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# New Jersey Defense

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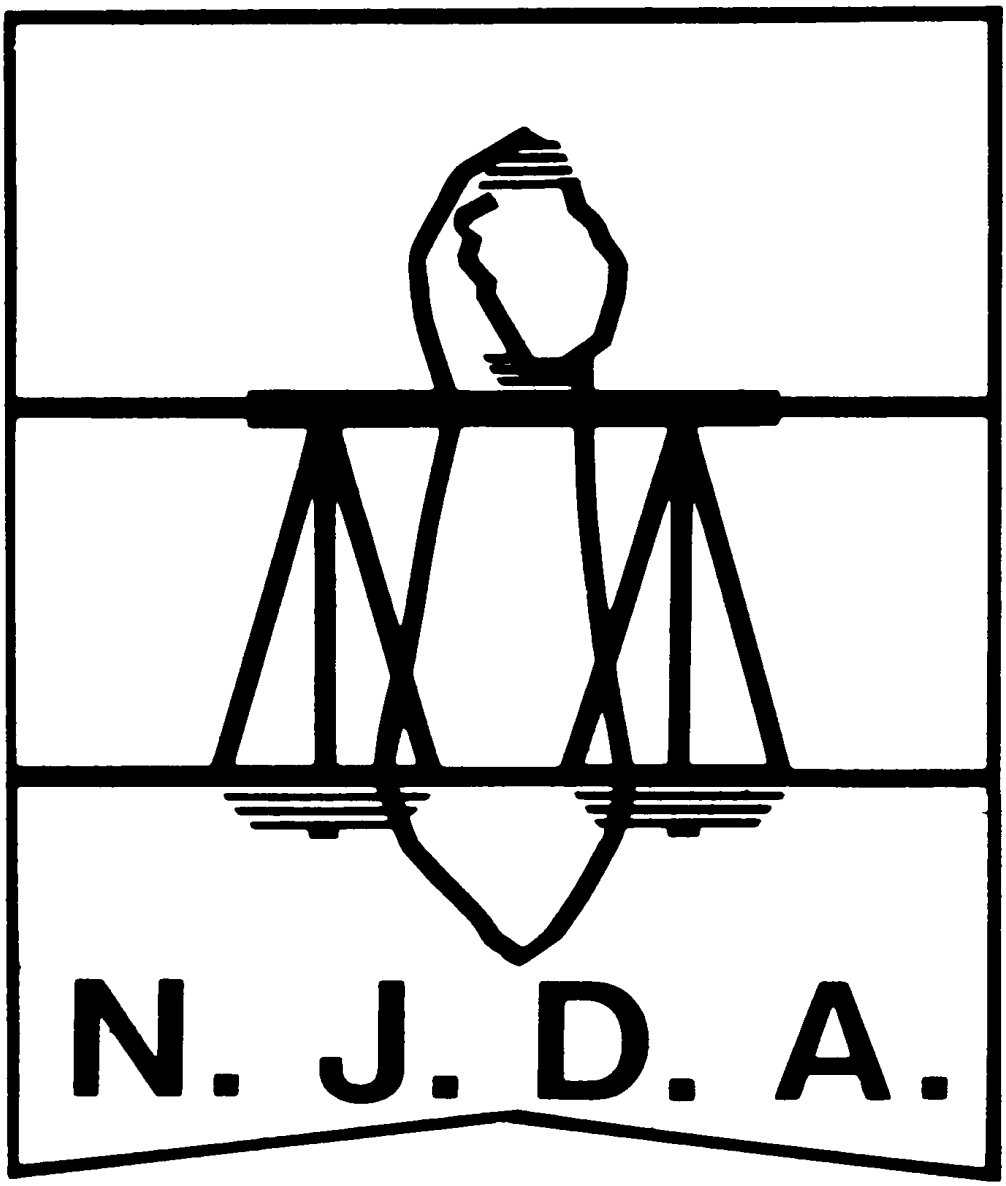


## inside...

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# PRESIDENT'S MESSAGE

## *Kevin J. DeCoursey, Esq.*

Dear Members:

I cannot believe that nine months of my term has expired. So many things have occurred in such a short time that it seems that it was only yesterday that I was sworn in on that lovely summer day in Coopers-town, New York.

As promised, we are continuing our goal of providing continuing legal education to our membership. This past fall we had a seminar sponsored by our Workers' Compensation Committee. Our annual Thanksgiving seminar dealt with medical issues and legal ethics. Our annual Trial College was conducted on February 12, 2009 in the Union County Courthouse.

Our Young Lawyers Committee recently sponsored their annual holiday party at Tumulty's in New Brunswick, New Jersey. It was a rousing success, and several donations were collected for a local charity.

In my initial letter to the membership, I indicated I would need the help of all members, and I haven't been disappointed. With your support, we are building a better and stronger organization. This is crucial considering the change in our economy that has taken place. We must work harder, aster and smarter if we are to keep up with these trends. I want to assure you that your Board of Directors is doing everything possible to help our membership and organization flourish in these difficult times.

Our spring seminar is scheduled for March 28, 2009 at the Woodbridge Hilton and will include topics on insurance coverage and jury selection.

I look forward to the months remaining as your President. I hope everyone is enjoying a healthy and prosperous 2009.

Please mark your calendar for the 2009 Convention in Hershey, PA - June 25 - 28, 2009. I look forward to seeing you there.

# Kevin J. De-Coursey

# GUEST EDITORIAL

## *William R. Powers, Jr., Esq., Esq.*

When I founded this newsletter 27 years ago, I had the opportunity to write the quarterly editorial. While I have not missed the work of putting the newsletter together after doing so for 9 years, I do miss not being able to comment on some of the events that have taken place. The newest adventure of the AOC has stirred my journalistic juices.

It appears that on some occasions court clerks have failed to turn on the recording system which records witnesses, judges and all comments on the record during court proceeding. I will avoid here the "I told you so" of court reporters who lost their jobs on the promise that tape recorders were at least equal to if not superior to their talents. The remedy to this problem by the AOC is a new recording system which will record, full time, all noises anywhere in the courtroom. This will be a supersensitive system, able to detect even whispers. It will record everything said, including conversations by counsel and client, off the record colloquy between counsel and the court, discussions between counsel before and after court, in short, everything that is said in the courtroom and possibly even in chambers or hallways, before, during or after court is in session. Judges will have no control over this system, other than to determine if the contents should be on the record. The control of the recording remains with the AOC. Although ostensibly, it is only to back up a failure of the court personnel to turn on the official tape recorder, in fact, it can be used to monitor a judge's performance, be used unscrupulously to monitor counsel's privileged conversations (useful for negotiations), catch jurors comments during recess (expect contempt of court on these) and record unguarded moments of any kind. In fact, the mischief possible is unlimited. Most incredibly, the power to control this weapon is not in the hands of the judiciary or even attorneys, both of whom are bound by ethics rules, but by lay people in the AOC.

Now I am not an ACLU member. I can understand balancing personal freedoms against security powers for combating terrorism. As that is not the case here, I fail to see the justification for the pervasive invasion of a forum in which constitutional protections have always been foremost.

If the problem is someone forgetting to turn a recorder on, it seems that much simpler solutions are possible which compromise nothing. Being a low tech guy, I immediately thought of a sign saying: "Remind the court clerk to turn the recorder on or you won't be able to get a transcript." My more sophisticated friends tell me the AOC would never go along with such a primitive (and inexpensive solution). So I have allowed my thinking to go into at least the electronic era by recommending that the recorder be connected to a big red light visible to all in the courtroom. We have seen this sort of simple device in recording studios and photo developing rooms, so we know the technology has been perfected. When the recorder is on, the light is on. Otherwise, otherwise. I still like the idea of the sign. I guess I could even live with a rule change putting the onerous burden on counsel or even a pro se, that if they fail to mention that the red light is not on, they cannot complain that no transcript is available. I fear this suggestion will be rejected because:

1. It solves the problem enunciated
2. It prevents the nefarious invasion mentioned above
3. It gives no new powers to the AOC
4. It involves the hiring of no new personnel

And lastly, it doesn't cost the taxpayers a ton of money.

