

NJ Supreme Court Continues to Allocate Fault to Non-Monetarily Liable Co-Defendants

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This article briefly outlines the seminal opinions issued by the NJ Supreme Court and the Appellate Division, which have increasingly permitted co-defendants to be included on the jury verdict sheet under the Comparative Negligence Act and the Joint Tortfeasors Contribution Law.

Over the past few decades, New Jersey appellate jurisprudence has continually affirmed that trial courts should permit the allocation of fault to co-defendants in negligence and strict liability actions, even if those co-defendants retain no monetary liability due to settlement, bankruptcy or statutory immunity. This article briefly outlines the seminal opinions issued by the New Jersey Supreme Court and the Superior Court of New Jersey, Appellate Division, which have increasingly permitted co-defendants to be included on the jury verdict sheet under the New Jersey Comparative Negligence Act (CNA) and the Joint Tortfeasors Contribution Law (JTCL).

The CNA, codified at N.J.S.A. §2A:15-5.1, et seq., mandates that the trier of fact determine two findings of fact in all negligence and strict liability actions: (1) the “full value of the injured party’s damages,” N.J.S.A. §2A:15-5.2(a)(1); and (2) the percentage of each party’s negligence, which, in sum, should add up to 100%, N.J.S.A. § 2A:15-5.2(a)(2). Once those percentages are properly determined, the trial judge “mold[s] the judgment from the findings of fact made by the trier of fact.” N.J.S.A. §2A:15-5.2(d). If, however, a defendant’s fault is determined to be 60% or more, the plaintiff may recover the full amount of the awarded damages from that defendant. N.J.S.A. §2A:15-5.3(a). This is key, because if, for example, a settling defendant is ultimately determined to be more than 40% liable in a negligence action, the plaintiff could be severely disadvantaged regarding his or her recovery options. The JTCL complements the CNA by providing culpable defendants contribution rights against other parties if those defendants are ultimately liable for more than their allotted percentage share of a damages award. N.J.S.A. §2A:53A-3. “When applied together, the [CNA and JTCL] implement New Jersey’s approach to fair apportionment of damages among plaintiffs and defendants, and among joint defendants.” *Town of Kearny v. Brandt*, 214 N.J. 76, 97 (2013) (quoting *Erny v. Estate of Merola*, 171 N.J. 86, 99 (2002)).

The critical question, then, is whether the fault allocation mechanisms driven by the CNA and JTCL permit the apportionment of fault to a co-defendant who has been dismissed from the suit, for myriad reasons.

In *Ramos v. Browning Ferris Industries of South Jersey*—one of the earliest cases in which the New Jersey Supreme Court confronted this issue—the court concluded that if an injured worker elects benefits under New Jersey’s Workers’ Compensation Act (WCA), N.J.S.A. §34:15-1 to -127, a jury *cannot* later allocate fault to the absent employer in a negligence and/or strict liability suit. 103 N.J. 177, 193 (1986). In arriving at that conclusion, the court stressed the strict statutory language comprising the WCA and explained that when an employee accepts benefits under the WCA “the employee agrees to forsake a tort action against the employer.” *Id.* at 183 (citing *Morris v. Hermann Forwarding Co.*, 18 N.J. 195, 197-98 (1955)). The WCA similarly “precludes a claim for contribution against an employer whose concurring negligence contributed to the injury of an employee.” *Id.* at 185. *See also id.* at 184 (“At the time the Legislature enacted the Joint Tortfeasors Contribution Law, as at present, the Workers’ Compensation Act provided that the agreement, express or implied, between employer and employee to accept the Workers’ Compensation Act ‘shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article.’” (quoting N.J.S.A. § 34:15-8)). The court therefore determined that “the [WCA] removes the employer from

operation of the [JTCL] ... [b]ecause the employer *cannot be a joint tortfeasor* ...” *Id.* at 184 (emphasis added). And, once the employer was dismissed from the suit on WCA grounds, the court found that it “was *no longer a party to the suit*, and the trial court correctly decided not to submit [the employer’s] negligence to the jury.” *Id.* at 193 (emphasis added).

Since *Ramos*, the court has consistently found that, in the absence of explicit statutory language to the contrary, the jury is permitted to allocate fault to co-defendants who have been dismissed from negligence or strict liability actions. The principal case initiating that trajectory was *Young v. Latta*, 123 N.J. 584 (1991). In *Young*, a medical-malpractice action, the jury allocated percentages of fault between a culpable, non-settling tortfeasor and a physician who had settled before trial. The New Jersey Supreme Court upheld that allocation, concluding that under the CNA “a non-settling defendant may seek a credit in every case in which there are multiple defendants.” *Id.* at 596.

