STATEMENT OF FACTS

This case involves an accident in which plaintiff Nelson Prante was a passenger in a van driven by defendant Bruce Hoffer. *(See Exhibit A, Complaint; Exhibit B, Plaintiff's Answers to Interrogatories ¶ 2)*. On October 5, 2005, at about 8:00 a.m., defendant Hoffer picked up plaintiff to work on a job site. *(See Exhibit C, Defendants' Answers to Interrogatories ¶ 2)*. Since defendant's van had no seats, plaintiff was forced to sit on a bucket in the rear cargo area of the van. *(See Exhibit A, Complaint; Exhibit B, Plaintiff's Answers to Interrogatories ¶ 2)*. While plaintiff was a passenger in the vehicle on their way to a job site, defendant Hoffer drove the van over railroad tracks on or near 5th Avenue in Long Branch, New Jersey in an unsafe manner causing work related tools and materials to strike plaintiff's lower leg. *(See Exhibit A, Complaint; Exhibit B, Plaintiff's Answers to Interrogatories ¶ 2)*.

Plaintiff testified at his deposition that he worked for the defendant Bruce Hoffer for six or seven months before the accident. *(See Exhibit D, Plaintiff's Deposition, p. 11-12)*. Defendant would pick up plaintiff at his home in defendant's work van before each day of work to go to the job site. *Id. at 12*. Plaintiff testified that he went to more than 10 different locations to work during the six or seven month period he worked for defendants before the accident. *Id. at 12-13*.

Defendant's van did not contain any seats in the back. *Id. at 17*. As such, when plaintiff would be picked up by defendant each day, he was forced to sit on a five-gallon bucket or on a drop cloth on the floor. *Id.* There was always another worker sitting in the front seat. *Id.* In the back of van where plaintiff sat, there were tools spread all the defendant's van and it was not organized. *Id.* There were also drop cloths on the floor of the van. *Id.* The tools not only including painting items, but also hammers, nails, saws and powerwashing machines. *Id at 20.* These tools were not only on the racks, but also spread out all over the floor of plaintiff's van. *Id*. Plaintiff was surrounded by these sharp tools each day he sat in the back of the van. *Id.*

Plaintiff testified that on their way to a job site while he was sitting in the back of the van, defendant applied the brakes of the van briskly throwing plaintiff off the five-gallon bucket into one of the sharp tools in the van. *Id. at 27*. Plaintiff's leg hit one of the sharp tools causing a large laceration and a lot of blood to his right leg. *Id.* Since plaintiff was not restrained by any seatbelt or device in the back of the van, he was thrown forward off the bucket into the tool. *Id. at 33*. Plaintiff could not hold on to anything when defendant applied the brakes in the van to prevent him from being thrown forward since there were no restraints or devices to protect him. *Id.* at 29.

Immediately after the accident, plaintiff went to the Emergency Room at Monmouth Medical Center in Long Branch for medical treatment. *(See Exhibit B, Plaintiff's Answers to Interrogatories ¶ 3)*. As such, plaintiff sustained severe and permanent injuries to his leg, including but not limited to, a large laceration in his right leg, nerve damage, numbness, loss of sensation, tenderness, tingling, and weakness. *(See Exhibit A, Complaint; Exhibit B, Plaintiff's Answers to Interrogatories ¶ 3)*.

Although plaintiff worked for defendant Bruce Hoffer at the time of the accident, he was not on the payroll or paid by check, but rather was paid cash each day. *Id. at 38*. Plaintiff never filed tax returns for defendant, nor were any taxes taken out by defendant during plaintiff's employment with him. *Id. at 39*. Defendant also never maintained any health insurance for plaintiff to pay any of his medical bills. *Id. at 42*.

Additionally, defendants Bruce Hoffer and B.A.H. Pro Painting and Power Washing never maintained Workers Compensation insurance despite the fact that said defendants employed plaintiff and picked him up to work on a jobsite. In fact, defendants admit that during the time of plaintiff's employment with B.A.H. Pro Painting and Power Washing, they never maintained workers' compensation insurance. *(See Exhibit E, Second Request for Admissions)*. Furthermore, defendants admit that during the time of plaintiff's employment with B.A.H. Pro Painting and Power Washing, they also never obtained authorization from the appropriate agency from the State of New Jersey to be self-insured. *Id*.

