New Jersey Law Journal

STATEWIDE LEGAL AUTHORITY SINCE 1878

An ALM Publication

VOL. 222 NO. 11 | MONDAY, MARCH 14, 2016 | NJLJ.COM

Court Declines to Hold Public Schools Liable for Sex Abuse

By Michael Booth

A New Jersey appeals court has refused to expand the scope of the state's child sex abuse law to make public schools liable when a student is sexually assaulted by a school employee.

A three-judge Appellate Division panel said in a published ruling released March 7 that legislators, when they enacted the Child Sexual Abuse Act (CSAA), N.J.S.A. 2A:61B-1, did not mean to put public schools under its purview.

Appellate Division Judge Harry Carroll, joined by Judges Carmen Messano and Thomas Sumners Jr., declined to expand on the state Supreme Court's 2006 ruling in *Hardwicke v. American Boychoir School*, in which the court said private boarding schools could be held liable under the CSAA.

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Are NJ Courts Anti-Arbitration?

By Charles Toutant

A spate of recent cases has seen New Jersey courts invalidating what they believed were unfairly lopsided arbitration agreements, a trend some attorneys view as a divergence from the U.S. Supreme Court's strong pro-arbitration policy. But the answer to the question of whether New Jersey courts are truly averse to arbitration depends on who you ask.

In a multitude of recent cases, New Jersey courts have invalidated arbitration agreements out of concern for the rights of consumers and employees who may have unwittingly signed agreements waiving their right to trial. But some have argued that the court has adopted standards that would not pass U.S. Supreme Court muster.

At issue are two competing views of arbitration clauses, according Gavin Rooney of Lowenstein Sandler in Roseland. When federal courts analyze arbitration waivers, they look for an offer and acceptance of terms, as dictated by the Federal Arbitration Act (FAA), he said. That law was enacted in 1925 as a means to overcome judicial disparagement of arbitration, Rooney noted.

But when New Jersey courts examine an arbitration agreement, they view it as a waiver of rights, and only enforce those agreements that are clear and unambiguous, he said.

"What it means is there are certain arbitration provisions that are probably not enforceable. That's a problem. For the astute practitioner, it's a fixable problem," Rooney said.

But Jeffrey Carr, a commercial litigation attorney at Pepper Hamilton in Philadelphia, said the New Jersey courts' treatment of arbitration agreements constitutes "recognition of a

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GAVIN ROONEY

general rule, and chipping away at it with exceptions."

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Judiciary Seeks to Close Diagnostic Dye, Bone Density Drug Mass Torts

By David Gialanella

The state judiciary is aiming to close the book on two mass tort matters centralized in Middlesex County in 2008 after the judge there said active matters are no longer pending.

One is multicounty litigation by alleged uses of bone-density drugs Zometa and Aredia; the other, multicounty litigation by patients who were injected with contrasting dyes used during MRIs that contain the metal gadolinium.

According to a pair of notices to the bar posted March 8, Middlesex County Superior Court Judge Jessica Mayer notified the Administrative Office of the Courts that all active litigation had been resolved on both fronts.

The Zometa/Aredia cases were designated for mass tort litigation in January 2008 in Middlesex County. In October 2007, when the application for mass tort designation was filed, there were roughly 35 cases filed in New Jersey and 350 federal cases had been centralized for multidistrict litigation in U.S. District Court for the Middle District of Tennessee.

The plaintiffs claimed that

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Official Misconduct Charge Against NJ Judge Dropped

By Charles Toutant

Suspended Middlesex County Superior Court Judge Carlia Brady, whom authorities accused of hiding her fugitive boyfriend from police, has won dismissal of the charge of official misconduct, but her bid to dismiss the lesser charge of hindering law enforcement was denied.

Superior Court Judge Julie Marino of Somerset County granted Brady's motion on March 4 to dismiss the second-degree official misconduct count but denied the motion to dismiss two counts of third-degree

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DAVID PASSCRELL

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"If you're on the plaintiff side, I think this is a good thing. If you're representing employers or corporations, it's a bad thing," Carr said.

At the center of the controversy is a 2014 New Jersey Supreme Court case, *Atalese v. U.S. Legal Services Group*, in which the court struck down an arbitration agreement because it was not sufficiently clear to a reasonable consumer. The court in that case said the arbitration agreement, on page nine of a 23-page contract, was unenforceable because it "did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue statutory claims in court."

