STATE OF NEW JERSEY

RETAIL COMPENDIUM OF LAW

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I. Introduction

A. New Jersey State Court System Overview

The structure of New Jersey's court system is as follows: Municipal Court, Tax Court, state Superior Court, which includes the trial courts, an Appellate Division and the New Jersey Supreme Court.

The New Jersey Superior Court, or trial court, is comprised of the Law and Chancery Divisions. These divisions are divided into subdivisions or Parts. The Law Division is divided into a General Part and a Special Civil Part (jurisdictional limit of $15,000). The Chancery Division has three Parts: General Equity, Family and Probate.

Judges in New Jersey are appointed by the Governor, subject to approval by the legislature. After serving a period of seven years, Judges are then eligible for reappointment with lifetime tenure.

The procedural rules in New Jersey are controlled by the New Jersey Rules of Court. Certain rules pertaining to discovery practices are analogous to those contained in the Federal Rules of Civil Procedure. As a result, in the absence of case law interpreting New Jersey Rules of Court, the Courts have looked to decisional authority interpreting the parallel Federal Rule.

B. New Jersey Federal Court System Overview

Although the federal courts in New Jersey are one judicial district, federal judges sit at three different locations throughout the state: Newark, Trenton, and Camden. Pursuant to Local Rule 40.1 (a), once a lawsuit is commenced the Clerk of the Court determines which of the three vicinages that the case will be venued. In making this determination, the Clerk considers the residence of the defendant, the convenience of litigants, counsel, and witnesses, and the place

where the cause of action arose. The vicinage chosen is then the location for the trial and all other proceedings in the case, unless changed by order of the Court.

II. Statute of Limitations

The following is a list of applicable statute of limitations:

- Personal Injury - 2 years.[1]
- Wrongful Death - 2 years.[2]
- Property Damage - 6 years.[3]
- Sales Contracts - 4 years.[4]
- Contracts - 6 years.[5]
- Employment - 2 years (Claim under New Jersey Law Against Discrimination)[6]
- Contribution/Indemnification - 6 years.[7]

[1] N.J.S.A. 2A:14-2.
[2] N.J.S.A. 2A:31-3. However, "if the death resulted from murder, aggravated manslaughter, or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, the wrongful death action may be brought at any time." Id.
[3] N.J.S.A. 2A:14-1.
[4] N.J.S.A. 12A:2-725.
[5] N.J.S.A. 2A:14-1.
[6] N.J.S.A. 2A:14-2; N.J.S.A. 2A:14-1.
[7] N.J.S.A. 2A:14-1.

III. Negligence

A. General Negligence Principles

In order to sustain a common law cause of action in negligence, a plaintiff must prove four core elements: (1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages.[8]

In the context of a premises liability case, New Jersey takes a traditional common law approach to landowner or occupier tort liability toward a person who has been injured because of a dangerous condition on property, which is predicated on the status of the person on the property at the time of the injury.[9] Historically, the duty of the owner or occupier to such a person was gauged by the right of that person to be on the land. That status is determined by which of three classifications applies to the entrant, namely, that of a business invitee, licensee, or trespasser.

I. Business Invitee

An owner or possessor of property owes the highest degree of care to the business invitee because that person has been invited on the premises for purposes of the owner that often are commercial or business related.[10] As a result, the highest duty of care is owed to patrons who enter a retail establishment because they are conferring some sort of benefit, usually financial, to the landowner or lessee of the property. Only to the invitee or business guest does a landowner owe a duty of reasonable care to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered.[11] That standard of care also

[8] Weinberg v. Dinger, 106 N.J. 469, 484 (1987).
[9] Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433 (1993).
[10] Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 43-45 (2012).
[11] Ibid.

encompasses the duty to conduct a reasonable inspection to discover latent dangerous conditions.[12]

II. Licensee

A lesser degree of care is owed to a social guest or licensee, whose purposes for being on the land may be personal as well as for the owner's benefit.[13] Although the owner does not have a duty actually to discover latent defects when dealing with licensees, the owner must warn a social guest of any dangerous conditions of which the owner had actual knowledge and of which the guest is unaware.[14]

III. Trespasser

The owner owes a minimal degree of care to a trespasser, who has no privilege to be on the land. The duty owed to a trespasser is relatively slight.[15] A landowner, under most circumstances, has a duty to warn trespassers only of artificial conditions on the property that pose a risk of death or serious bodily harm to a trespasser.[16]

IV. Balancing Test

The New Jersey Supreme Court recently reaffirmed the State's traditional approach, but has stated that if a person does not fit squarely within a one of the above classifications, Courts should perform a full duty analysis applying a balancing test based upon basic fairness principles to determine the duty of care owed.[17] Some of the factors to be considered include: the

