. 493, 531 A.2d 717 (1987), by using portions of the Court's language to their liking and disregarding those portions that are unfavorable. We agree with plaintiff that defendants are incorrect when they assert that Clarendon, by settling the UM claim, “stepped into” the shoes of the phantom vehicles. The Riccio Court specifically rejected such an analysis, noting that UM coverage is a matter of contract between the insured and his carrier. Id. at 498–99, 531 A.2d 717. In our judgment, however, plaintiff is incorrect when she urges that Riccio stands for the proposition that a tortfeasor is not entitled to benefit from UM coverage for which it paid no premium.

[18] Rather, the Riccio Court noted that the law governing UM coverage and the law governing comparative negligence and contribution among joint tortfeasors serve different goals and purposes. Id. at 503, 531 A.2d 717. The UM “statute was designed to provide maximum remedial protection to the innocent victims of financially irresponsible motorists and to reduce the drain on the financially-troubled Unsatisfied Claim and Judgment Fund.” Id. at 503–04, 531 A.2d 717. Its purpose “is to make the victim whole, but not provide a windfall or to allow a double recovery....” Id. at 504, 531 A.2d 717.

“The policy behind the Joint Tortfeasors Contribution Law and the Comparative Negligence Act, on the other hand, is quite different. It is one of equity among joint tortfeasors—that is, those responsible for injury to an innocent victim should share equally the burden of recompense. The purpose is to relieve tortfeasors of an injustice among themselves.”

In our judgment, to preclude defendants from seeking an apportionment of liability against the phantom vehicles does not advance the purposes of the UM law and frustrates the purposes of the joint tortfeasor and comparative fault law. The trial court erred when it precluded the jury from making such an apportionment.

One final aspect of defendants' argument must be noted. They contend that the trial court should also have included on the verdict sheet the question of what proportion of negligence, if any, should be attributed to Menendez. If that were the only question presented on appeal with respect to apportionment, we would decline to reverse because a fair reading of the transcript indicates a decision by defense counsel not to pursue that issue. We do not determine whether that decision would preclude a different analysis in a subsequent trial.

We turn now to the question whether the trial court erred in the manner in which it dealt in its instructions with the defendants' failure to preserve the IVIS data. FN3 The trial court gave the following instruction to the jury:

FN3. Plaintiff's claim of fraudulent concealment based upon loss of Clark's IVIS data was severed prior to trial and dismissed after the jury returned its verdict.

*620 The intentional destruction of evidence relevant to proof of an issue at trial gives rise to an inference unfavorable to the party who destroyed or concealed the evidence.

If you should find that the defendant, UPS, destroyed or concealed evidence, you may presume...
that the evidence destroyed or concealed would have been unfavorable to UPS. In this case, Kevin Clark. Whether or not an adverse inference should be drawn is for your determination.


[21] Various civil remedies have been developed with the intent of making “whole, as nearly as possible, the litigant whose cause of action has been impaired by the absence of crucial evidence; ... punish[ing] the wrongdoer; and ... deter[ring] others from such conduct.” *Rosenblit v. Zimmerman*, 166 N.J. 391, 401, 766 A.2d 749 (2001). Depending on the circumstances, spoliation can result in dismissal, a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence. *Jerista, supra*, 185 N.J. at 201, 883 A.2d 350; *Aetna Life & Cas. Co., supra*, 309 N.J.Super. at 368–69, 707 A.2d 180.

[22] The selection of the appropriate sanction is left to the trial court's discretion and will not be disturbed if it is “just and *621 reasonable in the circumstances.” *Hirsch, supra*, 266 N.J.Super. at 260–61, 628 A.2d 1108 (quoting *Lang v. Morgan's Home Equip. Corp.*, 6 N.J. 333, 339, 78 A.2d 705 (1951)). An appropriate sanction is one that properly takes into account the spoliator's level of intent, and is adequate and effective, but not excessive. *Manorcare Health Servs. Inc., supra*, 336 N.J.Super. at 226, 230–31, 764 A.2d 475).

