NEW JERSEY DEFENSE

FALL 2011

NEW JERSEY DEFENSE ASSOCIATION

PRESIDENT'S MESSAGE

EDWARD J. FANNING, JR., ESQ.

One of our top priorities for my year as President is for the NJDA to continue to provide first-rate in CLE while at the same time helping our members build their practices in these challenging economic times. I am happy to report that we are off to an excellent start. In November alone, we held two truly exceptional seminars with record-setting attendance. Marie Carey assembled an all-star lineup of Superior Court judges and private practitioners for our Women and the Law Seminar. The panelists discussed candidly the unique challenges and opportunities faced by female attorneys, including building professional relationships, trial advocacy considerations, business development, the importance of professionalism, and perspectives on the difficult work-like balance. It was an enlightening and engaging discussion showcasing various viewpoints from the bench, seasoned practitioners, and young lawyers. The positive energy and camaraderie in the room were incredible. Not surprisingly, the reviews for the seminar were truly exceptional.

Not to be outdone, on November 22, Chad Moore moderated a terrific Auto Liability Seminar featuring Mike Marone and Rich Williams discussing bad faith case law and proposed legislation, and Rob Luthman leading an interactive discussion regarding which medical expenses are "boardable" at trial. As an added bonus, we were able to co-sponsor this seminar with the Insurance Council of New Jersey. Their members also came out in large numbers for this seminar, which provided an opportunity for our NJDA members to spend valuable time with our ICNJ friends and colleagues. Again, the reviews were off the charts. I would like to extend a heartfelt thanks to Marie Carey, Chad Moore, all of our distinguished speakers, and our sponsors for presenting these excellent seminars to you.

As we move into the holiday season, I invite you all to join us for our upcoming Holiday Party on Tuesday, December 13 at 6:30 p.m. at Tumulty's in New Brunswick. In the spirit of giving, our Young Lawyers Committee has designated Community Hope as our charity for this event. Community Hope is a great organization that provides therapy, counseling and support for homeless veterans and victims of mental illnesses. As always, it promises to be a lively, festive and fun evening in support of a worthy cause.

As we move through the holidays and into the New Year, please keep an eye out for further information on our annual Trial College, which has established itself as one of the premier trial advocacy training programs in the state. On February 13, 2012, our breakout groups will be occupying several courtrooms at the Union County Courthouse for this intensive hands-on trial advocacy workshop. Whether you are just starting out or have been practicing for decades, this unique CLE program is for you. Demand for this seminar is always very high so please be sure to reserve a spot early.

Best wishes for a wonderful holiday season and a happy, healthy and prosperous New Year!

Ed Fanning

VOLUME 27, ISSUE 1 FALL 2011

In this issue:

OFFICERS AND DIRECTORS

CHAIRMAN OF THE BOARD
Joseph J. Garvey, Esq.
Garvey, Ballou & Rogalski
204 Courthouse Lane
Toms River, NJ 08754
732-341-1212
jgarvey@courthouselane.com

PRESIDENT
Edward J. Fanning, Jr., Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-622-4444
efanning@mccarter.com

PRESIDENT-ELECT
Mark A. Saloman, Esq.
Proskauer Rose
One Newark Center
Newark, NJ 07102
973-274-6038
msaloman@proskauer.com

SECRETARY/TREASURER
Michele G. Haas, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
mhaas@hoaglandlongo.com

VICE PRESIDENT NORTHERN REGION
Scott T. Glennon, Esq.
The Law Offices of William E. Staehle
1200 The American Road
Morris Plains, NJ 07950
973-606-5661
sglennon@travelers.com

VICE PRESIDENT CENTRAL REGION
Jeffrey A. Bartolino, Esq.
New Jersey Manufacturers Insurance Co.
301 Sullivan Way
West Trenton, NJ 08628
609-883-1300
jbartolino@njm.com

VICE PRESIDENT SOUTHERN REGION
John M. Cinti, Esq.
Reger Rizzo Kavulich & Darnall
700 East Gate Drive Suite 101
Mt. Laurel, NJ 08054
856-778-8950
jcinti@rrkdlaw.com

DIRECTORS 2009-2012

Brian Chabarek, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
bchabarek@hoaglandlongo.com

Mario Delano, Esq.
Campbell Foley Delano & Adams
601 Bangs Avenue
Asbury Park, NJ 07712
732-775-6520
mdelano@campbellfoley.com

DRI STATE REPRESENTATIVE
Michael J. Leegan, Esq.
Hack Piro O'Day Merklinger Wallace & McKenna
30 Columbia Turnpike
Florham Park, NJ 07932
973-301-6500
mleegan@hpomlaw.com

