

Investigation Insights

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Analysis and Commentary From NFC's Investigations Practice Group - July 2026

Case Spotlight:

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***C.S. v. Brick Recycling Co.*, No. A-0628-25,
2026 WL 1532494 (N.J. App. Div. June 1, 2026)**

In this case, New Jersey's Appellate Division provided important guidance on the extent to which an employer relying on a lawyer-led investigation as an affirmative defense to a harassment claim waives privilege with respect to investigation-related materials such as draft investigation reports and the investigator's notes.

The underlying lawsuit involved claims by the plaintiff against his former employer and its CEO based on allegations that the company's CFO made unwanted sexual advances and accessed his bank records without his authorization. The employer hired a law firm to investigate the allegations, and the investigating attorney ultimately issued a 45-page report concluding that the CFO had likely violated the company's policy against harassment.

The plaintiff had resigned while the investigation was pending, but filed suit a week after the report was issued. The defendants asserted as an affirmative defense that they acted reasonably and in good faith, and the company produced the investigation report with attachments during discovery. However,

the defendants withheld related documents as privileged, including the investigator's retainer agreement; two letters from the investigator to the CEO; a partial draft of the report; and the investigator's notes from various meetings and calls with the CEO, plaintiff, and other witnesses. After the trial court held that none of the withheld documents were privileged, the Appellate Division granted leave for the defendants to file an interlocutory appeal.

The Appellate Division began its analysis by reviewing the principles established in *Payton v. New Jersey Tpk. Auth.*, 148 N.J. 524, 691 A.2d 321 (1997), explaining a trial court must first carefully assess whether withheld documents are privileged, reviewing them "page-by-page" or even "line-by-line." 2026 WL 1532494 at *6. Then, before ordering disclosure of any privileged material on the basis of waiver, the trial court must evaluate whether the material is "sufficiently . . . related to an employer's affirmative defense to be disclosable." *Id.* If material is only "tenuously related" to the affirmative defense, a waiver of privilege "may be overcome" and the material need not be disclosed. *Id.*



C.S. v. Brick Recycling Co., No. A-0628-25, 2026 WL 1532494 (N.J. App. Div. June 1, 2026) *Continued*

The Appellate Division then offered guidance as to when investigation-related materials are only “tenuously related” to an affirmative defense based on an investigation, suggesting that the trial court consider whether each document “substantiate[s]” or “impeach[es]” the employer’s defense. For example, material may substantiate the employer’s defense if it shows “the reasonableness or thoroughness of the attorney-led investigation,” but may impeach that defense if it shows “that the employer unduly curtailed the investigation or undermined the independence or integrity of the attorney’s efforts” The Appellate Division also suggested that details about a prior complaint involving different personnel a

and alleged misconduct would have “no (or virtually no)” relevance to the employer’s affirmative defense. *Id.* at *6.

Turning to the documents at issue, the Court held they were potentially privileged even though the investigation began before the plaintiff filed suit, finding that the defendants could have “reasonably anticipated litigation” at the time they retained the investigator, particularly in light of the serious nature of the allegations. *Id.* at *6. Accordingly, the Court held that a “line-by-line” privilege analysis of the documents was warranted, followed by the waiver analysis required by Payton. *Id.* at *7.



Key Takeaways:

- When an employer hires a lawyer to investigate a human resources complaint, investigation-related materials may be privileged even if the investigation begins before a lawsuit is filed.
- Employers now have a stronger argument that asserting an affirmative defense based on an investigation report does not waive privilege with respect to drafts of investigation reports, communications (and related notes) between the investigator and employer that consist of legal advice, and other materials that only tenuously relate to the affirmative defense.

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