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THE BLACKOUT DEFENSE

In New Jersey, the operator of a motor vehicle cannot be found negligent if he suddenly loses consciousness and an accident results. As a result, a person who suffers from a sudden heart attack cannot be found negligent. However, if a person has reason to know of a condition that makes him subject to blackouts, then he can be liable for his actions.

The Supreme Court of New Jersey has adopted the use of the "blackout defense", stating that it is more than an affirmative defense but rather is a "denial of negligence" which should not be treated as a separate issue from the a plaintiff's charge of negligence. **Cohen v. Kaminetsly,** 36 N.J. 276, 284 (1961). Moreover, where a defendant denies negligence due to sudden unconsciousness, such denial does not shift the burden of persuasion to the defendant. **Kahalili v. Rosecliff Realty, Inc.,** 26 N.J. 595, 606 (1958).

It should be noted that if a plaintiff wants to defeat the blackout defense by asserting that defendant's unconsciousness was a result of a known medical condition, he must utilize expert testimony. **Ibarrondo v. Candee,** A-6290 – 09T3, 2011 WL 2694560 (App. Div. 2011). In **Ibarrondo,** defendant asserted the blackout defense. He testified that the subject automobile accident occurred as a result of him sustaining sudden unconsciousness. Defendant testified that he never experienced a blackout prior to the accident. Discovery had revealed that prior to the accident, he was diagnosed with atrial fibrillation, an irregular heartbeat, and had been under the care of a cardiologist since then. Plaintiffs did not retain an expert witness to causally relate this heart condition to defendant's loss consciousness. As a result, New Jersey's Appellate Division upheld the trial court's decision not to allow the plaintiff to introduce evidence of defendant's heart condition at trial.

IS COURT APPROVAL REQUIRED TO RESOLVE A MINOR PLAINTIFF'S CASE?

There is often some confusion amongst the parties as to when and under what circumstances a Court is required to approve a settlement on behalf of a minor or mentally incapacitated person. Many practitioners believe that no Court approval in needed for a settlement of $5,000.00 or less. This is interesting considering the law is fairly clear in this regard. Under New Jersey Court Rule 4:44-3, **All proceedings to enter a judgment to consummate a settlement in matters involving minors and mentally incapacitated persons shall be heard by the Court without a jury.** This proceeding is commonly referred to as a "friendly hearing". It is usually non-adversarial in nature and all of the parties to the matter are in agreement in an attempt to convince the Court that the settlement is fair and reasonable as to its amount and terms. There is no bright line rule that the Court must follow to approve a settlement by way of a friendly hearing. Each case presents its own unique set facts and circumstances as to why the parties seek the Court's approval of the settlement. The Court can either approve or disapprove a settlement. The Court does not have the authority to vary the terms of the settlement even in the best interest of the minor or mentally incapacitated person.

This rule incorporates New Jersey Court Rule 4:48A by reference and requires disposition of the proceeds pursuant to New Jersey Statutes. If a settlement is for an amount more than $5,000.00 than the proceeds must be disposed of pursuant to N.J.S.A. 3B:15-16 and N.J.S.A. 3B:15-17. If a settlement is for an amount less than $5,000.00 then the proceeds must be disposed of pursuant to N.J.S.A. 3B:12-6.

Please note that unless judicial approval is obtained pursuant to this Rule, a minor is not bound by his parents' settlement of his cause. Nor is a minor precluded by the Entire Controversy Doctrine from pursuing claims against non-settling parties unless those claims are inquired into by the Court at the friendly hearing.

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