[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.

relationship of the parties; the nature of the attendant risk; the opportunity and ability to exercise care; and the public interest in the proposed solution.[18]

The New Jersey Supreme Court went on to explain that ultimately, the same considerations apply whether a party falls squarely within a common law classification or not.[19] The common law categories are simply a shorthand, in well-established classes of cases, for the duty analysis; they, too, are based on the relationship of the parties, the nature of the risk, the ability to exercise care, and considerations of public policy.[20] The only difference is that, through the evolution of New Jersey's common law, the duty analysis has already been performed in respect of invitees, licensees (social guests), and trespassers, and in furtherance of the goal of a reasonable degree of predictability, those standards continue to guide us.[21]

B. The Duty of Commercial Landlord/The Out of Possession Landlord

Historically, a lease was viewed as a sale of an interest in land.[22] As a result, the landlord was not responsible to maintain the leased premises.[23] However, over time, two common law exceptions to the general rule developed: (1) a landlord is responsible to use reasonable care with regard to portions of the leased premises which are not demised and remain in the landlord's control, and (2) a landlord's covenant to repair gives rise to a duty to the tenant to use reasonable care to protect the tenant from injury arising from defects in the property.[24]

The Court has since extended protections to an injured party who was not a tenant on the lease where the landlord had breached a written covenant to maintain the leased premises in

[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] McBride v. Port Authority of New York and New Jersey, 295 N.J. Super. 521, 525 (App. Div. 1996).
[23] Ibid.
[24] Ibid.

good repair.[25] Another longstanding exception to the general common law tenet: "A landlord, knowing of an actually or deceptively concealed dangerous condition on the premises, is under a duty to disclose it to the tenant at or prior to the transfer of possession."[26]

However, in the absence of an agreement to make repairs, the landlord is under no obligation to do so as that burden falls upon the tenant.[27] Thus, there is no landlord liability for personal injuries suffered by a commercial tenant's employee on the leased premises due to a lack of proper maintenance or repair, when the lease unquestionably places responsibility for such maintenance or repair solely upon the tenant.[28]

With that said, when warranted by the facts, the Court has extended the liability of a commercial landowner's duty to cases in which the landowner had no control over the dangerous condition and the condition was not located on its property.[29] The reason being is that the Court emphasized that the injured party was seeking to hold the commercial property owner responsible for negligently failing to take such measures as were within its power and duty to protect its invitees from reasonably foreseeable danger, and it was up to the jury to determine whether that duty was satisfied.[30]

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[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Id. at 522.
[29] Monaco v. Hartz Mt. Corp., 178 N.J. 401, 419 (2004) (imposing a duty on a commercial landowner to protect its invitees exiting the building from a loose municipal permit parking sign situated on its abutting sidewalk that became dislodged and airborne by a gust of wind, even though it was the city's responsibility to place and maintain the parking sign).
[30] Ibid.

IV. Specific Examples of Negligence Claims

A. "Slip and Fall" Type Cases

i. Sidewalks

The general rule is that commercial landowners are responsible for maintaining the public sidewalks abutting their property in a reasonably safe condition.[31] Maintenance of the public sidewalk is required where holes or broken sidewalk pieces or uplifted segments of the public sidewalk create unreasonable hazards. These hazards can arise from natural causes. For example, the expansion and contraction of sidewalks due to weather may cause fractures and fissures, water may accumulate in openings and expand on freezing causing dangerous crevices, or tree roots may undermine sidewalk slabs producing a dangerous condition.[32]

Moreover, the danger may be due to objects or material cast or dropped upon the sidewalk. In that case, a property owner is under a duty to clean up, within a reasonable time, material that he dropped, negligently or otherwise, upon a sidewalk that might impede safe passage and cause a pedestrian to fall and injure himself. A similar obligation would exist if the foreign substance had been deposited on the sidewalk by some third person.[33]

An abutting owner may also be liable to a pedestrian who is injured as a result of a dangerous condition irrespective of the fact that nature or some third person caused the condition. The duty with respect to maintenance is equally applicable to situations where debris or foreign material creates the dangerous condition.

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[31] Stewart v. 104 Wallace Street, Inc., 87 N.J. 146, 157 (1981).
[32] See Hayden v. Curley, 34 N.J. 420 (1961).
[33] Cf. Christine v. Mutual Grocery Co., 119 N.J.L. 149 (E. & A. 1937) (holding store owner owed duty to pedestrian to remove bag of salt on sidewalk).

ii. Snow and Ice Removal

Snow and ice poses a much more common hazard than dilapidated sidewalks. The view in New Jersey is that the many innocent plaintiffs that suffer injury because of unreasonable accumulations should not be left without recourse. Moreover, ordinary snow removal is deemed to be less expensive and easily accomplished, thus, commercial landowners are to be encouraged to eliminate or reduce these dangers. Further, many municipalities have adopted ordinances that require snow removal regardless.