Nevertheless, defendants' previous counsel corresponded with plaintiff's counsel alleging that plaintiff's claim was covered by Workers' Compensation, and demanded that plaintiff withdraw his complaint or else defendant will file a motion to dismiss with prejudice and seek fees and costs for such motion. *(See Exhibit F, Defendant's 1/6/06 Correspondence)*. When plaintiff refused to withdraw his complaint, defendant subsequently filed a motion to dismiss the complaint. *(See Exhibit G, Defendant's Motion to Dismiss Plaintiff's Complaint)*. However, defendant's motion was denied on May 26, 2007 since plaintiff's complaint was not barred by the Workers' Compensation Act. *(See Exhibit H, 5/26/06 Order)*.

Despite this Order, defendant now again moves to dismiss plaintiff's complaint by way of summary judgment motion. As such, defendants' motion is frivolous since these defendants had previously moved to dismiss plaintiff's complaint under the workers' compensation bar which was denied by this Court. *(See Exhibit H, 5/26/06 Order)*. Notwithstanding this Order though, defendant's motion should be denied since defendant acted with knowledge that his conduct was substantially certain to result in plaintiff's injuries. Defendant's motion should also be denied since defendants admittingly failed to maintain workers' compensation insurance or obtain authorization

from the appropriate agency to be self-insured. *(See Exhibit E, Second Request for Admissions)*. Furthermore, defendant's motion should be denied since plaintiff was at most a casual employee, thereby not covered under the Workers' Compensation Act. Finally, defendant's motion should be denied since the accident happened not on the premises of his employment, but while he was going to the jobsite.

RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

1. Denied. Plaintiff testified that he was on his way to a jobsite at the time the accident occurred. *(See Exhibit D, Plaintiff's Deposition, p. 11-12)*. Defendant also admitted in his answers to interrogatories that the accident happened on their way to a customer's home for a job. *(See Exhibit C, Defendants' Answers to Interrogatories ¶ 2)*.

2. Objection, the record speaks for itself. Notwithstanding such objection, admitted.

3. Admitted in that defendant has attached a photograph of plaintiff showing the laceration to his right calf. However, denied that plaintiff only sustained this injury. In addition to his severe laceration to his right leg, sustained further injuries including, but not limited to, nerve damage in his right leg, numbness, loss of sensation, tenderness, tingling, and weakness throughout his right leg which injuries are permanent in nature. *(See Exhibit A to defendant's motion, Answers to Interrogatories #3 & #4)*.

4. Objection, the record speaks for itself. Notwithstanding such objection, admitted.

5. Objection, this is not a statement of material fact, and not proper. Notwithstanding such objection, defendants' motion speaks for itself.

LEGAL DISCUSSION

POINT I

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS FRIVOLOUS SINCE DEFENDANT HAD PREVIOUSLY MOVED TO DISMISS PLAINTIFF'S COMPLAINT TO DISMISS UNDER THE WORKERS' COMPENSATION BAR WHICH WAS DENIED BY THIS COURT.

The frivolous litigation statute, *N.J.S.A.* 2A:15-59.1(a)(1), provides that a complaint, counterclaim, cross-claim, or defense is deemed frivolous if it was "commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury," http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW7.04&fn=_top&sv=Split&tc=-1&findtype=L&docname=NJST2A%3a15-59.1&db=1000045&utid=%7b35D1B9BA-3DFF-43AA-B8EE-FD5F44E8076E%7d&vr=2.0&rp=%2ffind%2fdefault.wl&mt=NewJerseyor if "[t]he non-prevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law . . ." *Id.* at (b)(2).

Likewise, New Jersey Court Rule 1:4-8 provides that the signature of an attorney or pro se party on a "pleading, written motion, or other paper" certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be

withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and

(4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.[*R.* 1:4-8(a).]