In *Burt v. West Jersey Health Systems*, the Appellate Division furthered that tenet. 339 N.J. Super. 296 (App. Div. 2001). *Burt* involved a malpractice action naming several health-care professionals as co-defendants. Some of those co-defendants were dismissed as a result of the plaintiff’s failure to file an affidavit of merit as to them, as regulated by N.J.S.A. §2A:53-A-27. The remaining defendants sought to allocate fault and obtain a “settlement credit” as to those co-defendants dismissed on affidavit-of-merit grounds. *Id.* at 302. Interpreting the CNA and JTCL as sanctioning that allocation of fault, the Appellate Division concluded that the remaining defendants “shall be permitted to assert the negligence of the [dismissed co-defendants] provided they have competent evidence to support that contention.” *Id.* at 305. In fact, the Appellate Division maintained that a contrary ruling would “deny [the remaining co-defendants] the right to pursue their statutory right to contribution ... [and] the protection afforded under the [CNA], which ordinarily would limit their contribution to plaintiff’s damages to the percentage of negligence allocated to them by the jury.” *Ibid.* That allocation of fault “harmonize[d] the legislative intent” underpinning the CNA and JTCL, by ensuring that the remaining defendants (1) only retained responsibility for their share of damages; and (2) maintained the ability to exercise their right to contribution—via fault allocation—against the co-defendants who had been dismissed on affidavit-of-merit grounds. *Id.* at 309. Of course, the allocation of fault did not change the outcome as to the dismissed co-defendants, who were still entitled to dismissal and insulated from liability.

The New Jersey Supreme Court confronted the fault-allocation issue again in *Brodsky v. Grinnell Haulers*, in which one of the named co-defendants filed a bankruptcy petition in the United States Bankruptcy Court instead of an answer. 181 N.J. 102, 107 (2004). The court was then tasked with determining “whether, under the [CNA], a defendant who has been dismissed from a case as a result of a bankruptcy discharge is still a ‘party’ to whom a percentage of fault may be allocated” on the jury verdict sheet. *Id.* at 110. The court answered that question affirmatively, concluding that allocating fault to the bankrupt party “assures that defendants are not deprived of the benefits of the [CNA], namely their right to be held accountable only for their percentage of fault ...” *Id.* at 116 (citing N.J.S.A. §2A:15-5.3(c)). The court emphasized that even if the remaining defendants were to allocate fault to the bankrupt party based on the jury’s determinations, such a “finding of fault by a jury will not result in any personal liability to [the bankrupt party].” *Id.* at 108 (internal citations omitted).

In *Town of Kearny v. Brandt*, the New Jersey Supreme Court continued to reinforce prior appellate jurisprudence which permitted an allocation of fault to “parties” in an action under the CNA and JTCL, even if those same parties were later dismissed and retained no monetary liability to pay damages. 214 N.J. 76 (2013). In *Kearny*, the township sued an architectural firm, soil engineering firm and structural engineering firm, alleging liability for defects in a public safety facility those entities had designed. The latter two entities were later dismissed from the case via the statute of repose, N.J.S.A. §2A:14-1.1(a), and the statute of limitations, N.J.S.A. §2A:14-1.2(a). In its analysis, the court outlined four “guiding principles” of fault apportionment, and determined that the Appellate Division properly apportioned fault to the two dismissed co-defendants “who will, in any event, pay no damages.” *Id.* at 103. The court assessed that allocating fault to the two dismissed co-defendants “promotes fair allocation of responsibility and avoids creating an incentive for a plaintiff to strategically target only one of a range of culpable defendants.” *Id.* at 104.

Most recently, in *Jones v. Morey’s Pier*, the New Jersey Supreme Court again stressed that the CNA/JTCL permit and encourage apportionment of fault to defendants against whom claims are dismissed by virtue of the operation of a statute. 230 N.J. 142, 164 (2017). In *Jones*, a young girl died on a school trip after falling from a ride in an amusement

park. After the suit commenced, the named defendants filed a third-party claim against the girl's charter school, which was subsequently barred because the named defendants failed to serve notice of their claim on the charter school within 90 days, per the New Jersey Tort Claims Act. Relying on *Young, Burt, Brodksy* and *Kearny*, the court concluded that despite the charter school's dismissal from the action, if the named defendants could prove the charter school's negligence, the jury should be instructed to allocate fault to the charter school thereby offsetting any damages owed by the named defendants. *Id.* at 162-64, 169-170. "As those decisions recognize, the allocation of a percentage of fault to a joint tortfeasor that is not a defendant at trial may afford to a remaining defendant the practical benefit of the contribution claim to which it is entitled under the [CNA] and the [JTCL]." *Id.* at 164.

As is discernably evident, New Jersey appellate jurisprudence has consistently determined that the CNA and JTCL mandate allocation of fault to co-defendants who retain no monetary liability in negligence and strict liability actions by virtue of bankruptcy, settlement, or statutory exemption, and are thus no longer parties when the case goes to verdict. What this means for plaintiffs and defendants, is that unless a relevant statutory scheme specifically dictates that a party cannot be a joint tortfeasor—as occurred under the WCA in *Ramos*—New Jersey courts are increasingly likely to permit defendants in negligent and strict liability actions to apportion fault to co-defendants who are no longer active in the suit. As the New Jersey Supreme Court has stated repeatedly, doing so furthers the legislative intent underlying both the CNA and JTCL; namely, the "fair apportionment of damages among plaintiffs and defendants, and *among joint defendants.*" *Kearny*, 214 N.J. at 97 (emphasis added) (citations omitted).

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