While commercial landowners have a duty to remove, there are some caveats. Namely, the abutting commercial owner's responsibility to remove snow arises only if, after actual or constructive notice, he has not acted in a reasonably prudent manner under the circumstances to remove or reduce the hazard.[34] Thus, maintenance of a public sidewalk in a reasonably good condition may require removal of snow or ice or reduction of the risk, depending upon the circumstances.[35] The test is whether a reasonably prudent person, who knows or should have known of the condition, would have within a reasonable period of time thereafter caused the public sidewalk to be in a reasonably safe condition.[36] The accident victim must also prove that the defective condition was a proximate cause of his injuries.[37]

iii. Duty of Tenants to Maintain Sidewalks

The duty to maintain sidewalks is not limited to landlords, as tenants/store operators have a corollary duty. New Jersey Courts have held that even where the leasee-operator of a store has no responsibility for the sidewalk's maintenance under the lease provisions, the tenant

[34] Mirza v. Filmore Corp., 92 N.J. 390, 395 (1983).
[35] Ibid.
[36] Id. at 395-396
[37] Ibid.

nonetheless has the duty to provide a safe path between the store and parking lot.[38] The reason being is that commercial entrepreneurs know in providing the parking facility that their customers will travel a definite route to reach their premises, thus, the benefiting proprietor should not be permitted to cause or ignore an unsafe condition in that route which it might reasonably remedy.[39]

iv. Liability of Snow Removal Contractors

Often times an owner of land will hire an independent contractor to remove snow. The liability of the snow removal company arises independently of contract and is founded upon the general duty that an independent contractor is to exercise due care in regard to persons lawfully upon the premises.[40] Thus, it has been uniformly held that an independent contractor is liable to a third person injured as a result of the negligence of the independent contractor or his servants in the performance of his work for the contractee in an action based in tort, although such third person could not base his action upon the contract to which he was not a party.[41]

With that said, as a general rule, a landowner has a non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers.[42] Thus, landowners cannot completely absolve themselves of liability by blaming their snow removal company.

v. Slippery Surfaces

Ordinarily, an injured plaintiff asserting a breach of duty must prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous

[38] Jackson v. K-Mart Corp., 182 N.J. Super. 645, 650 (L. Div. 1981); Warrington v. Bird, 204 N.J. Super. 611, 617-618 (App. Div. 1985).
[39] Ibid.
[40] Gonzalez v. Eastern Freightways, 2010 N.J. Super. Unpub. LEXIS 2338 (App. Div. Sept. 23, 2010), citing, Bacak v. Hogya, 4 N.J. 417, 422 (1950).
[41] Ibid.
[42] Rigatti v. Reddy, 318 N.J. Super. 537, 541 (App. Div. 1999).

condition that caused the accident.[43] However, equitable considerations have motivated the Court to relieve the plaintiff of proof of that element in circumstances in which, as a matter of probability, a dangerous condition is likely to occur as the result of the nature of the business, the property's condition, or a demonstrable pattern of conduct or incidents.[44] In those circumstances, the Court will provide the plaintiff with an inference of negligence, imposing on the defendant the obligation to come forward with rebutting proof that he/she took prudent and reasonable steps to avoid the potential hazard.[45]

For example, where a plaintiff was leaving the counter of a self-service cafeteria and claimed to have slipped on a sticky, slimy substance on the littered and dirty floor, the Court pointed out that spillage by customers was a hazard inherent in that type of business operation from which the owner is obliged to protect its patrons, and held that when it is the nature of the business that creates the hazard, the inference of negligence thus raised shifts the burden to the defendant to negate the inference by submitting evidence of due care.[46] Another example occurred where the plaintiff had slipped on a string bean in the produce aisle of a supermarket, and the Court explained that the defendant's self-service method of operation required it to anticipate the hazard of produce falling to the ground from open bins because of the carelessness of either customers or employees, imposing upon the defendant the obligation to use reasonable measures promptly to detect and remove such hazards in order to avoid the inference that it was at fault.[47] This is commonly referred to as the "mode-of-operation rule".

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[43] See, e.g., Brown v. Racquet Club of Bricktown, 95 N.J. 280, 291 (1984).
[44] Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563-565 (2003).
[45] Ibid.
[46] Bozza v. Vornado, Inc., 42 N.J. 355, 359-60 (1964).
[47] Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 429-430 (1966).

