

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Bove v. Akpharma Inc.

460 N.J. Super. 123 (App. Div. 2019) · Decided July 11, 2019

SUMMARY

The New Jersey Superior Court, Appellate Division, affirmed summary judgment for AkPharma Inc. and its CEO, holding that the plaintiff failed to establish an intentional wrong sufficient to overcome the Workers’ Compensation Act’s exclusivity bar. The court also affirmed denial of the plaintiff’s motion to strike the workers’ compensation defense but reversed sanctions imposed against the plaintiff’s attorneys under Rule 1:4-8. The claims arose from the plaintiff’s use of the NasoCell nasal spray and included battery, fraud, and product-liability theories.

CASE DETAILS

COURT	Superior Court of New Jersey, Appellate Division
WRITING FOR THE COURT	Enright, J.S.C. (temporarily assigned); Enright; Fisher; Suter
JURISDICTION	New Jersey
DECIDED	July 11, 2019
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff appealed orders granting defendants summary judgment, denying his motion to strike the Workers' Compensation Act exclusivity defense, and imposing Rule 1:4-8 sanctions against his attorneys.
STANDARD OF REVIEW	Summary judgment is reviewed de novo under the same standard governing the trial court, with the evidence viewed in the light most favorable to the party opposing summary judgment. A decision on frivolous-litigation sanctions is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Charles L. Bove v. AkPharma Inc., Alan Kligerman

TOPICS

- workers compensation
- personal injury
- summary judgment
- sanctions
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Bove's civil claims against his employer and its CEO fell within the intentional-wrong exception to the Workers' Compensation Act's exclusivity provision.
2. Whether the trial court properly granted defendants summary judgment and denied Bove's motion to strike the WCA exclusivity defense.
3. Whether sanctions against Bove's attorneys under Rule 1:4-8 were proper despite the timing and content of defendants' safe-harbor notice and the absence of a finding of bad faith.

HOLDINGS

1. An employee may overcome the WCA exclusivity bar only by proving both that the employer knowingly exposed the employee to a substantial certainty of injury or death and that the resulting injury was not a fact of industrial life and was plainly beyond what the Legislature intended the WCA to immunize. Bove's evidence did not satisfy the conduct prong, so his civil claims were barred.
2. The sanctions order could not stand because the trial court failed to account for the temporal limitation on recoverable fees, defendants' safe-harbor letter did not specifically identify the WCA exclusivity bar, and the court made no finding that Bove's attorneys acted in bad faith or lacked an objectively reasonable belief in the claims.

KEY QUOTATIONS

“The Millison Court emphasized the concept of “intentional wrong” encompassed more than a subjective intention to injure.” (at 141)

“Under that standard, the Court held a plaintiff had to establish two elements: (1) the employer must knowingly expose the employee to a substantial certainty of injury (i.e., the “conduct” prong); and (2) the resulting injury must not be “a fact of life of industrial employment,” and must be “plainly beyond anything the legislature” intended the Act to immunize (i.e. the “context” prong).” (at 141-142)

“Without a finding Bove's attorneys acted in bad faith and with no explanation as to why the trial court found the significant sum of \$205,147.82 was the amount needed to deter them from similar conduct, Rule 1:4-8(d), the sanction is unsupportable.” (at 155)

FACTUAL BACKGROUND

Bove worked for AkPharma and used the company's NasoCell nasal spray from approximately 2007 through 2010, both at work and at home. He later alleged that NasoCell caused endocrine failure and a colon tumor, and asserted battery, fraud, and products-liability theories against AkPharma and its CEO, Alan Kligerman. The evidentiary record showed that Bove voluntarily participated in the product study, continued to work after stopping use, and presented no competent medical evidence establishing that NasoCell caused his alleged injuries or that defendants knew injury was substantially certain to result.

PROCEDURAL HISTORY

Bove filed a workers' compensation claim in 2013 and a related civil action concerning injuries allegedly caused by his use of NasoCell. After amendment of the complaint, the trial court dismissed one claim, limited discovery to the Workers' Compensation Act litigation bar, denied summary judgment without prejudice, and later conducted a five-day evidentiary hearing. On August 4, 2017, the court denied Bove's motion to strike the exclusivity defense and granted defendants summary judgment. On December 13, 2017, it imposed \$205,147.82 in sanctions against Bove's attorneys. The Appellate Division affirmed the summary-judgment and exclusivity rulings but reversed the sanctions order.