However, if the court has the money to implement this idea, maybe it is time to bring back court reporters. At least then, if they are not present, you know you are not getting a transcript.

# PARDO NO LONGER A PLAINTIFF'S SWORD: JURY TO DECIDE WHETHER A HERNIATION IS A PERMANENT INJURY

***Michael A. Malia, Esq., LL.M.***

In Pardo v. Dominguez, 382 N.J.Super. 489, 494, 889 A.2d 1099 (App.Div.2006) the Appellate Division held that a plaintiff's proof of a herniated disc was a permanent injury sufficient to overcome the defendant's motion for summary judgment on the verbal threshold. Since Pardo, plaintiff attorneys have attempted to expand the Appellate Division's holding to convince trial judges that once the plaintiff establishes through expert testimony that a herniated disc was causally related to the accident; the plaintiff is entitled to a jury instruction that the plaintiff has met the burden of proving a permanent injury sufficient to satisfy the verbal threshold. This attempted expansion was the result of dissension among unpublished opinions on this issue until the recent published opinion of Ames v. Gopal, 404 N.J.Super. 82, 960 A.2d 765 (App.Div.2008) wherein the Appellate Division held that the jury was to determine whether a herniated disc is a permanent injury.

The first unpublished opinion, Kalra v. Garcia, 2007 WL 2032906 (July 17, 2007) accepted an expansion of Pardo. In Kalra, the plaintiff brought suit for personal injuries from a motor vehicle accident. Following the accident, the plaintiff went to the emergency room, was examined and x-rays were taken. Thereafter, she saw her family doctor and an orthopedic surgeon. The orthopedic surgeon sent the plaintiff for an MRI, which revealed superimposed disc disease at multiple levels, herniated discs at levels C3-7 with spinal cord compression and osteophytic ridges and osteophytes at multiple levels. The plaintiff continued with physical therapy and a home exercise program. Her orthopedic surgeon opined that the plaintiff had permanent neck injuries and a poor prognosis. The defendant's orthopedic surgeon agreed that the plaintiff's MRI showed herniations at C2-C7, but testified that they were the result of an aging process not causally related to the accident. The defense expert opined that the plaintiff sustained a cervical sprain superimposed upon pre-existing spondylolysis.

Over defense counsel's objection, the trial judge instructed the jury that if they decided that there is a herniation caused by this accident, then that is a permanent injury under the statute and the plaintiff would be entitled to non-economic damages. The jury returned a verdict for the plaintiff in the amount of $75,000.

The Appellate Division in Kalra held:

"Defendant's expert did not dispute plaintiff had disc herniations, and he did not dispute a disc herniation is a permanent injury. Moreover, 'the existence of a herniated disc [is] sufficient to satisfy the verbal threshold.' Pardo v. Dominguez, 382 N.J.Super. 489, 494 (App.Div.2006). Thus, the jury charge defendant objects to was proper, given the circumstances present in this case."

The Appellate Division first rejected an attempted expansion of Pardo in a second unpublished opinion, Diaz v. Gonzalez 2008 WL 2627648 (July 7, 2008). In Diaz, the plaintiff brought suit for personal injuries from a motor ve-

*(Continued on page 4)*

*(Continued from page 5)*

hicle accident. After the accident, she went to the hospital, was examined, given painkillers and released. Thereafter, she followed-up with treatment for headaches, neck, mid-back and low back problems. She received physical therapy, underwent an EMG, a cervical and lumbar MRI. At trial the plaintiff's board certified neurologist diagnosed cervical disc herniations at C4-5 and C5-6 on the MRI, carpal tunnel syndrome on the EMG and an aggravation of L5-S1 listhesis on the MRI, in addition to post-traumatic tenosynovitis of the right ankle with decreased range of motion. The plaintiff's neurologist opined that the injuries were permanent. The defendant's board certified orthopedist opined that the plaintiff sustained temporary soft tissue injuries with nothing permanent. Both experts found no evidence of nerve compression or impingement.

The first two questions the trial judge presented to the jury were: (1) "Did…plaintiff Nancy Diaz sustain an injury proximately caused by the auto accident of August 9, 2004?" and (2) "Was an injury to the neck, or the lower back, or either of her wrists sustained by Nancy Diaz permanent?" Plaintiff's counsel requested the judge charge the jury that if they found a herniation that was caused by the accident, it was a permanent injury as a matter of law. The trial judge refused this request. The jury found that the plaintiff suffered an injury proximately caused by the accident, but did not find it to be permanent. The trial judge denied plaintiff's motion for a new trial and the plaintiff appealed.

The Appellate Division found that there were broad factual issues for resolution by the jury. The plaintiff's expert testified that the plaintiff suffered several injuries which were permanent, whereas the defendant's expert testified that all of the plaintiff's injuries were temporary in nature. Both physicians found two herniated discs with no nerve compression. Both physicians diagnosed preexisting listhesis. The defense expert explained that a herniated disc would cause no pain or discomfort unless the protrusion compresses or impinges on the nerves in the spine. Moreover, the plaintiff did not complain of any neck pain to him upon examination. For these reasons, the Appellate Division found no error in the charge or denial of the plaintiff's motion for new trial since the issue of permanency in the face of undisputed evidence of no nerve impingement or spinal compression was correctly presented to the jury as a question of fact for their resolution.

The Appellate Division again rejected an attempted expansion of Pardo in a third unpublished opinion, Yankanich v. Allstate Ins. Co., 2008 WL 4998695 (November 26, 2008). In Yankanich, the plaintiff brought suit for personal injuries as a result of a motor vehicle accident. After the accident, the plaintiff went to an orthopedic surgeon and then a neurosurgeon for neck pain with numbness and tingling into the hands and arms, as well as low back pain with radiation into the leg. The plaintiff's neurosurgeon testified about permanent injuries in the form of cervical herniated discs at C3-4, C5-6 and C6-7 and a lumbar herniated disc at L1-2, all related to the accident. Id. at 1. However, the plaintiff's expert conceded on cross examination that degenerative disc disease was present in the neck and back which was not related to the accident; the radiologist who read the cervical and lumbar films did not diagnose a herniated disc in either, but simply could not exclude the possibility of a cervical herniation; and that his initial examination of the plaintiff revealed several normal findings. Additionally, the plaintiff had "a little" limitation of neck and low back range of motion, which the expert conceded "can be faked".

The defendant's orthopedic expert examined the plaintiff four months after the plaintiff's last visit to the neurosurgeon. The plaintiff told the defendant's expert that his lower back pain and radicular symptoms fully resolved three months earlier, although he still complained of stiffness and a "burning type of pain" in his neck. The defendant's expert concluded that the plaintiff sustained no permanent injury and that his complaints of pain were consistent with underlying degenerative arthritis found on the MRI.

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# PARDO

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During a charge conference, plaintiff's counsel requested a jury charge based upon the holding in Pardo and the unpublished opinion of Kalra that if the jury found the plaintiff suffered a herniated disc as a result of the accident, he sustained a permanent injury under the law and is entitled to a recovery for all injuries sustained as a result of the accident. Defense counsel objected to the requested charge since the defense expert disputed the plaintiff's claim that there were any herniations on the MRI. The trial judge denied plaintiff's counsel's request finding that Pardo and Kalra do not require an instruction on that issue in all cases. In those cases, it appeared that the issue of a herniation being a permanent injury was not disputed whereas it was disputed in this case. The jury returned a verdict of no cause.

