

June 1, 2012

I. EMPLOYMENT LAW

A Request For Accommodation Prior To Filing Suit Is Not Required In LAD Public Accommodation Disability Discrimination Claim Alleging Overall Lack Of Access

In *Lasky v. Borough of Hightstown*, ___ A.3d ___, 2012 WL 1648017 (N.J. Super. May 11, 2012), the Plaintiff Mr. Gregory Lasky, was not able to access several public buildings and facilities during his frequent visits to Hightstown, New Jersey because the facilities, sidewalks and parking areas were not built to accommodate him as a paraplegic. Plaintiff secured the services of an expert, who reported areas of non-compliance with the Americans with Disabilities Act of 1990(ADA), American National Standards Institute (ANSI) regulations; and the New Jersey Barrier Free Subcode, N.J.A.C. 5:23–7.1 to –7.32 (2009), including, but not limited to, the bathroom facilities in City Hall, the ramp leading to City Hall, the rear parking area of City Hall, the library, the Army Navy Memorial, curb cuts at the corners, and cross slopes on various streets in downtown Hightstown.

Thereafter, plaintiff filed a complaint, alleging that the Borough of Hightstown discriminated against him by failing to provide plaintiff access to defendant's "services including the sidewalks and curb cuts, library, municipal hall and parking[,]" in violation of Title II of the ADA and LAD. After defendant removed the case to federal court, plaintiff filed an amended complaint that abandoned the ADA claim and requested less than \$75,000 in damages.

Following discovery, on defendant's motion for summary judgment, the court dismissed plaintiff's public accommodation disability discrimination claims under the LAD because the court found he failed to request assistance or an accommodation prior to filing his lawsuit.

This appeal raised the novel issue of whether a request for assistance is required to sustain an LAD public accommodation disability discrimination claim alleging overall lack of access. The Appellate Division looked to the legislative history of the New Jersey LAD. The court specifically distinguished situations where the plaintiff brings a claim alleging lack of overall access from those where plaintiff alleges a lack of specific adaptations necessary to accommodate that person's particular disability.

The court held that where a more generalized claim alleging overall lack of access is made, a plaintiff seeking redress should not be required, as a prerequisite to filing such a claim, to first make a request for a reasonable accommodation. The court found nothing in the language of the

LAD itself or its legislative history to suggest that notice is an element of the claim in the public accommodation context.

In this case, the motion judge noted, as a matter of law, that a request for accommodation is required in every instance regardless of the specific circumstances and nature of the claim raised. This court found that in doing so, the motion court failed to appreciate the distinction, clearly drawn in federal cases under the ADA, between particularized claims of a failure to reasonably accommodate and generalized claims of an overall lack of access, and therefore erred in dismissing plaintiff's entire complaint. The court reversed and remanded leaving it to the motion judge, after appropriate and full discovery, to ascertain the precise nature and substance of the claims presented and apply the holding of this court.

II. INSURANCE LAW

Residents of An Insured's "Household" Could Include Relatives Who Live On the Insured Premises, Regardless Of Whether the Policyholder Is Also Present

In *Miller v. Poole*, ___ A.3d ___, 2012 WL 1980647 (Pa. Super. June 4, 2012), Helen Poole was a home owner and named insured on a homeowner's insurance policy issued by Wall Rose. Helen's son, Abe Poole, and 18-year-old grandson, Daniel Poole, spent the night of April 1, 2005 at Helen's house. Helen Poole died the following day on April 2, 2005. Because Helen's will granted Abe a life estate in her house, Abe and Daniel moved their belongings from the new apartment to Helen's house and continued to stay there until September 2005.

On September 2, 2005, Daniel ignited the gas stove at the house to light a cigarette, and then left the house without turning off the stove. A fire ensued and spread to the Millers' adjacent property. The Millers sued Daniel for the damages caused by the fire. Wall Rose refused to defend Daniel and denied coverage for the Millers' property damage. The Millers eventually obtained a default judgment against Daniel.

The Millers filed a declaratory judgment action against Daniel and Wall Rose, seeking a ruling that Wall Rose had a duty to indemnify Daniel for the judgment entered against him. After discovery, the Millers and Wall Rose filed cross-motions for summary judgment. The trial court granted Wall Rose's motion and denied the Millers' motion. The Millers filed a timely notice of appeal.

The insurance policy at issue provided that Wall Rose will pay, up to its limit, sums for which an "insured" is liable for property damage or bodily injury. The questions before the court centered around the interpretation of the provision of the contract which defines who is an "insured" under the policy. The court found that under the unusual factual scenario presented in the instant case, the language providing that an "insured" includes "'your' relatives if residents of 'your' household" is reasonably susceptible to more than one interpretation. "It plausibly could mean either that Helen Poole's relatives qualified as "insureds" (1) if they lived in the same house with her, or (2) if they lived on the premises insured by her under the Wall Rose policy."

The Court found there was no dispute that Daniel Poole began staying at the insured premises on April 1, 2005, and continued to live there until the fire occurred on September 2, 2005. As a question of physical fact, Daniel Poole was a resident of the insured premises at the time of the fire. Construing the term "household" against Wall Rose as the drafter of the contract, the court held that Daniel Poole was an "insured" under the policy as a resident of Helen Poole's household. Therefore, the court reversed the trial court order.

III. DEFAMATION

A Private Party Alleging Defamation Need Not Offer Evidence Of Actual Damages to Survive a Motion For Summary Judgment

In *W.J.A. v. D.A.*, ___ A.3d ___, 2012 WL 1820878 (N.J May 16, 2012), plaintiff, Wayne Anderson, brought a defamation action against a website operator based on internet posting by his nephew, Dave Adams, accusing plaintiff of child abuse. The Superior Court entered summary judgment in favor of the internet operator finding that internet postings, if defamatory, constituted libel rather than slander, and that it is an open question whether "the doctrine of presumed damages should apply to claims made by a private-figure plaintiff when no public interest is implicated." The court also concluded that "the right to recover damages in an action premised upon libel without proof of actual harm remains the law in this jurisdiction."

The Supreme Court granted Adams's petition for certification. Adams argued that the Appellate Division erroneously applied the doctrine of presumed damages and incorrectly permitted the case to go to the jury merely upon Anderson's subjective testimony. He urged the Court to declare the doctrine of presumed damages "an archaic, unsettled presumption over proof in fact," which results in injustice and "does not serve the stated goal of defamation law of compensating the plaintiff for actual injury to his reputation." Adams further claimed that the Appellate Division wrongly decided that the case was a private libel action when it, in fact, involves a matter of public importance.

Anderson countered that the doctrine of presumed damages has continued vitality and supports his argument that the failure to present concrete proof of injury should not preclude his case from going to the jury; that the doctrine applies to "private concern cases"; and that his case is a "private concern" case because he is a private figure.

The New Jersey Supreme Court held that presumed damages continue to play a role in defamation jurisprudence in private plaintiff cases that do not involve matters of public concern. Where a plaintiff does not proffer evidence of actual damage to reputation, the doctrine of presumed damages permits him to survive a motion for summary judgment and to obtain nominal damages, thus vindicating his good name. Compensatory damages, however, will continue to require proof of actual damage to reputation.

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