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New Jersey Case Law Update - Fendt v. Abrahams

The recent unpublished Appellate Division decision of *Fendt v. Abrahams*, (decided April 9, 2013), further strengthens the WC exclusive remedy provision set forth in N.J.S.A. 34:15-8 that states an employer shall not be liable to anyone at common law or otherwise from a work accident, except for an intentional wrong. In this case, the Plaintiff, a paving company employee, was directing traffic using only a hand-held stop sign. The Plaintiff alleges that while fluorescent jackets, warning signs, cones and flags were available he was not directed by his employer to utilize same. The Plaintiff was struck by a vehicle. The driver stated that had there been warning cones, he would have driven more slowly. The employer was issued two summons, one for not having proper construction warning signs and the other for not complying with the signage requirements of the Manual on Uniform Traffic Control Devices. The employer pled guilty to not using warning signs and the other charge was dismissed. The plaintiff filed a civil complaint against the driver, its owner and the employer.

The Plaintiff appealed the Law Division order granting summary judgment to the employer and the order denying the motion to reconsider. Plaintiff claimed the defendants' lack of safety precautions created a virtual certainty that injury or death would result, thereby overcoming the exclusive remedy provision. The appellate court affirmed the decision of the judge. The appellate division noted the most recent case *Van Dunk* held that the Act's exclusivity bar applied where the accident resulted in an OSHA violation. The court noted that simply because a willful violation under OSHA occurred was not dispositive of the issue of whether an intentional wrong occurred. Rather, an intentional wrong must amount to a virtual certainty which they defined as egregious conduct. The court felt the present case was similar to *Van Dunk* and noted that while the facts amount to possibly gross negligence, they do not show the employer committing an affirmative act that made the workplace significantly less safe for its employees.