DISPOSITION

other

REMAND INSTRUCTIONS

The order imposing sanctions against Bove's attorneys is reversed. The summary-judgment and WCA-exclusivity rulings are affirmed. No further remand instructions are stated.

CASES CITED

- *Townsend v. Pierre*, 221 N.J. 36, 59, 110 A.3d 52 (2015)
- *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378, 658 A.2d 1230 (1995)
- *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 523, 529, 666 A.2d 146 (1995)
- *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 171, 177-79, 181-82, 185, 501 A.2d 505 (1985)
- *Laidlow v. Hariton Mach. Co., Inc.*, 170 N.J. 602, 605, 608, 616, 620-22, 790 A.2d 884 (2002)
- *Van Dunk v. Reckson Assocs. Realty Corp.*, 210 N.J. 449, 454, 470-74, 45 A.3d 965 (2012)
- *Bryan v. Jeffers*, 103 N.J. Super. 522, 523-24, 248 A.2d 129 (App. Div. 1968)
- *Crippen v. Cent. Jersey Concrete Pipe Co.*, 176 N.J. 397, 409-10, 823 A.2d 789 (2003)
- *Mull v. Zeta Consumer Prods.*, 176 N.J. 385, 392, 823 A.2d 782 (2003)
- *Vitale v. Schering-Plough Corp.*, 447 N.J. Super. 98, 115, 146 A.3d 162 (App. Div. 2016), *aff'd as modified*, 231 N.J. 234, 174 A.3d 973 (2017)
- *Perna v. Pirozzi*, 92 N.J. 446, 459-65, 457 A.2d 431 (1983)
- *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610, 691 A.2d 350 (1997)
- *Badiali v. N.J. Mfrs. Ins. Grp.*, 220 N.J. 544, 555, 107 A.3d 1281 (2015)
- *McDaniel v. Man Wai Lee*, 419 N.J. Super. 482, 498-99, 17 A.3d 816 (App. Div. 2011)
- *Masone v. Levine*, 382 N.J. Super. 181, 193, 887 A.2d 1191 (App. Div. 2005)
- *First Atl. Fed. Credit Union v. Perez*, 391 N.J. Super. 419, 425, 432-33, 918 A.2d 666 (App. Div. 2007)
- *Gerhardt v. Continental Ins. Co.*, 48 N.J. 291, 301, 225 A.2d 328 (1967)
- *Gooch v. Choice Entertaining Corp.*, 355 N.J. Super. 14, 18, 809 A.2d 154 (App. Div. 2002)
- *State v. Franklin Sav. Account No. 2067*, 389 N.J. Super. 272, 281, 913 A.2d 73 (App. Div. 2006)
- *United Hearts, LLC v. Zahabian*, 407 N.J. Super. 379, 389-90, 395, 971 A.2d 434 (App. Div. 2009)
- *LoBiondo v. Schwartz*, 199 N.J. 62, 98-99, 970 A.2d 1007 (2009)

- Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 69-71, 918 A.2d 595 (2007)
- Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 408-09, 975 A.2d 473 (App. Div. 2009)
- Trocki Plastic Surgery Ctr. v. Bartkowski, 344 N.J. Super. 399, 406, 782 A.2d 447 (App. Div. 2001)
- Horowitz v. Weishoff, 346 N.J. Super. 165, 166-67, 787 A.2d 236 (App. Div. 2001)
- K.D. v. Bozarth, 313 N.J. Super. 561, 574-75, 713 A.2d 546 (App. Div. 1998)
- Iannone v. McHale, 245 N.J. Super. 17, 32, 583 A.2d 770 (App. Div. 1990)
- Romero v. City of Pomona, 883 F.2d 1418, 1429 (9th Cir. 1989)
- Wyche v. Unsatisfied Claim & Judgment Fund, 383 N.J. Super. 554, 560, 892 A.2d 761 (App. Div. 2006)
- DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226, 229-30, 745 A.2d 561 (App. Div. 2000)
- Fagas v. Scott, 251 N.J. Super. 169, 181, 597 A.2d 571 (Law Div. 1991)
- McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 549, 557-59, 626 A.2d 425 (1993)
- Belfer v. Merling, 322 N.J. Super. 124, 144-45, 730 A.2d 434 (App. Div. 1999)
- Rendine v. Pantzer, 141 N.J. 292, 661 A.2d 1202 (1995)