[23][24] “The spoliation inference permits the jury to infer that the evidence destroyed or concealed would not have been favorable to the spoliator.” *Jerista, supra*, 185 N.J. at 202, 883 A.2d 350 (citing *Rosenblit, supra*, 166 N.J. at 401–02, 766 A.2d 749). If a plaintiff can make a threshold showing that a defendant's recklessness caused the loss of relevant evidence, the jury should be so instructed. *Jerista, supra*, 185 N.J. at 203, 883 A.2d 350. The jury is free, however, to accept or reject the inference. *Ibid.* “Needless to say, if the jury were to accept defendant's account, the spoliation inference would be rejected.” *Ibid.*

[25] Defendants argue first that the trial judge erred in administering an adverse inference charge, rather than simply imposing a monetary sanction, where: (1) there was no evidence that IVIS data was destroyed with an intent to conceal, and (2) plaintiff was not prejudiced by the absence of the IVIS data.

Our review of the record does not indicate that defendants ever sought a lesser sanction. In any event, contrary to defendants' first representation, plaintiff presented evidence that UPS allowed the IVIS data to be purged even though it usually looked at the data even in the case of a minor accident. Menendez's car was totaled, UPS had some concerns about Clark's possible liability vis-à-vis decedent's death, and UPS was made aware of plaintiff's claims while Menendez's claim was still pending.

We also cannot agree with defendants' further
contention that proof of Clark's speed and braking was not crucial where: (1) plaintiff had almost no evidence from which to reconstruct this accident, (2) Clark's estimates of his speed varied, and (3) the IVIS data might have undercut Clark's claims that he was unable to brake after being sideswiped by a phantom truck.

Next, defendants argue that the trial judge erred in “permit[ting] the plaintiff to explore what happened to the [IVIS] data in front of the jury.” Contrary to defendants' representations, there was no way the jury could have assessed plaintiff's entitlement to the inference in a vacuum. Rather, as noted above, the jury had to pick between the parties' accounts of how and why the evidence was lost in deciding whether to accept or reject the spoliation inference. We reject defendants' contention that the lower court committed reversible error in administering an adverse inference charge.

III

Included in the remainder of defendants' arguments on appeal are challenges to various aspects of the damages awarded by the jury. In light of our determination that the matter must be retried, we do not address those contentions. Nor do we address defendants' argument that the trial court erred in precluding them from presenting two of their proposed experts. That is an issue that may be taken up with the trial court in the course of preparing for the second litigation.

We deem it necessary, however, to address one remaining argument by defendants, that the trial court, in settling the form of judgment, erred when it did not reduce plaintiff's award by the amounts of the social security survivor and death benefits and the PIP death benefit that she received. We are satisfied defendants are correct.

Following decedent's death, plaintiff received approximately $128,295 in social security death and survivor benefits pursuant to 42 U.S.C.A. § 402(d) and (g). She also received $10,000 in death benefits from Clarendon pursuant to her PIP insurance coverage.

In response to defendants' post-trial request for a set-off, plaintiff's counsel argued that plaintiff's receipt of these benefits did not require a reduction in her award pursuant to the collateral source statute, N.J.S.A. 2A:15–97. Specifically, plaintiff's counsel maintained that the availability of the social security benefits was not contingent on employment, and that these benefits were really akin to life insurance, which is exempted under the statute. Plaintiff's counsel also argued that the social security benefits did not duplicate any part of the award because the jury awarded alimony and child support, not lost income. Lastly, counsel argued that the PIP benefits were like life insurance because they were payable to plaintiff simply by virtue of decedent's death provided he was working. The trial court adopted this argument.

Pursuant to N.J.S.A. 2A:15–97:

In any civil action brought for personal injury or death, ... if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefits contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable.