The Appellate Division in Yankanich found Pardo distinguishable in that it never addressed the issue of whether a trial judge is required to instruct a jury that if it finds that a plaintiff has sustained a herniated disc then the verbal threshold is satisfied as long as the herniation was caused by the accident. Pardo concerned only the type of evidence necessary to survive a summary judgment motion, but cannot be read as establishing a blanket rule that the existence of a herniated disc requires a trial court to remove from the jury's consideration the issue of whether a herniated disc is a "permanent injury". The Appellate Division held that the issue of permanency was correctly presented to the jury for resolution.

In Ames v. Gopal, 404 N.J.Super. 82, 960 A.2d 765 (App.Div.2008), the Appellate Division held that "our conclusion in Pardo that the existence of a herniated disc, demonstrated through an MRI, is sufficient to satisfy the verbal threshold for purposes of a motion for summary judgment is not the equivalent of a holding that the existence of a herniated disc caused by an accident entitles one to an award of damages at trial".

In Ames, the plaintiff filed suit for personal injuries after a rear-end accident. Approximately two weeks after the accident, the plaintiff first sought treatment with a chiropractor. The chiropractor referred the plaintiff for a lumbar MRI, which revealed a herniated disc at L5-S1. The chiropractor referred the plaintiff to an osteopathic physician for a cortisone injection into the hip and an epidural injection into the lower back. The plaintiff was 35 years old and claimed that as a result of the accident, he could no longer play ice hockey, roller hockey, ski, play golf or hike. The plaintiff presented both the chiropractor and osteopathic physician at trial, claiming the lumbar herniation was related to the accident and permanent. The defense orthopedic surgeon agreed that the plaintiff had a herniated disc, but testified that it was the result of degeneration and not related to the accident. The defense expert also opined that the plaintiff's complaints of left-sided pain did not correlate with the MRI showing a right-sided herniation. At the close of evidence, the plaintiff requested that the trial judge charge the jury that a herniated disc constituted a permanent injury under Pardo, which the judge did over the defense's objection. The jury returned a verdict for the plaintiff in the amount of $250,000.

The Appellate Division held that the trial court erred when giving the Pardo instruction to the jury. The Appellate Division found that the trial court gave too broad a reading to the opinion in Pardo. In Pardo, the existence of a herniated disc demonstrated by MRI is sufficient for purposes of satisfying the verbal threshold in the context of a motion for summary judgment, but that is not the equivalent of holding that the existence of a herniated disc caused by an accident entitles one to an award of damages at trial. At trial, the plaintiff must prove by a preponderance of objective, credible medical evidence that he suffered a permanent injury, which has not healed to function normally and will not heal to function normally with further treatment.

The defense expert testified that although a disc would not return to its original position in the plaintiff's spine, it would function normally. The expert drew a distinction between a permanent condition and a permanent injury. He agreed that the herniated disc presented a permanent condition, but

*(Continued on page 7)*

*(Continued from page 6)*

did not agree that it presented a permanent injury. This testimony presented a factual question for the jury to resolve as to whether the plaintiff suffered a permanent injury under the statute. The trial court took this question away from the jury and ruled that the plaintiff's injury was permanent as a matter of law, which was error and entitled the defendant to a new trial.

## New Jersey Defense Wants You!

New Jersey Defense is the now quarterly publication of the New Jersey Defense Association. It is distributed to each of the association's seven-hundred-fifty members as well as to all Judges of New Jersey's State and Federal Courts. The Editorial Board welcomes the submission for publication of articles and news items of interest to the civil trial bar.

**For information on publishing schedules, contact Editor-In-Chief Steve Foley at (732) 775-6520 or through his electronic caretaker rschick@campbellfoley.com**

# ENVIRONMENTAL LAW COMMITTEE FORMED

The New Jersey Defense Association is pleased to announce the new Environmental Law Committee. This committee was created in response to the needs of the New Jersey defense bar and the ever-expanding practice areas of our members. Environmental laws, rules, and regulations are subject to a wide breadth of interpretation and as such, it is playing a significant role in the ways in which we, as defense counsel, represent our clients, now more than ever. Whether you represent a homeowner, a carrier, a real estate developer, environmental professional, or a small business owner, you now need to have a working knowledge of New Jersey's environmental rules and regulations to adequately protect your client's interests. The NJDA Environmental Law Committee is looking for a few good men and women to identify the pertinent issues, educate the membership, and participate in amicus considerations when appropriate. If you are interested in becoming a member of the committee or obtaining information about the committee, please contact the Chair, Joanne Vos of Greenbaum, Rowe, Smith & Davis in Woodbridge.

# NJDA TRIAL COLLEGE

*February 12, 2009*

Instructors
back row left to right: Steven Isaacson, Bruce Helies,
Joseph Garvey, Kevin DeCoursey
front row left to right: Kim Mento, Thomas


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# NEW JERSEY DRAM SHOP LAW: DUTY AND EXCLUSIVITY ON THE ROCKS?


## *Daniel M. Young, Esq. and Amy L. Bargerhuff, Esq.*


Two cases that are currently on appeal to the New Jersey Supreme Court, *Mazzacano v. Estate of Kinnerman,*[1] argued on October 6, 2008, and *Bauer v. Nesbitt* [2] raise questions about the extent of the duty of a licensed alcohol server under the New Jersey Dram Shop Act[3] (Act) and whether the act can be considered the exclusive remedy for alcohol related injuries involving alcohol service. The outcomes of *Mazzacano* and *Bauer* will affect the future of both dram shop and premises liability law.

Since its enactment in 1987, the Dram Shop Act has been the exclusive remedy for injured individuals regarding service of alcohol by a commercial establishment.[4] In *Fisch v. Bellshot,*[5] the Supreme Court stated, "The Dram Shop Act exclusively defines negligence for the purposes of civil liability… [T]he Legislature drafted subsection b. precisely to render service to a visibly intoxicated person the only defining act of negligence other than serving alcohol to a person whom one knows or reasonably should know under the circumstances is a minor."[6] Section b is as follows:

> b. A licensed alcoholic beverage server shall be deemed to have been negligent **only when the server served a visibly intoxicated person**, or served a minor, under circumstances where the server knew, or reasonably should have known, that the person served was a minor. *(emphasis added).*

In *Mazzacano*[7] the dissenting opinion suggested that the Act should be interpreted to include a separate duty to monitor alcoholic consumption. The matter arose from an automobile accident in which four people were killed, including the plaintiff's husband and John Kinnerman, the driver of the vehicle.[8] Prior to the accident, Kinnerman and his three passengers attended a pig roast hosted by defendant Happy Hour Social and Athletic Club (Club) in Maple Shade, New Jersey. The guests were provided beer from a self-serve beer truck.[9] The evidence indicated that no employees of the defendant club served the defendant alcohol. Numerous witnesses testified that Kinnerman did not appear intoxicated during the roast or just prior to entering his vehicle.[10]

Plaintiff submitted expert testimony that Kinnerman had a .15% blood alcohol level at the roast and would had shown signs of visible intoxication.[11] Plaintiff also raised questions about the credibility of the witnesses' testimony regarding visible intoxication because they were members of the club. Though testimony was allowed that there was no one monitoring the beer, the Trial Judge refused to answer a jury question whether or not the permit[12] obtained by the club to serve alcohol placed a responsibility on the club to monitor alcohol consumption.[13] The Judge responded to the question reiterating the definition of negligence defined by the Act.[14]

The jury returned a no cause verdict, answering the first verdict interrogatory asking them to decide whether the Club negligently provided alcoholic beverages to Kinnerman while Kinner-