However, it is not presumed that every injurious mishap that one encounters is necessarily attributable to the negligence of another.[48] Thus, the dangerous condition must be a foreseeable risk posed by the store's mode of operation.

vi. Defenses

1. Comparative Negligence

The rule of comparative negligence is based on N.J.S.A. 2A:15-5.1 et seq. New Jersey Courts view principles of comparative negligence as serving to distribute the costs and burdens of accidental injury among all involved parties. Thus, liability for resultant injuries should mirror the responsibilities of the participants and be apportioned in accordance with their combined fault.[49] Overall, contributory negligence does not preclude recovery if it does not exceed the negligence of the person against whom recovery is sought, and damages are reduced in accordance with the percentage of fault assigned to the party recovering.[50]

2. Assumption of Risk

The assumption of the risk defense contemplates that one with knowledge of a risk, or facts sufficient to put a reasonably prudent person on notice of risk, must exercise the degree of care that the risk requires.[51] If a defendant can successfully raise an assumption of the risk defense, a plaintiff is barred from recovery because he or she is said to have relieved the defendant of any duty to protect the plaintiff or because no duty existed.[52]

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[48] Overby v. Union Laundry Co., 28 N.J. Super. 100, 104 (App. Div. 1953) , aff'd o.b., 14 N.J. 526, 103 A.2d 404 (1954).
[49] Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 447 (1993).
[50] N.J.S.A. 2A:15-5.1.
[51] Del Tufo v. Twp. of Old Bridge, 147 N.J. 90, 112 (1996).
[52] Ibid.

3. Exculpatory Clauses

Exculpatory agreements have long been disfavored in New Jersey because they encourage a lack of care.[53] While they are not *per se* barred,[54] courts will closely scrutinize liability releases and invalidate them if they violate public policy. For example, it is well settled that to contract in advance to release tort liability resulting from intentional or reckless conduct violates public policy[55], as does a contract that releases liability from a statutorily-imposed duty.[56] Further, courts have found that exculpatory agreements for negligence claims violate public policy in a variety of settings, such as in residential leases,[57], or in connection with rendering professional services.[58]

The New Jersey Supreme Court has held that the public policy of this state prohibits a parent of a minor child from releasing a minor child's potential tort claims.[59] The Court stated that the relevant public policy implicated is the protection of the best interests of the child under the *parens patriae* doctrine, which refers to the state in its capacity as provider of protection to those unable to care for themselves.[60] Accordingly, in view of the protections that the State historically has afforded to a minor's claim and the need to discourage negligent activity on the part of commercial enterprises attracting children, the Court held that a parent's execution of a pre-injury release of a minor's future tort claims arising out of the use of a commercial recreational facility to be unenforceable.[61]

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[53] See, e.g., Gershon v. Regency Diving Ctr., 368 N.J. Super. 237, 247 (App. Div. 2004).
[54] Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 292 (2010) (rejecting the argument that limited liability waivers are *per se* invalid in private fitness center venues).
[55] Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 580 (App. Div. 1955).
[56] McCarthy v. NASCAR, Inc., 48 N.J. 539, 542 (1967).
[57] Cardona v. Eden Realty Co., 118 N.J. Super. 381, 384 (App. Div.), certif. denied, 60 N.J. 354 (1972).
[58] Lucier v. Williams, 366 N.J. Super. 485, 495 (App. Div. 2004)
[59] Hojnowski v. Van Skate Park, 187 N.J. 323, 338 (2006).
[60] Id. at 333.
[61] Id. at 338.

B. Liability for Violent Crimes

Business owners and landlords have a duty to protect patrons and tenants from foreseeable criminal acts of third parties occurring on their premises.[62] The general rule is that a proprietor of a premises to which the public is invited for business purposes of the proprietor owes a duty of reasonable care to those who enter the premises upon that invitation to provide a reasonably safe place to do that which is within the scope of the invitation.[63] The measure of that care has been described as due care under all the circumstances.[64] Negligence is tested by whether the reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others.[65] If the reasonably prudent person would foresee danger resulting from another's voluntary criminal acts, the fact that another's actions are beyond defendant's control does not preclude liability.[66] Foreseeability of the risk that criminal acts of others would cause harm is the crucial factor. Ibid.

