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I'ASIA MORELAND, et. al.,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
	:	Docket No.: A-4754-16T4
	:	
Plaintiff/Appellant,	:	<u>On Appeal From:</u>
	:	Superior Court of New Jersey
	:	Law Division - Mercer County
	:	Docket No.: MER-L-227-11
	:	
v.	:	Civil Action
	:	
WILLIAM PARKS, et. al.,	:	Sat Below:
	:	Hon. William Anklowitz, J.S.C.
	:	
Defendant/Respondent.	:	

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

As amicus curiae, the New Jersey State Bar Association (NJSBA) relies on the Procedural History and Statement of Facts as set forth by the parties.

PRELIMINARY STATEMENT

This case concerns an improvident grant of summary judgment by the trial court that implicates significant issues concerning a litigant's access to the courts and a failure to recognize the wide range of scenarios that may constitute an "intimate, familial relationship" necessary to establish a claim for negligent infliction of emotional distress under Portee v. Jaffee, 84 N.J. 88 (1980) (hereinafter, a "Portee claim").

The NJSBA files this brief to urge the Court to affirmatively clarify that the familial relationship requirement underpinning a Portee claim should not be limited to only those individuals having a narrowly-defined marital, legal custodial or biological relationship to an injured person or decedent, as is well established by existing Supreme Court precedence. Accordingly, we ask the Appellate Division to reverse the summary judgment order, and remand the matter for further review and presentation to a jury.

LEGAL ARGUMENT

SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THE "INTIMATE, FAMILIAL RELATIONSHIP" REQUIRED FOR A VALID PORTEE CLAIM IS NOT LIMITED TO ONLY THOSE INDIVIDUALS HAVING A NARROWLY-DEFINED MARITAL, LEGAL CUSTODIAL OR BIOLOGICAL RELATIONSHIP TO AN INJURED PERSON OR DECEDENT, AND A JURY SHOULD CONSIDER QUESTIONS ABOUT THE QUALITY OF A FAMILIAL RELATIONSHIP

The role of a judge in deciding a motion for summary judgment prior to a jury trial is limited to a determination of whether there is a genuine issue for trial and whether the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) quoting Anderson v. Liberty Lobby, Inc., 77 U.S. 242, 249 (1986).

[Summary judgment] is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at trial. Brill, supra, 142 N.J. at 531 quoting Ledley v. William Penn Life Ins. Co., 138 N.J. 627 (1995) quoting Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

When determining whether there is a genuine issue of material fact, a motion judge must determine if the evidentiary matters presented, when reviewed in the light most favorable to the non-moving party and given all reasonable inferences, "would require submission of the issue to the trier of fact." R. 4:46-2(c). See Brill, supra, 142 N.J. 520.

A motion for summary judgment must be denied when determination of material disputed facts depends primarily on credibility evaluations or when the existence of a genuine issue of material fact appears from the discovery materials or from the pleadings and affidavits on the motion. Parks v. Rogers, 176 N.J. 491, 502 (2003). Such a motion should be denied if even the slightest doubt as to the facts exist. Linn v. Rand, 140 N.J. 212, 216 (App. Div. 1976).

One of the central inquiries in a Portee claim for negligent infliction of emotional distress is whether the bystander seeking to recover had a "close, substantial, and enduring relationship [with the decedent]." Dunphy v. Gregor, 136 N.J. 99, 101 (1994).

Dunphy involved a negligent infliction of emotional distress claim brought by the decedent's fiancée after the decedent was struck and killed by a car while changing a tire along a roadway. Id. at 99. The trial court ruled that the plaintiff's claims were barred since she and the decedent were not married at the time of the accident, relying upon the requirement in Portee of a "marital or intimate, familial relationship between the plaintiff and the injured person." Portee, supra, 84 N.J. at 101.

On appeal, the New Jersey Supreme Court in Dunphy upheld the Appellate Division's reversal of the trial court's dismissal and explicitly permitted Portee claims by parties who do not have legal relationships *per se*, such as unmarried cohabitants. The Court's

expansive ruling declined to draw a bright-line rule that would demarcate a narrow class of potential claimants grounded in strict legal family relationships, stating that it is the "'sedulous application' of the principles of tort law, which inform our ultimate determination that a particular claimant is owed a duty of care." Dunphy, supra, 136 N.J. at 108 quoting People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 254 (1985).

The Court reasoned that it is "the quality of the relationship that creates the severity of the loss." Dunphy, supra, 136 N.J. at 111. Therefore, the Dunphy Court set forth a standard with a variety of factors for the fact-finder to apply in order to determine both the existence and quality of the familial relationship.

The standard must take into account the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and...whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements. Id. at 112.

In the instant matter, it was the trial court that evaluated the Dunphy factors and made credibility determinations and determined what weight should be given to testimony in the record relating to those factors. The trial court evaluated deposition testimony about the nature and length of Plaintiff Benning's cohabitation with the Decedent's mother, and the nature and length

of Plaintiff's relationship with the Decedent, including testimony about the Decedent's references to Plaintiff as "Mom". The trial court said, "The evidence is that she was a girlfriend and she might have been part of the child's household but, by any definition that I can find in the law about family, Ms. Benning doesn't meet it." (T188:16-19) The court ultimately concluded that, "There's no evidence that there was any permanent bond or that the relationship that she [Plaintiff Benning] shared with the decedent was one that was deep, lasting and genuinely intimate." (T191:29 - T192:3)

Contrary to the trial court's evaluation here, the Dunphy court made clear that the "sound assessment of the quality of interpersonal relationships is not beyond a jury's ken." It rejected a rote review of the "legalities[] of relationships" in favor of consideration by "the factfinder." Id. at 111, citing Bendar v. Rosen, 247 N.J. Super. 219, 228 (App.Div.1991) and Carr v. Carr, 120 N.J. 336, 352 (1990).

The NJSBA submits that the law is clear that the "intimate familial relationship" required for a valid Portee claim is not limited to just those individuals having a narrowly-defined marital, legal custodial or biological relationship to an injured person or decedent. Further, as noted in Dunphy, when there are questions about the quality of a familial relationship, a jury should be permitted to consider the quality of that relationship.

CONCLUSION

In light of the foregoing, the NJSBA respectfully urges this Court to reverse the trial court's grant of summary judgment with a remand that clarifies that the instant Portee claim is not limited to individuals having a marital, legal custodial or biological relationship to an injured person and, when assessment of a relationship is required, a jury should make that assessment.

Respectfully submitted,
NEW JERSEY STATE BAR ASSOCIATION

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Dated: 9/29/17