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man was visibly intoxicated in the negative.[15] The Appellate Division upheld the jury verdict, finding that the key issue was whether Kinnerman was visibly intoxicated when allowed access to beer at the club.[16] The dissent suggested that the jury should have been instructed that the defendant had a duty to monitor alcoholic consumption and that it was free to infer that Kinnerman's intoxication could have been observed if the alcohol consumption had been properly monitored.[17] The dissent called for the definition of negligence under the Act to be expanded to include a duty to monitor. This in essence is a duty to supervise.[18]

At issue in *Bauer* is not so much whether a duty to supervise can be read into the statute, but whether a plaintiff can also pursue a separate cause of action for negligent supervision against a bar when the Act until now has been the exclusive remedy. In *Bauer,* the estate of a patron killed in an accident sued a bar where the plaintiff and defendant driver met for a weekly "Wing Night."[19] There was no evidence to establish that the driver, who was underage, was served alcohol by the bar. [20] Rather, the evidence indicated that defendant driver Nesbitt's soft drinks were spiked with rum, which was not purchased from the bar, by his friend- the deceased plaintiff Hamby.[21]

Witness testimony was contradictory regarding whether Nesbitt showed signs of being intoxicated.[22] After the accident, Nesbitt's blood alcohol level was found to be .199%.[23] Plaintiff submitted an expert report concluding that Nesbitt would have shown obvious physical signs of intoxication while at the bar.[24] Plaintiff's expert also opined that the bar should have taken "corrective action …including: making certain that the young underage patron, Nesbitt, did not operat[e] any vehicle, and that the remaining patrons obtain alternative transportation."[25] The trial court dismissed the claim because Nesbitt was not served alcohol by the bar and because the Dram Shop Act preempted a common-law cause of action for negligent supervision.[26]

The Appellate Division, however, found a way to further expand the scope of a business proprietor's duty while going outside of the Act into the realm of premises liability, citing several cases where service of alcohol was not at issue, but negligent supervision was.[27]

The Court first found that the evidence indicated that Hamby was served while visibly intoxicated.[28] The Courts inquiry could have stopped there because under the Act and prior case law, the issue at this point was whether Hamby could have appreciated the risk of riding with Nesbitt. The court, however, went further and found that the bar had a duty to protect Hamby from foreseeable injury, including insuring not only that he himself did not drive, but also that he did not ride as a passenger with another intoxicated patron.[29] The duty owed to Hamby also required the bar to inquire into who was driving him home.[30]

In the next part of its decision, the Court further expanded a bar's duty to include supervising intoxicated patrons not served alcohol. While the Court found that plaintiff could not succeed with a claim under the Act with regard to Nesbitt's intoxication because there was no proof that he was served alcohol while visibly intoxicated, the Court held that the Act did not preempt a claim for negligent supervision of Nesbitt by the bar.[31] The Court found that if Nesbitt was visibly intoxicated, a duty of reasonable care for his safety arose, regardless of whether his intoxication resulted from the bar's service of alcohol to him or from other causes.[32] This duty of care included protecting him from the foreseeable risk of injury to himself **and others** from an automobile accident by insuring that Nesbitt did not drive while in an intoxicated state.[33] Hence, plaintiff could also proceed on a separate cause of action for negligent supervision.

**The Future of the Dram Shop Act**

At stake in *Mazzacano* is whether the court will impose a separate duty under the Act to require alcohol servers to "monitor alcoholic consumption" and thus allow evidence of "failure to supervise" to play into a jury's determination of negligence un-

*(Continued on page 12)*

# DRAM SHOP LAW

*(Continued from page 11)*

der the act. This duty to observe is already implicit in the Act because the Act itself establishes liability on those who serve visibly intoxicated persons. Visibility takes into consideration observation. To interpret the Act to impose a duty to supervise or monitor consumption exceeds the statutory language. The dissent in *Mazzancano* expressed its frustration that the Club's lack of supervision allowed it to avoid liability. The duty it sought to impose, however, is one which the legislature elected not to adopt.

The facts in *Mazzancano* are unique because they involved self-service rather than a bartender or waiter. Whether a club which allows its guests unfettered access to self serve alcohol should be required to monitor its guests to supervise their alcohol consumption presents a question of public policy in a field already occupied by the legislature. The fact that the Act does not extend liability under the circumstances presented in *Mazzancanno* does not warrant a judicial response to any perceived insufficiencies in the Act whose primary purpose was to reduce insurance costs for establishments that serve alcohol. The imposition of additional duties will increase those costs, and it should be for the legislature to decide whether to require them.

At stake in *Bauer* is the exclusivity provision of the Act with regard to dram shop matters and the extent of the duty owed by a bar owner. If the decision is allowed to stand, it appears to create a duty on all proprietors upon whose property intoxicated individuals traverse.

The holdings in *Bauer* go beyond the duty set forth under the Act and subsequent case law. They also abrogate the exclusivity provision of the Act which does not provide for a separate cause of action for negligent supervision. The court's decision not only makes bar owners the insurers of their patron's safety, but also makes all business owners potentially liable if they do not provide a safe haven for those who enter their premises while visibly intoxicated. The resulting insurance cost implications for both dram shop and general liability are considerable. Although such costs factors ordinarily are but a single facture in the decision-making process when courts consider whether to impose new duties in general negligence matters, by its passage of the Licensed Beverage Servers Act, the legislature has made its own determination as to the extent of the liability, and the consequent costs of insuring that liability, which licensees must assume. Any perceived insufficiencies in the law should be addressed by the legislature rather than the Court.

* On January 22, 2009, the New Jersey Supreme Court affirmed the appellate division's decision in Mazzacano v. Estate of Kinnerman, 197 N.J. 307 (2009)

## Endnotes

[1] *Mazzacona v. Estate of Kinnerman*, 2007 WL 3071196 (App. Div. 2007).

[2] Bauer v. Nesbitt, N.J.Super. 71 (App. Div. 2008).

[3] New Jersey's Dram Shop Act, N.J.S.A. 2A-5, which was enacted in 1987, provides:

a. A person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages by a licensed alcohol beverage server may recover damages from a licensed alcoholic beverage server only if:

(1) The server is deemed negligent pursuant to subsection b. of this section and

(2) The injury or damage was proximately caused by the negligent service of alcoholic beverages;

and

(3) The injury or damage was a foreseeable consequence of the negligent service of alcoholic beverages.

b. A licensed alcoholic beverage server shall be deemed to have been negligent only when the server served a visibly intoxicated person, or served a minor; under circumstances where the server knew, or reasonably should have known, that the person served was a minor. (emphasis added).

[4] N.J.S.A. 2A:22A-4, *Verni ex rel. Burstein v.*

*(Continued from page 12)*

*Harry M. Stevens, Inc.* 387 N.J.Super. 160, 187 (App.Div.2006) *certif. denied*, 189 N.J. 492, 915 A.2d 1052 (2007). *See also Fisch v. Bellshot*, 135 N.J.374, 382 (1994); *Truchan v. Sayerville Bar and Rest., Inc*., 323 N.J.Super 40,53 (App.Div.2007)).

[5] *Fisch* 135 N.J.374, 382.

[6] *Id*. at 383.

[7] *Mazzacano v. Estate of Kinnerman*, 2007 WL 3071196 (App. Div. 2007).

[8] *Id*. at *1.

[9] *Id*. at *1.

[10] *Id*. at *2.

[11] *Id*. at *2.

[12] *Id*. at *1.

[13] *Id*. at *4.

[14] *Id*. at *4.

[15] *Id*. at *1.

[16] *Id*. at *5.

[17] *Id*. at *7-8.

[18] The plaintiff in *Mazzacano* did not bring a separate cause of action for failure to supervise.

[19] *Bauer v. Nesbitt*, 399 N.J.Super. 71, 75p. Div. 2008).

[20] *Id*. at 74-77.