Here, defendant's motion for summary judgment is frivolous since the court already denied his motion to dismiss the complaint under the Workers' Compensation Bar. Defendants' previous counsel corresponded with plaintiff's counsel alleging that plaintiff's claim was covered by Workers' Compensation, and demanded that plaintiff withdraw his complaint or else defendant will file a motion to dismiss with prejudice and seek fees and costs for such motion. *(See Exhibit F, Defendant's 1/6/06 Correspondence)*. When plaintiff refused to withdraw his complaint, defendant subsequently filed a motion to dismiss the complaint. *(See Exhibit G, Defendant's Motion to Dismiss Plaintiff's Complaint)*. However, defendant's motion was denied on May 26, 2007 since plaintiff's complaint was not barred by the Workers' Compensation Act. *(See Exhibit H, 5/26/06 Order)*.

As such, defendant is now seeking again to dismiss plaintiff's complaint based upon the Workers' Compensation Act. There is no reasonable basis for defendant to move for summary judgment under the Workers' Compensation Act when a previous order denying defendant's motion has previously been entered by the Court. *(See Exhibit H, 5/26/06 Order)*. There is also no additional evidence in the record since this Court's previous May 26, 2006 Order warranting summary judgment for the defendant on the Workers' Compensation Bar. Therefore, defendants' motion for summary

judgment should be denied on this issue alone.

POINT II

PLAINTIFF'S COMPLAINT IS NOT BARRED BY THE WORKERS' COMPENSATION ACT SINCE DEFENDANT ACTED WITH KNOWLEDGE THAT ITS CONDUCT WAS SUBSTANTIALLY CERTAIN TO RESULT IN PLAINTIFF'S INJURIES.

Notwithstanding this Court's previous order denying defendant's motion to dismiss as shown in *Point I, supra*, plaintiff's complaint is not barred by the Workers' Compensation Act since defendant acted with knowledge that his conduct was substantially certain to result in plaintiff's injuries.

The Workers' Compensation system has been described as an historic "trade-off" whereby employees relinquish their right to pursue common-law remedies in exchange for prompt and automatic entitlement to benefits for work-related injuries. *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 174 (1985). That characterization is only broadly accurate. In fact, not every worker injured on the job receives compensation benefits, and not all conduct by an employer is immune from common-law suit. The Legislature has declared that certain types of conduct by the employer and the employee will render the Workers' Compensation bargain a nullity. *Laidlow v. Hariton Machinery Co., Inc.*, 170 N.J. 602, 606-7 (2002).

One of these examples is where an employer who causes the death or injury of an employee by committing an "intentional wrong" will not be insulated from common-law suit. *N.J.S.A.* 34:15-8; *Millison, supra*, 101 N.J. at 169. An intentional wrong, though, is not only categorized as a "deliberate intention to injure", but also includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm. *Laidow*, *supra,* at 613; *see W. Prosser and W. Keeton*, The Law of Torts, § 80 at 569 (5th ed.1984). If the employer knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead,

he is treated by the law as if he had in fact desired to produce the result; thus committing an "intentional wrong." *Id; Restatement (Second) of Torts* § 8A.

In addition to the "substantial certainty" test relative to the employer's conduct, the Courts must also examine the context in which that conduct takes place, that is, may the resulting injury or disease, and the circumstances in which it is inflicted on the worker, fairly be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the Compensation Act. *Laidlow, supra,* at 614-15; *Millison*, *supra,* at 179. By the addition of the context prong, *Millison* required courts to assess not only whether the employer acted with knowledge that injury was substantially certain to occur, but also whether the injury and the circumstances surrounding it were part and parcel of everyday industrial life or plainly outside the legislative grant of immunity. *Laidlow*, 614-15.

