FAISAL JAMEEL, Administrator Ad Prosequendum for the ESTATE OF AASAI JAMEEL, Plaintiff/Appellant v. JENNIFER L. DEMBER; BAYSHORE COMMUNITY HOSPITAL; BAYSHORE COMM HOSP-D INGENITO-TAX; HMH HOSPITALS CORP., Defendants/Respondents.	**Superior Court of New Jersey, Appellate Division** **Docket No. A-001225-23** On Appeal From The Superior Court of New Jersey Law Division, Middlesex Vicinage, Trial Court Docket No. MID-L-7038-21 Sat Below: The Honorable Alberto Rivas, J.S.C.

BRIEF
OF PLAINTIFF/APPELLANT FAISAL JAMEEL, ADMINISTRATOR AD PROSEQUENDUM FOR THE ESTATE OF AASIA[1] JAMEEL

Hobbie & DeCarlo, P.C.
125 Wyckoff Road
Eatontown, NJ 07724
(732) 380-1515
Jdecarlo@hdlawattorneys.com
Attorneys for Plaintiff

Of Counsel:
Norman M. Hobbie, Esq. (Atty. I.D. No. 015541980)

Of Counsel and On The Brief:
Jacqueline DeCarlo, Esq. (Atty. I.D. No. 001321996)

Date: April 1, 2024

[1] Decedent's name is spelled Aasia; it is inadvertently misspelled in the caption.

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[1] Note: The trial court entered two identical orders and statements of reasons on December 15, 2023: one order was e-filed in connection with the summary judgment motion filed by HMH Hospitals Corporation d/b/a Bayshore Medical Center (i/p/a Bayshore Community Hospital) and Bayshore Comm Hosp-D Ingenito-Tax (a/k/a Diane Ingenito) (E-courts transaction ID LCV20233642789); the other, identical order was E-filed in connection with Defendant Dember's summary judgment motion (E-courts transaction ID LCV20233642776).

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PRELIMINARY STATEMENT

In this tragic wrongful death case, Plaintiff, the Estate of Aasia Jameel, is appealing from the trial court's erroneous summary judgment dismissal of her claims against Defendants HMH Hospitals Corp. and Jennifer Dember.

On the morning of October 6, 2021, Ms. Jameel, a loving mother and wife working as a nuclear medical technician at Bayshore Community Hospital, parked her car in the area of the hospital parking lot where she was required to park by Defendant HMH, her employer. HMH had instituted a policy requiring technicians such as Ms. Jameel to park in the distant part of the hospital's vast, busy parking lot, in an area that lacked pedestrian safeguards such as sidewalks, crosswalks, traffic control signs, warning signs, and other measures to protect pedestrians who had to negotiate the parking lot to get to the hospital building. In contrast, HMH permitted hospital administrators, physicians, and patients to park closer to the building in an area of the lot that had pedestrian safeguards such as sidewalk, crosswalk, signage, and a paved "peninsula"/"island" to increase motorists' ability to see pedestrians around corners. HMH was clearly aware of the need for pedestrian safety measures, yet it intentionally required non-management employees such as Ms. Jameel to park in the distant, dangerously unprotected area of the lot.

On the morning in question, as Ms. Jameel attempted to walk through an

intersection in the distant area of the parking lot that had no pedestrian safety measures or traffic control devices, and at which a parked car blocked driver visibility around the corner, she was struck and run over by an SUV driven by Defendant Jennifer Dember, another HMH employee driving through the lot.

In addition to filing a Workers' Compensation claim, Plaintiff also filed a civil action against Defendant HMH based upon an exception to the general bar prohibiting civil suits against one's employer. Plaintiff alleged that HMH's intentional conduct in requiring employees such as Ms. Jameel to park in a distant, unprotected area of the parking lot resulted in a substantial certainty that an employee would be injured, thereby subjecting HMH to civil liability. In other words, HMH created a dangerous situation that was an accident waiting to happen for its non-management employees, whom it treated as second-class citizens when it came to their safety in the parking lot.

On December 15, 2023, the trial court erroneously granted summary judgment to HMH. In doing so, the trial court misapplied the summary judgment standard, wrongly construed the evidence against the non-moving party (the Plaintiff), and failed to conduct the case-sensitive analysis for "substantial certainty" claims required by the New Jersey Supreme Court. Because a reasonable juror could conclude that HMH's intentional conduct created a substantial certainty that an employee would be injured, particularly in light of

HMH's knowledge of the need for pedestrian safety measures in the lot, summary judgment should have been denied.

The trial court also granted summary judgment to Defendant Dember based on the immunity provided under the Workers' Compensation Statute for co-employees acting in the course of their employment. Under the particular facts of the instant matter, Plaintiff respectfully submits that this Court should revisit the case law relied upon by the trial court regarding this issue. Dember's shift had already started at 6:45 a.m. on the date of the fatal collision, which occurred at approximately 7:00 a.m. Thus, Dember was not where she was supposed to be and was not performing any work functions in the scope of her employment at the time of the crash. Dember never clocked into work on the day of the crash. The Legislature cannot have intended for the anomalous and unjust result that occurred here, in which a tortfeasor who caused a fatal collision has escaped without any civil liability, when her conduct had no inherent relationship to her work duties or the scope of her employment.

Accordingly, for the reasons set forth herein, the trial court's December 15, 2023 orders granting summary judgment to Defendants HMH and Dember should be reversed and this matter should be remanded for trial.

PROCEDURAL HISTORY

On December 9, 2021, Plaintiff filed this wrongful death and survivorship action on behalf of Aasia Jameel's Estate against Defendant Jennifer Dember, the driver who struck Ms. Jameel on October 6, 2021 in the Bayshore Hospital parking lot. Pa744. On June 24, 2022, Plaintiff filed an amended complaint adding premises liability claims against Defendants Bayshore Community Hospital ("Bayshore") and Bayshore Comm Hosp-D Ingenito-Tax (a/k/a Diane Ingenito) ("Ingenito"). Pa271-8. On March 17, 2023, Plaintiff filed a second amended complaint adding Millison/Laidlow/"Intentional Wrong" claims and punitive damages claims against Defendant HMH Hospitals Corp. ("HMH"), Ms. Jameel's employer. Pa62; 70-78.

On November 2, 2023, Defendants HMH, Bayshore, and Ingenito moved for summary judgment. Pa25. Defendant Dember filed a separate summary judgment motion on the same date. Pa258. Oral argument on both summary judgment motions was held on December 1, 2023. T4:3-27:11[1].

On December 15, 2023, the trial court entered two identical orders and statements of reasons granting the summary judgment motions filed by HMH, Bayshore, and Ingenito (Pa1-12) and Dember (Pa13-24). Plaintiff filed this appeal of the trial court's orders on December 22, 2023. Pa1109.

[1] T refers to the transcript of the December 1, 2023 oral argument.

As set forth in the legal argument below, Plaintiff is only appealing the trial court's grant of summary judgment as to Defendants HMH and Dember. Plaintiff is not challenging the trial court's grant of summary judgment to the other Defendants: Bayshore Community Hospital (an entity that was acquired by Defendant HMH prior to the subject crash) and Bayshore Comm Hosp-D Ingenito Tax (a/k/a Diane Ingenito) (an entity/person listed on a property record but which was not the actual owner of the subject property). See Pa6.

STATEMENT OF FACTS

A. The October 6, 2021 Fatal Crash

Plaintiff's decedent Aasia Jameel was employed by Defendant HMH as a nuclear medical technician at Bayshore Community Medical Center in Holmdel. Pa42; Pa437; Pa922. Defendant HMH required certain employees, including technicians such as Ms. Jameel, to park in a distant section of the hospital's expansive parking lot. See HMH emails dated January 21, 2020 (Pa446-450) and February 26, 2020 (Pa442-445); see also photographs of the parking lot with labels indicating the designated employee parking area (Pa376-7). The distant area of the mandatory employee parking lot where the October 6, 2021 fatal crash occurred had no crosswalk, no designated walking area, no sidewalk, no pedestrian warning signs, and no traffic directing personnel/flaggers to protect employees as they attempted to make their way through the busy parking lot

from the area in which HMH required them to park. See Pa319 (70:17-71:1); Pa327-8 (105:18-106:3; 108:13-15); Pa329-330 (113:9-114:19); Pa815-6 (25:16-26:1); Pa45; see also video stills, Pa416-429.

In contrast to where technicians such as Ms. Jameel were ordered to park, HMH permitted hospital management, administration, physicians, patients, and visitors to park closer to the building, in an area of the parking lot that had sidewalk, fencing, signage, cones, and other pedestrian safety measures. Pa553-7 (54:2-58:2); Da1029-1032 (41:24-44:4). See also photographs of the management/physician/patient parking area safety features, Pa694-8.

The time period from just before 7:00 a.m. to 7:30 a.m. is always extremely busy in HMH's parking lot because many of the hospital employees' shifts change around this time. Pa485-6 (32:6-33:22). Around 7:00 a.m. there is regularly a "mass entrance" of employees arriving for work and crossing through the parking area. Id. In general, 70 to 100 nurses and technicians would be coming in around 7:00 a.m. Pa586 (87:8-19).

At approximately 6:57 a.m. on October 6, 2021, Ms. Jameel parked her car along the far eastern edge of the employee parking lot. Pa44; Pa416-Pa429 (video stills). There were no sidewalks, crosswalks, or pedestrian safety markings in the area where Ms. Jameel parked. Id. In order to get to the hospital, Ms. Jameel had to walk across a T-intersection of vehicular travelways in the parking lot that had no

stop signs or traffic control markings, unlike intersections in other parts of the parking lot. Pa655. The intersection also had no warning signs or markings that would alert drivers of pedestrians. Id.

In addition, unlike other areas of the parking lot, the east-west vehicular travelway at the T-intersection in the distant area where Ms. Jameel had to park ended in a parking space, rather than a concrete island or peninsula. Pa655. Peninsulas "command a driver's attention and provide increased visibility by eliminating the [sight] restriction caused by a vehicle in a parking space at the very intersection of travelways." Pa655. See also Pa694 (an example of a peninsula and crosswalk in the administration/physician/patient area of the HMH lot). On the morning in question, the parking space at the end of the east-west vehicular travelway in the distant area of the employee lot where Ms. Jameel was required to park was occupied by a vehicle. Pa655; Pa416-Pa429. Thus, the driver of any vehicle traveling east-bound and attempting to make a left turn at the T-intersection in question would have his or her view of any pedestrians who were around the corner crossing the intersection blocked by the parked vehicle. Pa663.

As Ms. Jameel was walking within the distant section of the expansive parking lot where HMH required her to park, attempting to cross the subject T-intersection without any pedestrian safeguards, she was struck and run over by a vehicle owned and operated by Defendant Jennifer Dember. Pa431-3. Ms. Dember was an HMH

employee who was late for work that morning, as her shift started at 6:45 a.m. See Pa51; Pa1010-1 (22:20-23:13); Pa1057-8 (69:5-70:3). Defendant Dember was driving east-bound on the east-west travelway in the parking lot when she came to the T-intersection in question, intending to make a left turn. Pa44-45. At that time, Ms. Jameel was walking west-bound, attempting to cross the north side of the T-intersection. Id. Dember did not stop her vehicle before making her left turn, as there was no stop sign or any other traffic control device. Pa44-45. As noted above, Dember's view to her left, around the corner of the intersection, was blocked by a parked car, since there was no peninsula at the end of the row of parking spaces. Pa663. Defendant Dember did not see Ms. Jameel at any time before the crash. Pa305 (15:5-16).

In the course of making the left turn, Dember struck and ran over Ms. Jameel in the intersection. Pa44; Pa416-Pa429 (video stills). The Dember vehicle knocked Ms. Jameel forward onto the pavement before running over her body and crushing her head. Id. See also Pa910-914.

Ms. Jameel died as a result of the horrific injuries she suffered in the crash. Id. Ms. Jameel was only 45 years old at the time of her death, leaving behind a husband and two children, ages 10 and 15. Pa921.

B. Defendant HMH Required Employees Such As Ms. Jameel To Park In A Distant Area With No Pedestrian Safeguards

The October 6, 2021 crash was captured on the hospital's video surveillance system. See Pa372-3 (stills from the video with notations identifying Ms. Jameel and Dember's vehicle); see also Pa416-429 (full set of stills). As demonstrated in the stills from the video footage, there was no signage, no pavement markings, no sidewalks, no crosswalk, no cones, and no staff directing traffic to afford pedestrians any type of protection from vehicles as they traversed the distant section of the expansive parking lot to get to the hospital. Id. An investigating police officer noted that "there is no stop sign or other traffic control device located at this location in the parking lot[.]" Pa45. See also Pa442-450; Pa376-7.

It is undisputed that the distant area of the expansive parking lot where Ms. Jameel was instructed to park on the date of the subject crash did not have a sidewalk, crosswalk, or warning signs so that pedestrians could safely traverse the parking area in order to get into the hospital. See Pa311 (40:20-24); Pa318 (68:12-69:22); Pa319 (70:17-20); Pa327-8 (105:18-106:3); Pa329-330 (113:9-114:19). While there were crosswalks far away near the entrance to the lot and down the center of the lot, there was no crosswalk at the intersection located in the distant, eastern section of the lot along the route that Ms. Jameel had to take from where she parked, which is where the fatal crash occurred. See Pa309 (30:19-31:2); Pa329 (113:9-114:19). Defendant

Dember testified as follows regarding the absence of a sidewalk, crosswalk and pedestrian safety signage:

> Q: Is there a sidewalk that is adjacent to where Mrs. Jameel parked her car?
> A: No.
> Q: Is there a crosswalk where Mrs. Jameel was crossing to walk?
> A: No.
> Q: Is there a sign warning you of any pedestrian traffic crossing in this area where Ms. Jameel crossed?
> A: No.
>
> [Pa327 (105:18-106:3).]

> Q: Is there a sidewalk around the exterior, the perimeter of the back parking lot?
> A: No, there is not.
> Q: The only marking – and there is no signs for yield to pedestrians, watch out, beware of pedestrians, drive with caution, lower your speed, there is no signage like that in back parking lot, correct?
> A: Correct. There is no signage.
>
> [Pa319 (70:17-71:1).]

It is also undisputed that there is no posted speed limit signage in the area of the employee-designated lot where Ms. Jameel was struck. Pa328 (108:13-15).

Defendant Dember admitted that, at the time the crash occurred, Ms. Jameel was walking along the route that she had to take in order to get from where she parked to the nearest crosswalk located all the way in the center of the lot; there was no designated walking area or sidewalk for Ms. Jameel to take as she attempted to walk across the unprotected, visibly obstructed intersection and through the parking area to get to this point so she could safely walk to the hospital:

Q: **What other way in this Bayshore parking lot does Mrs. Jameel have to get to the crosswalk?**
A: ***That is the route she would have to take—***
Q: She had to take ---
A: --- to the crosswalk.
Q: Just like the other woman in the purple top, she parked, got out and crossed the parking lot, right?
A: Yes.
Q: **There is no walking area designated for those people, correct?**
A: **Correct.**
Q: **And there is no sidewalk along the outside?**
A: **Correct.**
Q: **You can see from looking at this view that there are two stop signs, but there are no speed limits posted, correct?**
A: **Correct.**
Q: **There are no warning signs, view for pedestrians, correct?**
A: **Correct.**
Q: **And there are no crosswalks for pedestrians to cross from where Ms. Jameel parked to get to the crosswalk at the front of the building, correct?**
A: **That is correct.**
Q: **The only crosswalk is the crosswalks in front of the building and down the center of the parking lot, correct?**
A: **Yes.**

[Pa329-330 (113:9-114:19) (emphasis added); see also the stills from the video depicting the subject crash, Pa372-3; Pa416-429.]

An eyewitness to the fatal crash, HMH employee Diane Cusick, also testified as to the lack of pedestrian crossing safety measures in the distant parking lot:

Q: Now, ***in order for you to get to the hospital, is it true that there is no crosswalk between your car and the sidewalk? There is no crosswalk for you to take?***
A: ***Correct***.
Q: Is there a sidewalk that goes around the exterior of the perimeter from where you parked?
A: No.

Q: ***So, you have to walk across the area where cars are pulling in, yes?***
A: ***Yes.***

[Pa815-6 (25:16-26:1) (emphasis added).]

C. Pedestrian Safeguards Would Have Alerted Drivers Such As Dember For The Safety Of Pedestrians Such As Ms. Jameel

Significantly, Defendant Dember has admitted that the presence of pedestrian crosswalks would have focused her attention toward pedestrians crossing in the distant area of the expansive parking lot designated for employee parking where she struck Ms. Jameel. See Pa309 (30:11-31:2); Pa318 (68:8-22).

Defendant Dember admitted that, at the time of the crash, Ms. Jameel was simply walking in an open area of the parking lot; she did not dart out or run in front of Dember's vehicle. Pa326 (100:5-22). Dember was making a left turn when she struck Ms. Jameel, whom she had not seen and to whose presence she had not been alerted:

> And then when I made the left, I felt that I hit something. And I was just like, confused, because I didn't see any cones. I didn't see – I know we don't have a curb, because I've driving in this parking lot for years. **I didn't see anything.** What the hell did I hit? Then just from looking out the window, I didn't see anything. So I just went over and felt the bump, the second bump from the tire. And then I opened the door. And I was like, oh my God. It's a human. I couldn't believe it was a human.

[Pa305 (15:5-16) (emphasis added).]

Defendant Dember admitted that, had there been crosswalks in the area of the parking lot where the crash occurred, that would have called her attention to

the fact that people such as Ms. Jameel were walking through the lot:

> Q: If there were – ***if there were crosswalks designated in the parking lot, that would have called your attention that people are walking there, would it not?***
> MS. VIZZONE: Objection to form. You can answer.
> A: ***Yes. It would have called my attention to that.***
> Q: This area, you can explain it from personal knowledge and looking at the video, ***there were no crosswalks, correct?***
> A: ***There was no painting anything.***
> Q: As I understand the layout, ***there are crosswalks at the beginning of the parking lot. But there are no crosswalks where the crash – where you crashed into Ms. Jameel, correct?***
> A: ***Correct.***
>
> [Pa309 (30:11-31:2) (emphasis added).]

> Q: ***When you see a crosswalk, does it focus your attention that there could be pedestrians crossing at that point?***
> A: ***Yes, yes.***
> Q: [….] let's go to the back parking lot, the one where you hit Ms. Jameel. ***Did you see any signs that say yield to pedestrians, pedestrian crossing?***
> A: ***There were no signs- there were no signs that say that.*** There is signs that say patient and visitor parking this way. ***But there was nothing that said pedestrian on it or road lines.***
>
> [Pa318 (68:8-22) (emphasis added).]

Eyewitness Cusick also testified that the presence of pedestrian crossing safeguards in the distant designated parking lot would have made it safer:

> Q: If there were traffic controllers, security personnel, flaggers, and/or cones in the parking lot on October 6, 2021 when you got there, would you have found that to be an -as an assist for you, for your protection, would it make it more secure and safe? [….]
> A: Yes.
>
> [Pa872 (82:6-13).]

D. Defendant HMH Was Aware Of The Need For Pedestrian Safeguards In Its Lot, But Only Provided Them To Management, Doctors, Patients, And Visitors, Not Employees Such As Ms. Jameel

In contrast to its treatment of employees such as Ms. Jameel, Defendant HMH permitted management, doctors, patients, and visitors to park in a specially designated lot close to the hospital building, which lot was equipped with ample pedestrian-safety features including sidewalks, crosswalks, traffic signage and markings, pedestrian warning signage, fenced-in walking areas, cones, a peninsula/island, and other safety measures. Pa1029-1032 (41:1-44:22). See also Pa378, Pa694-8 (photographs of pedestrian safety features in the management/physician parking area).

HMH manager Tracey Derby testified that "there was a different lot management parked in" and HMH's policy was that "management parks here. Employees park in the back. Front spots are for visitors and patients." Pa1029 (41:8-11); Pa1030 (42:7-9). As a manager parking in the special lot close to the building, Ms. Derby was able to take a cement walkway to get from the management parking area to the hospital building. Pa1032 (44:5-22).

The current hospital president (and then Chief of Operations) for HMH, administrator Caitlin Miller, testified as follows:

> Q: This photograph is your hospital that you are president of, correct?
> A: Yes.
> Q: **This shows a special parking lot you administrators park in**

very close to the building, yes?
A: **Yes.**
Q: ***Sidewalk all around it, correct?***
A: ***Yes.***

[Pa553 (54:11-18) (emphasis added).]

Q: Here's P-75 and P-75 shows the entire parking lot, back parking lot in the closest to the building. That's the patient and visitor parking and those to the left side is employees parking, correct?
MR. DICROCE: Objection. Go ahead.
A: ***Correct, all the horizontal rows in the spots along the perimeter for team members, the back half.***
Q: ***So, the parking that's closer to the building with the sidewalks and the fencing and the signs, those are for visitors and patients, correct?***
A: ***Correct.***

[Pa554-5 (55:15-56:1) (emphasis added); see also Pa379 for the photograph of the parking lot referenced in the above testimony.]

Q: ***So, the patients and visitors are in this yellow that's got the new sidewalk, got the fencing, got the signage, yes?***
MR. DICROCE: Objection. Go ahead.
A: ***Yes, and it has a sidewalk along the driveway.***
Q: Well, here's P-56, here's P-56, you see the peninsula down there, the peninsula right there?
A: Yes.
Q: ***Everything to the left belongs to employees parking there, correct?***
MR. DICROCE: Objection. Go ahead.
A: ***Correct.***
Q: ***Where is the speed limit sign on this parking lot?***
MR. DICROCE: Objection. Go ahead.
A: ***I don't see any.***
Q: ***As the president of your hospital do you think for the safety and security of your employees you should have: Do not speed, caution, people crossing signs up and about?***
MR. DICROCE: Objection. Go ahead.
A: ***Not necessarily.***

[Pa556-7 (57:2-58:2) (emphasis added); see also Pa 379 for the marked photograph of the parking lot referenced in the above testimony.]

As noted above, the distant area of the parking lot where Ms. Jameel was required to park on October 6, 2021 had none of the pedestrian safeguards that HMH provided for hospital management and physicians, despite the fact that Ms. Jameel was required to traverse a much greater distance across the busy parking lot to get to work. See Pa311 (40:20-24); Pa318 (68:12-69:22); Pa319 (70:17-20); Pa327-8 (105:18-106:3); Pa329-330 (113:9-114:19).