[21] *Id*. at 76.

[22] *Id*. at 78.

[23] *Id*. at 80.

[24] *Id*.

[25] *Id*.

[26] *Id*. at 74.

[27] *Id*. at 81 and 82.

[28] In reviewing the briefs, it is apparent that plaintiff failed to bring a count for the negligent service of alcohol on Hamby in the complaint. Thus it appears that Appellate Division accepted this argument after the fact and included it in their decision.

[29] *Id*. at 83.

[30] *Id*. at 84.

[31] *Id*. at 84. The common-law cause of action for negligent supervision had previously been extended in matters where the service of alcohol was not directly at issue, however, those cases involved rape and assault. *Id*. at 81-82 (citations omitted.)

[32] *Id*. at 85.

[33] *Id*.

# RECENT WORKERS' COMPENSATION DECISIONS


## *Michelle Haas, Esq. and Stephen Banks, Esq.*


*Stephen Banks not pictured*

As a follow-up to our last article advising of the legislative changes signed into law by Governor Corzine on October 2008, the Bill of most concern to the defense bar was S1916/A2968 because it shortened the time frame for a Respondent to defend a claim where a claimant required emergent medical treatment, but failed to unquestionably define what medical conditions would meet the new criteria of "emergent." A call to a spokesperson for the New Jersey Division of Labor has, so far, shown a conservative position taken by the Workers' Compensation Courts with 16 motions for emergent treatment being filed statewide, and only five (5) of these given this distinction as of February 1, 2009.

Two recent cases were decided at the end of 2008, which should be highlighted to the defense bar. The first, Forker v. Circuit Foil*, 2008 WL 4998496 (App. Div. 2008) was decided on November 26, 2008 and is an important case, when defending a claim for an occupational worsening of an underlying condition.

Richard Forker worked for Circuit Foil from 1968 until he left work in 1999 due to back pain. He filed three claims for Workers' Compensation for a back sprain in 1997, and arm injury in 2001, and an occupational claim for his back. During this period, he testified to four non-work related injuries to his back, resulting in continuous medical treatment and a recommendation for spinal surgery in 1994, which he declined, prior to any work accident taking place.

During trial, the claimant testified to a physical job requiring him to lift heavy rollers and moving heavy drums, and his expert collectively determined that his condition was made worse by his employment without citing specific objective proofs to the same, and the Workers' Compensation Judge found him to be totally disabled with Second Injury Fund contribution.

The Appellate Court reversed and remanded the decision taking a strict interpretation of two part test of Perez v. Pantasote, 95 N.J. 105 (1984) requiring an injured worker to both prove by demonstrable objective evidence a disability that restricts the body and the lessening of a material degree of one's work ability. The Court cautioned that mere subjective complaints by a claimant without providing "comparative objective medical evidence" to show that one's prior condition and need for surgery was made worse by one's occupational exposures is not enough.

The second case deals with the issue of cancellation of coverage and is limited to a number of claims where cancellation had been in limbo because email was used over the method outlined in the Statute to submit notices of cancellation by mail.

Srocynski v. John Milek Construction, N.J. (2008) (citation pending) was decided by the New Jersey Supreme Court on December 17, 2008. The specific issue in this case was whether an insurance carrier failed to comply with the "like notice" requirement of N.J.S.A. 34:15-81(b), when it sent a policy holder cancellation of coverage by certified mail, but notice sent to the Commissioner of Banking and Insurance was electronic only and failed to contain the certified statement. The Workers' Compensation Judge ruled that the policy was not cancelled properly because the insurance company did not file a "certified statement" when it transmitted data to the Compensation Rating and Inspection Bureau (CRIB) and that strict compliance with the Statute was necessary. The decision was affirmed by the Appellate Division. 396 N.J.Super. 248 (App. Div. 2007) The Supreme Court held that a carrier did not satisfy N.J.S.A. 34:!5-81(b) merely by transmitting electronic notice of cancellation coverage and that the Statute

*(Continued on page 15)*

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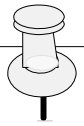
clearly requires that a carrier file a certified statement by an employee that the required notice was provided to the insured. The Court also found that the substantial compliance argument was not enough in this case. The Court did not find that the industry acted in bad faith by utilizing the electronic procedure, but reinforced that despite reliance on CRIB's advise, the statute was not met. The Court further held that Srocynski and any other party who previously raised the notice issue should be granted relief from the improper cancellations at the time of the decision, but any cancellation not challenged should stand because the policyholders waived their right to do so.

* This case remains on Appeal subject to changes made by the Workers' Compensation Court on remand.



## Past NJDA President Chairs ICLE Civil Trial Preparation Seminar

Chuck Hopkins, past NJDA President, served as Chairman and Moderator for the Jersey Institute for Continuing Legal Education's "New Jersey Civil Trial Practice" seminar on December 18, 2008. The seminar took place at the Law Center in New Brunswick. Serving with him on the panel were Melissa A. Geist a Partner in the firm of Reid Smith and Chad M. Moore a Partner in the firm of Hoagland, Longo, Moran, Dunst and Doukas.

The panel presented on everything from the inception of the case up until trial. The seminar took a practical look from both the plaintiff's and the defense side. Included were discussions of client intake, initial investigation, interrogatories and depositions, motion practice and retaining of experts. Audience participation enlivened the proceedings as the seminar attendees brought their personal experience into the discussion.

# THE ART AND SCIENCE OF JURY SELECTION

## *Ron Kurzman, Litigation Consultant*

Any experienced litigator would agree that jury selection is an art and not a science. However, in order to be a good artist it's extremely important to understand the science of a jury. Recent studies on jury psychology have provided litigators with an invaluable look into the decision making process of jurors. By studying countless mock jury verdicts and analyzing hundreds of actual postjury verdict interviews we understand that there are three main drivers that lead jurors to a verdict in a particular case: 1) Likeability; 2) Prior Experiences and 3) Preconditioning. It is with an understanding of jurors' decision making process that should guide you in your jury selection strategy.

**Likeability**

First, jurors form decision in a case based upon likeability. Jurors will find for one side or another based upon how much those jurors like you and your client. This long held belief by many trial attorneys about likeability is supported by a study conducted in Trial Diplomacy Journal. Sanito and Arnold reported on a study of 600 jurors who were interviewed after they had reached a verdict in different cases. The one issue that was similar amongst all 600 jurors interview as a reason for why they reached a verdict was that they "liked" the lawyer that they found for more than the opposing lawyer.

**Prior Experiences**

The second main factor that leads jurors to a verdict are jurors' prior experiences, attitudes, values and beliefs, and how these factors relate to your case. Again we know from our study of jurors that they enter the courtroom and then filter all information presented to them in the case through these factors. Therefore, jurors are not simply basing their verdict on the facts presented to them, but rather processing the facts through the filter of their prior experiences. For instance, jurors frequently in employment, personal injury or medical malpractice cases spend up to 50% to 60% of their time in deliberations talking about their own personal experiences.

**Preconditioning**

Jury selection provides the opportunity to precondition jurors to the key issues in your case. We know from jury research that jurors start to form decisions about a case from the first moment that they hear about the case. Jury selection provides us the opportunity to precondition jurors to our case themes.

As mentioned, understanding the science of the jury's decision making is only half the battle. To be effective in jury selection one must apply the art of jury selection. Below are suggestions that are designed to assist in the art of jury selection.

**Likeability**

Will they like me? We need to understand that most jurors experience a high level of stress during jury selection. A good jury selection artist will start the jury selection process by making the jury feel comfortable. Each lawyer has his / her own style, and we have seen everything from story telling, jokes, to divulging embarrassing stories about ones self ease jurors' nerves. The key is that jurors need to feel comfortable before they divulge their feelings about a particular life experience. It is your job as the questioner to make jurors feel comfortable enough to answer your questions. Remember its jury selection and not crossexamination.

