Civil Practice Update

All the Law That's Fit to Print

by Michael J. Epstein

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Is Expert Testimony Required to Obtain Charge on *Res Ipsa Loquitor*? For those of you said no, you would be correct. See Mayer v. Once Upon A Rose, Inc., 429 N.J. Super. 365 (App. Div. 2013). In Mayer, a caterer sustained injuries when a vase being held by a florist, who was working at the same event, shattered. The trial court dismissed the case at the close of the plaintiff's case because he did not have an expert to explain why the vase shattered. The Appellate Division rejected the trial court's reasoning, and concluded that the jury should have evaluated liability under the doctrine of *res ipsa loquitor*, which provides plaintiff with a permissive presumption that the incident would not have occurred but for the negligence of the defendant. Of course, the defendant is permitted to produce evidence demonstrating that it was not negligent, and the jury does not have to accept the presumption. The panel explained that where *res ipsa* applies, courts should deny motions for directed verdicts except where the defendant's countervailing proof is so strong that there is no reasonable doubt as to the absence of negligence. As for the expert, the panel said that same is not needed where the basic notion of negligence is within the common knowledge of the jury, which applied here to an exploding vase. Three cheers to the Appellate Division for reaching the correct conclusion and explaining *res ipsa* for future cases. *Res ipsa* is an important legal theory that applies in limited circumstances, and in such situations, juries must be charged on *res ipsa* to promote the fairness of allowing a blameless victim an inference of negligence.

Who Decides Whether Defendants Exercise Discretion Under Title 59? For those of you who said judges, you would be wrong. See Henebema v. South Jersey Trans. Auth., N.J. Super. 2013 N.J. LEXIS 48 (App. Div. 2013). In Henebema, the plaintiff sustained injuries on the Atlantic City Expressway during a time when at least eight accidents happened where her accident happened. The question arose whether the South Jersey Transportation Authority ("SJTA") exercised discretion under N.J.S.A. 59:2-3(d) in responding to calls reporting the accidents. The trial court determined that the SJTA's actions and omissions in responding to the calls were ministerial, and thus, charged ordinary negligence. The jury returned a verdict of $8,748,311. The Appellate Division reversed ruling that when issues of fact exist regarding whether a public entity exercised discretion

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regarding resource allocation or completed ministerial acts, the issue should be submitted to the jury. The case was remanded for liability only. This case properly explains that factual issues regarding discretion versus ministerial acts is a jury question, and provides guidance to parties and trial courts on how to handle this issue in the future. A final interesting note is the Appellate Division affirmed that pre-judgment interest cannot be imposed against a public entity.

Adverse Inference or No Adverse Inference for Failing to Call an Expert Witness? For those of you who said, no adverse inference, you would be correct! See Washington v. Perez, 2013 N.J. LEXIS 46 (App. Div. 2013). In Washington, a personal injury action arising out of an auto accident, defense counsel stated on opening that the plaintiff was not injured in the accident, but provided no evidence on the issue even though defendants obtained and served two medical reports during discovery. Over defendants' objection, the trial court granted the plaintiff's request for an adverse inference charge for the defendants' failure to call the experts. The Appellate Division reversed the trial court and vacated the approximate $750,000 verdict. The panel explained that the missing witness charge is governed by the four-factor test articulated in State v. Hill, and that control over the witnesses and superior testimony factors were not present. Essentially, the panel found that the plaintiff could have called the experts if they were helpful to her case, and the testimony was not superior to the plaintiff's expert's testimony. Model Jury Charge 1.18 provides the instruction for adverse inference, and although the Appellate Division correctly determined that the adverse inference charge did not apply here, it failed to explain that 1.18D applies! 1.18D explains that in certain circumstances, trial courts should instruct juries that the failure to produce a witness permits the jury to infer that the witness would not have contradicted the witnesses called by the adverse parties. See Parantini v. S. Klein Dept. Stores, 94 N.J. Super. 452 (App. Div. 1967). Candidly, I think that the parties and the Appellate Division missed the big issue in this case.

Contributions. If you have an interesting case, rule interpretation, ethics issue, or civil-related story, please contact me at (201) 845-5962, (f) (201) 845-5973, or e-mail mjepstein@theepsteinlawfirm.com.