Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NJ Cases To Watch In The 2nd Half Of 2015

By **Martin Bricketto**

Law360, Jersey City (August 6, 2015, 1:23 PM ET) -- The New Jersey Supreme Court this year has protected watchdog employees and allowed Gov. Chris Christie's pension funding cuts, but significant opinions are looming that could clarify a defrauded employer's ability to recoup salary and the rights of medical malpractice victims when faced with a doctor's insurance failings.

The court has heard arguments in several civil and criminal cases in which it has yet to make decisions. Those rulings could come at any time, as highlighted by the justices' decision Thursday that the onetime owner of a heating-oil contaminated property **can't pursue nuisance claims** against neighbors and bad-faith allegations against their insurers over the migrated pollution and its delayed cleanup.

Here are four other cases in which attorneys say the Supreme Court's eventual opinions could make waves:

Kaye v. Rosefielde

The court has sunk its teeth into businessman Bruce Kaye's wide-ranging suit against the former general counsel of his timeshare companies, but has focused on whether Kaye is entitled to disgorgement as part of his victory on fraud, breach of fiduciary duty and legal malpractice claims. The justices **heard arguments** in the case in February.

In a few short sentences buried in a **105-page opinion**, the Appellate Division agreed in 2013 that Kaye couldn't secure the disgorgement of Alan Rosefielde's annual $500,000 salary. The panel also backed the rescission of Rosefielde's interests in three Kaye entities but upended punitive damages and more than $700,000 in legal fees and costs for Kaye based on a dearth of actual, compensable damages from Rosefielde's alleged conduct.

Rosefielde has argued that economic damages are a precondition for the disgorgement of salary from an allegedly disloyal employee and that Kaye can't show that. But Kaye has countered that the trial judge misconstrued the state Supreme Court's 1999 decision in Cameco Inc. v. Gedicke and that winning equitable relief can support disgorgement. Cameco involved an allegedly disloyal employee who was not an attorney.

The trial court had found that, among other self-dealing, Rosefielde misled Kaye in securing an ownership stake in BA Management, an entity that was supposed to manage timeshare sales, and that he planned to bilk Kaye and others out of $1 million.

The decision could prove important in the broader context of legal malpractice cases, according to Michael K. Furey of Day Pitney LLP. While Cameco established a multifactor test for disgorgement, the high court's landmark 1996 decision in Saffer v.Willoughby has stood for the proposition that the forfeiture of attorneys' fees is automatic when a plaintiff proves legal malpractice, which isn't the case for other professionals confronted with such

claims, Furey said.

"Maybe the court is in the beginning stages of looking at that issue," Furey said.

DeMarco v. Stoddard

The court could offer new guidance on when alleged medical malpractice victims deserve coverage under a voided policy as part of a suit that Thomas DeMarco and his wife brought against podiatrist Sean Robert Stoddard and his onetime insurer, the Medical Malpractice Joint Underwriting Association of Rhode Island.

The JUA axed coverage for Stoddard over misrepresentations that at least 51 percent of his practice came from Rhode Island, but a New Jersey appellate court last year backed a ruling that the association had to indemnify the physician up to $1 million if DeMarco prevails. The justices, who heard **oral arguments** in April, have wrestled with issues including whether Rhode Island law should apply.

New Jersey statutorily requires doctors to carry at least $1 million in coverage or a letter of credit worth at least $500,000 if coverage isn't available, while Rhode Island didn't directly mandate a specific amount of malpractice coverage during the period in question.

A win for the JUA could create too much room for physicians to make fraudulent representations tied to their malpractice coverage and leave patients exposed, according to E. Drew Britcher of Britcher Leone & Roth LLC, who has represented the New Jersey Association for Justice as an amicus participant.

"The innocent victim should not be left without the benefit of that coverage, that's the entire purpose of the statute that requires them to have that coverage," Britcher said. "As a matter of public policy, we should not leave those individuals bare."

However, others such as the New Jersey Civil Justice Institute have argued that the Appellate Division improperly applied a standard from automobile insurance disputes to the world of medical malpractice without a proper statutory foundation.

Jarrell v. Kaul

Wading into another case where insurance coverage and medical malpractice issues intersect, the court is poised to decide whether the victim of **an allegedly botched spinal surgery** can not only sue his physician for allegedly failing to disclose his lack of malpractice coverage, but also the surgical center where he worked. The justices heard arguments in the case in October.

James R. Jarrell and his wife won a judgment of nearly $938,000 against Dr. Richard Kaul for allegedly deviating from accepted standards of care as part of the procedure, but they contend that other claims against Kaul and Market Street Surgical Center based on the physician's alleged failure to maintain malpractice coverage were improperly tossed.

While it upheld the Jarrells' money judgment, the Appellate Division in 2013 found that the statute governing physicians' obligation to maintain malpractice coverage or a letter of credit doesn't provide a private cause of action for aggrieved patients. The appellate court also upheld the dismissal of claims that MSSC negligently allowed Kaul to practice despite his failure to comply with the statute.

The case is especially important because more and more patients are undergoing procedures at such surgical centers, according to Britcher.

"They should have to operate under some of the same rules that hospitals do when it

comes to assuring that physicians performing procedures there are within the scope of their practice," he said.

Qian v. Toll Brothers Inc.

Condominium groups could see increased liability if the justices rule in favor of a slip-and-fall victim and decide that ownership associations should be on the hook for injuries that occur in interior, common areas of such residential properties.

Plaintiff Cuiyun Qian wants the court to topple an appellate ruling that its 2011 decision in Luchejko v. City of Hoboken — which found that condominium associations aren't liable for injuries on sidewalks abutting their property — extends to an interior sidewalk in an adult residential community in Plainsboro, New Jersey, where she lived.

"The decision in this case regarding sidewalk liability may have an effect on condominium associations statewide depending on how the court comes out on that issue," said Bruce Greenberg of Lite DePalma Greenberg LLC.

The bylaws of defendant Cranbury Brook Homeowners Association require its board to maintain common areas, but the Appellate Division found that the interior sidewalks functioned like the public sidewalk of any residential development. Qian fell on an icy patch in December 2008 following a bout of freezing rain.

"The association had a duty to clear the interior sidewalks of ice and snow, but that duty is not conceptually different from its duty, or the duty of the association in Luchejko, to clear an abutting sidewalk used by the public," the court said.

Attorney Ronald Grayzel, who represented the NJAJ as an amicus participant when the Supreme Court heard arguments in March, told Law360 that he hopes the justices reaffirm the legal obligation of condominium and townhouse associations to maintain common areas in safe condition.

"The Appellate Division decision undermined this established legal principle by engrafting residential sidewalk principles to a situation involving common area walkways absolving the association from the duty of maintaining a common area sidewalk," Grayzel said.

--Editing by John Quinn and Patricia K. Cole.