- Talk to jurors, not at them and listen to and care about the responses they provide. Subtly match jurors body language, style of speech and / tone. Use your personality in any way possible to win over the jury (don't be obvious about it!!!).

**Prior Experiences**

Deselection. A biased juror can sway an entire jury to his / her side of the case. You must use voir dire to ferretout biased prospective jurors.

*(Continued on page 17)*

# JURY SELECTION

*(Continued from page 16)*

Rather than relying on a persons demographic backgrounds as the sole indicator of whether he / she is good or bad for your case – it's much more telling to ask jurors openended questions to determine their prior experiences. Before you step into the courtroom know what biases you are looking to expose. This can simply be done by understanding the issues in your case that will trigger a bias in a potential juror. When evaluating these issues in your case take into account jurors' prior experiences, values, beliefs and attitudes. Remember it is better to hear that a jury is biased before a verdict is entered, so don't worry about "tainting the jury pool" by asking a deselection question.

- Openended questions: When asking a deselection question make sure that it is openended. Openended questions allow jurors to share their beliefs with you and hopefully divulge information that can assist in deselection.

- Reinforce: Complement jurors for giving honest answers that reveal their biases. This will encourage other jurors to also give honest answers.

- Survey: Immediately after you reinforce – ask the other jurors whether they agree with a particular juror's response. Your goal in asking for jurors who agree is to identify jurors with similar biases. You should then ask these biased jurors to share their experiences.

- Confirm: Confirm jurors' biases and get jurors to commit to their bias. To successfully challenge a biased juror, you must highlight his or her prejudice for all to see.

- Eliminate: Once you confirm a juror's bias they should be struck for cause immediately. Don't let bias jurors hang around.

**Preconditioning**

Key Themes. When the opportunity presents itself you should attempt to precondition jurors to the key themes in your case. This should not be done by lecturing the jury, but rather by embedding your themes in the voir dire questions. For instance, in a personal injury case where you are representing the defense and one of your main themes in the case is the plaintiff's failure to take responsibility for his / her own actions – you may precondition jurors to this theme by asking: Does anyone believe that a person should not have to take responsibility for their own actions?

Most likely no one on the jury is going to agree with this question. In turn you have preconditioned the jury to a key theme in your case.

- Indoctrinate: Remember what jurors told you during jury selection. Use their words, body language, analogies, and stories and reframe them in terms of the stories we want to tell on behalf of our client.

**Conclusion**

When you approach jury selection with the jury's psychology in mind your artistic ability in selecting a jury will flourish. Remember and utilize the three keys to jury selection: 1) Likeability; 2) Prior Experiences and 3) Preconditioning to give yourself the best chance at winning your case.

# REAL ESTATE PROFESSIONALS BEWARE OF VIOLATING THE NJ CONSUMER FRAUD ACT

***Betsy G. Ramos, Esq.***

Since 1976, the New Jersey Consumer Fraud Act ("CFA") has made certain acts with respect to the sale or advertisement of real estate unlawful. N.J.S.A. 56:8-2. Real estate professionals - brokers, agents, and salespersons - became covered by the CFA as to the sale of residential real estate at that time. See Arroyo v. Arnold-Baker & Assoc. Inc., 206 N.J. Super. 294, 297 (Law Div. 1985). In this declining market, with many unhappy and potentially litigious buyers, it is important for attorneys who represent realtors to be aware of their clients' obligations under the CFA and caution them against making misrepresentations as to the sale of real estate.

The CFA prohibits "the act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate…" N.J.S.A. 56:8-2. A violation of this Act could result in an award of treble damages and attorneys fees. N.J.S.A. 56:8-19.

Under the CFA, an unconscionable practice can either be an affirmative act or a knowing omission. No intent to deceive is necessary when the representation is affirmative. Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 534 (App. Div. 1996), aff'd, 148 N.J. 582 (1997). The courts have held that an affirmative misrepresentation in this context is "one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase." Id. at 535. However, when the act alleged is an omission or a failure to disclose, the plaintiff must show that the realtor "intentionally concealed the information about the defect with the intention that its client would rely on the concealment, and that the information was material to the transaction." Mango v. Pierce-Coombs, 370 N.J. Super. 239, 254 (App. Div. 2004).

A non-professional seller (i.e., an individual homeowner selling his/her own home) would not be subject to the CFA. Byrne v. Weichert Realtors, 290 N.J. Super. 126, 134 (App. Div. 1996); DiBernardo v. Mosley, 206 N.J. Super. 371, 376 (App. Div.), certif. denied, 103 N.J. 503 (1986). The case law has limited its application to professional sellers of real estate.

In 1999, the CFA was again amended as to real estate sales, but this time the enacted legislation expressly limited the liability of licensed real estate brokers, broker-salespersons, and salespersons. N.J.S.A. 56:8-19.1. Pursuant to this amendment, neither punitive damages nor attorneys fees may be recovered against such real estate professionals for the communication of any false, misleading or deceptive information provided to the real estate professional, if the professional met certain criteria. The professional must be able to demonstrate that he:

a. Had no actual knowledge of the false, misleading or deceptive character of the information; and

b. Made a reasonable inquiry to ascertain whether the information is of a false, misleading or deceptive character.

N.J.S.A. 56:8-19.1(a) and (b).

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This statutory provision further defines what constitutes a "reasonable and diligent inquiry" to include information (1) provided in a report or representation by a licensed person such as an appraiser, home inspector, plumber, or electrical contractor; (2) provided in a report or representation by a government official or employee; or (3) that was obtained from the seller in a property condition disclosure statement. Id.; see also N.J.A.C. 13:45A-29.1 (Property Condition Disclosure Form, which implements the provisions of N.J.S.A. 56:8-19.1 concerning this exemption from the CFA).

If the professional is relying on the property condition disclosure statement as the exemption, note that the buyer must be informed that the seller is the source of the information, but also the professional must visually inspect the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller. Further, the disclosure form used must comply with the form approved by regulation. N.J.S.A. 56:8-19.1(b). Thus, to rely on this exemption, the approved disclosure form must be utilized and the real estate professional independently must inspect the property to determine that the seller's information appears to be correctly reported.

Even if this exemption applies, the real estate professional is only exempted from liability for punitive damages and attorneys fees. This provision does not exempt the professional from compensatory damages. Moreover, common law fraud and a CFA claim can be pursued at the same time. Zorba Contractors, Inc. v. Housing Authority, 362 N.J. Super. 124, 139 (App. Div. 2003).

Realtors are also required to comply with the New Residential Real Estate Off-Site Conditions Disclosure Act. N.J.S.A. 46:3C-1, et seq. This Act requires the disclosure of certain offsite physical conditions in real estate transactions involving new construction. If the realtor satisfies the disclosure obligations under this Act as to offsite physical conditions, that compliance will preclude CFA claims for failure to disclose offsite conditions. Nobrega v. Edison Glen Assocs., 167 N.J. 520, 534 (2001).

As for specific cases under the CFA, in Gennari v. Weichert Co. Realtors, 148 N.J. 582 (1997), a sales agent of a residential real estate developer was found liable for affirmative misrepresentations to purchasers of new homes from the developer. The buyers claimed that the realtor made misrepresentations about the builder's qualifications and the quality of his workmanship. The homes suffered from numerous structural and system defects and shoddy workmanship. The New Jersey court found that the sales agent was liable for making affirmative misrepresentations about the builder's experience and qualifications, which induced the buyers to buy such homes. Accordingly, the agent was found liable under the CFA to the homeowners.