Previously, Courts in New Jersey required prior similar criminal acts to prove foreseeability. However, the Courts have now moved away from this principal and instead apply a totality of the circumstances test when deciding whether criminal actions are foreseeable.[67] The totality of the circumstances standard encompasses all the factors a reasonably prudent person would consider.[68] This includes evidence of high incidents of crime in the neighborhood and an attempted theft within the building.[69] The determination of whether a duty exists does not depend solely on the existence of prior similar criminal incidents, even though foreseeability is

[62] Clohesy v. Food Circus Supermarkets, 149 N.J. 496, 504-505 (1997).
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Id. at 507-508.
[68] Ibid.
[69] Ibid.

the driving consideration, but rather the totality of the circumstances controls, such as criminal activities in close proximity to the landowner's premises.[70]

C. Claims Arising From the Wrongful Prevention of Thefts

i. False Arrest and Imprisonment

A false arrest does not require the use of physical force, but rather the essential element is the constraint of the person.[71] This constraint may be caused by threats as well as by actionable force, and the threats may be by conduct or by words.[72] If the words or conduct are such as to induce a reasonable apprehension of force and the means of coercion is at hand, a person may be as effectually restrained and deprived of liberty as by prison bars.[73] Unless it is clear that there is no reasonable apprehension of force, it is a question for the jury whether the submission was a voluntary act, or brought about by fear that force would be used.[74]

Similarly, false imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing, by force or threats, unlawful restraint upon a man's freedom of locomotion.[75]

With that said, pursuant to N.J.S.A. 2C:20-11e, "A law enforcement officer, or a special officer, or a merchant, who has probable cause for believing that a person has willfully concealed unpurchased merchandise and that he can recover the merchandise by taking the person into custody, may, for the purpose of attempting to effect recovery thereof, take the person into custody and detain him in a reasonable manner for not more than a reasonable time."[76] Because of the seriousness of shoplifting problem, Courts have said that this statute must be construed in

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[70] Ibid.
[71] Earl v. Winne, 14 N.J. 119, 127-128 (1953).
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Carollo v. Supermarkets General Corp., 251 N.J. Super. 264, 268-269 (App. Div. 1991), citing, N.J.S.A. 2C:20-11e.

a manner reasonably calculated to carry out its objective of protecting the merchant from shoplifting and safeguarding the innocent customer.[77]

N.J.S.A. 2C:20-11e further provides that "A merchant who causes the arrest of a person for shoplifting…shall not be criminally or civilly liable in any manner or to any extent whatsoever where the merchant has probable cause for believing that the person arrested committed the offense of shoplifting." Thus, this qualified immunity applies to false arrest and imprisonment claims.[78]

With regard to the definition of probable cause, it has been described as something less than proof needed to convict, but something more than a raw, unsupported suspicion; thus, it is a suspicion or belief of guilt that is well-grounded.[79] The issue of whether there is sufficient probable cause to invoke the immunity provisions of N.J.S.A. 2C:20-11(e) is a jury question and not one to be decided as a matter of law.[80]

ii. Malicious Prosecution

As an initial matter, malicious prosecution is not a favored cause of action because of the policy that people should not be inhibited in seeking redress in the Courts.[81] Thus, the law does not look with favor upon actions for malicious prosecution and it does not encourage them. On the other hand, one who recklessly institutes criminal proceedings without any reasonable basis should be held responsible for such irresponsible action.[82] As a result, extreme care must be exercised when allowing this cause of action so as to avoid the creation of a reluctance of party

[77] Henry v. Shopper's World, 200 N.J. Super. 14, 17 (App. Div. 1985).
[78] Carollo, supra, 251 N.J. Super. at 269.
[79] Liptak v. Rite Aid, Inc., 289 N.J. Super. 199, 214 (App. Div. 1996).
[80] Ibid.
[81] Lind v. Schmid, 67 N.J. 255, 262 (1975).
[82] Id. at 262.

to seek redress for civil or criminal wrongs for fear of being subjected to a damage suit if the action results adversely.

A civil action based upon the malicious prosecution of a criminal complaint may be sustained only with proof (1) that the criminal action was instituted by the defendant against the plaintiff, (2) that it was actuated by malice, (3) that there was an absence of probable cause for the proceeding, and (4) that it was terminated favorably to the plaintiff.[83] Further, a plaintiff must also establish a special grievance, which consists of interference with one's liberty or property. Counsel fees and costs in defending the action maliciously brought may be elements of damage in a successful malicious prosecution, but do not in themselves constitute a special grievance necessary to make out the cause of action. Moreover, it is not appropriate to institute a suit or file a counterclaim alleging malicious prosecution until the litigation has terminated in favor of the party who seeks to assert this cause of action.