Perhaps most importantly, though, the *Laidlow* court held that if the substantial certainty standard presents a jury question and if the court concludes that the employee's allegations, if proved, would meet the context prong, the employer's motion for summary judgment must be denied. *Id.* at 623. As a summary judgment motion, the evidence must be viewed in a light most favorable to the employee as to whether the employer acted with knowledge that it was substantially certain that a worker would suffer injury. *Id*. If the proofs at trial do not track the employee's allegations at the time of the summary judgment motion, the employer may then, afterwards, apply to the trial court for reconsideration. *Id*. Otherwise, the employer's motion for summary judgment must be denied when there is a question of fact as to whether the employer acted with knowledge that it was substantially certain that a worker would suffer injury. *Id.*

Here, there is at the very least a question of fact, that defendant acted with knowledge that

its conduct was substantially certain to result in plaintiff's injuries. Plaintiff testified that defendant's van did not contain any seats in the back. *(See Exhibit D, Deposition of Plaintiff at 17)*. As such, when plaintiff would be picked up by defendant each day, he was forced to sit on a five-gallon bucket or on a drop cloth on the floor. *Id*. Moreover, plaintiff testified that there were sharp tools spread all over defendant's van and it was not organized. *Id. at 17*. These tools included hammers, nails, saws and powerwashing machines. *Id. at 20*. Plaintiff was surrounded by these sharp tools each day he sat in the back of the van. *Id. at 20*.

As such, when defendant applied the brakes of the van briskly while plaintiff was sitting in the back of the van, he was thrown off the five-gallon bucket into one of the sharp tools in the van. *Id. at 27*. Plaintiff's leg hit one of the sharp tools causing a large laceration and a lot of blood to his right leg. *Id. at 27*. There were no seatbelts or devices to restrain plaintiff and protect him from being thrown forward into the sharp tools. *Id. at 33*. These tools were not put in a safe location and placed out in the open all around plaintiff where he could be easily injured. *Id. at 20*.

Therefore, a jury question exists as to whether defendant acted with knowledge that his conduct was substantially certain to result in plaintiff's injuries. Plaintiff was placed in an unsafe situation daily not only by sitting on a bucket in the back of defendant's van without any seats, but also by being surrounded by sharp tools resulting in plaintiff's injuries. Moreover, the circumstances surrounding plaintiff's injury cannot be said to be part and parcel of everyday industrial life or plainly outside the legislative grant of immunity. It is not the standard or appropriate practice in the workplace to have employees sit on a floor or on an unrestrained bucket surrounding by sharp tools where an injury can easily occur. It is also not proper to have employees sit in a vehicle being unrestrained or unprotected by any seatbelts or devices as required by law.

Accordingly, summary judgment should not be granted to defendants considering the above factual circumstances leading to plaintiff’s accident.

POINT III

PLAINTIFF'S COMPLAINT IS NOT BARRED BY THE WORKERS' COMPENSATION ACT SINCE DEFENDANT FAILED TO MAINTAIN WORKERS' COMPENSATION INSURANCE, THUS ENTITLING PLAINTIFF TO BRING A COMMON LAW NEGLIGENCE CLAIM AGAINST DEFENDANTS.

Ordinarily, the Workers' Compensation Act provides the exclusive remedy for an employee who sustains an injury in an accident that arises out of and in the course of the employment, when there is not an intentional wrong by the employer. *Danek v. Hommer*, 9 N.J. 56, 62 (1952). *N.J.S.A.* 34:15-1 *et seq.* has l g tghvb ong provided relief for an employee injured on the job. By providing compensation insurance, the employer gains immunity from a common law negligence action by the injured employees, and the employee gained assured compensation for injuries regardless of his own negligence. See *United States Casualty Co. v. Hercules Powder Co.*, 4 N.J. 157 (1950).

However, if the employer fails to comply with N.J.S.A. 34:15-79, then they do not get the exclusive remedy protections of the workers compensation act and the employee is free to bring a common law negligence claim against the employer.[1] New Jersey has what is commonly known as an "elective system" of workmen's compensation. Under this system either the employer or employee may reject the ordinary system of compensatory non-fault liability (in New Jersey, Article II coverage), thus leaving the employer liable to his employee for only common-law negligence (in New Jersey, Article I coverage). *Peck v. Newark Morning Ledger Co.,* 344 N.J. Super. 169, 177

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[1] It should also be noted that an employer who fails to maintain workers' compensation insurance or obtained authorization from the appropriate agency from the State of New Jersey to be self-insured is guilty of a disorderly persons offense, or a crime of the 4th degree if such failure is willful. *N.J.S.A.* 34:15-79.