[26][27][28] The primary purpose of N.J.S.A. 2A:15–97, which abrogated the common law collateral source rule, is to “disallow double recovery to plaintiffs.” Perreira v. Rediger, 169 N.J. 399, 410, 778

[29] Defendants argue first that, contrary to the lower court’s ruling, social security survivor and death benefits are not excluded from N.J.S.A. 2A:15–97. We agree.

The statute does not exempt death benefits that are “similar to” life insurance. It exempts “proceeds from a life insurance policy.” Adopting plaintiff’s construction would require us to ignore the clear language of the statute. This we cannot do.

Plaintiff relies upon the case of Krum v. Green Island Constr. Co., 671 N.Y.S.2d 563 (App.Div.1998). However, in that case, the social security benefits received by the decedent’s widow under 42 U.S.C.A. § 402(e) and excluded under New York’s collateral source statute as insurance, were expressly denominated by the Social Security Administration as “‘Life Insurance’ from Social Security.” Id. at 564. Additionally, we cannot agree with plaintiff that it makes any difference that her award consisted of alimony and child support rather than the more “traditional” award of the decedent's lost earnings, since both compensate for the loss of “monetary contributions which the decedent reasonably might have been expected to make to the survivors.” Curtis v. Finneran, 83 N.J. 563, 570, 417 A.2d 15 (1980); see also Tash v. Tash, 353 N.J.Super. 94, 103, 801 A.2d 436 (App.Div.2002) (social security death benefits are “designed to replace monies which would or could have been earned” by the deceased parent had he or she survived).

[30] Defendants also argue that the lower court erred in failing to reduce plaintiff’s award by the amount of the PIP death benefit she received because this benefit was also intended to replace lost income. In response, plaintiff acknowledges that the PIP benefit was intended to replace lost income, but insists only that “[t]here is no correspondence” between this benefit and any item of damage awarded by the jury. In plaintiff’s view, “[t]he decedent's lost income was not recovered by anyone” since the awards here were for alimony and child support. Plaintiff is drawing too fine a distinction. The support awards she received were based upon the income decedent would have earned had he not been killed. Any judgment entered should reflect this PIP benefit.

IV

We turn now to plaintiff’s cross-appeal, which also revolves around the relationship between N.J.S.A. 2A:15–97 and federal law.

In her cross-appeal, plaintiff contends that N.J.S.A. 2A:15–97 is invalid under federal law. In accordance with Rule 4:28–4, plaintiff notified the Attorney General of her challenge, and the State of New Jersey was permitted to intervene with respect to that issue. We question whether this is properly the subject of a cross-appeal, as opposed to the proffer of an additional basis upon which plaintiff contends we should affirm the decision of the trial court that the final judgment need not reflect the social security survivor and death benefits due to plaintiff as a consequence of Cockerline's death. We elect, in **593
any event, to deal briefly with the substance of the question.

The essence of plaintiff's argument is that our collateral source statute is invalid because it has been pre-empted by the Employee Retirement Income Security Act of 1974 (“ERISA”) § 514, 29 U.S.C.A. § 1144(a), and, alternatively, because it is prohibited by the anti-assignment clause of the Social Security Act § 207, 42 U.S.C.A. § 407.

In support of her first proposition, plaintiff relies upon Levine v. United Healthcare Corp., supra, 402 F.3d at 156. In our judgment, Levine does not lead to the result plaintiff advocates.

The plaintiffs in Levine had each suffered damages for which they brought third-party actions. Id. at 159. When those actions were settled, the plaintiffs reimbursed their health insurers for the amounts the insurers had paid toward the medical expenses plaintiffs had incurred because their health insurance policies had *626 provisions calling for such reimbursement, in accordance with then-existing N.J.A.C. 11:4–42.10. Id. at 159–60. Several years later, the New Jersey Supreme Court in Perreira v. Rediger, supra, invalidated that regulation. Based upon the Court's opinion in Perreira, the plaintiffs in Levine brought suit to recover the sums they had earlier reimbursed the insurers. Id. at 160.