The fundamental difference between an action for malicious prosecution and one for false imprisonment is that in the former the detention is malicious, but under the due forms of law, whereas, in the latter the detention is without color of legal authority.[84] As a result, the immunity statute afforded to merchants for claims of false claims and imprisonment does not apply to claims of malicious prosecution as such proceedings are beyond the self-help recovery of stolen goods, which the arrest authorization of the statute is expressly designed to effect.[85]

D. Defamation

A defamatory statement is one that is false and injurious to the reputation of another or exposes another person to hatred, contempt or ridicule or subjects another person to a loss of

[83] Epperson v. Wal-Mart Stores, Inc., 373 N.J. Super. 522, 530 (App. Div. 2004).
[84] Earl v. Winne, 14 N.J. 119, 128 (1953).
[85] Carollo v. Supermarkets General Corp., 251 N.J. Super. 264, 270 (App. Div. 1991).

good will and confidence in which he or she is held by others.[86] In certain situations, however, the public interest presents the vital counter policy that persons should be permitted to communicate without fear of a defamation action.[87] The common law has accommodated these countervailing policies by recognizing that some otherwise defamatory statements should be "privileged", or that their publication does not impose liability upon the publisher.[88]

Privileges may be "absolute," which means that the statements are completely immune from suit.[89] Because an absolute privilege protects even a maliciously-spoken untruth, it is provided only in the narrowest of instances, where the public interest in unfettered communication justifies the complete abrogation of the plaintiff's right of recovery for damaged reputation.[90] A "qualified privilege," on the other hand, is designed to advance the important public interest in unrestrained speech, while retaining a measure of protection for the plaintiff who is maliciously defamed.[91] As a result, qualified privileges are recognized in a broader range of circumstances than absolute privileges, including statements made by a former employer about an employee to a prospective new employer.[92]

In general, a qualified privilege for the protection of the publisher's own interest will be recognized if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.[93] A qualified privilege for the protection of an interest common to the publisher and the recipient will be

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[86] Gallo v. Princeton Univ., 281 N.J. Super. 134, 142 (App. Div. 1995).
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Id. at 143.
[92] Erickson v. Marsh & McLennan Co., 117 N.J. 539, 564 (1990).
[93] Gallo, supra, 281 N.J. Super. at 143.

recognized if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information another sharing the common interest is entitled to know.[94] With that said, even if a qualified privilege exists, a party may lose the privilege by "excessive publication," that is, by publishing defamatory matter without a reasonable belief that the publication is a proper means of communicating the defamatory matter to the person to whom its publication is privileged.[95]

E. Negligent Hiring/Retention Employees

The New Jersey Supreme Court has expressly recognized that an employer who negligently hired or retained an incompetent, unfit, or dangerous employee might be liable to a third party whose injury was proximately caused by the employer's failure to exercise due care.[96] The tort addresses the risk created by exposing members of the public to a potentially dangerous individual. The employee conduct, however, does not need to be within the scope of employment.[97] Instead, the duty owed is properly to be determined by whether the risk of harm from the dangerous employee to a person was reasonably foreseeable as a result of the employment.[98]

To hold an employer liable for negligent hiring, the plaintiff must prove: (1) the employer knew or had reason to know of the employee's dangerous characteristics and could reasonably have foreseen that such qualities created a risk of harm to other persons; and (2) through the

[94] Ibid.
[95] Ibid.
[96] Mavrikidis v. Petullo, 153 N.J. 117, 133 (1998).
[97] Di Cosala v. Kay, 91 N.J. 159, 174 (1982)
[98] Ibid.

employer's negligence in hiring the employee, the employee's incompetence, unfitness or dangerous characteristics proximately caused the injury.[99]

F. Respondeat-Superior

Under the doctrine of respondeat superior, an employer will be held liable to a third party for the torts of an employee if the employee was acting within the scope of his or her employment.[100] Conduct by an employee is usually within the scope of employment if the conduct is of the kind the employee was hired to perform, it occurs substantially within the authorized time and space limits, and it is actuated, at least in part, to serve the employer.[101] Other factors include: whether the conduct is of the same general nature as that authorized, or incidental to the conduct authorized; whether the master has reason to expect that such an act will be done; the similarity in quality of the act done to the act authorized; and the extent of departure from the normal method of accomplishing an authorized result.[102]

Thus, New Jersey Courts consider the nature of the employment, the duties of the employee, and whether the accident occurred in the course of fulfilling some job-related function.[103] Conversely, if an employee deviates from his or her employer's business and commits a tort while in pursuit of his or her own ends, the employer is not liable.[104]

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[99] Id. at 173-74, 177 (recognizing that employer, who hired employee who possessed and used guns, had duty to protect the public and the injured minor from foreseeable physical danger presented by firearms kept at employee's living quarters). See also Lo Bosco v. Kure Eng'g Ltd., 891 F. Supp. 1020, 1034 (D.N.J. 1995) (dismissing tort of negligent hiring based on alleged misrepresentations where the plaintiff did not present evidence that the defendants knew of employee's propensity to commit fraud or that the allegedly fraudulent acts were foreseeable); Johnson v. Usdin Louis Co., 248 N.J. Super. 525, 529 (App. Div.) (holding no duty owed by employer to protect public or specific victims because there was no evidence that the employer knew the employee "possessed dangerous characteristics" and would use nitric acid taken from job site to assault family members), certif. denied, 126 N.J. 386, 599 A.2d 163 (1991).