The court has also held a realtor liable for misrepresenting the severity of a home's termite problem. Byrne v. Weichert Realtors, 290 N.J. Super. 126, 134 (App. Div.), certif. den., 147 N.J. 259 (1996). The realtor, knowing that the home had severe termite damage, misrepresented to the buyers the extent of the damage, characterizing it as minimal. Even though the buyers obtained their own termite inspection, since its scope was limited to visible damage, they were entitled to rely on the realtor's representations. Thus, the court found that the realtor could have violated the CFA by keeping silent about the extent of the termite infestation.

Not only can a real estate professional be responsible for failure to disclose known conditions about the home, a realtor could be responsible for misrepresenting the location of a house. Vagias v. Woodmont Props., 384 N.J. Super. 129, 131 (App. Div. 2006). A buyer wanted to purchase a home in a desirable neighborhood because it was perceived to be more prestigious than other sections with a better elementary school. The realtor, who made a false statement of the neighborhood, although without an intent to deceive (she claims she relied on the builder's representations), was found to have made a misrepresentation, which would violate the CFA.

In a similar matter, the realtor mistakenly advised the purchaser of a four-unit apartment building that the property could be rented as a multifamily

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*(Continued from page 19)*

dwelling. Ji v. Palmer, 333 N.J. Super. 451, 454-55 (App. Div. 2000). In fact, the property was zoned for a single-family occupancy only and the purchaser, who had bought the property for investment purposes, was unable to rent it. Even though the realtor did not know the statement was false, that was not enough to prevent the court from finding that the CFA applied to the realtor's representations.

In an unpublished decision, Hagan v. Castro, No. A-2504-05T3 (App. Div. July 13, 2007), the court found that a realtor may have violated the CFA by making affirmative representations as to the square footage of the leasehold. In Hagan, the plaintiff alleged that the realtor knew the dimensions of the property, had measured it, and told the plaintiff that they were sufficient to meet the State standards for a hair salon. As it turned out, the leasehold was only 286 square feet, less than the State required space of 350 square feet. The court found that these statements could constitute affirmative misrepresentations, in violation of the CFA, and that the plaintiff was entitled to pursue this claim.

Other "real estate professionals" or "professional sellers" can be subject to the CFA depending on their actions. In Jackson v. Manasquan Sav. Bank, 271 N.J. Super. 136, (Law Div. 1993), a bank was found subject to the CFA when they represented that they would sell real estate at auction to the highest bidder, but thereafter changed the rules. An architect was found to be potentially be covered by the Act in Blatterfein v. Larken Associates, 323 N.J. Super. 167, 183 (App. Div. 1999), when he was involved in the marketing and sales efforts regarding the real estate.

In today's real estate market, realtors may be tempted to make misrepresentations or fail to disclose known conditions to make a sale. However, these acts may violate the CFA and any such violation could easily exceed any commissions received on the sale. Attorneys should make their real estate professional clients aware that they should be able to avoid or minimize their liability if they comply with the provisions of section 19.1 of the Act and are scrupulous in disclosing known conditions that could affect the condition or value of the property which they are marketing.

*This article was prepared by Betsy G. Ramos, Esq., Chair of Capehart Scatchard's Litigation Group. She has over 25 years experience as a litigator handling matters including business litigation, employment litigation, tort claims and civil rights defense, construction litigation, insurance coverage, tort defense, estate litigation, and general litigation. Should you have any questions or would like more information, please contact Ms. Ramos at 856.914.2052 or by e-mail at bramos@capehart.com.*

# NEW JERSEY SUPREME COURT REJECTS VIOXX MEDICAL MONITORING CLASS ACTION

***John T. Chester, Esq.*** [1]

In June 2008, the New Jersey Supreme Court in *Sinclair v. Merck & Co., Inc*., 195 N.J. 51 (2008), rejected an ambitious attempt to force Merck to fund a massive, nationwide medical-monitoring program for some 20 million former Vioxx users. Why? Because they did not allege that they had sustained any physical injury as a result of their Vioxx use and, as such, failed to plead a *prima facie* tort claim under New Jersey law.

Any other outcome would have had the effect of vastly expanding tort liability under New Jersey law, and would have invited a deluge of no-injury medical-monitoring claims with potentially dire consequences.

The Facts of *Sinclair*

Vioxx was approved by the FDA in 1999 for relief of acute pain, menstrual symptoms, and signs and symptoms of osteoarthritis. On September 30, 2004, the product was withdrawn from the market in light of concerns that it increased the risk of serious cardiovascular events, including myocardial infarction (heart attack). In the wake of market withdrawal, tens of thousands of personal-injury product-liability claims were filed by Vioxx users asserting that the product had caused them to sustain cardiovascular injuries.

By contrast, the *Sinclair* case was filed on behalf of a putative class of all Vioxx users in the United States who had *not* filed personal injury claims. *Sinclair*, 195 N.J. at 55. The *Sinclair* plaintiffs' complaint alleged that, as a result of their Vioxx use, they were "at a significantly increased risk of having suffered an unrecognized myocardial infarction ('UMI') and require[d] medical screening to determine whether, in fact, [they] suffered a UMI." In short, the *Sinclair* plaintiffs claimed that because *some* members of the putative class *may* have had past UMIs caused by Vioxx use, Merck should be required to offer free, screening EKGs to 20 million people to determine whether any of them had had UMIs (which *may* have been caused by Vioxx use).

New Jersey Precedent

The New Jersey Supreme Court has addressed the medical-monitoring remedy (a/k/a "medical surveillance") in three earlier decisions: *Ayers v. Township of Jackson*, 106 N.J. 557 (1987); *Mauro v. Raymark Industries Inc.*, 116 N.J. 126 (1989); and *Theer v. Philip Carey Co.*, 133 N.J. 610 (1993).

In 1987, the Court in *Ayers* first recognized medical monitoring as a special tort remedy. There, 339 plaintiffs established that their town had contaminated the local drinking water with 12 toxic chemicals in a "palpably unreasonable" way. The plaintiffs' expert testified that "the exposure to chemicals had already caused actual physical injury to plaintiffs," putting them at risk of serious disease with a potentially long latency period. On the unique facts of the case, the *Ayers* Court approved medical monitoring, which it termed a "post-injury, pre-symptom recovery."[2] The Court held that in a toxic tort case, the cost of medical surveillance is a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary. [*Ayers*, 106 N.J. at 606.]

In *Mauro*, the Court also permitted medical

*(Continued on page 22)*

# VIOXX MEDICAL MONITORING

*(Continued from page 22)*

monitoring relief for a plaintiff who had developed pleural thickening and was at risk of future disease (cancer) as a result of asbestos exposure.

In *Theer*, however, the Court rejected medical monitoring absent a present physical injury. Mrs. Theer alleged that she was exposed to asbestos in the course of handling her husband's work clothes. Based upon the jury's finding that the plaintiff did not prove that she had an asbestos-related injury, the trial court rejected the plaintiff's prayer for medical-monitoring relief. On appeal, the New Jersey Supreme Court agreed, and clarified that the medical-monitoring remedy is "not easily invoked" and is available only to plaintiffs "who have suffered increased risk of cancer when directly exposed to a defective or hazardous product like asbestos, *when they have already suffered a manifest injury or condition* caused by that exposure, and whose risk of cancer is attributable to the exposure." *Theer*, 133 N.J. at 627 (emphasis added).

**The *Sinclair* plaintiffs failed to plead a *prima facie* case**

The *Ayers/Mauro/Theer* line of cases makes clear that, under New Jersey law, medical monitoring is a not a cause of action but, rather, a special tort *remedy* available if – and only if – an underlying tort is established.[3] As such, the *Sinclair* plaintiffs' claims were rejected because they did not plead the manifest-injury element of their underlying product-liability cause of action.