E. Defendant HMH's Use Of Pedestrian Safety Measures After The Fatal Crash.

Defendant HMH's actions after the October 6, 2021 fatal crash, including the use of traffic controllers, security staff, flaggers, and new directional signs in the parking area, demonstrate HMH's knowledge of the need for pedestrian safety measures and that it would have been feasible for HMH to have implemented them prior to the happening of the fatal crash. However, it was only after the tragic October 6, 2021 fatal crash that HMH instituted the use of traffic controllers, security and flaggers, and directional signage to protect the safety of its employees who it required to park in the distant employee area of the lot. See Pa492-3. Approximately two weeks after the fatal October 6, 2021 crash, on October 21, 2021, HMH Director of Operations Caitlin Miller issued an e-mail to HMH employees (team members) specifically advising them as follows:

> For the **safety of everyone**, and with sensitivity and compassion in our hearts, we ask for your commitment in **exercising caution when driving and walking in the parking lots.**
>
> [Pa497 (emphasis added).]

Approximately 40 days after the fatal October 6, 2021 crash, on November 16, 2021, HMH Director of Operations Miller issued an email to HMH employees confirming that HMH had instituted the use of pedestrian safety measures including traffic controllers, security and flaggers, and directional signage:

> It is imperative that all team members proceed with caution, **use traffic controllers (security and flaggers) for guidance, follow new directional signage,** and allow extra time to get to work, park and enter the facility.
>
> [Pa493 (emphasis added).]

Defendant HMH's institution of pedestrian safety measures for employees and team members who were required to park in the distant part of the lot after the fatal October 6, 2021 crash demonstrates that HMH knew of the need for pedestrian safety measures and that it was feasible for HMH to have ameliorated the danger posed by its parking lot to employees such as Ms. Jameel. See Pa493.

F. The Fatal Crash Occurred During The "Mass Entrance" Of Employees That Routinely Took Place At Approximately 7:00-7:30 p.m. When Many Shifts Changed

Further demonstrating that Defendant HMH knew of the need for pedestrian safeguards in the mandatory employee parking area is the fact that the subject crash occurred around the time of a routine shift change when the parking area would

always be busy with people crossing as they attempted to get to the hospital to begin work. See Pa485-6 (32:6-33:22). In her transcribed statement to detectives at the Holmdel Police Department, which was given 5 hours after the subject crash, Defendant Dember described the traffic conditions of the parking lots at the Bayshore Medical Center campus as follows:

> OFC.: What's the parking lot usually like at that time? Like the people work flex hours, is there usually people crossing? Like is there like trying to get there at the same time?
> DEMBER: **Seven o'clock is always mass entrance and then like 7:30'ish is like mass exit.** We work in shifts.
> OFC.: So the night shift gets off around 7:30.
> DEMBER: Right, most units are 12 hour shifts. Mine is a 10 hour shift.
> OFC. MENOWSKY: Got you.
> DEMBER: Because we close at night but we're on call for (inaudible) heart attack. You know we still come in at seven but hey, **that's obviously a busy time, change of shift.**
> [….]
> OFC.: And around that time when you usually show up for work, what's it like? Like people crossing, few scattered.
> DEMBER: Always scattered.
> OFC.: Always scattered.
> DEMBER: Yes. **People always crossing.**
> OFC.: Got you, and-
> DEMBER: Because they're the ones—
> OFC.: **Everyone is coming.**
> DEMBER: **Right, and no one wants to be late or whatever.**
>
> [Pa485-6 (32:6-33:22) (emphasis added).]

Thus, the October 6, 2021 crash occurred at a "busy time" when there was "always [a] mass entrance" with "[p]eople always crossing" in the parking area. Id.

G. Plaintiff's Expert Engineer Opines That HMH's Parking Area Was In A Hazardous Condition In Violation Of Applicable Standards

Plaintiff's engineering expert, Dr. Wayne Nolte, performed an engineering evaluation of the area of the parking lot where Ms. Jameel was killed and concluded that the area of the subject collision was in a "hazardous condition" due to "the lack of proper traffic control devices [….]" Pa665. Dr. Nolte described the area where Dember struck and ran over Ms. Jameel as follows:

> This incident took place on the East side of the Ganz parking lot. The intersection between the east and west travel way and the north and south travel way on the east side of the property does not contain any control devices such as a stop sign, stop line, double yellow line, a speed limit sign, a pedestrian crosswalk, pedestrian warning signs, or a recessed line to bring vehicles to a stop for visibility. Further, the ends of the east west travel way, and particularly the one on the east side of the parking lot does not contain a peninsula, such as at the end of the north south travel way. The east west travel way ends in a parking space which at the time of this incident was occupied by a vehicle. Peninsulas command a driver's attention and provide increased visibility by eliminating the restriction caused by a vehicle in a parking space at the very intersection of travel ways. There were no signs informing of pedestrians, no signs reminding drivers to slow because of pedestrians, and no markings on the roadway to bring a vehicle to a controlled stop. Jennifer testified that that had there been a crosswalk, it would have focused her attention on it.
>
> [Pa655.]

Dr. Nolte also took several photographs to illustrate the pedestrian safety measures that HMH used in the administration/patient/visitor parking area that were absent from the employee parking area where the fatal crash took place. See Pa656-7, Pa694-8 (photographs 26-30). Specifically, the patient/visitor parking area had a

peninsula to separate the parking spaces from the vehicular travelway, which increased visibility for drivers at the intersection. Pa655-6, Pa694. In contrast, the area where the fatal crash occurred had no peninsula and the travelway ended in a parking space, which blocked driver visibility around the corner of the intersection and did not alert drivers to be particularly cautious. Pa655-6, Pa694. The patient/visitor lot also provided sidewalks, fences to separate pedestrian walkways from the vehicular travelway, crosswalks, a pedestrian warning sign, a vehicular stop sign, a stop line, and a warning cone; none of these safety devices were present in the distant area of the lot where Mr. Jameel was struck. Pa656-7; Pa695-8.

Dr. Nolte opined that the "inconsistent features" of the parking area "greatly contributed to the happening of this incident[.]" Pa659. The large parking area contained several T-intersections between vehicular travelways. The T-intersection close to the hospital (i.e., in the administrative/patient/visitor parking area) was replete with vehicular stop signs, traffic markings, a peninsula, and pedestrian warning signs/safeguards. Pa660; Pa697. In contrast, the very same type of "T" intersection in the distant part of the employee lot where Ms. Jameel was required to park, and where the fatal accident occurred had none of these safety features. Id. As Dr. Nolte explained:

> The safety features in this parking lot are not consistent. The safety features diminish from the south end of the parking lot [i.e., the administrative/patient/visitor parking area] to the center of the parking lot and to the north or rear of the parking lot. Yet the same configuration

> of intersecting travelways exists within the parking lot the same as at the front of the parking lot, adjacent to the rear of the hospital.
>
> [Pa661.]

While the distant employee parking area had a single walkway down its center, there was no safe means for employees who parked on the outer edge of the lot, like Ms. Jameel, to access that walkway. Pa661. Instead, employees such as Ms. Jamel had to walk in the vehicular roadway, crossing a T-intersection without any traffic controls, vehicular signs, crosswalks, sidewalks or pedestrian safety signs and without a peninsula to increase visibility and catch drivers' attention. Id.

The Institute of Transportation Engineers' Transportation and Traffic Engineering Handbook provides that the use of traffic signs and markings must have "uniformity" so that they command the attention and respect of drivers. Pa661-2. Here, there were no traffic signs, pedestrian warning signs, crosswalks, or other traffic markings at the T-intersection where the crash occurred, even though it was no different than the T-intersection closer to the hospital that had these safety features. Pa662. Critically, Defendant Dember testified that "had she seen a crosswalk at the end of the east west travelway, it would have focused her attention." Pa 662. See also Pa309 (30:11-31:2); Pa318 (68:8-22).

Dr. Nolte further opined:

> Where pedestrians were most vulnerable and exposed to vehicular traffic the parking lot had no markings to control traffic or stop signs to stop traffic. The parking lot did not contain a perimeter sidewalk to

> safely move people/employees to and from the north side of the parking lot to the south side of the parking lot. There were no stop signs, no stop lines, and no traffic control devises to slow traffic or to inform to watch for pedestrians.
>
> [Pa662-3.]

Dr. Nolte also explained how the lack of a peninsula at the T-intersection in question "removed a sight triangle that was necessary at this location and certainly would have given Jennifer Dember an opportunity to see Aasia Jameel walk across the east north-south travelway." Pa663. "A site triangle created by an island, or a peninsula would have provided 22-33 feet of visibility giving reasonable time for Jennifer Dember to slow or stop her vehicle." Pa663. Moreover, "the application of a stop sign and a stop line would slow and stop traffic increasing visibility." Pa663. "The stop sign and the stop line were absolutely necessary at the intersection where this incident occurred because of the restricted visibility by the last parking space and that it was occupied on the morning of this incident." Pa663.

Dr. Nolte summarized his conclusions as follows:

> 1. The incident site was in a hazardous condition on the day of this incident.
>
> 2. **The hazardous condition was the lack of proper traffic control devices to maintain the Ganz parking lot in a safe condition.** The employees/team members were directed by their employer to park in a lot that was **unsafe and inconsistently maintained with diminishing traffic control devices from the south to the north.** The area where this incident occurred was a "T" intersection no different than the "T" intersection at the east west travel way at the rear of the hospital where it intersected the north south center travel

way. The many safety devices that were used at that location were diminished at the center of the parking lot where the north south center travel way intersected the east west center travel way and then further diminished to nothing at the east and west ends of the east west travel way where it intersected the north south travel ways located on the east and west perimeters of the property to the point where there were **no pedestrian crossing safeguards in place at all.**

3. **The maintenance of this parking lot was not consistent with the recommendations from the Institute of Transportation Engineers for the effectiveness of signs and markings to maintain safe travel ways.** The parking lot at and about the area where this incident took place did not contain perimeter sidewalks, stop signs, stop lines, signs to control vehicle speed by indicating slow or watch for pedestrians, islands or peninsulas that increased visibility through increased perception-reaction time, cones, security, flags, flaggers, pavement markings, lines and crosswalks.

4. The Ganz parking lot contained i**slands and peninsulas** at the end of the parking rows that widened the view for a motorist proceeding in an aisleway approaching an intersection. This is the concept of a sight triangle commonly used at roadway intersections and driveways to **broaden a driver's visibility to pedestrians or oncoming traffic. This feature did not exist at the accident location but did exist at other locations in the Ganz parking lot.** In fact, the sight triangles existed at locations where stop signs and stop lines were used but not at the location where none of the commonly used traffic control devices were used. **Eliminating parking in the last space of the parking row at the accident location would have provided the visibility needed to prevent this accident.**

5. **The lack of safe and consistent traffic control and pedestrian crossing devices throughout the parking lot on the north side of this property which was owned by Defendant Bayshore Community Hospital and utilized for mandatory employee parking by Defendant Hackensack Health was a significant contributing factor in causing this incident that resulted in the death of Mrs. Jameel.**

[Pa665-6 (emphasis added).]

H. Defendant Dember, Who Was Late For Work, Was Not Performing Any Job Responsibilities At The Time Of The Crash

Defendant Dember was scheduled to be present in the cardiac catheterization lab to start her shift as a staff nurse at 6:45 a.m.; thus Defendant Dember's shift had already started 14 minutes prior to the subject crash, while she was still commuting within the parking lot:

> Q: [I]t's 6:59 in the morning. ***So the employee of Hackensack Meridian Health [Dember] is late, is technically late, correct?***
> A: Yes.
> MS. VIZZONE: Objection to form.
> Q: We can look at P-83 and see that her hours are 6:45 to 5:15, correct?
> A: Yes.
> Q: ***She is late to begin with, correct?***
> A: ***Yes.***
> Q: ***Now, also it appears she hit a person in the parking lot who was also an employee of the hospital or Hackensack Meridian Health, yes?***
> A: ***Yes.***

[Da1057-8 (69:14-70:3) (emphasis added); see also Pa1011 (23:5-13).]

Defendant Dember also missed the start of her shift on the two days preceding the date of the crash, and she had not worked her entire shift the day prior to the subject crash. Pa1011-3 (23:25-25:10); Pa1016-7 (28:15-29:22).

On October 6, 2021, the day of the fatal crash, Defendant Dember never clocked in to work and did not work at all that day. Pa789 (Dember's timesheet).

Defendant Dember had been scheduled that day to meet with an attorney representing the hospital with respect to a medical malpractice case and to provide deposition testimony related to said case. Pa468-9 (15:21-16:15); Pa784-5. Defendant Dember did not attend the meeting or the deposition on October 6, 2021. Pa3030 (6:18-24). Thus, Defendant Dember did not work as a nurse or perform any professional duties at any time on October 6, 2021, or, for that matter, on any other day in the weeks that followed the subject crash. Pa1059 (71:19-24).

I. Plaintiff's Claims Against Defendants HMH And Dember

In the subject wrongful death/survivorship lawsuit, Plaintiff has asserted claims against Defendant HMH arising from the fact that the distant parking area where HMH required Ms. Jameel to park was devoid of any pedestrian crossing markings, signage, walkways, fencing, cones, pavement markings, cautionary signage, speed signage, attendants, flaggers, traffic controllers, security, and/or any other pedestrian safety measures, thereby creating a substantial certainty that an employee such as Ms. Jameel would be injured. Pa69-78. Plaintiff also asserted a claim against Defendant Dember for negligence. Pa62-5.

On December 15, 2023, the trial court dismissed Plaintiff's claims against Defendants HMH and Dember on summary judgment. Pa1-24. This appeal follows.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT TO DEFENDANT HMH (Pa1-3, 6-12).

Based on the totality of the circumstances, a reasonable juror could conclude that Defendant HMH intentionally required non-management employees to park in the most distant section of the expansive parking lot, without providing those employees with pedestrian safeguards, even though HMH was aware that pedestrian safeguards and traffic control devices were needed and were provided in other similarly-configured parts of the busy hospital lot where administrators, physicians, and patients were permitted to park. In essence, HMH treated non-management employees as second-class citizens when it came to their safety in the parking lot. A reasonable juror could conclude that HMH's utter failure to ensure that there were pedestrian safeguards in the distant area of the parking lot where Ms. Jameel was required to park created a substantial certainty that an employee, such as Ms. Jameel, would be injured; in other words, it was an accident waiting to happen.

The trial court erroneously failed to recognize that the question of whether a defendant employer has created a "substantial certainty" of injury to its employees is an inherently fact-sensitive determination to be made based on the totality of the circumstances. The trial court appears to have granted summary

judgment here because this case arose in a context (a dangerous parking area with no pedestrian protections) that has never been specifically addressed as the basis for a "substantial certainty" claim in prior case law. However, the fact that a novel issue was presented by this case did not justify the trial court's decision to usurp the role of the jury and erroneously grant summary judgment to HMH.

A. The Summary Judgment Standard (Pa1-3)

Summary judgment is a proper remedy only when there is no genuine issue of material fact challenged and the moving party is entitled to judgment as a matter of law. See R. 4:46-2. In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court held that the summary judgment standard "requires the motion judge to consider whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 524. A judge's function is "not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540 (internal citation and quotation marks omitted). The movant on a summary judgment motion has the burden to "exclude all reasonable doubt as to the existence of any genuine issue of material fact. All inferences of doubt are to be drawn against the moving

party and in favor of the opponent of the motion." Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). "If there is the slightest doubt as to the existence of a material issue of fact, the motion should be denied." Id. (citations omitted).

Here, as set forth in detail below, the trial court erroneously construed the evidence in favor of the moving parties and failed to recognize that genuine issues of material fact precluded summary judgment as to Plaintiff's claims against Defendant HMH.

B. The Intentional Wrong / "Substantial Certainty" Exception To The Workers' Compensation Bar (Pa1-2, 6-12)

The New Jersey Workers' Compensation Statute, at N.J.S.A. 34:15-8, provides an exception to the general rule that an employee who is injured in the course of her employment may only recover through a Workers' Compensation claim: An injured employee may proceed in a civil action against her employer if the injury arose from an "intentional wrong" committed by the employer. Id.

"Intentional wrong" is a term of art that has been interpreted in a more expansive way as case law has evolved. The New Jersey Supreme Court in Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161 (1985) set forth a two-prong analysis for determining whether a claim satisfies the "intentional wrong" exception to the Workers' Compensation exclusivity bar. First, the employer's conduct must have created a "substantial certainty" that an employee would be

injured. Id. at 178. Second, the context in which the employer's conduct occurred must have been such that the conduct was more than "a fact of life of industrial employment" and that it was "plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act[.]" Id. at 179.

The first prong, known as the "conduct prong", is to be determined by a civil jury if the trial court is satisfied that "viewed in the light most favorable to the employee, the evidence could lead a jury to conclude that the employer acted with knowledge that it was substantially certain that a worker would suffer injury." Laidlow v. Hariton Machinery Co., Inc., 170 N.J. 602, 623 (2002). The trial court must then decide the second, "context prong", as a matter of law, determining whether the employee's allegations "constitute a simple fact of industrial life or are outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation bar." Id.

In Laidlow, the New Jersey Supreme Court clarified and resolved certain conflicting interpretations of the Millison decision's "intentional wrong" analysis. "Thus, it is now clear that an 'intentional wrong' is **not** limited to the traditional assault and battery, or to actions taken with a subjective intent to harm, but also includes instances where an employer **knows** that the consequences of its acts are substantially certain to result in harm or injury to

an employee." Fisher v. Sears, Roebuck & Co., 363 N.J. Super 457, 465 (App. Div. 2003), certif. den., 179 N.J. 310 (2004) (citing Laidlow, 170 N.J. at 613, 617-618) (emphasis added).

Critically, the New Jersey Supreme Court in Laidlow made clear that the determination of whether an employer's conduct created a substantial certainty of injury must be "grounded in the **totality of the facts contained in the record**" and is not to be determined based upon any per se or categorical rule. Laidlow, 170 N.J. at 622-623 (emphasis added). The substantial certainty determination "requires a case-by-case analysis." Fisher, 363 N.J. Super. at 466. "[N]o one fact is dispositive." Id. at 469.

There is no requirement of prior incidents or injuries in order to establish that an employer's acts or omissions constituted an intentional wrong by creating a substantial certainty of injury: "[T]he absence of a prior accident does not preclude a finding of an intentional wrong." Crippen v. Central Jersey Concrete Pipe Co., 176 N.J. 397, 408 (2003).

The Laidlow decision also abrogated earlier case law that relied on a more restrictive conception of "intentional wrong" as requiring a subjective or deliberate intent to injure on the part of an employee. In Charles Beseler Co. v. O'Gorman & Young, Inc., 188 N.J. 542, 547-548 (2006), the New Jersey Supreme Court confirmed that, as clarified in Laidlow, an "intentional wrong"

claim could arise from "an unintended injury caused by an intentional wrong" where harm to an employee was "substantially certain" to result. The New Jersey Supreme Court's Laidlow holding abrogated earlier cases, such as New Jersey Mfrs. Ins. Co. v. Joseph Oat Corp., 287 N.J. Super. 190, 195-196 (App. Div.), certif. denied, 142 N.J. 515 (1995), that had relied on the outmoded conception that a "deliberate intention to injure" was the only way to satisfy the intentional wrong/substantial certainty test. See Charles Beseler, 188 N.J. at 548 n. 2.

C. The Trial Court's Erroneous Grant Of Summary Judgment To HMH (Pa1-3, 6-12)

Here, the trial court failed to view the evidence in the light most favorable to the Plaintiff and disregarded the fact-sensitive, "case-by-case" analysis required by the case law for analyzing whether a substantial certainty of injury was created by Defendant HMH's acts and omissions.

Preliminarily, the trial court fundamentally misconstrued the summary judgment standard when it found that "there is no evidence that **unequivocally** leads to the conclusion that HMH's actions were 'substantially certain to result in injury or death of its employees.'" Pa11 (emphasis added). In so ruling, the trial court misapplied the summary judgment standard set forth in Brill. It is not the burden of Plaintiff, the non-moving party, to "unequivocally" prove his or her case to withstand summary judgment. Rather, Plaintiff need only demonstrate that there is a genuine dispute such that a reasonable jury could rule

in his or her favor. Thus, "equivocal" evidence, meaning evidence that could be construed either in support of or against the Plaintiff, must be construed in Plaintiff's favor and its existence requires the denial of a defendant's summary judgment motion. Brill, 142 N.J. at 524. The trial court clearly erred in construing what it viewed as equivocal evidence against Plaintiff and in favor of the moving party, HMH.

The trial court also erred in its analysis of whether a jury could find that HMH's conduct created a substantial certainty that one of its employees would be injured. The trial court focused largely on the facts of distinguishable cases rather than conducting a case-specific analysis based on the totality of the facts in the instant matter, which appears to present an issue of first impression.

In its written decision, the trial court emphasized that "[t]he numerous cases dealing with intentional wrong primarily involve industrial settings, particularly situations where employers have either removed or modified safety features on machinery, which lead to employee injuries." Pa9. However, the fact that many cases involving intentional wrongs involve industrial settings and removing safety features from machines is irrelevant to whether the circumstances of the instant matter give rise to a jury question, which must be determined on a totality of the facts, case-by-case analysis. See Laidlow, 170 N.J. at 622-623. See also Fisher, 363 N.J. Super. at 469 (holding that "no one

fact is dispositive" in determining whether a substantial certainty of injury has been created by an employer's conduct).

As a result of its erroneous focus on whether the facts of the instant matter fit the fact patterns of other cases, the trial court primarily relied on the facts of two distinguishable cases to support its granting of summary judgment to Defendant HMH: McGovern v. Resorts Int'l Hotel, Inc., 306 N.J. Super. 174 (App. Div. 1997) and Fisher v. Sears, Roebuck & Co., 363 N.J. Super 457, 466 (App. Div. 2003). Pa9-11. Neither of these cases involved facts that were comparable to the instant matter, in which a fatal accident arose from HMH's decision to require certain employees to park in a distant area of the hospital parking lot that lacked the pedestrian safeguards present in other areas of the lot.

In McGovern, the first case cited by the trial court, the employer, a casino, required employees to transport money carts across the public gaming floor, during which process an employee was robbed. McGovern, 306 N.J. Super. at 176. The McGovern fact pattern has nothing to do with the parking lot risks at issue herein. Moreover, the McGovern case, which was decided prior to Laidlow, relied on the now-abrogated case of New Jersey Mfrs. Ins. v. Joseph Oat Corp., 287 N.J. Super. 190, for the disapproved proposition that "deliberate intent to harm" is required to establish an "intentional injury" claim. McGovern, 306 N.J. Super. at 179, 180-1. As noted above, the New Jersey Supreme Court

has recognized the abrogation of the New Jersey Mfrs. Ins. v. Joseph Oat Corp. case. See Charles Beseler, 188 N.J. at 548 n. 2.

