

NEWSLETTERS

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[ABOUT US](#)[OUR FIRM](#)[PRACTICE](#)[ARTICLES](#)[CLIENTS](#)[CONTACT](#)

THE PASCHOS LAW UPDATE NEWSLETTER

ARCHIVES

2015

[January 2015](#)

2014

[November 2014](#)[October 2014](#)[September 2014](#)[August 2014](#)[July 2014](#)[June 2014](#)[May 2014](#)[April 2014](#)[March 2014](#)[February 2014](#)[January 2014](#)

2013

[December 2013](#)[November 2013](#)[October 2013](#)[September 2013](#)[August 2013](#)[July 2013](#)[June 2013](#)[May 2013](#)[April 2013](#)[March 2013](#)[February 2013](#)[January 2013](#)

2012

[December 2012](#)[November 2012](#)[October 2012](#)[September 2012](#)[August 2012](#)[July 2012](#)[June 2012](#)[May 2012](#)[April 2012](#)[March 2012](#)[February 2012](#)[January 2012](#)

2011

[December 2011](#)[November 2011](#)[October 2011](#)[September 2011](#)[August 2011](#)[July 2011](#)[June 2011](#)[May 2011](#)

February, 2015

I. EMPLOYMENT LAW

"ABC Test" Governs Whether an Individual is an Employee or an Independent Contractor for Purposes of New Jersey's Wage Laws

In *Hargrove v. Sleepy's LLC*, 2015 N.J. LEXIS 38 (January 14, 2015), the New Jersey Supreme Court was asked by the U.S. Court of Appeals for the Third Circuit to decide which test a court should apply regarding the classification of an individual as an independent contractor under the New Jersey Wage Payment Law ("WPL") and the New Jersey Wage and Hour Law.

The underlying action arose when the plaintiffs, Sam Hargrove, Andre Hall, and Marco Eusebio, who delivered mattresses to customers of Sleepy's, brought an action under the WPL against their employer, Sleepy's, LLC, asserting "that Sleepy's miscategorized them as independent contractors, and that such misclassification caused various financial and non-financial losses to them." The issue of whether the plaintiffs are employees or independent contractors was submitted originally to the U.S. District Court for the District of New Jersey on cross motions for summary judgment. The District Court ruled in favor of Sleepy's and the plaintiffs appealed to the Third Circuit. Since there are a variety of tests that can be used to determine independent contractor status, the Third Circuit certified this question of law to the New Jersey Supreme Court.

In analyzing the case, the court noted that the New Jersey Department of Labor, the agency charged with implementation and enforcement of the WPL and the WHL, had declared that the "ABC" test set forth in N.J.S.A. 43:21-19(k)(6)(A) – (C), should govern employment-status disputes under the WHL and that that rule has been applied without challenge since 1995. The ABC test is a three-part test, which is derived from the New Jersey Unemployment Compensation Act (UCA), was extended to New Jersey wage and hour law by regulation. The ABC test assumes an employment relationship unless the employer can show all of the following:

1. The employer did not exercise control over the individual or have the ability to exercise control in terms of completion of the work;
2. The individual provided services that were outside the usual course of business or performed outside of all of the places of business of the employer; and
3. The individual's work comes from an enterprise that exists independently and will continue to exist independently after the termination of the relationship between the individual and the employer.

Sleepy's argued unsuccessfully that the common law "right to control" test, which evaluates the totality of the circumstances, should be utilized in this situation, as opposed to the ABC test. The "right to control" test focuses primarily on the control exercised by the employer in terms of the manner and means of the work and how it is completed and is more employer friendly.

The court acknowledged that deference must be paid to the agency charged with interpreting and implementing a legislative initiative and said it was not persuaded that this long-standing approach to resolving employer-status issues should be altered.

As such, the Supreme Court held that the "ABC" test derived from the New Jersey

April 2011
March 2011
February 2011
January 2011

2010

December 2010
November 2010
October 2010
September 2010
August 2010
July 2010
June 2010
May 2010
April 2010
March 2010
February 2010
January 2010

Unemployment Compensation Act governs whether a plaintiff is an employee or an independent contractor for purposes of resolving a wage-payment or wage-and-hour claim.

Anti-Harassment Policy a Defense to Supervisory Sexual Harassment Claim

In *Aguas v. State of New Jersey*, 2015 N.J. LEXIS 131 (Feb. 11, 2015), Ms. Aguas was a corrections officer who alleged serious sexual harassment by two of her male supervisors at the New Jersey Department of Corrections (DOC) facility where they worked. While the DOC had a written anti-discrimination policy and provided training to its employees, Ms. Aguas did not file a written complaint but rather she informally reported the harassment in conjunction with another work issue. The corrections facility conducted a full investigation and concluded the allegations could not be substantiated. Although Ms. Aguas could appeal the investigation findings, she never did and instead filed suit against the DOC under the New Jersey Law Against Discrimination (NJLAD).