[100] Carter v. Reynolds, 175 N.J. 402, 408-09 (2003).

[101] Di Cosala, supra, 91 N.J. at 169.

[102] Hill v. N.J. Dep't of Corr. Comm'r, 342 N.J. Super. 273, 306 (App. Div. 2001), certif. denied, 171 N.J. 338 (2002).

[103] Carter, supra, 175 N.J. at 411.

[104] Roth v. First Nat'l State Bank of N.J., 169 N.J. Super. 280, 286 (App. Div.), certif. denied, 81 N.J. 338 (1979).

In determining whether an employer is vicariously liable for the acts of its employees, the fact that the tort is negligent or intentional is of no real consequence.[105] Further, whether the plaintiff names the actual employee tortfeasors as the defendants in a suit against their employer is legally irrelevant to the employer's liability for their conduct under the doctrine of respondeat superior.[106] An employer, therefore, may be held liable for its employee's intentional torts when they are reasonably connected with the employment and so within its scope.[107] Intentional torts, however, rarely fall within the scope of employment.[108]

G. Negligent Training/Supervision of Employees

Liability may be imposed on an employer who fails to perform its duty to train and supervise employees.[109] A claim based on negligent supervision is separate from a claim based on respondeat superior as unlike respondeat superior, this negligence claim covers acts committed outside the scope of employment.[110] An employer, however, is liable for negligent training/supervision only if all the requirements of an action of the tort for negligence exists.[111] Thus, a person conducting an activity through agents is subject to liability for harm resulting from the agents' conduct if the person is negligent or reckless in the supervision of the activity.[112]

[105] Hill, supra, 342 N.J. Super. at 305.
[106] Zukowitz v. Halperin, 360 N.J. Super. 69, 74 (App. Div. 2003).
[107] Hill, supra, 342 N.J. Super. at 306.
[108] Schultz v. Roman Catholic Archdiocese, 95 N.J. 530, 535 n.1 (1984).
[109] Tobia v. Cooper Hosp. Univ. Med. Ctr., 136 N.J. 335, 346 (1994).
[110] Hoag v. Brown, 397 N.J. Super. 34, 54 (App. Div. 2007).
[111] Dixon v. CEC Entm't, Inc., 2008 N.J. Super. Unpub. LEXIS 2875 (App. Div. Aug. 6, 2008).
[112] Ibid.

V. Workers Compensation

Pursuant to New Jersey's Workers' Compensation Act, employees are barred from pursuing negligence actions in court against their employers.[113] The exclusive remedy provision also bars injured employees from maintaining tort actions against their co-employees for negligent acts committed within the scope of employment, which result in injury.[114] However, minors may elect to pursue compensation either under the Workers' Compensation Act, or by tort actions against their employers.[115]

An accident arises "in the course of employment" when it occurs within the period of employment and at a place where the employee may reasonably be.[116] In order to trigger coverage under workers' compensation there must be a causal connection between the accident and the employment.[117]

When determining whether a worker is an employee covered by the Act, or an independent contractor not covered by the Act, New Jersey Courts first look to the "control test". Namely, whether the employer had the right to direct the manner in which the business or work shall be done, as well as the results to be accomplished.[118] The control test is satisfied so long as the employer has the right of control, even though the employer may not exercise actual control over the worker.[119] A second measure of employee status is the "relative nature of the work" test: an employer-employee relationship exists if there is substantial economic dependence upon the putative employer and a functional integration of their respective operations.[120]

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[113] N.J.S.A. 34:15-1 et seq.
[114] N.J.S.A. 34:15-8.
[115] LaPollo v. Hospital Serv. Plan of N.J., 113 N.J. 611, 613 (1989).
[116] N.J.S.A. 34:15-36.
[117] Mule v. New Jersey Mfrs. Ins. Co., 356 N.J. Super. 389, 397 (App. Div. 2003).
[118] Sloan v. Luyando, 305 N.J. Super. 140, 148 (App. Div. 1997).
[119] Ibid.
[120] Ibid.

Lastly, it should be noted that lawsuits resulting from the intentional acts of an employer or co-employee are not barred by the exclusivity provision.[121]

[121] Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 185 (1985).