The facts of the Fisher case cited by the trial court are similarly distinguishable from the instant matter, as they involved a security guard who was killed by armed robbers while transporting cash from his employer's store. Fisher, 363 N.J. Super. at 460. The cases cited by the trial court have nothing to do with the risks posed by Defendant HMH's conduct in this case, whereby it required certain employees to park in a distant area of the hospital parking lot that lacked pedestrian safeguards, even though said safeguards were provided in the parking area used by hospital administrators, physicians, and patients.

The trial court misapprehended the significance of the case of Livingstone v. Abraham & Straus, Inc., 111 N.J. 89, 105-106 (1988), which Plaintiff cited for its holding that, "by requiring its employees to park in a distant section of the lot," an employer "caused its employees to be exposed to an added hazard, on a daily basis, in order to enhance its business interests." As in the instant matter, in Livingstone, the distant lot where the employer required its employees to park was lacking in pedestrian safeguards:

> The lot has no pedestrian walkways. Employees must make their way across the lot to and from the perimeter areas in day and night, whatever the condition of season, traffic or weather. Thus, we do not think that it can fairly be said that the employee is subjected only to the same risks as other users of the lot. To the contrary, it would seem logical that the hazard of traversing an expansive parking area is a function of the distance

between the parking spot and the employer's store.

[Livingstone v. Abraham & Straus, Inc., 216 N.J. Super. 685, 691 (App. Div. 1987), aff'd, 111 N.J. 89 (1988).]

Here, as in Livingstone, a jury could readily conclude that Defendant HMH intentionally and knowingly required non-management, non-physician employees such as Ms. Jameel to undergo a heightened risk by requiring them to park in a distant area of the parking lot that was devoid of pedestrian safeguards and traffic control devices. See Pa319 (70:17-71:1); Pa327-8 (105:18-106:3; 108:13-15); Pa329-330 (113:9-114:19); Pa815-6 (25:16-26:1); Pa45; Pa655, Pa663, Pa665-6; see also video stills, Pa416-429.

Critically, Defendant HMH had pedestrian safety and traffic control measures in place in other areas of the parking lot, such as the areas used by hospital management and physicians, which had features such as pedestrian sidewalk, crosswalks, traffic signage and markings, cones, and peninsulas to increase visibility at intersections. Pa553-7 (54:2-58:2); Da1029-1032 (41:24-44:4); Pa665-6. See also photographs of the management/physician/patient parking area safety features, Pa694-8. Thus, Defendant HMH was well aware of the need for pedestrian safeguards and traffic control measures in the large, busy parking lot, yet intentionally chose to require non-management employees such as Ms. Jameel to park and walk through an area of the lot without these necessary pedestrian safeguards.

The unsafe, unprotected configuration of the area of the parking lot where the fatal crash occurred clearly played a substantial role in causing the incident. Unlike the T-intersection in the patient/visitor parking area, the T-intersection in the distant area of the employee parking lot that Ms. Jameel was attempting to cross on the morning in question had no stop sign, no traffic control markings, no pedestrian warning markings, and no peninsula to increase a driver's ability to see pedestrians around the corner. Pa655, Pa663. Instead, the corner of the T-intersection in question was blocked by a parked car, obstructing Dember's ability to see Ms. Jameel as she crossed. Id. Defendant Dember did not see Ms. Jameel at any time before the crash. Pa305 (15:5-16). Due to the lack of traffic control signs and markings, Dember did not stop as she made the left turn during which she crashed into Ms. Jameel. Pa44-45. A jury could readily conclude that Defendant HMH intentionally and knowingly allowed the distant area of its parking lot where it required employees to park to be in a dangerous condition, creating an accident waiting to happen that substantially contributed to the causation of the subject fatal crash.

Significantly, Defendant Dember has admitted that the presence of crosswalks would have focused her attention toward pedestrians crossing in the distant area of the expansive parking lot designated for employee parking where she struck Ms. Jameel. See Pa309 (30:11-31:2); Pa318 (68:8-22).

Further confirming Defendant HMH's knowledge of the danger it had created, after Ms. Jameel's tragic death, HMH used traffic controllers, security staff, flaggers, and new directional signage to protect the safety of its employees who it required to park in the distant employee area of the lot. Pa492-3. While not admissible as to the issue of fault, HMH's subsequent actions are admissible, and highly probative, of its knowledge regarding the need for pedestrian safeguards in the area where it required non-management employees to park and of the feasibility of instituting such safety measures. See N.J.R.E. 407 (evidence of subsequent remedial measures is admissible for issues other than culpability).

Under the totality of the facts, a reasonable juror could conclude that Defendant HMH's intentional act in requiring employees such as Ms. Jameel to park in a distant area of the parking lot that lacked the pedestrian safety measures present in other areas of the lot was an accident waiting to happen and that it created a substantial certainty that someone would be injured.

The trial court erroneously focused on its finding that "[N]o evidence suggests that HMH altered or modified the parking lot." Pa11. Once again, the trial court appears to have been fixated on comparing the instant matter with the fact-patterns of other cases involving industrial machinery where safety devices were removed or altered. However, there is no per se rule that only cases involving the alternation or removal of a condition or safety device can create a

substantial certainty of injury. See Laidlow, 170 N.J. at 622-623. Here, it is undisputed that there were pedestrian safeguards installed in the area of the lot where hospital administrators and physicians parked. A jury could find that HMH knew of the necessity of these safeguards, yet intentionally required Ms. Jameel and other non-management employees to park in a distant area of the lot without such safeguards in place. A jury could find that HMH's acts created a substantial certainty that an employee would be injured in this unprotected area of the busy parking lot.

The trial court also erroneously stated that "Plaintiff does not argue that the lot was in and of itself inherently dangerous." Pa11. The trial court's finding is clearly contradicted by the record. To the contrary, Plaintiff has argued, through both factual evidence and the opinion of its engineering expert Dr. Wayne Nolte, that the area of the parking lot in question was in an inherently "hazardous" condition due to the absence of pedestrian safeguards, in violation of both common sense and the governing transportation engineering standards. See Pa665-6. Dr. Nolte specifically opined that "[t]he incident site was in a hazardous condition on the day of this incident" due to "the lack of proper traffic control devices" that were needed to maintain the lot "in a safe condition." Pa665. The trial court's erroneous overlooking of evidence in the record supporting Plaintiff's contention that HMH's parking lot was in an inherently

dangerous condition further demonstrates that its order granting summary judgment should be reversed.

The trial court also erred when it held as follows: "While not dispositive, the fact that there were no significant reports of any prior incidents in the lot militates against a finding of an intentional wrong by HMH with respect to requiring employees to utilize the lot." Pa11. Contrary to the trial court's conclusion that the absence of prior incidents "militates" against a finding of an intentional wrong, the New Jersey Supreme Court has held that "the absence of a prior accident does **not** preclude a finding of an intentional wrong." Crippen v. Central Jersey Concrete Pipe Co., 176 N.J. at 408 (emphasis added). The trial court erroneously afforded too much weight to the absence of prior reported accidents when the New Jersey Supreme Court has held that such prior accidents are not necessary to the finding of an intentional wrong.

In addition, the trial court erred in basing its decision on the fact that Plaintiff's expert engineer did not use the legal term "substantially certain" in his report regarding the hazardous, unprotected nature of the mandatory, distant employee parking area. Pa9. In fact, an expert is prohibited from rendering such explicit legal conclusions. As the New Jersey Supreme Court has held: "Expert testimony that recites the legal conclusion sought in a verdict is not helpful to the jury." State v. Nesbitt, 185 N.J. 504, 517 (2006). Experts are therefore

prohibited from testifying as to "improper legal conclusions" and questions to experts must avoid tracking the language of legal principles or statutes. Id. The trial court's focusing on the fact that Dr. Nolte did not use the legal term "substantial certainty" in his report was therefore misplaced and not a valid basis to grant summary judgment to Defendant HMH. Rather, the issue before the trial court was whether the totality of the circumstances, which included Dr. Nolte's opinion that HMH created a hazardous situation by requiring its employees to park in the distant area of the lot with no pedestrian safety measures in place, would allow a reasonable jury to conclude that HMH had created a substantial certainty that one of its employees would be injured. Since a reasonable jury could answer this question in the affirmative, summary judgment was inappropriate.

Finally, to the extent the trial court addressed the "context" prong of the Laidlow analysis, the trial court erred in suggesting that being required to park in a distant area of a parking lot with no pedestrian safeguards, when such safeguards are acknowledged as necessary and are provided for other areas of the same parking lot, is somehow an accepted fact of industrial employment. See Pa11. In contrast, the Legislature cannot have meant to normalize and immunize an employer like HMH who essentially categorizes its non-managerial employees as second-class citizens for safety purposes and requires

them to park in an area of a busy lot that is bereft of the pedestrian safety mechanisms and traffic control devices that the employer knows are necessary and which it provides for its managers and administrators.

For the foregoing reasons, the trial court's erroneous order granting summary judgment to Defendant HMH should be reversed and Plaintiff's claims against HMH should be remanded for trial.

D. The Trial Court Also Erred In Granting Summary Judgment As To Punitive Damages Against Defendant HMH (Pa1-3, 12)

For similar reasons to those set forth above, the trial court also erred in granting summary judgment as to Plaintiff's claim for punitive damages against Defendant HMH. Pa12. The trial court appears to have failed to appreciate that a punitive damages claim need not be predicated upon "actual malice", but can be based on a finding of "wanton and willful disregard", which is defined as "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." N.J.S.A. 2A:15-5.10. For example, in McLaughlin v. Rova Farms. Inc., 56 N.J. 288, 295 (1970), the New Jersey Supreme Court held that a reasonable jury could award punitive damages where the defendant failed to post appropriate warning signage prohibiting guests from diving into a shallow area of a lake. The Court in McLaughlin cited, with approval, several other examples of cases where a jury could appropriately find wanton and willful conduct

sufficient to sustain punitive damages, including cases in which: (1) a defendant property owner allowed a hole to exist, with no warnings or safety barriers, near a path where it knew tenants would travel to reach garbage cans in the back of an apartment complex. Id. at 306 (citing Greeton v. Solomon, 287 P.2d 721 (Wash. 1955)); and (2) a defendant pool operator allowed people to swim in a pool with an uncovered filter pipe despite knowing of the danger of drowning that could occur if a swimmer's body got caught in the pipe. Id. at 308 (citing Atlas Properties, Inc. v. Didich, 226 So.2d 684 (Fla.Sup.Ct. 1969)). As a further example, in Smith v. Whitaker, 313 N.J. Super. 165, 198 (App. Div. 1998), the Appellate Division held that a jury question was created as to punitive damages where an automobile collision was caused by a defendant trucking company's "lack of attention to maintenance procedures and poor supervision" of a driver.

Here, a reasonable jury could determine that HMH knowingly created a high degree of probability that its employees would be injured by requiring them to park in a distant area of the parking lot with inadequate pedestrian safety measures, particularly as HMH knew of the necessity of these pedestrian safeguards since it employed them in other areas of its lot that were used by hospital administrators and physicians. Accordingly, the trial court erroneously granted summary judgment as to Plaintiff's punitive damages claim against HMH, which should also be remanded for trial.

POINT II

THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT DEMBER SHOULD BE REVERSED (Pa13, 17-18)

The trial court granted summary judgment to Defendant Dember under the "co-employee" bar to civil suits contained in the Workers' Compensation Act. Pa17-18. Plaintiff maintains that this Court should reverse the trial court's ruling and revisit the Appellate Division case law relied upon by the trial court. The Legislature could not have intended to fully immunize from any civil responsibility a defendant such as Dember, who negligently struck and killed the Plaintiff while engaging in conduct that had no inherent connection to the scope of her employment with the hospital. Indeed, Defendant Dember never even clocked in or worked at all on the day of the crash.

N.J.S.A. 34:15-8 immunizes a defendant from a civil action if he or she "was in the same employ as the person injured or killed [….]" This Court has explained that the determinative factor that prevents suit against a co-employee is whether the defendant co-employee is in the course of employment when the injury occurs. See Mule v. NJM, 356 N.J. Super. 289, 394 (App. Div. 2003). In Mule, this Court stated that

> The fact that a car accident occurs on an employer's property between two co-employees, and that injury to the employee who is in the course of her employment at the time is compensable at the time is compensable under the Worker's Compensation Act, ***does not automatically mean that the injured employee's common law claim against the other is barred by***

> ***N.J.S.A. 34:15-8. The critical question is whether both employees were in the course of their employment at the time the accident occurred.*** If not, the fact that both motorists were co-employees is without legal significance.
>
> [Mule, 356 N.J. Super. at 394 (emphasis added).]

Further, in Manole v. Carvellas, this Court found that "If [Defendant] was not yet within the scope of his employment when the vehicles collided, the fact that he was also a [co-employee] would be **a mere coincidence without legal significance**, and plaintiff would be as free to sue him in a third-party action as anyone else." Manole v. Carvellas, 229 N.J. Super. 138, 143 (App. Div. 1988) (emphasis added).

Here, the trial court cited the case of Konitch v. Hartung, 81 N.J. Super. 376 (App. Div. 1963), certif. denied, 41 N.J. 389 (1964), which held that when one employee, who arrived for work and was walking through an employer-provided parking lot, was struck by a vehicle driven by another employee who was also arriving to work, no civil suit could be filed against the co-employee.

While Plaintiff admits that the facts in Konitch are similar in many respects to the instant matter, Plaintiff respectfully submits that this Court should revisit the holding of Konitch in light of the particular circumstances raised by the instant matter. Here, Defendant Dember's shift had already started at 6:45 a.m. on the date of the fatal collision, which occurred at approximately 7:00 a.m. See Da1057-8 (69:14-70:3); Pa1011 (23:5-13). Thus, Dember was not

where she was supposed to be and was not performing any work functions in the scope of her employment at the time of the crash. Dember never even clocked into work on the day of the crash. See Pa789 (Dember's timesheet). Thus, Defendant Dember did not work as a nurse or perform any professional duties at any time on October 6, 2021.

The Legislature cannot have intended to require the anomalous and unjust result that occurred here, in which a tortfeasor (Dember) who caused a fatal motor vehicle collision has escaped without any civil liability, when her conduct had no inherent relationship to her employment duties. Likewise, the Legislature cannot have meant to completely immunize Dember from civil liability for her fatal negligence as a driver based on the fortuitous facts of where her negligent driving occurred and who she happened to hit. This is particularly so where Dember's negligent driving had nothing to do with her actual job responsibilities, which she was not performing at the time of the crash. In contrast, the fact that Dember and Ms. Jameel were co-employees was essentially a "mere coincidence" with no inherent connection to the actual work they performed. See Manole, 229 N.J. Super. at 143. The anomalous and unjust result in this tragic case, in which a negligent tortfeasor who caused a fatal collision has escaped without any civil liability at all, renders this legal issue particularly ripe for review and reconsideration by this Court.

Accordingly, it is respectfully submitted that the trial court's dismissal of Plaintiff's claims against Defendant Dember should be reversed.

CONCLUSION

For the reasons set forth above, the trial court's December 15, 2023 orders granting summary judgment to Defendants HMH and Dember should be reversed and this matter should be remanded for trial.

Thank you for the Court's consideration herein.

Respectfully submitted,

/s Jacqueline DeCarlo, Esq.
Jacqueline DeCarlo, Esq.
HOBBIE & DECARLO, P.C.
Counsel for Plaintiff

Dated: 4/1/2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-001225-23

FAISAL JAMEEL, Administrator ad Prosequendum for the ESTATE OF AASAI JAMEEL	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY
Plaintiffs/Appellants	:	DOCKET NO: MID-L-7038-21
v.	:	SAT BELOW
JENNIFER L. DEMBER; BAYSHORE COMMUNITY HOSPITAL; BAYSHORE COMM HOSP-D INGENITO-TAX	:	HON. ALBERTO RIVAS, J.S.C.
	:	CIVIL ACTION
Defendants/Respondents	:	

BRIEF AND APPENDIX OF DEFENDANT/RESPONDENT, JENNIFER L. DEMBER

RUDOLPH, KAYAL & ALMEIDA
Counselors at Law, P.A.
Atlantic Corporate Center
2317 Highway 34, Suite 2-C
Manasquan, NJ 08736
Attorneys for Defendant/Respondent
Jennifer L. Dember

On The Brief

STEPHEN A. RUDOLPH, ESQ.
(034441994)

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PRELIMINARY STATEMENT

The trial Court, as a matter of law, properly granted this defendant, Jennifer Dember's (Dember) summary judgment motion based on Dember's workers' compensation co-employee immunity. As to Dember, the trial Court' decision must be affirmed.

On October 6, 2021, at approximately 7:00 a.m., plaintiff Aasia Jameel arrived at Bayshore Medical Center, her place of employment, and parked her vehicle in the employee-designated area of the hospital parking lot. As she started walking through her employer's parking lot to go to work at the hospital, plaintiff was struck by a vehicle operated by her co-employee Dember, a Registered Nurse, who was also reporting to work at Bayshore Medical Center. Plaintiff died as a result of the accident.

Plaintiff, Faisal Jameel, the decedent's husband, is currently recovering a lifetime of workers' compensation death/dependency benefits under the Workers' Compensation Act as a result of his wife's work-related accident. Not satisfied with the receipt of lifetime workers' compensation death benefits, Mr. Jameel and the Estate now want additional money damages from the defendants in this civil action.

Hackensack Meridian Health/Bayshore Medical Center (HMH) certified that both the decedent and Dember were "employed by HMH Hospitals Corporation

d/b/a Bayshore Medical Center on October 6, 2021." Further, the payroll statements for the decedent and Dember both list "HMH Hospitals Corporation" as their employer. HMH certified that, at the time of the accident, "Aasai Jameel and Jennifer Dember were employed by the same employer entity group."

The decedent's estate filed a workers' compensation Claim Petition against HMH. In its answer to the Claim Petition, HMH admitted that the decedent's parking lot accident "arose out of and in the course of employment." As noted above, HMH is also paying workers' compensation Dependency Benefits to the decedent's spouse. HMH has not disputed or objected to the decedent's estate's claim that the decedent was killed during the course of her employment in the employer's parking lot as she was walking to the hospital building.

The trial Court, as a matter of law, properly granted Dember's summary judgment motion based on Dember's co-employee (fellow-servant) immunity under the Workers' Compensation Act. The decedent and Dember were co-employees at the time of the accident, and the accident occurred during the course of their respective employment.

PROCEDURAL HISTORY

Dember adopts and incorporates the Procedural History set forth in plaintiff's brief, but adds the following. On March 21, 2023, Dember filed an answer to plaintiffs' second amended complaint, and asserted the following defense: "The claims in the subject second amended complaint and/or this litigation are barred or limited by the New Jersey Worker's Compensation Act and interpretive case law." (Da12).

STATEMENT OF FACTS

On October 6, 2021, at approximately 7:00 a.m., plaintiff Aasia Jameel arrived at Bayshore Medical Center, her place of employment, and parked her vehicle in the employee-designated area of the hospital parking lot. (Pa36). As she started walking through the parking lot to go to work at the hospital, plaintiff was struck by a vehicle operated by a co-employee, Jennifer Dember (Dember), a Registered Nurse, who was also reporting to work at Bayshore Medical Center. (Pa36). Plaintiff died as a result of the accident.

Despite seeking, and receiving, lifetime workers' compensation death/dependency benefits, the decedent's husband, plaintiff Faisal Jameel, as the Administrator *Ad Prosequendum*, also filed a wrongful death complaint against defendants Jennifer Dember and various "Bayshore" entities. (Pa62). Plaintiff alleges in the complaint that Dember operated her vehicle in a "negligent, careless and reckless manner." (Pa63 at ¶ 6).

Through various corporate mergers, Bayshore Medical Center is now a part of, or has been subsumed by, Hackensack Meridian Health Hospitals Corporation, or "HMH Hospitals Corporation" (HMH). (Pa103). At the time of the accident, the decedent was employed as a nuclear medicine technologist for HMH. (Pa285). At the time of the accident, Dember was employed as a Registered Nurse in the cardiac catheterization department for HMH. (Pa287).

In response to Dember's supplemental interrogatories, HMH certified that, "the decedent was employed by HMH Hospitals Corporation d/b/a Bayshore Medical Center on October 6, 2021." (Pa281). Further, HMH certified that, "defendant Jennifer Dember was employed by HMH Hospitals Corporation d/b/a Bayshore Medical Center on October 6, 2021." (Pa281).

The decedent's payroll statement (pay period September 5, 2021, through September 18, 2021) was from her employer HMH Hospitals Corporation. (Pa285). Similarly, Dember's payroll statement (pay period September 5, 2021, through September 18, 2021) was from the same employer HMH Hospitals Corporation. (Pa287).

In response to Dember's Request for Admissions, HMH certified that, at the time of the accident, "Aasai Jameel and Jennifer Dember were employed by the same employer entity group." (Pa289).

As a result of this work-related accident under the New Jersey Workers' Compensation Act, the decedent's husband, through the decedent's estate, filed a workers' compensation Claim Petition against the decedent's employer, HMH, under Case Number 2021-26059. In its Answer to the workers' compensation Claim Petition, HMH admitted that the decedent's parking lot accident "arose out of and in the course of employment." (Pa58). HMH certified that it is paying workers' compensation "Dependency Benefits" to the decedent's spouse. (Pa58).

In response to plaintiff's Request for Admissions, HMH certified that, "[t]he parking lot where the incident of October 6, 2021, occurred was owned by Bayshore Community Hospital, a division of HMH Hospitals Corporation." (Pa294 at 14). HMH also certified that, "[t]he property located at 727 North Beers Street, within the Township of Holmdel, County of Monmouth and State of New Jersey was owned by Bayshore Community Hospital, a division of HMH Hospitals Corporation on October 6, 2021." (Pa295 at 16,17).

As part of it ownership of the hospital property and parking lot, HMH entered into various agreements with contractors, including entering into a snow removal contract for the parking lot with A&B Landscaping of Central New Jersey. (Pa298).

At the time of the accident, Dember was driving to a designated portion of the back parking lot where the HMH employees were told by HMH to park, which would leave the parking spots closest to the hospital building for the patients and visitors. (Pa330 at 115-16; Pa333 at 126-27). Dember testified that, "[w]e were instructed to park in that area." (Pa333 at 127). Dember said the parking lot area she was driving to was the "employee parking lot." (Pa330 at 115).

Dember testified that the "majority of time," she started work at 7:00 a.m., and that the work schedule listed on the books is just "generic hours for the shift." (Pa325, 94:22-25 to 95:1-21).

The accident and resultant death of the decedent took an "emotional toll" on Dember, who testified that she "couldn't get myself out of bed for days." (Pa324, 91:17-21).

In her statement to the police after the accident, it was noted that at 3:30 p.m. on the date of accident, Dember was scheduled to have a Zoom meeting with an HMH attorney because of a malpractice case against a private cardiologist and HMH (Dember was not a defendant in the malpractice case). (Pa469, 16:4-15).