The trial court granted summary judgment to the state, holding that although Aguas presented a *prima facie* showing of sexual harassment and a hostile work environment, the state established an affirmative defense that the DOC's policy provided a legitimate complaint procedure that Aguas failed to take steps required by the policy. An Appellate Division panel affirmed the trial court's grant of summary judgment, agreeing that the state had established an affirmative defense.

The New Jersey Supreme Court granted *certiorari* to consider the impact of an employer's anti-harassment policy on an employee's claims for negligence or recklessness and for vicarious liability. Upon review, the New Jersey Supreme Court confirmed that the scope and legitimacy of DOC's anti-harassment policy must be central to the determination of Aguas' claims for liability under the LAD and applied this finding to claims brought under both theories of negligence/recklessness and of vicarious liability for supervisory harassment. The Court adopted as the governing standard the test set forth by the United States Supreme Court in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, namely: The employer in a hostile work environment sexual harassment case may assert as an affirmative defense that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise, provided that the employer has not taken an adverse tangible employment action against the plaintiff employee.

The Court, therefore, concluded that the state may avoid vicarious liability under the LAD by demonstrating by a preponderance of the evidence that the DOC exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that Aguas unreasonably failed to take advantage of any preventive or corrective opportunities provided by the DOC, or to otherwise avoid harm.

II. PROFESSIONAL LIABILITY

Attorney Defending Legal Malpractice Suit is Not Limited to Discovery Previously Conducted in Underlying Action.

The case *Smith v. Deza*, 2015 U.S. Dist. LEXIS 8423 (N.J.D. January 26, 2015), unpublished, involves Defendants' alleged legal malpractice in the underlying case, *Smith et al. v. Resort Condominiums Internationals, Inc.*, et al. Defendants, James C. Deza, Esquire, Law Offices of James C. Deza, P.A. f/k/a Deza & Dibrigida, LLC, and John/Jane Doe(s), (hereinafter collectively referred to as "Defendants"), represented Nancy Smith and Harold Smith, husband and wife, the plaintiffs in the underlying action. In that case, Nancy and Harold Smith brought a negligence action against multiple defendants as a result of their son, Andrew Smith's, tragic death during their family vacation in Cancun, Mexico.

Prior to the family's trip, Cancun was hit by a major hurricane, but the Smiths claim they were assured that storm damage at the hotel where they stayed, had been repaired. However, they arrived to find much of the hotel under construction. One of the hotel's two elevators was out of service, and its open shaft was blocked by sheets of plywood. One evening, sixteen year old Andrew leaned against the plywood and fell four stories to the bottom of the shaft. He survived the fall but later died at the hospital.

The family hired Defendants who filed a complaint against the timeshare company naming only the parents as plaintiffs. Defendants subsequently sought to amend the original complaint to add a claim for negligent infliction of emotional distress by Shawn Smith, who witnessed the accident. The court denied the motion stating that the applicable statute of limitations had expired on any of his claims. The parents eventually settled the case, and then the son filed a legal malpractice action against the attorney for failing to name him as a plaintiff.

Defendants filed a motion with the Court, seeking an order permitting him to discover information regarding whether or not Andrew Smith had consumed alcohol prior to falling down the elevator shaft. Defendants argued that he was entitled to fully discover this information, because under New Jersey's comparative negligence laws, any damages the son would have ostensibly recovered in the wrongful death case would have been reduced by the degree that the family, or their son, was responsible for the accident and resulting injuries. This would include whether or not the son was intoxicated.

Smith's family argued that Defendants should be bound by the same evidence that would have been presented at trial in the underlying suit, which ended in a settlement. The court held that this would be "patently unfair" to Defendants. Furthermore, the court provided it would be "impossible to know what would have been presented."

The court noted that the plaintiffs were seeking a "case within a case" approach to proving harm that results from malpractice, by presenting evidence that would have been submitted at trial had no malpractice occurred. This requires showing not only that an attorney's conduct was negligent, but also that it prevented the plaintiff from succeeding in the underlying lawsuit. Applying that doctrine, the Magistrate Judge reasoned that the attorney should be able to present evidence, which may have been used against the son in the underlying case, and resulted in reduced or no damages. The court held that the fact that the case settled, should not restrict the attorney to the record in the underlying matter. Therefore, the Judge granted Defendants' motion.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.

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