As part of their defense to this action, the plaintiffs' insurers argued that the plaintiffs' claims were preempted by ERISA. Ibid. The court went through a detailed analysis, eventually concluding that plaintiffs were suing for benefits due under health insurance plans governed by ERISA, that as a consequence their claims “related” to ERISA-governed plans and were thus preempted by ERISA's provision barring such suits. The court ruled that to the extent N.J.S.A. 2A:15–97 precluded reimbursement to health insurers for amounts paid pursuant to benefit plans governed by ERISA, it was preempted. The court remanded the matter to the District Court with instructions that plaintiffs' claims be dismissed. Id. at 166–67.

[31][32] We disagree with plaintiff's contention that the result of Levine was to invalidate N.J.S.A. 2A:15–97 in its entirety. The premise of plaintiff's argument rests on the fact that N.J.S.A. 2A:15–97 does not contain a severability clause. None is needed, however. “Where the principal object of the statute is constitutional, and the objectionable provision can be excised without substantial impairment of the general purpose, the statute is operative....” Exxon Corp. v. Hunt, 109 N.J. 110, 117, 534 A.2d 1 (1987) (quoting State ex rel. McLean v. Lanza, 27 N.J. 516, 528, 143 A.2d 571 (1958)). Nothing within Levine affected the continued viability of the statute's dual purposes of precluding a plaintiff from receiving a double recovery and relieving economic pressure on liability carriers.

[33] We also reject the second portion of plaintiff's argument, that N.J.S.A. 2A:15–97 is invalid because it conflicts with the anti-assignment clause of the federal social security law. This statute provides:

*627 The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

[Social Security Act § 207(a), 42 U.S.C.A. § 407(a).]

This anti-assignment provision is “directed at traditional types of assignments, whereby a recipient relinquished a portion of the **594 federal benefits.” Lamb v. Conn. Gen. Life Ins. Co., 643 F.2d 108, 111 (3d Cir.), cert. denied, 454 U.S. 836, 102 S.Ct. 139, 70
136 F.Supp. 125 (N.D.II.1955), aff'd, 234 F.2d 942
(7th Cir.), cert. denied, sub nom. Seybold v. W. Elec.
Co., 352 U.S. 918, 77 S.Ct. 216, 1 L.Ed.2d 124
(1956)).

molded the plaintiff's verdict in accordance with
N.J.S.A. 2A:15–97 by allowing the defendant a set-off
in the amount of the social security benefits plaintiff
had received. On appeal, the Thomas court rejected the
plaintiff's argument that the provisions of the Social
Security Act preempted the State “from reducing an
injured person's social security benefits by a tort
award.” Id. at 589, 660 A.2d 1236. While the
preemption argument in Thomas was specifically
premised upon 42 U.S.C.A. § 424(a), the Act's “offset”
provision, rather than section 407(a), the court's rea-
soning is equally applicable in this case:

The amount of social security benefits received by
plaintiff has not been diminished by State law.
Plaintiff has received and will continue to receive
whatever social security benefits federal law and
regulations permit. The State law under review,
N.J.S.A. 2A:15–97, simply does not permit a plai-
ntiff to duplicate those benefits through a tort award.
Thus, there is no conflict between state and federal
law. [Plaintiff's] social security benefits have not
been set off or diminished by State actions.

[ Thomas, supra, 282 N.J.Super. at 589, 660 A.2d
1236 (citations omitted).]

Although, as we have earlier indicated, the trial
court erred when it did not credit defendants with the
social security benefits plaintiff received, it was cor-
rect when it rejected plaintiff's claim of preemption.

On defendants' appeal, the judgment under review
is reversed, and the matter is remanded to the trial
court for further proceedings. On plaintiff's
cross-appeal, the trial court's ruling that N.J.S.A.
2A:15–97 is not preempted by federal law is affirmed.

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411 N.J.Super. 596, 988 A.2d 575

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