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO DEFENDANT JENNIFER DEMBER BASED ON DEMBER'S CO-EMPLOYEE WORKERS' COMPENSATION IMMUNITY UNDER *N.J.S.A.* 34:15-8. (Pa13; Pa281; Pa285; Pa287; Pa289; T7:19-T8:9).

N.J.S.A. 34:15-8 provides:

> **34:15-8. Election Surrender of Other Remedies.**
>
> Such agreement 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 and an acceptance of all the provisions of this article, and shall bind the employee and for compensation for the employee's death shall bind the employee's personal representatives, surviving spouse and next of kin, as well as the employer, and those conducting the employer's business during bankruptcy or insolvency.
>
> If an injury or death is compensable under this article, *a person shall not be liable to anyone* at common law or otherwise on account of such injury or death for any act or omission occurring *while such person was in the same employ as the person injured or killed*, except for intentional wrong.

The workers' compensation system is a historic "trade-off" whereby employees relinquish their right to pursue common-law remedies in exchange for prompt and automatic entitlement to benefits for work-related injuries. *Laidlow v. Hariton Machinery Co.*, 170 N.J. 602, 604 (2002); *Millison v. E.I. duPont deNemours & Co.*, 101 N.J. 161, 174 (1985). "The workers' compensation system

represents the bargain that was struck between employers and employees concerning workplace injuries, whereby employers shoulder the expense of workers' injuries arising out of the performance of work duties." *Basil v. Wolf*, 193 N.J. 38, 53 (2007); *McDaniel v. Man Wai Lee*, 419 N.J. Super. 482, 489-90 (App. Div. 2011). The Workers' Compensation Act "provide[s] a method of compensation for the injury or death of an employee, irrespective of the fault of the employer or contributory negligence and assumption of risk of the employee." *McDaniel*, 419 N.J. Super. at 490 (quoting *Harris v. Branin Transport, Inc.*, 312 N.J. Super. 38, 46, *certif. denied*, 156 N.J. 408 (1998)). The Act serves as the exclusive remedy for an employee who sustains an injury in an accident that arises out of and in the course of employment. *Basil*, 193 N.J. at 54-55; *McDaniel*, 419 N.J. Super. at 490; *Ahammed v. Logandro*, 394 N.J. Super. 179, 190 (App. Div 2007).

The workers' compensation immunity bars one employee from suing a co-employee for an injury or death arising from the same accident. *N.J.S.A.* 34:15-8. "If an employee experiences a compensable accident, he may not maintain a common law tort action against a fellow employee arising out of the same incident. This result is mandated by *N.J.S.A.* 34:15-8. . ." *Barone v. Harra*, 77 N.J. 276, 279 (1978) (emphasis added); see also *Basil*, 193 N.J. at 54-55 n.7. "The Act's exclusivity bar also applies to injury caused by the actions of a fellow employee."

Basil, 193 N.J. at 54-55 n.7. "A fellow employee. . .would be immune from responsibility." *Barone*, 77 N.J. at 279 (emphasis added).

The Workers' Compensation Act "precludes tort actions against fellow employees for compensable actions occurring while both persons are in the same employ." *Basil*, 193 N.J. at 54-55 n.7; *Barone*, 77 N.J. at 279. *N.J.S.A.* 34:15-8 is a statutory provision that "blankets co-employees with immunity from suit by injured co-workers." *McDaniel*, 419 N.J. Super. at 491 (emphasis added). In order for the co-employee immunity to apply, three conditions must be satisfied: (1) the plaintiff must have suffered a compensable injury; (2) the plaintiff and defendant must have been co-employees; and (3) the defendant must have been acting in the course of his/her employment. *McDaniel*, 419 N.J. Super. at 492; *Daus v. Marble*, 270 N.J. Super. 241, 246 (App. Div. 1994); *Wunschel v. City of Jersey City*, 96 N.J. 651, 659 (1984).

Konitch v. Hartung, 81 N.J. Super. 376 (App. Div. 1963), *certif. denied*, 41 N.J. 389 (1964) is a reported Appellate Division case directly on point factually and legally with the matter here. In *Konitch*, plaintiff had parked her vehicle in her employer's parking lot and was walking through the parking lot when she was struck by a vehicle operated by a co-employee, who was driving to work and was about to park his vehicle. Plaintiff sued defendant, her co-employee, for general negligence. The trial Court granted defendant's summary judgment motion based

on defendant's workers' compensation co-employee immunity under *N.J.S.A.* 34:15-8. In affirming the dismissal of plaintiff's complaint based on defendant's co-employee immunity, the Appellate Division held, "the injured plaintiff and defendant are employed by the same employer. Both were at the parking lot for the purpose of beginning their work day." *Konitch*, 81 N.J. Super. at 378 (emphasis added). The Appellate Division further held:

> There can be no question that when defendant drove to work and entered the parking lot provided by the company, he was in the course of employment. 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. [citation omitted]. Our courts have held that the employer's parking lot is part of the employment premises, and an employee entering or using the lot in the circumstances here present is in the course of employment. *McCrae v. Eastern Aircraft*, 137 N.J.L. 244 (Sup. Court. 1948); *Buerkle v. United Parcel Service*, 26 N.J. Super. 404 (App. Div. 1953); *Lewis v. Walter Scott & Co.*, 50 N.J. Super. 283 (App. Div. 1958); *Rice v. Pharmaceuticals, Inc.*, 65 N.J. Super. 579 (App. Div. 1961). Plaintiffs conceded at oral argument that not only did Mrs. Konitch have a compensable claim, but if defendant had been injured, he, too, would be entitled to compensation.
>
> *Konitch*, 81 N.J. Super. at 382-83 (emphasis added).

Since both the plaintiff and defendant in *Konitch* were in their employer's parking lot reporting to work, neither had "clocked in" yet when the accident occurred. The *Konitch* Court eviscerates plaintiff's arguments here that Dember

loses her co-employee immunity because she had not yet "clocked in" when the accident occurred.

DeCicco v. Anderson, 99 N.J. Super. 243 (App. Div. 1968) is another reported Appellate Division case directly on point factually and legally with the matter here. In *DeCicco*, plaintiff had parked her vehicle in her employer's parking lot and was walking through the parking lot when she was struck by a vehicle operated by a co-employee, who was driving to work and was about to park her vehicle. Plaintiff sued defendant, her co-employee, for general negligence. The trial Court granted defendant's summary judgment motion based on defendant's workers' compensation co-employee immunity under *N.J.S.A.* 34:15-8. In affirming the dismissal of plaintiff's complaint based on defendant's co-employee immunity, the Appellate Division relied on *Konitch v. Hartung*, *supra*, and held "[w]e therefore conclude that both parties were in the 'same employ' and that the accident occurred in the course of their employment." *DeCicco*, 99 N.J. Super. at 247 (emphasis added).

Since both the plaintiff and defendant in *DeCicco* were in their employer's parking lot reporting to work, neither had "clocked in" yet when the accident occurred. The *DeCicco* Court similarly eviscerates plaintiff's arguments here that Dember loses her co-employee immunity because she had not yet "clocked in" when the accident occurred.

In *Linden v. Solomacha*, 232 N.J. Super. 29 (App. Div. 1989), plaintiff was driving a vehicle while employed as a New Jersey State Police officer when he was struck by a vehicle operated by a New Jersey State employee with the Department of Treasury. Plaintiff sued defendant for general negligence. The trial Court granted defendant's summary judgment motion based on defendant's workers' compensation co-employee immunity under *N.J.S.A.* 34:15-8. In affirming the dismissal of plaintiff's complaint based on defendant's co-employee immunity, the Appellate Division held, "[i]n holding, as we do, that the bar of *N.J.S.A.* 34:15-8 applies to co-state employees regardless of where and for what department they are engaged in performing State duties, we express a view that is consistent with that espoused by other jurisdictions." *Linden*, 232 N.J. Super. at 33. The Appellate Division further held:

> On its face, the bar applies to plaintiff's negligence suit against defendant Solomacha. Though both work for different departments of the State, the employer of both is, in fact, the State. [citation omitted]. Neither the State Police nor the Department of Treasury is a separate legal entity, but rather each is a division or department of the State performing State functions.
>
> *Linden*, 232 N.J. Super. at 31.

In *Ehrgott v. Jones*, 208 N.J. Super. 393 (App. Div. 1986), plaintiff was injured in a motor vehicle accident as a passenger in a vehicle operated by his co-employee. Plaintiff and his co-employee were employed as chemists for Hoechst-

Roussel and they were driving to Newark Airport to fly to Las Vegas for the annual meeting of the American Chemist Society. Plaintiff and his co-employee were planning to fly to Las Vegas on Sunday to enjoy a day at the casinos before the meeting started on Monday. Plaintiff sued defendant, his co-employee/driver, for general negligence. The trial Court granted defendant's summary judgment motion based on defendant's workers' compensation co-employee immunity under *N.J.S.A.* 34:15-8. In affirming the dismissal of plaintiff's complaint based on defendant's co-employee immunity, the Appellate Division held, "[w]e think it obvious that paid travel to and from an out-of-state professional meeting is so integral to attending the meeting itself as to constitute a part of the overall special mission." *Ehrgott*, 208 N.J. Super. at 398. The Appellate Division further held:

> Since both plaintiff and his coemployee were in the course of their employment when the accident occurred, we must conclude that plaintiff's tort action in negligence against his coemployee is barred. *See N.J.S.A.* 34:15-8. We appreciate the hardship that this ruling may have on this plaintiff. But our ultimate obligation in dealing with the issue before us is to preserve the integrity of the workers' compensation law and to insure its interpretation and application in a manner consistent with its remedial and social purposes. That obligation requires the conclusion that the special-mission exception to the going and coming rule applies here.
>
> *Ehrgott*, 208 N.J. Super. at 399 (emphasis added).

In *Maggio v. Migliaccio*, 266 N.J. Super. 111 (App. Div. 1993), plaintiff, a West Long Branch police officer, was injured while directing traffic at a fire call.

Defendant, a volunteer fireman with West Long Branch Fire Company No. 2, was engaged in fighting the fire when the fire hose struck plaintiff and knocked his legs out from under him. Plaintiff sued defendant/fireman for general negligence. The trial Court granted defendant's summary judgment motion based on defendant's workers' compensation co-employee immunity under *N.J.S.A.* 34:15-8. The Appellate Division affirmed the dismissal, holding that both plaintiff and defendant were employed by the same employer and the accident occurred during the course of their employment. *Maggio*, 266 N.J. Super. 116-17.

Here, the evidence clearly and unequivocally establishes that, at the time of the accident, plaintiff/decedent Aasai Jameel and defendant Jennifer Dember were co-employees employed by the same employer. The decedent was employed as a nuclear medicine technologist for HMH. (Pa285). Dember was employed as a Registered Nurse in the cardiac catheterization department for HMH. (Pa287).

Further, HMH certified that, "the decedent was employed by HMH Hospitals Corporation d/b/a Bayshore Medical Center on October 6, 2021." (Pa281). Similarly, HMH certified that, "defendant Jennifer Dember was employed by HMH Hospitals Corporation d/b/a Bayshore Medical Center on October 6, 2021." (Pa281).

Additionally, the decedent's payroll statement (pay period September 5, 2021, through September 18, 2021) was from her employer HMH Hospitals

Corporation. (Pa285). Similarly, Dember's payroll statement (pay period September 5, 2021, through September 18, 2021) was from her employer HMH Hospitals Corporation. (Pa287).

In response to Dember's Request for Admissions, HMH certified that, at the time of the accident, "Aasai Jameel and Jennifer Dember were employed by the same employer entity group." (Pa289).

As a result of this work-related accident, the decedent's husband, through the decedent's estate, filed a workers' compensation Claim Petition against the decedent's employer, Hackensack Meridian Health, under Case Number 2021-26059. In its Answer to the Claim Petition, HMH admitted that the decedent's parking lot accident "arose out of and in the course of employment." (Pa58). HMH certified that it is paying workers' compensation "Dependency Benefits" to the decedent's spouse. (Pa58).

In response to plaintiff's Request for Admissions, HMH certified that, "[t]he parking lot where the incident of October 6, 2021, occurred was owned by Bayshore Community Hospital, a division of HMH Hospitals Corporation." (Pa294 at 14). HMH also certified that, "[t]he property located at 727 North Beers Street, within the Township of Holmdel, County of Monmouth and State of New Jersey was owned by Bayshore Community Hospital, a division of HMH Hospitals Corporation on October 6, 2021." (Pa295 at 16,17).

As part of it ownership of the hospital property and parking lot, HMH entered into various agreements with contractors, including entering into a snow removal contract with A&B Landscaping of Central New Jersey. (Pa298).

It is as clear as it is compelling that, at the time of the accident, the decedent and Dember were co-employees employed by the same employer. The workers' compensation statutory framework, along with the case law from this Court and the Supreme Court, make it clear that the decedent's claims against Dember, her co-employee, are barred as a matter of law. Both were in the course and scope of their respective employment. As such, Dember has, as a matter of law, co-employee immunity under the Workers' Compensation Act. The trial Court properly granted summary judgment to Dember, and that decision must be affirmed.

II. UNDER THE "PREMISES RULE," THE PARKING LOT ACCIDENT OCCURRED DURING THE COURSE OF EMPLOYMENT FOR BOTH PLAINTIFF AND DEFENDANT. (Pa294; Pa295; Pa330 at 115-116; Pa333 at 126-127; T6:20 – T7:4).

In determining whether an accident arises "out of and in the course of employment," our Courts apply the premises rule established by the Legislature in the 1979 amendments to *N.J.S.A.* 34:15-36 of the Workers' Compensation Act. *Lapsley v. Township of Sparta*, 249 N.J. 427, 435 (2022); *Kristiansen v. Morgan*, 153 N.J. 298, 316 (1998). *N.J.S.A.* 34:15-36 provides, in pertinent part:

> Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer . . .

"The premises rule is based on the notion that an injury to an employee that happens going to or coming from work arises out of and in the course of employment if the injury takes place on the employer's premises." *Lapsley*, 249 N.J. at 435; *Kristiansen*, 153 N.J. at 316. Therefore, the fact that an employee had punched out on the time clock does not preclude compensability. *Lapsley*, 249 N.J. at 435-36 (emphasis added); see also *Brower v. ICT Group*, 164 N.J. 367, 372 (2000).

"The Legislature used the phrase 'excluding areas not under the control of the employer' in its definition of employment because it intended to include areas

controlled by the employer within the definition." *Lapsley*, 249 N.J. at 436; *Kristiansen*, 153 N.J. at 316. "That phrase was intended to make clear that the premises rule can entail more than the four walls of an office or plant." *Lapsley*, 249 N.J. at 436; *Kristiansen*, 153 N.J. at 316.

To determine whether an injury is compensable, "[t]he pivotal questions under the premises rule are (1) where was the situs of the accident, and (2) did the employer have control of the property on which the accident occurred." *Lapsley*, 249 N.J. at 436; *Kristiansen*, 153 N.J. at 316-7; *Livingstone v. Abraham & Strauss, Inc.*, 111 N.J. 89, 96 (1988). "[P]laces that are not under the control of the employer are not considered part of the employer's premises for purposes of workers' compensation benefits. . ." *Hersh v. County of Morris*, 217 N.J. 236, 249 (2014). That said, "[t]he meaning of 'control' under the Act is more expansive than under formal property concepts." *Lapsley*, 249 N.J. at 436; *Brower*, 64 N.J. at 372.

The Supreme Court has held that "control exists when the employer owns, maintains, or has exclusive use of the property." *Lapsley*, 249 N.J. at 436; *Kristiansen*, 153 N.J. at 317. It is also well-established that "when compensability of an accident depends on control of the employer, that test is satisfied if the employer has the right of control; it is not necessary to establish that the employer actually exercised that right." *Lapsley*, 249 N.J. at 436; *Brower*, 64 N.J. at 372-73.

Recently, in *Lapsley v. Township of Sparta*, 249 N.J. 427 (2022), the New Jersey Supreme Court analyzed the premises rule in determining if an accident arises out of and in the course of employment. In *Lapsley*, plaintiff was employed as a librarian for the Township of Sparta at the Sparta Public Library. The library was located in a municipal complex with athletic fields, offices and three common-use parking lots, which are open to Township employees and the general public alike. The Township did not direct employees to park in the parking lots, assign parking spaces for employees, or require permit or paid parking. Nor did the Township restrict employees' manner of traveling between the parking lots and the library. The Township owned and maintained the parking lots.

On the day of her accident, plaintiff closed the library early because of a snowstorm. Plaintiff's husband drove to the library to pick up his wife. The husband parked his vehicle in a parking lot adjacent to the library and went inside. After plaintiff and her husband walked approximately eighteen feet into the parking lot, plaintiff was struck by a snowplow owned by the Township and operated by Paul Austin, a Township employee.

Plaintiff filed a personal injury complaint in the Law Division against the Township, the library, Paul Austin and the Sparta Department of Public Works. Defendants all filed a motion to dismiss in lieu of an answer, arguing they all had immunity because plaintiff's claims were barred by the Workers' Compensation

Act. Plaintiff then filed a summary judgment motion, arguing that her accident and injuries were not compensable under the Workers' Compensation Act. Defendants then filed a cross-motion to stay the Law Division matter and transfer the case to the workers' compensation court for determination of compensability.

After the matter was transferred, the Division of Workers' Compensation ultimately ruled that plaintiff's injuries arose out of and in the course of her employment, and were, therefore, compensable under the Workers' Compensation Act. *Lapsley*, 249 N.J. at 432. On plaintiff's appeal, the Appellate Division reversed, finding that plaintiff's injuries were not compensable under the Workers' Compensation Act. *Lapsley*, 249 N.J. at 432. However, the New Jersey Supreme Court reversed, finding that plaintiff's accident and injuries arose out of and in the course of employment, and thus were compensable under the Workers' Compensation Act. *Lapsley*, 249 N.J. at 437-38. The Supreme Court held:

> To determine whether an injury is compensable, "[t]he pivotal questions under the premises rule are (1) where was the situs of the accident, and (2) did the employer have control of the property on which the accident occurred." [citation omitted]. "[P]laces that are not under the control of the employer are not considered part of the employer's premises for purposes of workers' compensation benefits." [citation omitted]. That said, "[t]he meaning of 'control' under the Act is more expansive than under formal property concepts." [citation omitted]. "[T]his Court has stated that control exists when the employer owns, maintains, or has exclusive use of the property." [citation omitted]. It is also well-established that "when compensability of an accident

> depends on control of the employer, that test is satisfied if the employer has the right of control; it is not necessary to establish that the employer actually exercised that right." [citation omitted].
>
> *Lapsley*, 249 N.J. at 436.

The *Lapsley* Supreme Court further held:

> Applying the premises rule here, we find that Lapsley is entitled to compensation under the Act. The site of the accident was the parking lot adjacent to the library where Lapsley's husband had parked; Lapsley stepped off the library curb directly into the parking lot before being injured there. The Township controlled that parking lot through its ownership and maintenance. "[C]ontrol exists when the employer owns, maintains, or has exclusive use of the property." [citation omitted]. The parties do not dispute the Township's ownership or maintenance. The Township's plowing of the parking lot of snow when the accident occurred visibly demonstrated the Township's exercise of control over the lot. Also, the Township would have been aware that a library employee would park in the lot directly abutting the library.
>
> Unlike in *Hersh*, where the employee was injured on non-employer-owned property, the Township controlled this parking lot adjacent to Lapsley's place of work. And the lot was available for use by employees of the adjacent library. Therefore, we find Lapsley's injuries arose out of and in the course of her employment and are compensable under the Act. That construction of the Act is consistent with its "broad remedial objective." [citation omitted]. For the reasons set forth above, we reverse the judgment of the Appellate Division and affirm the judgment of the Division of Workers' Compensation.
>
> *Lapsley*, 249 N.J. at 437-38.

Here, it is undisputed that HMH owned and controlled the hospital parking lot where the accident occurred. Both the decedent and Dember, co-employees of HMH, were in the parking lot to start their respective workday at the hospital. And, as noted above, the decedent's husband is receiving lifetime workers' compensation death and dependency benefits (without objection from HMH) as a result of this work-related accident in the parking lot.

In response to plaintiff's Request for Admissions, HMH certified that, "[t]he parking lot where the incident of October 6, 2021, occurred was owned by Bayshore Community Hospital, a division of HMH Hospitals Corporation." (Pa294 at 14). HMH also certified that, "[t]he property located at 727 North Beers Street, within the Township of Holmdel, County of Monmouth and State of New Jersey was owned by Bayshore Community Hospital, a division of HMH Hospitals Corporation on October 6, 2021." (Pa295 at 16,17).

As part of it ownership of the hospital property, HMH entered into various agreements with contractors, including entering into a snow removal contract with A&B Landscaping of Central New Jersey. (Pa298).

Further, at the time of the accident, Dember was driving to a designated portion of the back parking lot where the HMH employees were told by HMH to park, which would leave the parking spots closest to the hospital building for the patients and visitors. (Pa330 at 115-16; Pa333 at 126-27). Dember testified that,

"[w]e were instructed to park in that area." (Pa333 at 127). Dember said the parking lot area she was driving to was the "employee parking lot." (Pa330 at 115).

Under the controlling authority of *N.J.S.A.* 34:15-36, the premises rule and the legal holding of the New Jersey Supreme Court in *Lapsley*, *supra*, the subject accident occurred during the course of employment for both the decedent and Dember. As such, Dember has, as a matter of law, co-employee immunity under the Workers' Compensation Act. The trial Court properly granted summary judgment to Dember, and that decision must be affirmed.

III. PLAINTIFF'S OTHER UNPERSUASIVE ARGUMENTS TO ELIMINATE DEMBER'S CO-EMPLOYEE IMMUNITY HAVE NO MERIT. (Pa325, 94:22-95:21; Pa469, 16:4-1).

Plaintiff makes several unpersuasive arguments that Dember should not benefit from her statutory co-employee immunity, including (1) Dember had not "clocked in" at time of the accident; (2) Dember was scheduled to meet with an attorney about a malpractice case involving the hospital; (3) Dember was fourteen minutes late to work at the time of the accident; (4) the Legislature could not have meant to give Dember co-employee immunity; and (5) this Court should "revisit" and "reconsider" its prior holding in *Konitch v. Hartung*, 81 N.J. Super. 376 (App. Div. 1963), *certif. denied*, 41 N.J. 389 (1964).

Dember had not "clocked in." This argument by plaintiff is meritless and has been flatly rejected by the Legislature, this Court and the New Jersey Supreme Court. *N.J.S.A.* 34:15-36 provides, in pertinent part:

> Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer . . .

"The premises rule is based on the notion that an injury to an employee that happens going to or coming from work arises out of and in the course of employment if the injury takes place on the employer's premises." *Lapsley*, 249 N.J. at 435; *Kristiansen*, 153 N.J. at 316. Therefore, the fact that an employee had

punched out on the time clock does not preclude compensability. *Lapsley*, 249 N.J. at 435-36 (emphasis added); see also *Brower v. ICT Group*, 164 N.J. 367, 372 (2000).

Significantly, the defendants in *Konitch*, *supra*, and *DeCicco*, *supra*, had not "clocked in," but nonetheless had, as a matter of law, co-employee immunity under the Workers' Compensation Act.

The irony with plaintiff's "clocked in" argument is that the decedent's husband filed a workers' compensation Claim Petition and (without objection from HMH) is receiving lifetime workers' compensation dependency benefits from his wife's accident -- even though the decedent had not "clocked in."

Dember was scheduled to meet with an attorney about a malpractice case. This argument by plaintiff is equally meritless. Plaintiff tries to imply that Dember was not scheduled to work that day, but rather was going to meet with HMH attorneys about a medical malpractice case. Plaintiff's appellate brief ignores Dember's actual testimony from her police interview. In her statement to the police, it was noted that at 3:30 p.m. on the date of accident, Dember was scheduled to have a Zoom meeting with an HMH attorney because of a malpractice case against a private cardiologist and HMH (Dember was not a defendant in the malpractice case). (Pa469, 16:4-15). That Zoom meeting at 3:30 p.m. would have been approximately 8½ hours after Dember started work at around 7:00 a.m.

Dember was fourteen minutes late to work. This argument by plaintiff is equally meritless. Whether Dember was "supposed" to start work at 6:45 a.m. and the accident occurred at 6:59 a.m. is wholly irrelevant. Dember testified that the "majority of time," she arrived at work at 7:00 a.m., and that the hospital's work schedule is just "generic hours for the shift." (Pa325, 94:22-25 to 95:1-21). Further, being fourteen minutes late for work can be caused by many things, such as getting caught behind a school bus that makes many stops; police officers blocking traffic because of a car accident; road detours from road construction/work; waking up fourteen minutes later than usual; and forgetting something and having to return home.

The statutory co-employee immunity is not limited only to employees who arrive at work "on time." The statute, *N.J.S.A.* 34:15-8, does not state that the co-employee immunity is eliminated for any employee who arrives fourteen minutes late for work. *N.J.S.A.* 34:15-8 provides that, "[i]f an injury or death is compensable under this article, *a person shall not be liable to anyone* at common law or otherwise on account of such injury or death for any act or omission occurring *while such person was in the same employ as the person injured or killed*, except for intentional wrong."

The Legislature could not have meant to give Dember co-employee immunity. Yes, providing co-employees with civil immunity is exactly what the

Legislature intended, and this is precisely what has been re-affirmed for decades by this Court and the New Jersey Supreme Court. This is the historical trade-off between no-fault workers' compensation benefits and direct actions by one employee against another employee. Hypothetically, if the decedent was 100% liable for the accident, she, her estate and her husband could nevertheless receive death and dependency workers' compensation benefits – even though she caused her own accident and damages. Contrary to a strong statutory scheme and decades of Appellate Division and Supreme Court opinions, plaintiff here wants to have the best of both worlds: lifetime workers' compensation benefits from a work-related accident under the Workers' Compensation Act, as well as civil damages in a civil suit.

This Court should "revisit" and "reconsider" its prior holding in *Konitch v. Hartung*, 81 N.J. Super. 376 (App. Div. 1963), *certif. denied*, 41 N.J. 389 (1964). This argument by plaintiff is equally meritless. As noted above in Point I, *Konitch* is just one of numerous cases that are on point with the subject matter and flatly reject plaintiff's position. *DeCicco v. Anderson*, 99 N.J. Super. 243 (App. Div. 1968) is another Appellate Division case involving two co-employees in a parking lot where plaintiff was injured as a pedestrian by the defendant who was driving a vehicle. In addition to *Konitch* and *DeCicco*, the following cases all re-affirmed the co-employee workers' compensation immunity:

Barone v. Harra, 77 N.J. 276 (1978); *Linden v. Solomacha*, 232 N.J. Super. 29 (App. Div. 1989); *Ehrgott v. Jones*, 208 N.J. Super. 393 (App. Div. 1986); *Maggio v. Migliaccio*, 266 N.J. Super. 111 (App. Div. 1993); *Grawehr v. Township of East Hanover*, 2017 N.J. Super. Unpub. LEXIS 1634 (App. Div. 2017). (Da17).

IV. THE NATURE OF THE INJURY CANNOT CONTROL THE LEGAL ANALYSIS ON STATUTORY CO-EMPLOYEE IMMUNITY UNDER THE WORKERS' COMPENSATION ACT. (*N.J.S.A.* 34:15-8).

Plaintiff makes repeated impassioned references to the "tragic" death of the decedent. However, the legal analysis as to the statutory immunity cannot be controlled by the fact that plaintiff died in this accident. Stripped to its core, this is a common, simple pedestrian/automobile accident that occurred in a commercial parking lot. Pedestrian/automobile accidents happen every day in New Jersey and throughout the country, whether it is in a mall parking lot, Home Depot parking lot or a ShopRite parking lot.

Hypothetically, if Dember's vehicle had struck plaintiff and plaintiff sustained a broken wrist, the legal analysis would be identical and Dember's co-employee immunity under the Workers' Compensation Act would remain unchanged. Dember is afforded co-employee immunity under the Workers' Compensation Act for all injuries – from a broken wrist to death. In fact, the Act, *N.J.S.A.* 34:15-8, expressly states that the immunity applies if a co-employee is "killed" ("If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.").

As such, the "sympathy" arguments being made by plaintiff about the "tragic death" have no relevance to the legal analysis on co-employee immunity under the Workers' Compensation Act. As aptly held by this Court in a similar co-employee immunity case: "We appreciate the hardship that this ruling may have on this plaintiff. But our ultimate obligation in dealing with the issue before us is to preserve the integrity of the workers' compensation law and to insure its interpretation and application in a manner consistent with its remedial and social purposes." *Ehrgott v. Jones*, 208 N.J. Super. 393, 399 (App. Div. 1986).

CONCLUSION

Based upon application of the legal principles to the factual circumstances herein, defendant/respondent Jennifer Dember respectfully requests that this Honorable Court affirm the trial Court's grant of summary judgment to defendant Dember.

Respectfully submitted,

RUDOLPH KAYAL & ALMEIDA
Counselors at Law, P.A.
Attorneys for Defendant Jennifer L. Dember

STEPHEN A. RUDOLPH

DATED: April 30, 2024

DICROCE, MCCANN & FARMAN, LLC
Valley Park Professional Center
2517 Highway 35, Building N - Suite 201
Manasquan, NJ 08736
(732) 223-3443
jdicroce@dicrocelaw.com
sfarman@dicrocelaw.com
Attorneys for Defendants/Respondents, HMH Hospitals Corporation d/b/a Bayshore Medical Center (i/p/a Bayshore Community Hospital) and Diane Ingenito (i/p/a Bayshore Comm Hosp-D Ingenito-Tax)

Plaintiffs/Appellants,

FAISAL JAMEEL, Administrator ad Prosequendum for the ESTATE OF AASAI JAMEEL

vs.

Defendants/Respondents,

JENNIFER L. DEMBER; BAYSHORE COMMUNITY HOSPITAL; BAYSHORE COMM HOSP-D INGENITO-TAX

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-001225-23

On Appeal From:

SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION
MIDDLESEX COUNTY

DOCKET NO. MID-L-7038-21

SAT BELOW: THE HONORABLE ALBERTO RIVAS, J.S.C.

DEFENDANTS' / RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION TO PLAINTIFFS' / APPELLANTS' APPEAL OF THE DECEMBER 15, 2023 ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS / RESPONDENTS

OF COUNSEL
Joseph A. DiCroce, Esq.
Attorney ID No. 001221986

OF COUNSEL AND ON THE BRIEF
Steven B. Farman, Esq.
Attorney ID No. 018701983

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PRELIMINARY STATEMENT

We submit that the record below is completely devoid of any evidence by which reasonable jurors could conclude that the death of plaintiff's decedent was the result of an intentional wrong committed by Defendant HMH Hospitals Corporation within the meaning of N.J.S.A. 34:15-8. Having analyzed the evidence presented in accordance with appropriate legal standards and in a light most favorable to plaintiff, we submit that the trial court correctly granted summary judgment to the defendant and that the trial court's decision should be affirmed.

The matter arises from an accident occurring on October 6, 2021 in the parking lot at Bayshore Medical Center in Holmdel, NJ. It is undisputed that at the time of the occurrence, plaintiff's decedent Ms. Jameel and defendant Jennifer Dember were employees of defendant HMH Hospitals Corporation assigned to work at Bayshore Medical Center at the time of the accident. It is also undisputed the Ms. Jameel was on site to begin her work shift.

At or around 6:59 AM, Holmdel police were dispatched to the hospital on a report of a pedestrian struck by a vehicle in the hospital's parking lot. On arrival they found Ms. Jameel unconscious and unresponsive in a lane of travel in the parking lot with the Dember vehicle parked in the same lane of travel just past were her body lay. Investigation revealed that Ms. Jameel had parked her car in the parking lot in an area

designated by her employer for non-management employee parking. She exited her vehicle and proceeded to walk through the lot towards the hospital entrance when she was struck by the Dember vehicle as it turned left into her path. Ms. Jameel was attended to at the scene and airlifted to Jersey Shore University Medical Center for a higher level of care where sadly she passed away the next day from her injuries.

Following the accident, plaintiff filed a claim for dependancy benefits with the State of N.J., Department of Labor and Workforce Development, Division of Worker's Compensation against Ms. Jameel's employer HMH Hospitals Corporation (*Jameel vs. Hackensack Meridian Health - Case No. 2021-26059*) (Pa57). In its answer to that petition, defendant admitted that the accident arose out of and in the course of employment and paid benefits. Plaintiff admitted that benefits were received and paid by Ms. Jameel's employer defendant HMH Hospitals Corporation.

Plaintiff then filed wrongful death and survivorship claims against HMH Hospitals Corporation seeking compensatory and punitive damages alleging that Ms. Jameel's death was the result of an "intentional wrong" by her employer for compelling non-management employees like her to park in an area of the parking lot which it knew lacked appropriate pedestrian safeguards. More specifically, plaintiff alleges that because Ms. Jameel was compelled to park in and area of the parking lot without adequate pedestrian safeguards and walk a greater distance to the hospital

entrance than the others (physicians, management, patients/visitors), it was substantially certain that injury or death would result.

During discovery, plaintiff proffered no evidence that the defendant rejected safety precautions recommended by civil engineers or did anything to alter the parking lot's design. Likewise plaintiff proffered no evidence to demonstrate that the defendant knew of safety concerns to drivers or pedestrians traversing the parking lot. Conversely, the defendant served a report from a certified traffic engineer who offered the opinions that the parking lot was designed in accordance with industry standard, and that the accident was caused by the negligent operation of the Dember vehicle.

Defendant timely filed a motion for summary judgment arguing that no reasonable jury could conclude that the defendant committed an intentional wrong within the meaning of N.J.S.A. 34:15-8. Following oral argument on the motion, the trial judge appropriately granted summary judgment to defendant HMH Hospitals Corporation including all claims for punitive damages. That order should now be affirmed.

PROCEDURAL HISTORY

Plaintiff filed an initial complaint against defendant Dember on December 9, 2021 seeking compensatory damages under the Survivorship and Wrongful Death Statutes. An amended complaint was filed on June 24, 2022 adding Bayshore Community Hospital and Bayshore Community Hosp-D Ingenito-Tax again seeking compensatory damages under the Survivorship and Wrongful Death Statutes. An answer was filed on July 22, 2022 by defendants HMH Hospitals Corporation d/b/a Bayshore Medical Center (i/p/a Bayshore Community Hospital) and Diane Ingenito (i/p/a Bayshore Community Hosp-D Ingenito-Tax) denying all allegations. A Worker's Compensation bar to the claim pursuant to N.J.S.A. 34:15-8 was pled as an affirmative defense.

On March 17, 2023, a second amended complaint was filed adding HMH Hospitals Corporation as a named defendant seeking compensatory damages under the Survivorship and Wrongful Death Statutes and punitive damages against HMH Hospital Corporation alone (Pa61-79). These defendants filed an answer on March 24, 2023 again denying all of the allegations and again pleading a Worker's Compensation bar to the claim pursuant to N.J.S.A. 34:15-8 as an affirmative defense. (Pa80-94).

On November 2, 2023, defendant HMH Hospitals Corporation filed a motion

for summary judgment or in the alternative for partial summary judgment seeking dismissal of the claims for punitive damages. (Pa25-257). Plaintiff filed opposition on November 21, 2023. (Pa371-1089). We filed a sur-reply to plaintiff's opposition on November 27, 2023. (Da1-Da14). Oral argument was heard on December 1, 2023. A written opinion and order granting our motion for summary judgment was filed on December 15, 2023. (Pa1-12). Plaintiff appealed from the trial court's order on December 22, 2023. (Pa1109-1112).

COUNTER STATEMENT OF FACTS

The following counter statement of facts are offered in response to plaintiff's statement of facts:

A) The October 6, 2021 Accident.

On this date at approximately 6:59 AM. the Holmdel Township Police Department was dispatched to Bayshore Medical Center on a report of a motor vehicle accident. On arrival they found Ms. Jameel unconscious and unresponsive laying on the ground in the parking lot. Just passed her body was a GMC Arcadia parked in the lane of travel and later identified as having been driven by defendant Jennifer Dember. (Pa36-48).

Investigation and surveillance video of the incident revealed that the site of the accident was near a T-intersection between a north-south lane of travel and the

terminus of an east-west lane of travel. Ms. Jameel had parked her car in the north-south row of parking stalls, exited her car and proceeded to walk across the north-south lane of travel to the hospital entrance. At the same time, Ms. Dember was driving her car in the east-west travel lane towards the T-intersection with the north-south travel lane. At the intersection, without either stopping or checking for oncoming traffic, Ms. Dember made a sharp left turn into the southbound lane of on-coming travel where Ms. Jameel was walking, striking her. (Pa36-48). Video stills from the accident show that the brake lights on Ms. Dember's vehicle were not activated until after she struck Ms. Jameel. (Pa416-429). See also, Da19-Da20, §1.3 - Incident Description.

Further investigation revealed that both Ms. Jameel and Ms. Dember were employees of HMH Hospitals Corporation assigned to work at Bayshore Medical Center. (Pa50-51). Both were on-site to start their respective work shifts. (Pa42). (Pa464:19-465:13). When interviewed by police, Ms. Dember stated that she usually arrived at work around 7:00 AM but if she clocked in later, her employer did not consider her to be late. Contrary to any assertions otherwise, she did not state that she was running late or in a rush to get to her job. Equally important, she indicated that she was not distracted and there were not any obstructions to her view. Specifically, she did not mention to police that her view was obstructed by any parked vehicle at

the end of the T-Intersection where she was making her left turn.

OFC. STRUBLE: Okay. And you kind of described it before but when you were in the car, I asked you what you were looking at or what you were doing. Can you just tell me more about what was going on inside your car? Did you have the radio on or any distractions?

MS. Dember: I didn't have any distractions. My phone was in my pocket as you guys saw. My, you know my car was empty.

OFC. STRUBILE: Okay.

MS. DEMBER: Like you saw.

MS. DEMBER: I didn't even have the air conditioning on.

OFC. STRUBLE: Okay. Was there any obstructions outside that may blocked your view or anything?

MS. DEMBER: Not that I'm aware of, no.

(Pa471:20-472:11). See also, Pa43-44.

Likewise, Ms. Dember testified that at the time of the accident it was a bright, clear day. (Pa308 at 26:11-27:23). She specifically denied being in a hurry to get to work and had no explanation for why she didn't see Ms. Jameel before striking her (Pa308 at 27:11-28:7). See also, Pa311 at 40:25-41:5. Notably, there is absolutely no testimony from Ms. Dember that a parked car at the end of the T-Intersection blocked her view or that the lack of any pedestrian safety devices such as crosswalks, speed limit signs or stop signs contributed in any way to the happening of the accident

(Pa301-335). See also Pa663 and Pa454-490.

B) The Parking Lot Was Designed In Accordance With Industry Standards and Local Zoning Regulations.

On or around May 13, 2016, Meridian Health - the predecessor corporation to defendant HMH Hospitals Corporation - contracted with Dewberry Engineers, Inc. to reconstruct the hospital's emergency department. That proposal included a renovation of the parking lot based in part on traffic demand and parking demand studies conducted by the engineering firm (Pa130-Pa183).

During the discovery period of this litigation, a site evaluation of the newly designed parking lot was conducted by Timothy G. Noordewier, P.E., PTOE (Certified Professional Traffic Operations Engineer) of the McLaren Engineering Group. The evaluation was conducted, to determine if the parking lot was designed in compliance with generally accepted engineering standards and practices for parking lot design, and whether any design deficiencies cause or contributed to the accident. (Da18, §1.1 Purpose).

Per the report, the parking lot is an approximate 350' x 500' rectangle of interconnecting drive aisles forming T-Intersections consistent with generally accepted engineering design best practices. (Da20-Da24, §1.4 Incident Site Location, §1.5 Site Visit by McLaren, §2.1 and §2.1.1, Parking Lot Layout).

The engineering standard for all traffic control devices installed on streets/highways is set forth in the U.S. Department of Transportation's Federal Highway Administration Manual on Uniform Traffic Control Devices ("MUTCD") which has been adopted by the State of New Jersey. However, specifically excluded from MUTCD applicability are parking areas and driving aisles within parking lots (Da22-24, §2.1 & 2.1.1 Parking Lot Layout).

In this case, the T-intersection where the accident occurred was an intersection between two drive aisles with parking stalls along both drive aisles, neither of which were subject to MUTCD applicability. Regarding a T-intersection like the one here, Mr. Noordewier concluded that at locations of intersecting drive aisles forming T-intersections where perpendicularly parked spaces were visible at the end of the terminating aisle,

> "it is inherently obvious to motorists approaching the intersection that they have reached the end of the aisle's travelway and must operate their vehicle in a safe manner consistent with the possibility of oncoming or conflicting traffic along the intersecting aisle."

Such controls were, however, present uniformly through the lot where internal circulation roads intersected in accordance with industry standards. (Da22-24, §2.1 & 2.1.1 Parking Lot Layout).

End "islands" or "peninsulas" (raised landscape areas with curb and sometimes

landscape vegetation placed at the end of parking rows intersecting drive aisles) were provided at the end of all north/south oriented rows of parking throughout the lot. They were not present at the ends of the east/west drive aisles including the one on which Ms. Dember was traveling before she turned her vehicle into the north/south drive aisle striking Ms. Jameel. However, Mr. Noordewier offered the opinion that there was no absolute engineering standard requiring the use of raised end islands or peninsulas in parking lots, and per Holmdel Township zoning regulations, neither were required for parking lots in the Township. (Da24-26, §2.1.2 Curbed Geometry & End Islands / Peninsulas). Additionally, Mr. Noordewier noted that the designer of a lot must also consider the efficient use of space within the lot to satisfy demand, and end island/peninsulas occupy space which could otherwise be used for parking. Here, the Dewberry Engineer's parking demand study noted that the hospital had occupancy rates over 94% which was noted to be a parking capacity deficiency. Therefore, end islands/peninsulas occupying additional space would further reduce available parking supply which could also lead to driver frustration and potentially contribute to aggressive driving behavior. (Da24-Da26, §2.1.2 Curbed Geometry & End Islands / Peninsulas). Additionally, Holmdel Township Zoning regulations did not require landscaped end islands at the end of parking rows, nor peninsulas at the end of parking rows. (Da32, §2.3 Zoning Compliance).

Likewise, there is also no absolute engineering standard regarding the universal use of painted striped end islands or peninsulas as those could be perceived by drivers in lots where parking is scarce - such as the subject lot - as a convenient place to improperly park causing an improperly parked vehicle to occupy a portion of the drive aisle, restrict sight distance and maneuverability space. Therefore, painted islands could be counterproductive to improving parking lot sight distance or safety. (Da24-Da26, §2.1.2 Curbed Geometry & End Islands / Peninsulas). The ITE Traffic Engineering Handbook notes too that typical parking lot crashes are "fender benders" near vehicle spaces with more than 2/3 of the reported accidents involving parking or unparking movements. Pedestrians being struck involved only 2% - 4% of all parking lot vehicular accidents. (Da24-Da26, §2.1.2 Curbed Geometry & End Islands / Peninsulas).

Pavement markings and signage was also present throughout the parking lot where required. However, neither stop signs nor stop lines were required to be placed at the ends of drive aisles intersecting other drive aisles by any absolute engineering standard. Rather, their use was subject to engineering judgment or preference (or in some case, zoning laws).(Da26-Da27, §2.1.3 Pavement Markings and Signage). In this case, views of the still photos of the site of the accident show that it should be inherently obvious to motorists approaching the intersection that they have reached

the end of the aisle's travelway and must operate their vehicle in a safe manner consistent with the possibility of oncoming or conflicting traffic along the intersecting aisle and pedestrians walking from their parked cars. (Da21 and Da80 Appendix B, Exhibit B1). See also, Pa416-429. A crosswalk was located in the center of the parking lot approximately equidistant between the east/west lot extremities. This minimizes the greatest distance pedestrians in the employee parking area must walk within drive aisles between their parked vehicle and the nearest marked crosswalk (150'). (Da21 and Da80 Appendix B, Exhibit B1).

Speed limit signs or speed limit pavement markings - which is a suggestion to drivers and not a police-enforceable speed limit) - are not required in private parking lots by any absolute engineering standard. The ITE Traffic Engineering Handbook notes too that this typically only influences good drivers who proceed at reasonable speeds anyway. (Da27-Da28, §2.1.4 Speed Limit Signage).

