5.40J COMPARATIVE FAULT[1] (9/09)

Defendant contends that plaintiff was at fault for the happening of the accident. To prevail on this claim, defendant must prove that plaintiff deliberately and knowingly acted in such a way as to create or materially increase a risk of injury and that such action was a proximate cause of the accident. Mere failure to discover a defect in the product or to guard against the possibility of its existence is not a defense. In other words, defendant must prove plaintiff had actual knowledge of the particular danger and knowingly and voluntarily encountered that risk before it can be found that plaintiff was at fault.

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[1] This defense is applicable to a workplace injury where the worker deliberately and knowingly acted in such a way as to create or materially increase a risk of injury. The seminal case on employee comparative negligence is *Suter v. San Angelo Foundry & Machine Company*, 81 *N.J.* 151 (1979). *Suter* held that an employee, engaged at his assigned task on a plant machine, has no "meaningful choice" in whether to use the allegedly defective machine, therefore the employee cannot be said to be guilty of comparative negligence. *Suter* at 167. Later cases clarified the point and held that, in specific instances where there is evidence that an employee did have a meaningful choice; the employee's fault can and should be considered by the jury.

Caution: *Butler v. PPG Industries, Inc.*, 201 *N.J. Super.* 558 (App. Div. 1985) is the only reported decision since *Suter* where it was found that the issue of the employee's comparative fault was properly left to the jury to decide. In *Butler*, the evidence indicated that the plaintiff employee was aware of the specific dangers associated with using a caustic chemical but used it without wearing safety gear or protective clothing supplied to him. See also, *Cavanaugh v. Skil Corp.*, 231 *N.J. Super.* 134 (App. Div. 1999), aff'd 164 *N.J.* 1 (2000) where it was held that where an employee intentionally circumvents a safety device, his behavior is properly considered by the jury on the issue of proximate cause but not on comparative fault.