(App. Div. 2001).

Here, defendants Bruce Hoffer and B.A.H. Pro Painting and Power Washing never maintained Workers Compensation insurance despite the fact that said defendants employed plaintiff and picked him up to work on a job site. In fact, defendants admit that during the time of plaintiff's employment with defendants, they never maintained workers' compensation insurance. *(See Exhibit E, Second Request for Admissions)*. Furthermore, defendants admit that during the time of plaintiff's employment with defendants, they also never obtained authorization from the appropriate agency from the State of New Jersey to be self-insured. *Id*.

There is no question that defendants failed to maintain workers' compensation insurance or getting appropriate authority from the State of New Jersey to be self-insured. As such, plaintiff is entitled to bring a common law negligence claim against defendants for the injuries he suffered at the time of the accident. Accordingly, defendant's motion for summary judgment should be denied.

POINT IV

PLAINTIFF'S COMPLAINT IS NOT BARRED BY THE WORKERS' COMPENSATION ACT SINCE PLAINTIFF WAS AT MOST A CASUAL EMPLOYEE, THUS ENTITLING PLAINTIFF TO BRING A COMMON LAW NEGLIGENCE CLAIM AGAINST DEFENDANTS.

Plaintiff cannot be considered an employee of the defendants for purposes of the Workers' Compensation Act since his employment with the defendants was not regular, recurring or periodic. *N.J.S.A.* 34:15-36; *DeMarco v. Bouchard*, 274 N.J. Super. 197, 199 (Law Div. 1994). As such, plaintiff was only a "casual employee" which fails outside the definition of an "employee" for purposes of the Workers' Compensation Act. *N.J.S.A.* 34:15-1, *et seq.*

N.J.S.A. 34:15-36 defines "employer" for purposes of workers' compensation as follows:

> (E)mployee . . . includes all natural persons . . .who perform service for an employer for financial consideration, exclusive of casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or If not in connection with any business of the employer, as employment not regular, periodic or recurring. . . '

The Appellate Division explains the "regular, recurring, periodic" phrase as follows:

> 'The words, as used in this act, connote that employment is regular when it is steady and permanent for more than a single piece of work; recurring, when the work is to be performed at some future time by the same party, without further engagement; and periodic, when the work is to be performed at stated intervals, without further engagement.'

Herritt v. McKenna, 77 N.J. Super. 409 (App. Div. 1962), *citing*, *Forrester v. Eckerson,* 107 *N.J.L.* 156, 158 (E. & A. 1930).

In the instant matter, plaintiff Nelson Prante's work for defendant can hardly be said to be regular since he was working for defendant on a random basis. Plaintiff only worked for defendants for a short period of time for six or seven months before the accident. *(See Exhibit D, Plaintiff's Deposition, p. 11-12)*. Defendant would pick up plaintiff at his home in defendant's work van before

each day of work to go to the job site. *Id. at 12*. Plaintiff testified that he went to more than 10 different locations to work during the six or seven month period he worked for defendants before the accident. *Id. at 12-13*. There was no agreement between plaintiff and defendants for regular or recurring work. Plaintiff did not return to work for defendants after the accident. *Id*. at 37. Thus, plaintiff was only a casual employee of defendants at the time he worked for them.

Moreover, plaintiff was not on the payroll or paid by check, but rather was paid cash each day. *Id. at 38*. Plaintiff also never filed tax returns for defendant, nor were any taxes taken out by defendant during plaintiff's employment with him. *Id. at 39*. Defendant also never maintained any health insurance for plaintiff to pay any of his medical bills. *Id. at 42*.