Pedestrian circulation in the lot was typical for a parking lot design utilizing a combination of pedestrian routes within drive aisles and separate dedicated pedestrian crosswalks and sidewalks. Mr. Noordewier advised that there was no ubiquitously accepted engineering standard relating to the maximum distance from parking stalls to pedestrian facilities in parking lots (crosswalks/sidewalks).(Da29-Da30, §2.1.8 Pedestrian Circulation). The National Association of City

Transportation Officials Urban Design Guide ("NATCO") provided some engineering guidance as relating to crosswalk spacing along public streets with 120-200' being sufficient. Applying this to the subject lot, Mr. Noordewier offered the opinion that a 200' walking distance translates to less than a one minute walk between a parking stall and a dedicated pedestrian route, and while it was logical to attempt to minimize the time, engineers must also consider that over-usage of crosswalk markings would diminish their significance. Here, the 150' walking distance from the outermost parking stalls in the employee parking section to the central crosswalk translated to an approximate 43 second walk from the incident site. Mr. Noordewier offered the opinion that this exceeded the industry standard of care. (Da29-Da30, §2.1.8 Pedestrian Circulation). Overall, he offered the opinion that to a reasonable degree of engineering certainty that the parking lot design met or exceeded MUTCD standards for the design of parking lots of this size and function and that the incident could not be reasonably attributed to, in whole or in part, the as-built design of the parking lot as it existed at the time of the accident. Rather, it was the conduct of defendant Dember which was the sole cause of this unfortunate accident. (Da36-Da37, §4 Conclusions).

Notwithstanding the plaintiff's traffic engineer concluded that the parking lot was hazardous, it is noteworthy that he never wrote a report to rebut the

findings/opinions of the McLaren Group though he reserved the right to do so if he received additional information after issuing his report. (Pa667).[1] Additionally, in all his discussions about the recommendations in the ITE Handbook, and all the safety deficiencies he complains of, he never says that the ITE Handbook recommendations and the safety precautions he deemed necessary were considered to be universally accepted industry standards required for the design of all parking lots.(Pa659-666).

C) Defendant Had No Knowledge of any Design Safety Deficiencies In the Non-Management Designated Employee Parking Area.

1) Prior Accident History

During the course of discovery, plaintiff issued a subpoena *duces tecum* to the Holmdel Police Department for production of all police/accident reports within the parking lot for the time period of January 2010 - December 2021. Per the 500+ pages of reports received, during that 12 year period there was only one other incident involving a pedestrian being struck by a vehicle. That incident occurred in a marked crosswalk in December 2019 immediately adjacent to the hospital entrance, not in the non-management employee designated parking area.[2]

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[1]The Nolte report was issued prior to the McLaren report.

[2]To protect the privacy of those involved, the police reports were not submitted to the trial judge nor are they a part of our appendix here. This is because redaction would be nothing short of a monumental undertaking impeding our ability to timely produce them with our responding papers. As

To put this in further perspective, the police department produced a total of 578 pages of documents in response to plaintiff's subpoena. Within those 578 pages there were only four instances of any reported physical injury aside from this case. Of the four other reported cases in which injury occurred, one occurred in 2010, one in 2016 and two in 2019. However, of those four instances, two of the accidents occurred on North Beers Street - the main road leading to the hospital parking lot - not in the parking lot itself. The other was a single car accident and the final one was the pedestrian struck in a crosswalk immediately adjacent to the hospital entrance as previously noted. Hence, the reality here is that from 2010-2021 there were only two reported instances of injury which actually occurred in the parking lot.

Additionally, of the four accidents reported, three were coded by the responding officer as "04" - "possible injury" - per State of New Jersey Police Crash Investigation Report overlay. The other was coded by the responding officer as "03" or "suspected minor injury" (the pedestrian accident). See, eg., Pa434-State of New Jersey Police Crash Investigation Report NJTR-1,"Victim's Physical Condition"-Box

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we indicated to the trial court though, we are happy to submit all the reports produced to the Court for *in camera* review. However, we note for the Court that counsel has never objected to our characterization of the contents of the reports as will be described herein either in their opposition to our summary judgment motion, during oral argument on the motion or in their brief here. Additionally, the trial court also accepted our representation writing in its opinion of December 15, 2023 "[w]hile not dispositive, the fact that there were no significant reports of any prior incidents in the lot militates against a finding of an intentional wrong by HMH with respect to requiring employees to utilize the lot." Pa11.

86. Aside from this, the vast majority of the records produced included motor vehicle incidents fairly characterized as "fender benders" occurring when drivers were pulling into/backing out of parking spaces. Also included were reports of suspicious activity, vandalism, disorderly conduct, keys locked in cars and infants locked in cars. In other words, during this entire 12 year period, there were no patterns of recurring crashes involving physical injury and/or pedestrians, and the Jameel accident was the only fatality.

2) Absence of Complaints About Safety Concerns For Drivers Or Pedestrians

Director of Operations Caitlin Miller testified that she was never notified of any safety concerns in the parking lot by employees until after the death of Ms. Jameel. Complaints included people texting while driving, and people walking through the parking lot texting with their heads down. (Pa570:3-Pa585:13).

Q: Did anybody comment to you, well, there's no sidewalks in the parking lots where we have to park, there's no crosswalks, center crosswalks, we have to cross in the middle of middle aisles without the use of crosswalks or anything, did anyone complain to you in the email?

A: No, not specifically what you are commenting on.

Q: What does that answer mean, not specifically, did anybody complain, do you have written complaints prior to the date of October 6, 2021 of complaints about your parking lot arrangements?

A: I don't believe - -

MR. DICROCE: Objection. Go ahead.

A: I don't believe it was emails but it was a feeling of fear from team members after the accident or worry because of - -

(Pa570:3-18).

Q: Did they mention to you about no signage, lack of signage, lack of speed, no cones, no security personnel, no sidewalks, not enough crosswalks, no safety mats, did they mention any of that in writing?

A: I don't recall receiving any emails and I don't recall specifically team members mentioning the items that you mentioned. And they were worried about things not necessarily connected to this incident. But it would be team members on phones or, you know, driving too fast, it was, you know, nothing that was related to an incident. It was just an overall feeling of wanting people to be careful there because there was a heightened worry after this incident.

(Pa571:11-23).

Q: Were people texting, were they complaining of people texting and driving or texting and walking?

A: I specifically remember people saying that people text and walk with their heads down and aren't looking where they are going.

(Pa582:18-22).

Furthermore, that Ms. Miller issued an email to team members after the accident to exercise caution and follow directions of security and flaggers cannot be

used to impute knowledge to HMH Hospitals Corporation of a pre-existing safety hazard. (Pa492-Pa494). See also, N.J.R.E. 407 (subsequent remedial measures). More importantly, it is a total mischaracterization of why that email was issued. First, it is clear from the email that the overall construction project was continuing and employees were being advised of necessary changes to the traffic pattern in and around the hospital with a site map to further guide them. (Pa493-Pa494). Second, Ms. Miller testified that flaggers were not employed by the hospital and were not used in the parking lot. Rather, they were used on the main roadway into and out of the parking lot to direct traffic during construction and often during lane closures on main roadways. (Pa519:20-12-Pa 520:21:6). See also, Pa528:29:20-Pa530:31:12.

That the accident occurred during a shift change is indeed an undisputed fact. However, it is not proof of the fact that the defendant knew of the need for additional pedestrian safeguards in the non-management employee parking area. Defendant Dember's statement to the police of her knowledge of a mass entrance into the lot at the time of the accident only proves that she was aware of shift changes at the time of the accident, that there would be a lot of cars and people traversing throughout the parking lot, and consequently that she should have exercised due caution when looking for a parking spot. (Pa485-486).

Likewise, it is disingenuous to offer a lay opinion in response to leading

question to impute knowledge to the defendant of an inherently dangerous condition that was substantially certain to cause injury or death to its employees:

> Q: If there were traffic controllers, security personal, flaggers, and/or cones in the parking lot on October 6, 2021 when you got there, would you have found that to be an - as an assist for you, for your protection, would it make it more safe and secure?
>
> MR. DICROCE: Objection.[3]
>
> A: Yes.

(Pa872:6-13).

Here, one cannot infer from the suggestion that because added precautions might make something more safe and secure, that the parking lot was inherently unsafe to begin with, or that the defendant knew that the absence of such added precautions made it substantially certain that injury or death would result to a non-management employee walking through the designated area of the parking lot where they were directed to park. Nor can one infer from this suggestion that Ms. Cusick who gave the aforementioned testimony that she felt unsafe when walking or driving through the parking lot. This is because that direct question - whether she felt unsafe walking through the parking lot - was never posed to her. (Pa790-Pa900). Notably too, that direct question was never put to defendant Dember who also parked in the

[3]Conveniently, this objection to the form of the question was omitted by plaintiff in their brief at page 13 when eliciting the lay opinion testimony of eyewitness Diane Cusick.

non-management employee parking area, and also had to walk that same greater distance through the lot as Ms. Jameel to enter the hospital than physicians, administrators, patients visitors.

D) Defendant HMH Hospitals Corporation Took No Action To Alter the Design of the Parking Lot.

Plaintiff has not put forth any evidence to show that the defendant did anything to alter or modify the parking lot design to increase the risk of injury to non-management employees beyond that which may be inherent to anyone walking in this area of the parking lot making it substantially certain that it knew that injury or death would result to one of these employees. Indeed, too was a factor influencing the decision of the trial judge who stated "[n]o evidence suggests that HMH altered or modified the parking lot." (Pa11). Conversely, in the Millison progeny of cases to be discussed, the employer took some affirmative action to make more dangerous an already inherent dangerous condition thereby increasing the risk of injury or death to its employees.

E) The Accident Was Caused By the Negligence of Defendant Dember, Not An Intentional Wrong by Defendant HMH Hospitals Corporation.

As previously indicated, Timothy G. Noordewier, P.E., PTOE (Certified Professional Traffic Operations Engineer) of the McLaren Engineering Group

performed an evaluation of the parking lot to determine if it was designed in compliance with generally accepted engineering standards and practices for parking lot design. The evaluation also included an accident reconstruction to assess relative distances, vehicle speed, stopping distances and Dember's sight lines to determine to what extent, if any that may have contributed to the cause of the accident. (Da33-Da37, §3 Incident Analysis & Discussion; §4 Conclusions). Photographs and observations made during this site visit were compared to photographs taken by Monmouth County Serious Collision Accident Response Team on scene on 10/6/21 ("SCART"), diagrams prepared by SCART, high resolution aerial orthoimagery taken on 10/19/21 (13 days post-accident) and 6/22/21 (3.5 months pre-incident). As part of this evaluation, Dember and Jameel's paths of travel and Dember's sight lines were reconstructed using scaled measurements from the SCART team's composite diagrams. (Da33-Da36, §3 Incident Analysis & Discussion).

Mr. Noordewier's reconstruction estimated that Dember's vehicle was traveling at 12 MPH prior to reaching the end of the east/west drive aisle. This was based on an analysis of video time stamps, Dember's vehicle position noted in surveillance video and SCART investigation documents. Plaintiff's expert also estimated Dember's speed at 11-12 MPH. (Da33, §3.1 Vehicle Approach Speed). See also, Pa653.

With this information, an assessment was conducted to determine Dember's line of sight during her travel through the east/west drive aisle to the point of impact. It also included actual stopping sight distance. Using the SCART team's diagrams of the location of Dember's vehicle path prior to the incident, at initial impact and at the final resting place of her vehicle, coupled with field measurements made using Nearmap orthoimagery, sight distance was calculated in accordance with the American State Highway and Transportation Officials Methodology ("AASHTO").(Da33-Da35, §3.2 Sight Distance Evaluation). See also, Da85-Da87, Appendix B- Exhibits 6-8).

Stopping distance was defined as the distance traveled by a vehicle to stop in situations such as an emergency. It consisted of a perception-reaction distance which is the distance traveled by the vehicle from when the driver recognized a hazard and reacted up to the instant that the brakes were applied. The second component was braking distance which was the distance traveled by the vehicle at a rate of deceleration. Stopping site distances increased exponentially with speed due to principles of kinetic equations. Whereas plaintiff's expert referenced a 1.5 second perception-reaction time, the AASHTO method was more conservative using a 2.5 perception-reaction time. (Da33-Da35, §3.2 Sight Distance Evaluation). See also, Pa663. Based on this, Mr. Noordewier offered the opinion that Dember had 95 feet

of stopping sight distance upon reaching the point of her initial line of sight to Jameel, whereas only 58-60 feet would have been necessary for a typical driver to have avoided striking Jameel (noting that if plaintiff's expert perception-reaction time was used, Dember would have had even more distance available to avoid impact). (Da33-Da35, §3.2 Sight Distance Evaluation).

He also concluded that stopping was not the only action available to Dember to avoid impact. The analysis proved that Dember cut her turn too sharply and turned into the wrong travel lane of the north/south drive aisle where Ms. Jameel was walking. Consequently, had she turned into the proper lane position, Ms. Jameel would not have been struck. (Da33-Da35, §3.2 Sight Distance Evaluation). See also, Da85-Da87, Appendix B- Exhibits 6-8).

Finally, Mr. Noordewier's evaluation proved that at the point where Dember no longer had available distance to stop her vehicle, an evasive or swerving maneuver could have been made at the "last second" to avoid hitting Ms. Jameel. (Da33-Da35, §3.2 Sight Distance Evaluation). He noted that in the surveillance video, Dember did not stop or check for oncoming traffic when turning into Jameel's path of travel, evidenced in part by the fact that her brake lights were not seen to activate until after she struck Jameel and came to a complete stop. (Da19-Da20, §1.3 Incident Description). See also, Da85-Da87, Appendix B- Exhibits 6-8).

Finally, Mr. Noordewier noted that it was understood that parking lot facilities are inherently multimodal facilities where each parking stall can be an origin or destination for pedestrians exiting or entering vehicles. Therefore, parking lots are designed with the understanding that despite the most industrious engineering designs to safely control or calm traffic, drivers bear responsibility for performing driving tasks of control, guidance and navigation in a safe manner consistent with the knowledge that there will be pedestrians in the lot. Failure to observe speed is the responsibility of the driver. Likewise, pedestrians ought to be aware that vehicles could be backing out of a stall or come around a corner with little notice, and drivers must be aware that pedestrians can walk into the drive aisle from between parked cars. In short, "nothing can substitute for this awareness." (Da35-Da36, §3.3 Discussion). Considering then that Dember denied any distractions or obstructions to her view, the sole cause of the accident was her negligent operation of her vehicle. (Da37, §4 Conclusions, #4,5). See also, Da85-Da87, Appendix B- Exhibits 6-8).

LEGAL ARGUMENT

STANDARD OF REVIEW

Grants of summary judgment are reviewed *de novo* applying the same standard as that used by the trial court. Lee v. Brown, 232 N.J. 114, 126 (2018). Summary judgment should be granted only if, when viewing the facts in the light most

favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to a judgment or order as a matter of law. Conley v. Guerrero, 228 N.J. 339, 346 (2017). *See also*, R. 4:46-2. Even though the allegations of the pleadings may raise an issue of fact, if the other papers show that, in fact, there is no real material issue, then summary judgment can be granted. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). But "bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." United States Pipe & Foundry Co. v. American Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961). Here, we submit that the trial court followed the appropriate standard and properly granted summary judgment. This Court should affirm that decision.

POINT I

THE TRIAL COURT APPROPRIATELY GRANTED SUMMARY JUDGMENT TO DEFENDANT HMH HOSPITALS CORPORATION.

The undisputed set of facts before the trial court were:

- The defendant undertook a redesign of the hospital parking lot,
- The defendant was Ms. Jameel's employer,
- The defendant required non-management employees like Ms. Jameel to park in a designated area of that parking lot which was farther from the

hospital entrance than others had to park,

- Ms. Jameel was fatally struck by a vehicle in the parking lot in the course of her employment,
- Plaintiff sought compensation under the Workers Compensation Act,
- Plaintiff received dependency benefits pursuant to the Act. (Pa55-56 - Response #4).

On this set of undisputed facts, plaintiff mistakenly claims that the trial court erred by failing to consider these facts in a light most favorable to plaintiff. Plaintiff also mistakenly claims that viewing the facts in a light most favorable to plaintiff, reasonable jurors could conclude that the defendant knew that it was substantially certain that a non-management employee would suffer injury or death by its conduct. The problem with this argument, however, is that it is sheer conjecture and not supported by any evidence in the record. (Plaintiff's Appellate Brief at p.26).

At the outset, it is important to note that the trial court properly set forth the applicable standard for deciding summary judgment. (Pa5). The trial court then went on to set forth the applicable standard required for plaintiff to prove that the defendant employer committed an intentional wrong to bypass the workers compensation bar to plaintiff's claim. (Pa7-Pa8). After discussing relevant case law, properly distinguishing the Livingstone case on which plaintiff premised its entire

argument, and recognizing the crux of plaintiff's argument - that requiring certain employees to park in a distant area of the parking lot heightened their risk of injury - the trial court did indeed view the undisputed facts in a light most favorable to plaintiff noting:

> "Even if we acknowledge the assertion that mandating employees to park in a remote section of the parking lot heightens the risk of accidents, it is important to recognize that such risks are inherent whenever vehicles navigate relatively confined spaces, such as parking lots."

(Pa11).

This single passage alone demonstrates that the court viewed the case in a light most favorable to plaintiff (*"Even if we acknowledge the assertion that mandating employees to park in a remote section of the parking lot heightens the risk of accidents..."*), and that it properly considered the conduct prong (*"mandating employees to park in a remote section of the parking lot..."*) and context prongs required under Millison (*"it is important to recognize that such risks are inherent whenever vehicles navigate relatively confined spaces, such as parking lots."*). See also, Da36 and Da151. Equally important, the court found that there was insufficient evidence in the record to support plaintiff's argument. (Pa11-Pa12). Accordingly, the grant of summary judgment was proper and must be affirmed.

Notwithstanding, the problems with plaintiff's argument are many. First to say

that Ms. Jameel had to park in the most distant area of an expansive parking lot is a subjective characterization by plaintiff without any proof in fact. Indeed, nowhere in the record was it conclusively shown that the parking lot was "expansive" and that the area where Ms. Jameel parked was "distant" from the hospital entrance. As our traffic engineer noted, the parking lot is an approximate 350' x 500' rectangle which is about the size of 1 ½ - 2 football fields. (Da22-Da24 §2.1 Parking Lot Layout). Consequently, it was no more "expansive" than many shopping center parking lots. Furthermore, a crosswalk was located in the center of the parking lot approximately equidistant between the east/west lot extremities. This minimized the greatest distance pedestrians in the employee parking area had to walk within drive aisles between their parked vehicle and the nearest marked crosswalk (150'). (Da29-Da30 §2.1.8 Pedestrian Circulation). But the important point is that whether Ms. Jameel had to park in a distant area of an expansive parking lot was not a material fact. The undisputed material fact that the trial court properly analyzed was the defendant's conduct in compelling non-management employees to park in an area farther from the hospital entrance than others were permitted to park.

Second, there is nothing in the record to show that the defendant knew that additional safeguards needed to be placed in the non-management employee parking area. In the depositions taken of the defendant corporate representatives, none were

ever asked about this. See, Pa499-Pa644, Deposition Transcript of Caitlin Miller. See, Da88-Da109, Deposition Transcript of Timothy Hogan. See, Da110-Da135, Deposition Transcript of Gary Sypniewski. Likewise, none of the non-management employees ever testified that the felt they had to walk an inordinate distance from the parking area to the hospital entrance, or that they felt like second-class citizens. See, Pa300-Pa370, Deposition Transcript of Jennifer Dember. See also, Pa790-Pa900, Deposition Transcript of Diane Cusick. Accordingly, subjectively characterizing something as "distant" and "expansive" does not make it so.

Third, plaintiff never deposed any persons from the engineering company that designed the parking lot. Plaintiff never produced any evidence that they made recommendations to defendant for additional pedestrian safeguards in the non-management parking area and that such recommendations were rejected by defendant. Additionally, as we previously indicated and the trial court also noted, in the 12 years of accident reports produced in response to plaintiff's subpoena, there were only two accidents reported in the parking lot, each involving only minor injuries. Hence, plaintiff put forth no evidence to show that the defendant knew of a dangerous situation and either ignored it or exacerbated it.

Plaintiff goes on to insinuate that the trial court erred by essentially failing to conduct an evidentiary hearing to make fact-sensitive determinations of whether the

defendant created a substantial certainty of injury by its conduct, and not simply distinguished this case from other reported intentional wrong cases. However, plaintiff fails to point out that before rendering its decision, the trial court had the opportunity to review the moving papers/exhibits submitted in support of our motion for summary judgment, (Pa25-Pa257), plaintiff's opposition which also included extensive exhibits offered into the record (Pa371-Pa1092) and our sur-reply in response to plaintiff's opposition. (Da1-Da14). Following that, the trial court properly set the matter down for oral argument during which plaintiff's counsel was given every opportunity to, and did in fact, bring fact-sensitive information to the court's attention for its consideration. Following all this, the trial court properly found that based on all the facts presented, the record was devoid of any evidence showing that the actions of the defendant - compelling employees to park in a certain area of the parking lot, even if the circumstances increased the risk of an accident - rose to the level of an intentional wrong within the meaning of N.J.S.A. 34:15-8 and case law interpreting the statute. (Pa11-Pa12). In reaching its conclusion, the trial court appropriately considered the facts in a light most favorable to plaintiff, the legal standard necessary to vault the workers compensation bar to common law tort claims, and the necessary inquiries to be made by the Court. (Pa6-Pa8). The trial court then undertook a thorough analysis of relevant case law including cases involving

employer mandated conduct, and properly distinguished those cases from the instant case. (Pa8-Pa11; Pa19). Yet plaintiff argues that the trial court should have eschewed analysis of precedent to assist in making its decision simply because the facts of the instant case were not on point with those in the cases considered. However, what plaintiff fails to realize is that it does not matter if the employee is injured in an industrial type setting, or a casino or a parking lot. It is the employer conduct, not the injury that is the relevant inquiry for analysis and for which precedent is controlling. Here, analyzing both McGovern v. Resorts International Hotel, Inc., 306 N.J. Super. 174 (App. Div. 1997) and Fisher v. Sears Roebuck & Co., 363 N.J. Super. 457 (App. Div. 2003), the trial court noted that in those cases the Appellate Decision focused on what the employers knew about the inherent dangers faced by their employees moving large sums of money in public and found that while every business decision has inherent risks, knowledge and appreciation of risk did not constitute the requisite conduct needed to circumvent the Worker's Compensation Act. (Pa21-Pa22). See also, Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161(1985)(court finding employer's conduct deceptive). Laidlow v. Hariton Machinery Co., Inc., 170 N.J. 602 (2002)(employer's deception of OSHA). Mull v. Zeta Consumer Products, 176 N.J. 385 (2003)(employer's alteration of design safety features on winding machine). Crippen v. Central Jersey Concrete Pipe Co. 176 N.J. 397(2003)(employer's repeated

disregard of and failure to correct known OSHA violations).

Correctly focusing on the defendant's conduct here - that being a decision to compel non-management employees to park in a designated area of the parking lot - the trial court properly found that such conduct did not rise to the level of an intentional wrong within the meaning of the statute and case law interpreting the statute. We submit that this is evident from the trial court's statement that "risks are inherent whenever vehicles navigate relatively confined spaces, such as parking lots." (Pa23).