The U.S. Supreme Court denied a petition of certiorari in the *Atalese* case in June 2015. Since then, New Jersey appellate courts have applied the *Atalese* ruling in several other settings.

The case was cited in *Morgan v. Raymours Furniture Company*, in which the Appellate Division held Jan. 7 that a clause in an employee handbook requiring arbitration of job disputes is unenforceable where the handbook also contains a disclaimer stating that it is not a binding employment contract.

The Appellate Division also cited *Atalese* Jan. 22 in *Epstein v. Wilenitz, Goldman & Spitzer*, in which the court struck down the Woodbridge law firm's efforts to compel arbitration of a dispute with two former partners who claim they were used for objecting to a class action settlement.

Atalese was also cited in cases involving the sale of a dental practice (*Rosenthal v. Rosenblatt*), a contract between a real estate developer and a condominium buyer (*Dispenziere v. Kushner Cos.*) and a union contract (*Kelly v. Beverage Works N.Y.*). In addition, a federal judge in the District of New Jersey applied it in a consumer's dispute with a debt adjustment company (*Guidotti v. Legal Helpers Debt Resolution*).

The problem with *Atalese* is that a party who is signing a contract can agree to arbitrate future disputes, then change his mind a few years later when a dispute develops, said Timothy Hegarty, a construction lawyer at Zeitlin & DeChiara in Caldwell.

Hegarty said he has no doubt that if the U.S. Supreme Court had agreed to hear the *Atalese* case and issued a ruling before Justice Antonin Scalia's death, it would have reversed the state Supreme Court's ruling. But he added that there's no telling how the court, in its current composition, would rule.

Rooney, of Lowenstein Sandler, said it's unlikely the U.S. Supreme Court would take an interest in New Jersey's approach to arbitration agreements, but he thinks the U.S. Court of Appeals for the Third Circuit might eventually issue a ruling on the subject, which would be controlling in federal courts in New Jersey.

While defense lawyers have taken issue with *Atalese* and its progeny, plaintiff lawyers, for their part, said they see nothing wrong with New Jersey courts' handling of arbitration disputes.

"New Jersey can't be hostile to arbitration agreements under guidelines set by the U.S. Supreme Court, but courts can enforce New Jersey's contract law the same as with any other contract," said Richard Yaskin, who heads a Cherry Hill labor and employment firm.

Courts in New Jersey aren't unfriendly to arbitration agreements but they also aren't willing to ignore requirements for securing a voluntary waiver of a jury trial that is implicit in an arbitration agreement, Yaskin said.

The FAA holds that arbitration agreements are void if signed under duress or based on misrepresentation, the same as any other contracts, said Andrew Dwyer, a labor and employment lawyer in Newark. The *Atalese* case, meanwhile, reflects a view long held by the state Supreme Court that a waiver of statutory or constitutional rights has to be knowing and voluntary, he added.

In the *Atalese* case, through a series of amicus briefs to the U.S. Supreme Court from groups such as the Cato Institute, the U.S. Chamber of Commerce and the Pacific Legal Foundation, the defense bar sought to create an impression that "that there was something deviant about what New Jersey was doing" and that the ruling was "this terrible, terrible departure from [the FAA]," Dwyer said.

But Dwyer cited a 2011 U.S. Supreme Court case, *AT&T Mobility v. Concepcion*, which overturned a California law banning contracts that restrict class-wide arbitration. That decision went on to say that states were free to take steps addressing concerns that attend contracts of adhesion, such as requiring class action waiver provisions in adhesive arbitration agreements to be highlighted, Dwyer said.

It's clear that, regardless of how some attorneys may view it, the *Atalese* decision has caused some drafters of arbitration clauses to rethink how they're presented.

Carr, of Pepper Hamilton, said that while the *Atalese* ruling didn't give specific guidance on the issue, an arbitration clause should make clear to signing parties that they are giving up the right to go to court and have a judge or jury resolve disputes. Arbitration clauses should also be presented in a conspicuous manner, with bold print or a larger font, he said. ■

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The CSAA states that "a...person standing in loco parentis within the household who knowingly permits or acquiesces in sexual abuse by any other person also commits sexual abuse..."

But the appeals court said there is no indication the Legislature intended for that provision to apply to public day schools.