Clearly these facts are insufficient for this relationship to be deemed a traditional regular, recurring and periodic employee-employer relationship as contemplated under the Workers' Compensation Act. *See Herritt v. McKenna*, 77 N.J. Super. 409 (App. Div. 1962); *DeMarco v. Bouchard*, 274 N.J. Super. 197 (Law Div. 1994)(denying motion for summary judgment on workers' compensation bar where plaintiff's babysitting job with the defendant homeowner was merely casual employment.) Therefore, summary judgment should be denied because plaintiff Nelson Prante was, at best, a casual employee of defendants.

POINT V

PLAINTIFF'S COMPLAINT IS NOT BARRED BY THE WORKERS' COMPENSATION ACT SINCE PLAINTIFF WAS NOT AT HIS PLACE OF EMPLOYMENT BUT RATHER WAS ON HIS WAY TO WORK.

N.J.S.A. 34:15-36 provides in part that: [e]mployment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work, otherwise known as the "going and coming rule". The "going and coming rule" is a rule of workers' compensation which denies compensation for injuries incurred while travelling to and from work. *See Hammond v. The Great Atlantic & Pacific Tea Co.,* 56 N.J. 7, 11 (1970); *1 Larson*, *The Law of Workmen's Compensation,* § 15.11 (1985). The rule, which is a generally accepted one, limits recovery to injuries which occur on the employer's premises. *Ibid.* It does this by confining the term "course of employment" to the physical limits of the employer's premises. *Ibid; Cressey v. Campus Chefs, Div. of CVI Service, Inc.*, 204 N.J.Super. 337, 342 (App. Div. 1985). As such, employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment. *Ramos v. M & F Fashions, Inc.*, 154 N.J. 583, 591 (1988).

Here, there is no question of fact that plaintiff was outside the premises of his employment at the time of his accident. Plaintiff testified that he was on his way to a jobsite at the time the accident occurred. *(See Exhibit D, Plaintiff's Deposition, p. 11-12)*. Defendant also admitted in his answers to interrogatories that the accident happened on their way to a customer's home for a job. *(See Exhibit C, Defendants' Answers to Interrogatories ¶ 2)*. Therefore, plaintiff's claims fails outside the Workers' Compensation Act since his accident happened while going to work. Accordingly, defendant's motion for summary judgment should be denied.

POINT VI

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED SINCE A GENUINE ISSUE OF MATERIAL FACT EXISTS.

The present version of Rule 4:46-2(c) reflects the Court's decision in *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995), which held that a trial court should make the same type of evaluation of evidential materials in ruling on a motion for summary judgment as in ruling on a motion for judgment under Rule 4:37-2(b) or Rule 4:40-1 or a motion for judgment notwithstanding the verdict under Rule 4:40-2. The standard is "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523, 666 A.2d 146. This is the same standard adopted by the Supreme Court of the United States in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[T]he essence of the inquiry" under this standard is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Brill*, supra, 142 N.J. at 536, 666 A.2d 146 (*quoting Anderson v. Liberty Lobby,Inc.*, *supra*, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed.2d at 214). Under this standard genuine "[c]redibility determinations ... continue to be made by a jury and not the judge." *Id.* at 540, 666 A.2d 146.

Although Rule 4:46-5(a) states that the mere allegations or denials of pleadings are not evidence which can defeat a motion for summary judgment, there is no particular form of evidential material that either party to a summary judgment is required to present. Rule 4:46-2(a) states that a motion for summary judgment may be submitted "with or without supporting affidavits, and Rule

4:46-2(c) provides that the motion shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged."

Similarly, a party may defeat a motion for summary judgment by demonstrating that the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raise sufficient credibility issues "to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill*, supra, 142 N.J. at 523, 666 A.2d 146; *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142, 155 (1970) ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented)."

Here, in this matter, plaintiff has shown that a genuine issue of material fact exists. Therefore, defendants' motion for summary judgment should be denied.

CONCLUSION

For the foregoing reasons, plaintiff respectfully request that defendants' motion for summary judgment be denied.

Respectfully submitted,

RICHARD C. SCIRIA

Dated: June 14, 2007

worker's comp bar- exceptions- Nelson Prante case.wpd