Here too, and contrary to plaintiff's assertion, there is nothing in the trial court's opinion by which one could infer that summary judgment was granted because this case arose in a context that had never been specifically addressed by prior case law. In its opposition to the summary judgment motion, plaintiff relied extensively on Livingstone v. Abraham & Strauss, Inc., 111 N.J. 89 (1998) which also involved an employee struck by a co-employee's car as she walked through the lot. Notably too, that case involved an employer's decision to compel its employees to park in a far corner of a mall parking lot giving access to closer spots to customers, thereby extending the distance employees had to walk to get to their job location arguably increasing the risk of injury. While that case focused on the "coming and going" rule to differentiate between compensable and non-compensable claims under the Workers

Compensation Act, the Court found that the employer had the right to direct its employees to park in a designated area. Livingstone, 111 N.J. at 105. Equally important, the focus in that case was always on the conduct of the employer in exposing the employee to added risk of injury, not the nature of the injury that actually resulted.

The takeaway from Livingstone is that an employer's decision to compel some employees to park in a designated area of a parking lot to give preferential treatment to others is not a *per se* intentional wrong. It simply means that an injury resulting from that decision is compensable under the Worker's Compensation Act. Whether the employer can be held further accountable under common law still depends on a multitude of different factors addressed in the Millison progeny of cases. Among those factors are deceptive practices by the employer exposing the employee to added risk beyond what might be inherent in the employment setting (not established by plaintiff here), whether the employer took affirmative action to modify an instrumentality or here, the parking lot, again exposing the employee to added risk beyond what was previously inherent (not established by the plaintiff here) and prior knowledge of accidents (not established by the plaintiff here). Here, consistent with Livingstone, the trial court found that "HMH appropriately directed specific employees to park in a designated section of the parking lot for a legitimate business

purpose of accommodating patients and physicians." (Pa23). Consistent with the Millison line of cases, the trial court appropriately found that "[no] evidence suggests that HMH altered or modified the parking lot" and that there were not any significant reports of prior incidents in the lot. (Pa23). While we can debate the issue of whether the defendant's conduct here to compel non-management employees park in an area where more pedestrian safeguards should have been placed was negligent, grossly negligent or even reckless, the trial court appropriately concluded that regardless, it did not rise to the level of an intentional wrong as defined. As the trial court correctly concluded from its fact-sensitive analysis and looking at the case in a light most favorable to plaintiff:

> "The analysis begins with the decision to mandate parking in the lot and whether there was evidence at that point indicating a predetermined likelihood of injury or death. The answer to the inquiry is no. "Even a strong probability of risk - - will come up short of the 'substantial certainty' needed to find an intentional wrong."

(Pa23-Pa24 quoting Millison, 109 N.J. at 179).

Simply put, the trial court correctly rejected the plaintiff's retroactive and flawed reasoning that the analysis started with the occurrence of death. Rather, the trial court properly ruled that the analysis started with the defendant's decision to designate different parking areas for different employees in the lot as designed, and

whether at that time there was more than just an appreciation of a significant risk of injury or death.(Pa11-Pa12). That the trial court used the word "unequivocal" to characterize the lack of evidence is not, as plaintiff suggests, proof that the judge applied the wrong standard when deciding the motion. Rather, it was a characterization of the certainty by which the trial court concluded that reasonable jurors could not conclude that the defendant's conduct made it substantially certain that injury or death would result. This was so, even viewing this in a light most favorable to plaintiff, based on the incredibly high bar needed to demonstrate an intentional wrong within the meaning of N.J.S.A. 34:15-8 and the progeny of cases interpreting this statute.

POINT II

THE RECORD IS COMPLETELY DEVOID OF ANY EVIDENCE TO SUBSTANTIATE PLAINTIFF'S CLAIM THAT HMH HOSPITALS CORPORATION COMMITTED AN INTENTIONAL WRONG.

What constitutes an "intentional wrong" within the meaning of N.J.S.A. 34:15-8 requires a two prong analysis of the employer's conduct and context in which the accident resulted. Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161(1985). The conduct prong has typically focused on what dangers the employer knew of in advance of an accident, whether the employer deceived its employees or others like

government regulatory agencies, or whether the employer took some affirmative action to make an inherently dangerous situation even more dangerous thereby exposing it employees to increased of risk of injury.

By way of example, in Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161(1985) it was alleged that plaintiffs' employer and doctors intentionally exposed employees to asbestos and then, to prevent them from leaving the workforce, knowingly aggravated their injuries by conspiring to fraudulently conceal from them knowledge of diseases caused by asbestos exposure. While it was undisputed that the employees' claims were compensable under the Worker's Compensation Act, the Court found that under these circumstances the employees should be given the opportunity to prove that their employer - by virtue of its alleged deception - committed an intentional wrong and should be held to account for that outside the exclusivity of the Act. In so doing, the Court did away with the need to demonstrate a deliberate intent to injure, instead adopting a "substantial certainty" test. Millison, 101 N.J. at 170 - 175. However, the Court cautioned that:

> "[T]he mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong."

Id. at 177. Significantly though, the Court also cautioned that even if a known risk "later blossoms into reality," that alone is not sufficient. Id. at 178. As the Court stressed, **"[W]e must demand a virtual certainty."** Id. at 178 (emphasis added).

By way of further example, in Crippen v. Central Jersey Concrete Pipe Co., 176 N.J. 397, 402-403 (2003), the court found that the employer's purposeful disregard of repeated OSHA violations which OSHA characterized as "[s]erious," meaning the condition could result in "a substantial probability [of] death or serious physical harm," along with testimony from a manager of the employer admitting knowledge that someone could die from the employer's inaction in correcting those violations was sufficient to constitute an intentional wrong.

Similarly, in Laidlow v. Hariton Machinery Co., Inc., 170 N.J. 602 (2002), the plaintiff suffered a debilitating hand injury when his hand got caught in a rolling mill due to the company's failure to engage a safety guide on the machine. Evidence showed over the course of approximately 13 years there were a number of other near misses and the safety guide was only engaged when OSHA inspectors came to the plant. Plaintiff alleged that the combination of the employer disengaging the safety guide and its deception of OSHA constituted an intentional wrong. Again, the Court found that plaintiff's intentional wrong claim should be submitted to a jury for its consideration.

Finally, in Mull v. Zeta Consumer Products, 176 N.J. 385 (2003), an employee was allowed to pursue an intentional wrong claim against his employer based on allegations that the employer altered the original design of a machine, that it failed to warn employees that the machine had sudden start up capabilities and that safety switches had been removed.

With this in mind, plaintiff alleges that the defendant's conduct here rose to the same level as in those cases and that had the trial court properly considered the totality of the facts here in a light most favorable to plaintiff, it would have found that reasonable jurors could conclude that the defendant conducted constituted an intentional wrong. However, we submit that there is nothing about the defendant's conduct from the totality facts contained in the record which would allow anyone to conclude that the defendant committed an intensional wrong within the meaning of N.J.S.A. 34:15-8. Indeed, there is nothing in this record by which reasonable jurors could conclude that the defendant knew of any dangerous condition in its parking lot, or that if it did, the defendant knew it was substantially certain that a non-management employee would be injured or killed by being compelled to park in a designated area of the lot which may have had less pedestrian safeguards than other areas of the lot.

Here, plaintiff complains that the trial court improperly relied on the absence

of prior accidents because "the absence of a prior accident does not preclude a finding of an intentional wrong." Crippen, 176 N.J. at 408. What plaintiff fails to note though is that prior accidents and "close-calls," are evidence "that may be considered in the substantial certainty analysis." Id. at 408, *citing* Laidlaw, *supra.* at 621–22.

Certainly, the reports from the Holmdel Police Department covering a 12 year period - which included the parking lot as originally designed and as redesigned - would not put any employer on notice of any such substantial certainty. Additionally, there is nothing in the record to show that the defendant knew that additional safeguards needed to be placed in the non-management employee parking area. In the depositions taken of the defendant corporate representatives, none were ever asked about this. See, Pa499-Deposition Transcript of Caitlin Miller. See, Da88-Da109, Deposition Transcript of Timothy Hogan. See also, Da110-Da135, Deposition Transcript of Gary Sypniewski. Likewise, plaintiff never deposed any persons from the engineering company that designed the parking lot and never produced any evidence that they made recommendations to defendant for additional pedestrian safeguards in the non-management parking area which were rejected by defendant.

Additionally, quoting to defendant Dember's testimony that a crosswalk in the area would have alerted her to pedestrians does not prove that the defendant disregarded known safety concerns or that it was a substantial certainty that a

pedestrian would be struck by a vehicle. Dember also testified that she drove through the parking lot regularly during shift changes (the time of the accident being a "mass entrance" of people) making it virtually certain that she knew that people would be walking through the parking lot at the time of the accident such that she needed to exercise due caution when operating her vehicle in the parking lot. (Pa485).

In short, plaintiff is improperly trying to impute knowledge of a substantial certainty to defendant based solely on the happening of this accident. However, the fact that there may have been more pedestrian safeguards in one area of the parking lot than another did not make it a virtual certainty that this was "an accident waiting to happen." See, Plaintiff's Appellate Brief at p.36.

While our engineering expert maintains that the lot was redesigned in accordance with all necessary industry standards, mere knowledge that a workplace is dangerous does not equate to an intentional wrong. Van Dunk v. Reckson Associates Realty Corp., 210 N.J. 449 (2012), citing, Millison, supra. at 178.

> "An intentional wrong must amount to a virtual certainty that bodily injury or death will result. A probability, or knowledge that such injury or death "could" result, is insufficient."

Van Dunk, 210 N.J. at 471 (internal citation omitted).

In this case, the redesign was undertaken pursuant to years of extensive

planning by a civil engineering firm which included a parking demand study, concept planning, schematic designs, a traffic impact study, meetings with architects, land use attorneys and the Township of Holmdel among others. (Pa130-Pa183). Most importantly though, counsel makes no assertions that the defendant took any affirmative action during that time to compromise the safety of its employees or that it knowingly rejected recommended safety precautions because plaintiff never deposed anyone involved in the planning. Accordingly, we submit that there is nothing in the totality of facts contained in the record by which one could reasonably conclude that anything the defendant did or failed to do rose to the level of the offending conduct in the Millison progeny of cases constituting an intentional wrong. Indeed, as the Millison court stated:

> "[a]lthough defendants' conduct in knowingly exposing plaintiffs to asbestos clearly amounts to deliberately taking risks with employees' health, as we have observed heretofore the mere knowledge and appreciation of a risk—even the strong probability of a risk—will come up short of the "substantial certainty" needed to find an intentional wrong resulting in avoidance of the exclusive-remedy bar of the compensation statute."

Millison, supra. at 179.

Finally, as to the context prong, parking lot accidents and pedestrian injuries, tragic as they may be, are not unusual. (Da151). But there is nothing in the record

here by which one could look at the context in which this injury occurred and conclude it was the result of an intentional wrong by the defendant. There is no evidence showing that the parking lot as designed was inherently more dangerous than the obvious danger inherent in any parking lot in which vehicles and pedestrians share limited space. See, Pa11. See also, Da36 and Da151. Likewise, there is no evidence in the record to demonstrate that the manner by which Ms. Jameel's tragic death occurred was "plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act." Millison, 101 N.J. at 179. This is because for better or worse, parking lot accidents are a foreseeable fact of life. Most importantly, Ms. Dember admitted to police that she was not distracted prior to the accident, nor was she aware of any obstructions blocking her view and could offer no explanation for why she never saw Ms. Jameel. Under those circumstances, this Court should not conclude that the trial court failed to properly consider all facts in a light most favorable to plaintiff, or that the trial court misapplied the standard for reviewing summary judgment motions. Rather, this Court should conclude that even in the light most favorable to the plaintiff, the totality of the record is devoid of any evidence by which one could reasonably conclude that the conduct of the defendant, and the context in which it was exercised rose to the level of an intentional wrong. Accordingly, the order granting summary

judgment must be affirmed.

POINT III

PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES WAS ALSO PROPERLY DISMISSED AND THAT DISMISSAL SHOULD ALSO BE AFFIRMED BY THIS COURT.

The trial court properly dismissed plaintiff's punitive damages claim, and did so using the appropriate legal standard. Here, plaintiff once again erroneously assumes and erroneously asserts that the trial court decided the issue utilizing the "actual malice" standard. See, Plaintiff's Appellate Brief at p.41. Notably, plaintiff offers no insight into how plaintiff reached this conclusion other than to say that plaintiff disagrees with the result reached by the trial court.

In reviewing the court's opinion, nowhere is the phrase "actual malice" used. (Pa12). Indeed, the legal standard it used to determine whether plaintiff put forth sufficient evidence supporting a viable claim for punitive damages was expressed as follows:

> "Punitive damages are to be awarded in circumstances that demonstrate a wanton and willful disregard of persons who foreseeably might be harmed by defendant's conduct...the defendant's conduct must have been wantonly reckless or malicious. There must be an intentional wrongdoing in the sense of an "evil-minded act" or an act accompanied by a wanton and willful disregard of the rights of another."

(Pa12, internal citations omitted and emphasis added).

Here, plaintiff's reliance on McLaughlin v. Rova Farms, Inc., 56 N.J. 288 (1970) is totally misplaced because it was decided before the 1995 enactment of the Punitive Damages Act ("the Act") which established more restrictive standards for an award of punitive damages. N.J.S.A. 2A:15-5.9 *et seq*. See also, Assembly Insurance Committee Statement, Senate, No. 1496-L.1995, c. 142 (stating the restrictions imposed on the awarding of punitive damages). Thus, in enacting the Act as part of a five-bill tort reform package, the Legislature obviously intended to limit the availability and amount of punitive damage awards in most cases. As Justice Garibaldi noted in Smith v. Walker, 160 N.J. 221, 248 (1999), the Act evinces a "clear legislative mandate indicating that the purpose of the Act was to restrict punitive damage awards rather than expand them." As such, plaintiff cannot recover punitive damages by merely recasting negligent conduct as willful and wanton. Entwistle v. Draves, 102 N.J. 559, 562 (1986). Likewise, punitive damages are not to be applied in the ordinary, unaggravated tort case. Berg v. Reaction Motors Division, 37 N.J. 396, 413 (1960). Rather, there must be a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences. Berg, 37 N.J. at 414.

Here, as the trial court properly concluded, "[t]here is no supporting evidence in the record to warrant such a conclusion in this instance." (Pa12). Accordingly,

punitive damages should not be rewarded for what is nothing more than a parking lot accident caused by the negligent conduct of defendant Dember, tragic as this case may be. Plaintiff has not set forth any evidence to show circumstances of aggravation or outrage, such as spite or malice, a fraudulent or evil motive on the part of the defendant, or such conscious and deliberate disregard of the interests of others that the defendant's conduct may be called wanton and willful. Indeed, the law makes clear that plaintiff cannot recover punitive damages simply by characterizing conduct as egregious as plaintiff attempts to do here. Entwistle, 102 N.J. 562 (1986). Accordingly, the trial court's grant of summary judgment as to plaintiff's punitive damages claim must be affirmed.

CONCLUSION

For all the reasons set forth at length herein we submit that the trial court's grant of summary judgment must be affirmed.

Respectfully submitted,

DiCroce, McCann & Farman, LLC

STEVEN B. FARMAN
Attorneys for Defendants/Respondents,
HMH Hospitals Corporation d/b/a Bayshore Medical Center (i/p/a Bayshore Community Hospital) and Diane Ingenito (i/p/a Bayshore Comm Hosp-D Ingenito-Tax)

DATED: April 17, 2024

FAISAL JAMEEL, Administrator Ad Prosequendum for the ESTATE OF AASAI JAMEEL, Plaintiff/Appellant v. JENNIFER L. DEMBER; BAYSHORE COMMUNITY HOSPITAL; BAYSHORE COMM HOSP-D INGENITO-TAX; HMH HOSPITALS CORP., Defendants/Respondents.	**Superior Court of New Jersey, Appellate Division** **Docket No. A-001225-23** On Appeal From The Superior Court of New Jersey Law Division, Middlesex Vicinage, Trial Court Docket No. MID-L-7038-21 Sat Below: The Honorable Alberto Rivas, J.S.C.

REPLY BRIEF AND APPENDIX (Pa1126-Pa1131) OF PLAINTIFF/APPELLANT FAISAL JAMEEL, ADMINISTRATOR AD PROSEQUENDUM FOR THE ESTATE OF AASIA[1] JAMEEL

Hobbie & DeCarlo, P.C.
125 Wyckoff Road
Eatontown, NJ 07724
(732) 380-1515
Jdecarlo@hdlawattorneys.com
Attorneys for Plaintiff

Of Counsel:
Norman M. Hobbie, Esq. (Atty. I.D. No. 015541980)

Of Counsel and On The Brief:
Jacqueline DeCarlo, Esq. (Atty. I.D. No. 001321996)

Date: May 13, 2024

[1] Decedent's name is spelled Aasia; it is inadvertently misspelled in the caption.

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[1] Note: The trial court entered two identical orders and statements of reasons on December 15, 2023: one order was e-filed in connection with the summary judgment motion filed by HMH Hospitals Corporation d/b/a Bayshore Medical Center (i/p/a Bayshore Community Hospital) and Bayshore Comm Hosp-D Ingenito-Tax (a/k/a Diane Ingenito) (E-courts transaction ID LCV20233642789); the other, identical order was E-filed in connection with Defendant Dember's summary judgment motion (E-courts transaction ID LCV20233642776).

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[2] The Mule case was inadvertently mis-cited as 356 N.J. Super. 289 on page 43 of Plaintiff's initial brief. Plaintiff apologizes to the Court and counsel for the error.

REPLY LEGAL ARGUMENT[1]

POINT I

THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT TO DEFENDANT HMH (Pa1-3, 6-12).

Defendant HMH's opposition brief highlights the existence of material disputes of fact that require the reversal of the trial court's summary judgment order. The arguments raised by HMH essentially amount to a summary of its expert's proffered opinion that the HMH parking lot where the subject fatal crash occurred was appropriately designed and configured. As set forth in detail in Plaintiff's initial brief, Plaintiff's expert engineer, Dr. Wayne Nolte, has opined that the area of the parking lot where non-management employees such as Ms. Jameel were required to park was in a hazardous condition due to its lack of traffic control and pedestrian safety measures. Pa665-6. The determination of this dispute presents a classic "battle of the experts", which a jury is required to resolve by weighing the credibility of the experts' conclusions in light of the totality of the evidence in the record. The trial court erred by deciding these disputed issues of material fact that were for the jury to resolve. See, e.g., Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995).

As to the governing law, HMH does not contest that the question of

[1] Plaintiff adopts the Procedural and Factual Statements from the initial brief.

whether a defendant's acts and omissions rise to the level of an "intentional wrong" creating a "substantial certainty" of injury under Laidlow requires an analysis of "the totality of the facts contained in the record" as to which "no one fact is dispositive." See Laidlow v. Hariton Machinery Co., Inc., 170 N.J. 602, 622-623 (2002) and Fisher v. Sears, Roebuck & Co., 363 N.J. Super 457, 469 (App. Div. 2003), certif. den., 179 N.J. 310 (2004). The fact-sensitive nature of the relevant inquiry, and the disputed facts and expert opinions in the record herein, rendered summary judgment particularly inappropriate.

In its brief, HMH admits that "parking lot accidents are a foreseeable fact of life." See HMH brief, Db42. HMH's admission regarding knowledge of the risks posed by its parking lot further confirms that a reasonable jury could conclude that HMH was "substantially certain" that injuries would result when it allowed an entire area of its expansive parking lot to have no pedestrian safety or traffic control features at all, in contrast to the abundant crosswalks, markings, and signage that HMH used to protect its own management and physicians in another area of the same parking lot.

Plaintiff's expert Dr. Nolte based his opinions on industry standards such as the Institution of Transportation Engineers' Transportation and Traffic Engineering Handbook, which provides that the use of traffic signs and markings must have "uniformity" in order to commend the attention and respect

of drivers. Pa661-662. Here, there was an unsafe lack of uniformity in HMH's "inconsistently maintained" parking lot, where traffic controls and pedestrian safety measures such as stop signs, stop lines, and crosswalks were implemented in the area of the lot where physicians and management parked, but were absent from the intersection in question in the distant part of the lot where HMH required nurses such as Mr. Jameel to park. See Pa665-6. Dr. Nolte further explained the safety function of having islands and peninsulas at the end of rows of parking spaces, something that, again, was implemented in the management parking area but not where Ms. Jameel was required to park. Id.

In addition to the opinions of Plaintiff's expert, the testimony of Defendant Dember confirms the causative role that the dangerous, unprotected condition of HMH's parking lot played in the fatal crash. Dember expressly testified that pedestrian safety features such as painted crosswalks at the intersection where the crash occurred would have called her attention to pedestrians like Ms. Jameel. Pa309 (30:11-31:2). It is for the jury to determine whether, as Plaintiff argues, the lack of pedestrian safeguards rendered it a "substantial certainty" that someone would be injured in HMH's parking lot.

HMH, naturally, disputes Plaintiff's arguments and Dr. Nolte's opinions. These disputes confirm the existence of jury questions that preclude summary judgment. For example, HMH's expert cites to the National Association of City

Transportation Officials ***Urban Design*** Guide" ("NATCO") for the proposition that HMH's inclusion of a crosswalk in another part of the subject parking lot was close enough to the area where Ms. Jameel parked. See Da36-37 (emphasis added). It is for the jury to weigh whether HMH's citation to a guide regarding "urban streets" is applicable to the HMH parking lot and whether the inclusion of a crosswalk in another part of the subject lot ameliorated the fact that there were no pedestrian safeguards, crosswalks, or traffic control markings at the intersection where the subject fatal crash occurred.

Similarly, the argument advanced by HMH and its expert that Defendant Dember was solely to blame for the fatal crash represents an issue for resolution by the jury. The questions of whether there is more than one proximate cause of an injury and apportionment of fault between causes are factual issues which must be resolved by the jury. See Davis v. Brooks, 280 N.J. Super. 406, 410 (App. Div. 1993) and Model Civil Jury Charge 7.30 § E, page 5.

The fact that Defendant Dember, in speaking with the police shortly after the crash, said that she was not "aware" of anything outside the car having obstructed her view, see HMH's brief at Db7, does not conclusively resolve the question of whether or not the parked car that was present at the corner due to HMH's failure to place an island/peninsula at the end of the row did, in fact, obstruct Ms. Jameel's visibility and contribute to the happening of the crash.

Clearly, Defendant Dember, who claimed she never saw Ms. Jameel at all until after she ran her over, was not alerted to Ms. Jameel's presence. See Pa305(15:5-16). It is for the jury to determine whether HMH's complete failure to use pedestrian safety design features, markings, and signings in the area of its parking lot in question was a contributing factor.