VI. Indemnification

A. Contractual Indemnification

Indemnity can arise from contract, express or implied.[122] Indemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally.[123] When the meaning of the clause is ambiguous, however, the clause is to be strictly construed against the indemnitee.[124] Thus, a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms.[125]

B. Common Law Indemnification

Common law indemnity arises from the absence of an express agreement wherein the allocation of the risk of loss between parties may be achieved through an equitable doctrine that allows a court to shift the cost from one tortfeasor to another. The right to common-law indemnity arises without agreement, and by operation of law to prevent a result which is regarded as unjust or unsatisfactory.[126] Generally, common law indemnification shifts the cost of liability from one who is constructively or vicariously liable to the tortfeasor who is primarily liable.[127]

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[122] George M. Brewster & Son v. Catalytic Constr. Co., 17 N.J. 20, 28 (1954).
[123] Ramos v. Browning Ferris Industries, Inc., 103 N.J. 177, 190-92 (1986).
[124] Ibid.
[125] Ibid.
[126] Promaulayko v. Johns Manville Sales Corp., 116 N.J. 505, 511 (1989).
[127] Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 80 (1960).

VII. Damages

A. Overview of Damages

There are three basic types of legal damages: compensatory, nominal, and punitive. Compensatory damages are designed to compensate a plaintiff for an actual injury or loss.[128] Nominal damages, unlike compensatory damages, do not attempt to compensate a plaintiff for an actual loss, but rather, they are a trivial amount awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one dependent upon loss or damage.[129] The award of nominal damages is made as a judicial declaration that the plaintiff's right has been violated.[130] Finally, punitive damages are awarded as punishment or deterrence for particularly egregious conduct.[131]

B. Damages for Personal Injury

In New Jersey a plaintiff bringing a cause of action for personal injury may recover for the following: pain and suffering; disability/impairment; loss of enjoyment of life; disfigurement; loss of spouse's services, society and consortium; past medical expenses; future medical expenses; and lost income, wages, earnings. The first five (5) are non-economic damages and under these principles a plaintiff is entitled to fair and reasonable compensation for any permanent or temporary injury resulting in pain and suffering, disability to or impairment of his/her faculties, health, or ability to participate in activities, as a proximate result of the defendant's negligence. This measure of damages is what a reasonable person would consider to be adequate and just under all the circumstances of the case to compensate plaintiff. The last three (3) listed above are economic

[128] 49 Prospect St. Tenants Asso v. Sheva Gardens, 227 N.J. Super. 449, 476 (App. Div. 1988).
[129] Ibid.
[130] Ibid.
[131] Ibid.

damages calculated by evidence of admissible past and future medical bills and evidence of past and future loss of earnings as a proximate result of the defendant's negligence.

C. Duty to Mitigate Damages

New Jersey Courts follow the doctrine of avoidable consequences, or mitigation of damages that will reduce the amount of damages recoverable attributable to a plaintiff.[132] A plaintiff who has suffered an injury as a result of a tort cannot recover for any portion of the harm that by the exercise of ordinary care he/she could have avoided.[133]

D. Punitive Damages

New Jersey's Punitive Damages Act provides that punitive damages may be awarded to a plaintiff only if he or she proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed.[134] To determine whether punitive damages should be awarded, the Act requires the court to consider all relevant evidence, including: (1) The likelihood . . . that serious harm would arise from the defendant's conduct; (2) The defendant's awareness of . . . the serious harm at issue…; (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and (4) The duration of the conduct or any concealment of it by the defendant.[135] Under the Act, "actual malice" means an intentional wrongdoing in the sense of an evil-minded act.[136] "Wanton and willful disregard" means a deliberate act or omission with knowledge of a

[132] Ostrowski v. Azzara, 111 N.J. 429, 441 (1988).
[133] Ibid.
[134] N.J.S.A. 2A:15-5.12(a).
[135] N.J.S.A. 2A:15-5.12(b)(1)-(4)
[136] N.J.S.A. 2A:15-5.10.

high degree of probability of harm to another and reckless indifference to the consequences of such act or omission.[137]

As mentioned already, punitive damages are limited to exceptional cases as a punishment of the defendant and as a deterrent to others.[138] They are awarded when the wrongdoer's conduct is particularly egregious, and at the discretion of the fact-finder.[139] To warrant the imposition of punitive damages, there must have been an intentional wrongdoing in the sense of an evil-minded act, or the defendant's conduct must have been accompanied by a wanton and willful disregard of the rights of another.[140] An award of punitive damages, however, must bear some reasonable relation to the injury inflicted and the cause of the injury.[141]

[137] Ibid.
[138] Pavlova v. Mint Mgmt. Corp., 375 N.J. Super. 397, 404 (App. Div.), certif. denied, 184 N.J. 211 (2005).
[139] Maul v. Kirkman, 270 N.J. Super. 596, 619-20 (App. Div. 1994).
[140] Smith v. Whitaker, 160 N.J. 221, 241 (1999).
[141] Lockley v. Dep't of Corr., 177 N.J. 413, 427 (2003).