"Had the Legislature wished to include a public day school within the scope of the CSAA, it could easily have used the terminology 'school or household,'" Carroll said in *J.P. v. Southern Regional High School*.

The ruling means that a former student at Southern Regional High School in Manahawkin, identified only as J.P. in Carroll's opinion, cannot sue the school for physical and psychological damages caused 16 years ago when she was allegedly repeatedly sexually assaulted by the school's assistant band director, Gregory Smith. The student eventually became pregnant and had an abortion, according to the opinion.

J.P. did not file a lawsuit against Smith and the school until 2014, and the appeals court judges also agreed with the school that her common law claims against the school must be dismissed because she failed to abide by the Tort Claims Act's requirement that notice be served on a public entity within 90 days of the plaintiff becoming aware of an injury allegedly caused by that public entity.

J.P., who was a member of the school's color guard, said in her lawsuit that she began receiving sexually explicit messages from Smith in 2000, when she was a junior, according to Carroll's opinion. She alleged that Smith sexually assaulted her in school, on overnight school trips and at her home, the opinion said.

According to the ruling, J.P's father, who was the school's band director, liked Smith and allowed him to stay overnight in their home. J.P. claimed that Smith had sex with her during those overnight stays and that after she became pregnant he said he would marry her after she turned 18, according to the opinion.

In her lawsuit, J.P. alleged that her pregnancy and the abuse caused her grades to drop and become addicted to opioids, the opinion said. She also said her parents locked her out of the house after she turned 18 and had to live in various locations, including her car. Her father, J.P. claimed, refused to believe that Smith was the father and instead believed she became pregnant after having a relationship with someone her own age, according to the opinion.

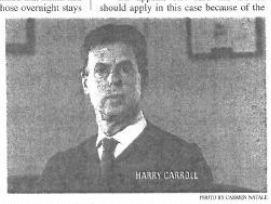

PHOTO BY CARMEN NATALE

J.P. began undergoing psychological therapy in July 2011 and was diagnosed as having post-traumatic stress disorder and depression, the opinion said.

J.P. filed her notice under the TCA naming Smith, the high school and others as defendants. She filed her suit several months later.

Ocean County Superior Court Judge Arnold Goldman dismissed the claims against the school on summary judgment, saying the school was not the same as a person "'within the household.'" He later reversed himself on the common law claims, saying the statute of limitations did not begin until her psychologist issued a written report Sept. 11, 2014. Both sides appealed.

On appeal, J.P. said the CSAA should apply in this case because of the role the school played, as well as the fact that some of the abuse occurred in her home while other instances occurred on school trips. The school, she said, was acting as a "passive abuser" and the ruling in *Hardwicke* should be expanded to include public schools.

"We are not persuaded," Carroll said. *Hardwicke* involved a private, full-time boarding school where the students' lives were heavily regulated by the staff, Carroll said. The school provided the students with shelter and food—"in other words, with amenities characteristic of both a school and a home," Carroll said.

He noted that shortly before the court released its ruling in *Hardwicke*, an Appellate Division panel, in *D.M. v. River Dell Regional High School*, said the CSAA did not apply to public day schools and the state Supreme Court refused to grant certification on appeal.

"Plaintiff's arguments overlook the fact that in *Hardwicke* the school provided...amenities and services to 'its full-time boarders,'" Carroll said. "That crucial element is lacking here.

"The court in *Hardwicke* was clearly concerned not only with the role of the school as a parental substitute, but also with its role as the provider of amenities normally associated with a home environment for students who resided there full-time," he said. "We are therefore satisfied that the term 'within the household' connotes a degree of 'residential' custody that is more than fleeting and temporary in nature and is simply not present in this case."

As for the TCA, Carroll said it was clear that after undergoing therapy, J.P. became aware of her injuries as early as July 2013, which means the 90-day notice was not filed in a timely manner. Because of that, he said, the common law claims must also be dismissed.

J.P.'s attorney, Toms River solo Robert Fuggi Jr., said an appeal is being considered.

"*Hardwicke* could and should be extended to public schools," he said. "We thought this case would be a logical extension of *Hardwicke*."

The school's attorney, Jerald Howarth, said it was clear that "the court recognized that public day schools are not included under the CSAA."

"We're further pleased by the fact that the court recognized that the notice requirements of the TCA apply to claims of sexual abuse," said Howarth, who runs a firm in Parsippany. ■

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