In *Sinclair*, plaintiffs pled their case as a product-liability action under the New Jersey Products Liability Act ("NJPLA"), N.J.S.A. 2A:58C-1 *et seq*.[4] They did not and could not, however, allege that all class members had sustained a *personal physical injury* – as required to plead a *prima facie* case. Consequently, the *Sinclair* Court held:

Here, it is not disputed that plaintiffs do not allege a personal physical injury. Thus, we conclude that because plaintiffs cannot satisfy the definition of harm to state a product liability claim under the [NJ] PLA, plaintiffs' claim for medical monitoring damages must fail.[5]

**"Unlimited and Unpredictable Liability"**

**This outcome should not be surprising: tort law has traditionally required a physical injury as an element of a cause of action. The problem with plaintiffs' attempt to unhinge medical monitoring from this prerequisite is that the logical extension of doing so is virtually boundless. Indeed, for this reason the United States Supreme Court rejected no-injury monitoring in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997). The plaintiff in *Buckley* sought medical monitoring after being exposed to asbestos dust on a daily basis over a period of three years; he had no symptoms of disease. The Supreme Court commented that the plaintiff was sympathetic and had "suffered wrong at the hands of a negligent employer" – and acknowledged the seeming-inequity of placing the economic burden of medical care on the plaintiff rather than on the negligent defendant. *Id.* at 443 (citing *Ayers*). Nevertheless, the Supreme Court rejected no-injury monitoring and expressed significant policy concerns over the potential systemic effects that could otherwise result:**

**[T]ens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related monitoring. . . . And that fact, along with uncertainty as to the amount of liability, could threaten both a "flood" of less important cases (potentially absorbing resources better left available to those more seriously harmed . . . ) and the systemic harms that can accompany "*unlimited and unpredictable liability*" (say, for example, vast testing liability adversely affecting the allocation of scarce medical resources). [*Id*. at 442 (emphasis added).][6]**

Likewise, the Kentucky Supreme Court in *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002), unanimously rejected a medical-monitoring class action because "[w]ith no injury there can be no cause of action." *Id*. at 855. The

*(Continued on page 23)*

# VIOXX MEDICAL MONITORING

*(Continued from page 22)*

Court commented: "[*A*]*ny other outcome would result in inordinate burdens for both the potential victim and the alleged negligent party*. . . . If each were actually tested, and the results of the tests showed no physical disease, the negligent party will have paid large sums of money despite having caused no physical injury. . . . *Id.* at 859 (emphasis added).

**Conclusion**

It is no surprise that enterprising plaintiffs' attorneys pursue no-injury medical-monitoring class actions: if such cases are viable, plaintiffs' attorneys stand to collect huge fees attendant to gigantic monitoring programs set up for thousands – or even millions – of people with no known present injury.[7]

As the United States Supreme Court recognized in *Buckley*, permitting no-injury monitoring claims will expand liability exponentially – to the point that liability becomes "unlimited and unpredictable." This would have dire consequences for our tort system's ability to deliver prompt justice to those who need it most. Ultimately, limiting medical-monitoring claims to those predicated on physical injuries will prevent a flood of litigation based only on allegations of possible or potential harms, and thereby preserve judicial and corporate resources for those who have actually been injured.

## Endnotes

[1] John T. Chester is Counsel at Porzio, Bromberg & Newman P.C., and a member of the firm's Commercial Litigation Group, and the Appellate Practice Group. Mr. Chester defends clients in cases involving commercial law disputes, Pharmaceutical and medical devise product-liability claims, and consumer-fraud matters. He also counsels clients with respect to product warnings, post-marketing safety monitoring, promotion, and marketing issues. Mr. Chester co-authored defense amicus briefs on behalf of the Product Liability Advisory Council, Inc. (PLAC) in the *Sinclair v. Merck & Co., Inc*. case discussed herein.

[2] *See Ayers, 106* N.J. at 604. *Ayers* is commonly misinterpreted as a no-jury case. Such reading, however, ignores the Court's characterization of medical surveillance as "***post-injury***, pre-symptom" relief. That the *Ayers* plaintiffs claimed (and offered expert testimony) that they had "already suffered physical injury" was emphasized by Justice Handler in his separate opinion concurring in the holding that medical-monitoring relief was available, and dissenting from the majority's rejection of a separate enhanced-risk claim. *See id*. at 614-15.

[3] *See e.g., Ayers*, 106 N.J. at 606 (the cost of medical-surveillance damages constitute a special compensatory remedy").

[4] Before adoption of the NJPLA, New Jersey courts generally adopted the view of the *Restatement (Second) of Torts* § 402A (1965), which defined strict liability in tort for defective products sold solely in terms of *physical* harm. *Sinclair*, 195 N.J. at 64.

[5] *Sinclair*, 195 N.J. at 65 (citation omitted). Significantly, the *Sinclair* Court rejected plaintiff's attempt to cast their claims, in the alternative, as claims to recover an economic loss under the New Jersey Consumer Fraud Act. *Id*. At 65-66. It is now well-established that, under the New Jersey law, claims relating to harms caused by products are governed by the NJPLA. *See id.; In re Lead Paint*, 191 N.J. 405, 436-37 (2007).

[6] *See*, similarly, *Ball v. Joy Manufacturing Co*., 755 F. Supp. 1344, 1372(S.D.W.Va 1990)

# VIOXX MEDICAL MONITORING

*(Continued from page 24)*

(concluding that a tort system that awards medical monitoring to those who have been exposed to hazardous substances but have suffered no resulting present injury "could potentially devastate the Court system as well as the defendants"), *aff'd*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

[7] Members of the plaintiff's bar have an obvious and enormous financial stake in [medical monitoring] proceedings." J. Henderson & A. Twerski, *Asbestos Litigation gone mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C.L. REV. 815, 848 (2002) (criticizing medical-monitoring damages in the absence of present injury or illness, and noting that plaintiffs' attorneys "are almost certainly the major beneficiaries of the successes enjoyed thus far").

***save the date...***

**Young Lawyers Committee**
**Summer Associate Luncheon**

**Tuesday, June 16, 2009**
**12:30 p.m.**
**Tumulty's Pub**
**361 George Street, New Brunswick**
**$25.00 per person**

# SPRING CLEANING

## *Brian O'Toole, Esq.*

With the snow melting, flowers budding and birds singing again, we pause once more to reflect upon our lives as trial lawyers and how important the little things can be. Here's our 2009 Wish List:

**10.** In Appellate practice, require only two copies of everything. Let's leave some trees for our grandkids.

**9.** Require any lawyer whose cell phone or blackberry or blueberry goes off during a deposition to buy lunch. Hey, it's a start!

**8.** Send a gentle message on a regular basis to all Judge's staff reminding them they are not the Judge. We should at least all know who's driving the bus!

**7.** Eliminate the rule that makes court arbitrations binding if not de novo'ed in 30 days. Then we can take our malpractice carrier off speed dial.

**6.** Encourage Judges to pick only seven jurors in a short civil case. Excluding two jurors as alternates can really upset the array.

**5.** At calendar calls allow the ready cases to be called first, regardless of their age. This might obviate the need for a second blood pressure pill.

**4.** Let's go back to the lawyer doing the jury *voir dire*. We've got to have some fun.

**3.** Return to motion days every Friday and the courts closed for August. Maybe we might get close to an average life span.

**2.** Make St. Patrick's Day a court holiday. Either that or allow all Irish lawyers to call in sick.

***And our Number 1 Wish:***

**1.** Extend the retirement age for the Honorable Eugene Codey to 90. He is a true friend of the Bar.

The views expressed by Mr. O'Toole are not necessarily shared by all members of the NJDA. The editorial board, however, recognizes that he has been around a long time, knows a lot of stuff and generally wishes everyone in the practice health and prosperity during every season of the year. We can't argue with that.

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# June 25 – 28, 2009