HMH's emphasis on the lack of prior similar incidents is misplaced: "[T]he absence of a prior accident does not preclude a finding of an intentional wrong." Crippen v. Central Jersey Concrete Pipe Co., 176 N.J. 397, 408 (2003).

Finally, Defendant HMH's admission that it "redesign[ed]" its parking lot, see Db40, such that there were no pedestrian safety or traffic control features in the area of the lot where Ms. Jameel was struck, when HMH included those safety features in the management's area of the parking lot, places the facts of this case firmly in the company of other cases in which a "substantial certainty" of injury has been found. See, e.g., Laidlow, 170 N.J. at 606 (employer removed a safety device from machinery); Mull v. Zeta Consumer Products, 176 N.J. 385, 388-389 (2003) (employer altered the design safety features of a machine). Here, a jury could reasonably determine that failing to include the very pedestrian safety features that HMH knew were needed to protect its management in the area where its nurses were required to park was an intentional decision to withhold safety devices that was substantially certain to result in injury or death.

The same disputed issues of fact preclude summary judgment as to Plaintiff's punitive damages claim against HMH, which should be reversed as well. A reasonable jury could find that failing to include safety features in the area of the lot where nurses were required to park when HMH knew these features were necessary and included them in the management parking area demonstrated a "wanton and willful" disregard for the nurse's safety "with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." N.J.S.A. 2A:15-5.10.

POINT II

THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT DEMBER SHOULD BE REVERSED (Pa13, 17-18)

Defendant Dember fails to address, or even to cite, the primary case relied upon by Plaintiff, in which this Court held that a co-employee is not automatically entitled to immunity from civil liability merely because a car crash occurs on the employer's property. See Mule v. NJM, 356 N.J. Super. 389, 394 (App. Div. 2003)[2], wherein this Court explained as follows:

> The fact that a car accident occurs on an employer's property between two co-employees, and that injury to the employee who is in the course of her employment at the time is compensable at the time is compensable under the Worker's Compensation Act, ***does not* automatically *mean that the injured employee's common law claim against the other is barred by N.J.S.A. 34:15-8. The critical question is whether both employees were***

[2] The Mule case was inadvertently mis-cited as 356 N.J. Super. 289 on page 43 of Plaintiff's initial brief. Plaintiff apologizes to the Court and counsel for the error.

> ***in the course of their employment at the time the accident occurred.*** If not, the fact that both motorists were co-employees is without legal significance. [Emphasis added.]

There must be a "causal connection between the employment and the injury", meaning that "the work" must have been a "contributing cause of plaintiff's injury and that the risk of the occurrence was reasonably incident to defendant's employment." Mule, 356 N.J. Super. at 396.

Defendant Dember similarly ignores this Court's holding in Manole v. Carvellas, wherein this Court found that "If [Defendant] was not yet within the scope of his employment when the vehicles collided, the fact that he was also a [co-employee] would be **a mere coincidence without legal significance**, and plaintiff would be as free to sue him in a third-party action as anyone else." Manole, 229 N.J. Super. 138, 143 (App. Div. 1988) (emphasis added).

The fact that Defendant Dember does not cite or respond to these cases is telling. There is undeniable tension between this Court's holding in cases such as Mule and Manole, on one hand, and older cases such as Konitch v. Hartung, 81 N.J. Super. 376 (App. Div. 1963), the sole case relied upon by the trial court in dismissing Plaintiff's claim against Dember. See Pa6. More recent cases like Mule and Manole provide that whether a co-employee is acting "in the course of their employment" presents a fact sensitive issue that cannot be determined merely based on the ownership of the location where the injury occurred.

Plaintiff respectfully submits that this Court should resolve the tension between Mule / Manole and older cases such as Konitch by clarifying that a fact-sensitive analysis of the totality of the circumstances is required to determine whether a co-employee is acting in the "course of their employment" at the time of the injury for the purposes of immunity under N.J.S.A. 34:15-8 and that the location of the injury is just one factor, not necessarily a dispositive one. A fact-sensitive analysis is particularly called for here, where Defendant Dember was still commuting, while late for work, at the time of the crash and was not performing any duties inherently related to her employment as a nurse. Accordingly, the trial court's summary judgment order, which was based upon the court's treatment of the fact that the incident occurred in an employee-owned parking lot as dispositive, should be reversed.

The disputed facts relevant to whether Defendant Dember was in the course of her employment at the time of the collision should be resolved by a jury. For example, Plaintiff has maintained that Dember's shift had already started at 6:45 a.m. on the date of the fatal collision, which occurred at approximately 7:00 a.m. See Da1057-8 (69:14-70:3); Pa1011 (23:5-13). Thus, Dember was not where she was supposed to be and was not performing any work functions in the scope of her employment at the time of the crash. Dember never clocked into work on the day of the crash and did not work as a nurse or perform

any professional duties at any time on October 6, 2021. See Pa789 (Dember's timesheet). For her part, Dember argues that the "majority of time" she started work at 7:00 a.m., and that the work schedule listed on the books is just "generic hours for the shift". See Defendant Dember's brief, Db6 (citing Pa325, 94:22-95:21). In other words, Plaintiff argues that Dember was late for work at the time of the crash and Dember denies it. This factual dispute presents an issue for the jury to resolve regarding a factor relevant to determining whether Dember was in the course of her employment at the time the crash, rendering summary judgment inappropriate.

Instead of addressing the Mule and Manole cases cited by Plaintiff, Defendant Dember focuses on cases that are irrelevant or distinguishable. For example, the case of Lapsley v. Township of Sparta, 249 N.J. 427 (2022) cited by Dember, had nothing to do with the co-employee immunity statute, N.J.S.A. 34:15-8, which is not cited in the Lapsley decision. In Lapsley, the plaintiff was a librarian employed by the Township of Sparta. Id. at 431. While leaving work on a snowy day and walking to her car in a municipal parking lot, she was struck by a snow plow operated by a fellow township employee. Id. In Lapsley, there was no dispute that the municipal employee plowing the parking lot with a snow plow was engaged in the course of his employment. In contrast, here, Defendant Dember was not performing any work function at the time of the crash; she was still in the course of her commute on top of being late for work, creating, at the very least, a jury question regarding whether

she was actually in the course of her employment at the time of the crash.

Similarly, in the case of McDaniel v. Man Wai Lee, 419 N.J. Super. 482 (App. Div. 2011) cited by Dember, both the plaintiff and defendant (named Devers) were employees of Sprint/Nextel, driving separate vehicles, when Devers was involved in a crash with the plaintiff. Id. at 487-488, 495. Devers was driving an employer-provided Sprint/Nextel vehicle at the time of the crash. Id. There was no dispute about whether defendant Devers was in the course of working at the time of the crash, unlike the facts of the instant matter in which Defendant Dember was commuting in her personal vehicle at the time of the crash.

The same distinguishing factors are present in the case of Linden v. Solomacha, 232 N.J. Super. 29, 30 (App. Div.), certif. denied, 117 N.J. 88 (1989), cited by Dember, in which there was no dispute that the co-employees were both "performing their respective State duties" and that the defendant was driving a "state vehicle" at the time of the crash. Likewise, in Maggio v. Migliaccio, 266 N.J. Super. 111, 113 (App. Div.), certif. denied, 134 N.J. 563 (1993), cited by Dember, the co-employees at issue were both responding to the same fire call at the time of the injury. These cases stand in sharp contrast to the instant matter, in which Dember was not performing any work duties and was not where she was supposed to be for work at the time of the crash.

The unpublished case of Grawehr v. Twp. of E. Hanover cited by Defendant

Dember had nothing to do with co-employee immunity: the plaintiff in that case fell in the parking lot, an incident that did not involve a co-employee at all. Da17.

The case of Ehrgott v. Jones, 208 N.J. Super. 393 (App. Div. 1986) cited by Dember involved issues and circumstances unrelated to the instant matter. In Ehrgott, the plaintiff was injured while a passenger in her co-employee's car while they were driving to an out-of-state professional meeting, which the Court held constituted a part of their work duties. Id. at 395.

In Barone v. Harra, 77 N.J. 276 (1978), cited by Dember, the Court held that co-employee immunity did not apply to a crash that occurred while two co-employees were driving together to get lunch because a specific decision holding that "lunch break" injuries are compensable, Hornyak v. The Great Atlantic & Pacific Tea Co., 63 N.J. 99 (1973), had not yet gone into effect. Id. at 277, 281.

In the case of DeCicco v. Anderson, 99 N.J. Super. 243 (App. Div. 1968), cited by Dember, there was no dispute that both employees involved in the collision were on time for work: the crash occurred at 7:23 a.m. and work started at 7:30 a.m. Id. at 245. Like the Court in Konitch, the Court in DeCicco appears to have afforded dispositive weight to the fact that the injury occurred on premises owned by the employer, which is inconsistent with the more modern, fact-sensitive analysis espoused by this Court in Mule and Manole, where the location of the accident is not entitled to dispositive weight.

Defendant Dember's focus on the "premises rule" set forth in N.J.S.A. 34:15-36 is not dispositive. As Dember acknowledges, the co-employee immunity set forth in N.J.S.A. 34:15-8 does not merely depend on the premises on which the incident occurred, but also requires that "the defendant must have been acting in the course of his/her employment." McDaniel, 419 N.J. Super. at 492. That determination requires a fact-sensitive analyses as set forth in Mule and Manole and cannot be resolved simply by the fact that the incident occurred on employer-owned property.

It should also be noted that N.J.S.A. 34:15-36's definition of the scope of "employment" was only amended to specifically include arriving at a designated employee parking area on January 10, 2022, **after** the October 6, 2021 crash that forms the basis of this litigation. See P.L. 2021, c.334, Pa1126, Pa1128. The statute in effect on the date of the October 6, 2021 crash provided in pertinent part that "employment shall be deemed to commence when an employee **arrives** at the employer's **place of employment to report for work**[.]" (Emphasis added). However, the statute did not define what it meant to "arrive", nor did it set forth the contours of the "place of employment." On January 10, 2022, after the subject crash, the Legislature amended N.J.S.A. 34:15-36 to specifically provide that "employment" commences when an employee "arrives at the parking area prior to reporting for work." Pa1128.

The fact that, on January 10, 2022, the Legislature amended N.J.S.A.

34:15-36 to include "when an employee arrives at the parking area prior to reporting for work" within the statutory scope of employment indicates that, at the time of the subject October 6, 2021 fatal crash, the time period "when an employee arrives at the parking area prior to reporting for work" was not automatically included within the scope of employment for the purposes of the Workers' Compensation statute generally or, specifically, with regard to the applicability of the co-employee immunity set forth in N.J.S.A. 34:15-8. There would have been no need for the Legislature to amend the statute on January 10, 2022 to specifically include within the scope of employment "when an employee arrives at the parking area prior to reporting for work" if that time period were already included by the other language in the "scope of work" definition. "In interpreting a statute courts should avoid a construction that would render 'any word in the statute to be inoperative, superfluous, or meaningless[.]" Bergen Commercial Bank v. Sisler, 157 N.J. 188, 204 (1999) (quoting In re Estate of Post, 282 N.J. Super. 59, 72 (App. Div. 1995)). The January 10, 2022 amendment to include "when an employee arrives at the parking area prior to reporting for work" within the statutory scope of employment would be "inoperative, superfluous, or meaningless" if that time period were already included within the general definition of scope of employment already found within N.J.S.A. 34:15-36. Thus, the language of the statute in effect at the time

of the October 6, 2021 fatal crash did not expressly provide that Defendant Dember was entitled to co-employee immunity.

In light of the modern trend in New Jersey case law exemplified by case law such as Mule and Manole, a fact-sensitive analysis should have been applied to the question of whether Defendant Dember, who was still commuting at the time of the crash and not performing any functions that were inherently related to her work as a nurse, was entitled to co-employee immunity. Under such a fact-sensitive analysis, the trial court erred in granting summary judgment to Defendant Dember, as a jury could have determined that she was not acting in the course of her employment as a nurse at the time of the subject crash.

Finally, there is no merit to Defendant Dember's accusation that Plaintiff is relying on "sympathy" to support its appeal. Plaintiff's legal arguments are based on published cases, such as Mule and Manole, that Dember failed to even address or cite in her opposition brief. Indeed, it is Dember herself who appears to rely on irrelevant factors by repeatedly noting that Plaintiff, the Estate of Ms. Jameel, also applied for workers' compensation benefits in order to protect its right to receive some compensation in the event the Court were to reject its civil suit on legal grounds. The filing of alternative claims, even if they are legally inconsistent, is expressly permitted by our Court Rules. See R. 4:5-6. If Plaintiff were to prevail on this appeal and ultimately recover an award in its civil suit,

any workers' compensation benefits received would be reimbursed so that there would be no double recovery. There is no legal or substantive merit to Defendant Dember's attempt to cast aspersions on Plaintiff for taking every step possible to protect the Estate's legal rights and to obtain as much compensation as possible for the two children left behind as a result of the subject fatal crash.

CONCLUSION

For the reasons set forth above and in Plaintiff's initial brief, the trial court's December 15, 2023 orders granting summary judgment to Defendants HMH and Dember should be reversed and this matter should be remanded for trial. Thank you for the Court's consideration herein.

Respectfully submitted,

/s Jacqueline DeCarlo, Esq.
Jacqueline DeCarlo, Esq.
HOBBIE & DECARLO, P.C.
Counsel for Plaintiff

Dated: 5/13/2024

P.L. 2021, CHAPTER 334, ***approved January 10, 2022***
Senate, No. 771

AN ACT concerning workers' compensation and amending R.S.34:15-36.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. R.S.34:15-36 is amended to read as follows:

34:15-36. "Willful negligence" within the intent of this chapter shall consist of (1) deliberate act or deliberate failure to act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication, operating as the proximate cause of injury, or (4) unlawful use of a controlled dangerous substance as defined in the "New Jersey Controlled Dangerous Substances Act," P.L.1970, c.226 (C.24:21-1 et seq.).

"Employer" is declared to be synonymous with master, and includes natural persons, partnerships, and corporations; "employee" is synonymous with servant, and includes all natural persons, including officers of corporations, who perform service for an employer for financial consideration, exclusive of (1) employees eligible under the federal "Longshore and Harbor Workers' Compensation Act," 44 Stat.1424 (33 U.S.C. s.901 et seq.), for benefits payable with respect to accidental death or injury, or occupational disease or infection; and (2) casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring; provided, however, that forest fire wardens and forest firefighters employed by the State of New Jersey shall, in no event, be deemed casual employees.

A self-employed person, partners of a limited liability partnership, members of a limited liability company or partners of a partnership who actively perform services on behalf of the self-employed person's business, the limited liability partnership, limited liability company or the partnership shall be deemed an "employee" of the business, limited liability partnership, limited liability company or partnership for purposes of receipt of benefits and payment of premiums pursuant to this chapter, if the business, limited liability partnership, limited liability company or partnership elects, when the workers' compensation policy of the business, limited liability partnership, limited liability company or

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

partnership is purchased or renewed, to obtain coverage for the person, the limited liability partners, the limited liability company members or the partners. If the business, limited liability partnership, limited liability company or partnership elects to obtain coverage for the self-employed person, limited liability partners, limited liability company members or the partners, the election may only be made at purchase or at renewal and may not be withdrawn during the policy term. If the business, limited liability partnership, limited liability company or partnership performs services covered under a homeowner's policy or other policies providing comprehensive personal liability insurance for domestic servants, household employees or the dependents thereof, the workers' compensation policy of the business, limited liability partnership, limited liability company or partnership shall have primary responsibility for the payment of benefits. Notwithstanding the provisions of R.S.34:15-71 and 34:15-72, the business, limited liability partnership, limited liability company or partnership shall not be required to purchase a policy unless the business, limited liability partnership, limited liability company or partnership is an "employer" of a least one employee as defined in this section who is not a self-employed person, limited liability partner, limited liability company member or partner actively performing services on behalf of the business, limited liability partnership, limited liability company or partnership.

Notwithstanding any other provision of law to the contrary, no insurer or insurance producer as defined in section **[**2 of P.L.1987, c.293 (C.17:22A-2)**]** 3 of P.L.2001, c.210 (C.17:22A-28) shall be liable in an action for damages on account of the failure of a business, limited liability partnership, limited liability company or partnership to elect to obtain workers' compensation coverage for a self-employed person, limited liability partner, limited liability company member or partner, unless the insurer or insurance producer causes damage by a willful, wanton or grossly negligent act of commission or omission. Every application for workers' compensation made on or after the effective date of this amendatory act shall include notice, as approved by the Commissioner of Banking and Insurance, concerning the availability of workers' compensation coverage for self-employed persons, limited liability partners, limited liability company members or partners. That application shall also contain a notice of election of coverage and shall clearly state that coverage for self-employed persons, limited liability partners, limited liability company members and partners shall not be provided under the policy unless the application containing the notice of election is executed and filed with the insurer or insurance producer. The application containing the notice

of election shall also contain a statement that the insurer or insurance producer shall not be liable in an action for damages on account of the failure of a business, limited liability partnership, limited liability company or partnership to elect to obtain workers' compensation coverage for a self-employed person, limited liability partner, limited liability company member or partner, unless the insurer or insurance producer causes damage by a willful, wanton or grossly negligent act of commission or omission. The failure of a self-employed person, limited liability partnership, limited liability company or partnership to elect to obtain workers' compensation coverage for the self-employed person, the limited liability partners, the limited liability company members or the partners shall not affect benefits available under any other accident or health policy.

Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer; provided, however, when the employee is required by the employer to be away from the employer's place of employment, the employee shall be deemed to be in the course of employment when the employee is engaged in the direct performance of duties assigned or directed by the employer; but the employment of employee paid travel time by an employer for time spent traveling to and from a job site or of any employee who utilizes an employer authorized vehicle shall commence and terminate with the time spent traveling to and from a job site or the authorized operation of a vehicle on business authorized by the employer. Travel by a policeman, fireman, or a member of a first aid or rescue squad, in responding to and returning from an emergency, shall be deemed to be in the course of employment.

Employment shall also be deemed to commence when an employee is traveling in a ridesharing arrangement between his or her place of residence or terminal near such place and his or her place of employment, if one of the following conditions is satisfied: the vehicle used in the ridesharing arrangement is owned, leased or contracted for by the employer, or the employee is required by the employer to travel in a ridesharing arrangement as a condition of employment.

Employment shall also be deemed to commence, if an employer provides or designates a parking area for use by an employee, when an employee arrives at the parking area prior to reporting for work and shall terminate when an employee leaves the parking area at the end of a work period; provided that, if the site of the parking area is separate from the place of employment, an employee shall be deemed to be in the course of employment while the employee

travels directly from the parking area to the place of employment prior to reporting for work and while the employee travels directly from the place of employment to the parking area at the end of a work period.

"Disability permanent in quality and partial in character" means a permanent impairment caused by a compensable accident or compensable occupational disease, based upon demonstrable objective medical evidence, which restricts the function of the body or of its members or organs; included in the criteria which shall be considered shall be whether there has been a lessening to a material degree of an employee's working ability. Subject to the above provisions, nothing in this definition shall be construed to preclude benefits to a worker who returns to work following a compensable accident even if there be no reduction in earnings. Injuries such as minor lacerations, minor contusions, minor sprains, and scars which do not constitute significant permanent disfigurement, and occupational disease of a minor nature such as mild dermatitis and mild bronchitis shall not constitute permanent disability within the meaning of this definition.

"Disability permanent in quality and total in character" means a physical or neuropsychiatric total permanent impairment caused by a compensable accident or compensable occupational disease, where no fundamental or marked improvement in such condition can be reasonably expected.

Factors other than physical and neuropsychiatric impairments may be considered in the determination of permanent total disability, where such physical and neuropsychiatric impairments constitute at least 75% or higher of total disability.

"Ridesharing" means the transportation of persons in a motor vehicle, with a maximum carrying capacity of not more than 15 passengers, including the driver, where such transportation is incidental to the purpose of the driver. This term shall include such ridesharing arrangements known as carpools and vanpools.

"Medical services, medical treatment, physicians' services and physicians' treatment" shall include, but not be limited to, the services which a chiropractor is authorized by law to perform and which are authorized by an employer pursuant to the provisions of R.S.34:15-1 et seq.

(cf: P.L.1999, c.383, s.1)

2. This act shall take effect immediately.

Expands workers' compensation coverage to parking areas provided by employer.

ASSEMBLY LABOR COMMITTEE

STATEMENT TO

SENATE, No. 771

STATE OF NEW JERSEY

DATED: DECEMBER 13, 2021

The Assembly Labor Committee reports favorably Senate Bill No. 771.

This bill provides that, for purposes of coverage under workers' compensation law, R.S.34:15-1 et seq., if an employer provides or designates a parking area for use by an employee, then employment is deemed to commence when an employee arrives at the parking area prior to reporting for work and ends when an employee leaves the parking area at the end of a work period. The bill further provides that, if the site of the parking area is separate from the place of employment, an employee is deemed to be in the course of employment while traveling directly from the parking area to the place of employment prior to reporting for work and while traveling directly from the place of employment to the parking area at the end of a work period.

Therefore, the bill provides that an injury is compensable under the workers' compensation law if it occurs in a parking area provided or designated by the employer, or it occurs when an employee is traveling directly between the parking area and the place of employment.

Currently, the workers' compensation law provides that employment commences when an employee arrives at the place of employment and ends when an employee leaves the place of employment. The law excludes any travel to or from the place of employment and the site of any parking area separate from the place of employment provided by an employer. Therefore, an injury occurring when an employee is traveling between the parking area and the place of employment is not now covered by workers' compensation.

SENATE LABOR COMMITTEE

STATEMENT TO

SENATE, No. 771

STATE OF NEW JERSEY

DATED: DECEMBER 8, 2020

The Senate Labor Committee favorably reports Senate Bill No. 771.

This bill provides that, for purposes of coverage under workers' compensation law, R.S.34:15-1 et seq., if an employer provides or designates a parking area for use by an employee, then employment is deemed to commence when an employee arrives at the parking area prior to reporting for work and ends when an employee leaves the parking area at the end of a work period. The bill further provides that, if the site of the parking area is separate from the place of employment, an employee is deemed to be in the course of employment while traveling directly from the parking area to the place of employment prior to reporting for work and while traveling directly from the place of employment to the parking area at the end of a work period.

Therefore, the bill provides that an injury is compensable under the workers' compensation law if it occurs in a parking area provided or designated by the employer, or it occurs when an employee is traveling directly between the parking area and the place of employment.

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This bill was pre-filed for introduction in the 2020-2021 session pending technical review. As reported, the bill includes the changes required by technical review, which has been performed.