DIRECTORS 2010-2013

Gregory McGroarty, Esq.
Litvak & Trifolis
45 Horse Hill Road
Cedar Knolls, NJ 07927
973-359-0090
gmcgroarty@litandtrif.com

Stephen R. Banks, Esq.
Florio & Kenny
100 Hudson Street
Hoboken, NJ 07030
201-659-8011
stephen.banks@floriokennylaw.com

DIRECTORS 2011-2014

Chad Moore, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
cmoore@hoaglandlongo.com

Herbert Kruttschnitt, Esq.
Law Offices of Charles P. Hopkins, II
200 Schultz Drive
Red Bank, NJ 07701
732-933-7900
herbert.kruttschnitt@cna.com

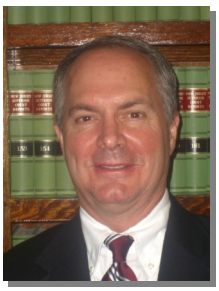
BUCK V. HENRY: AND A CASE AGAINST THE AFFIDAVIT OF MERIT STATUTE

BY HERBERT KRUTTSCHNITT, III, ESQ.*

I must confess that I have never been a big fan of the Affidavit of Merit Statute. It was a "feel-good" piece of legislation that has been more of a minefield for plaintiffs than a gatekeeper of frivolous lawsuits. Given the fact that a lawsuit against a professional generally requires expert testimony to get the case to a jury, it is likely that the marketplace, rather than any statute, already keeps utterly meritless professional negligence claims to a minimum. One third of nothing is, and always will be, nothing; and plaintiff lawyers do not become successful by tilting at windmills. If, at the end of the day, a professional negligence claim is not going to have the support of an expert, it is probably not going to be filed in the first place – or else dismissed at some point fairly early in discovery. The Affidavit of Merit statute may have given the Health Care lobby something to cheer about, but even in theory, it is of questionable value. In practice, it has been a menace.

This article will explore the evolution of the statute, as well as the machinations to which our Supreme Court has resorted in an effort to ensure that the statute will never result in an injustice. But first, an observation about how even a defendant can fall prey to its unintended consequences. Recently, after (unsuccessfully) arguing a summary judgment motion, I left the courthouse, once again, pondering whether we all might be better off without the Affidavit of Merit statute. I had argued a motion for summary judgment based upon the statute of limitations. What, you might ask, does the Affidavit of Merit statute have to do with the statute of limitations?

I had moved for summary judgment in a case in which the plaintiff had filed an Amended Complaint four years after the alleged malpractice, and more than two years into the lawsuit. My client is an emergency room nurse who cared for a patient who allegedly died as a result of a reaction to a medication that the nurse had administered. My argument on the motion was simple. Plaintiff was aware of all of the events that gave rise to the cause of action at the time that the original Complaint had been filed. Plaintiff knew that my client had administered the medication, and plaintiff knew the identity of my client as well. Her name was not an indecipherable set of initials on the ER chart. Her name was typewritten all over the electronic chart, and clearly identified her entire involvement with this patient. There could be no "discovery rule" argument – or so I thought. Clearly that statute of limitations had expired more than two years prior.



In opposing my motion, plaintiff's counsel made a clever argument - as one must do when there are no meritorious arguments to support one's position. To my surprise, however, the court actually agreed with it. Plaintiff certified that when the suit had first been filed, he had consulted a nurse expert who advised that she could not sign an Affidavit of Merit against my client. However, after two years of discovery and a number of depositions, including the subpoenaed deposition of my client before she was a party, the nurse expert was now willing to sign an Affidavit. The nub of plaintiff's argument was that until the expert was willing to sign an Affidavit of Merit, there was, under the language of the Affidavit of Merit statute, no cause of action. *Thus, the cause of action did not accrue until an expert was willing to offer an opinion against this nurse.*

Is there a chance in the world that when the Legislature passed the Affidavit of Merit statute, it ever imagined that it was creating another tolling provision to the statute of limitations? Worse yet, that it were setting the stage for defendants to be joined years into a lawsuit. Speaking for my client, it would have been much better for her to have had the opportunity to have participated in discovery, and to have been represented at the many depositions that preceded the Amended Complaint. In pre-Affidavit of Merit days that would have been the situation. In my case, due entirely to the Affidavit of Merit statute, the very person the statute was enacted to protect, is the person most prejudiced. We are now scrambling to get up to speed on the case, dealing with the conse-

(Continued on page 4)

AFFIDAVIT OF MERIT STATUTE

(Continued from page 3)

quences of discovery that we were not able to participate in, and facing almost unrealistic discovery deadlines because of the age of the case.

One might argue that the Affidavit of Merit statute has been more of a trap for the unwary, than as a gatekeeper of frivolous suits. And, it has been interesting to watch our Supreme Court valiantly try to fix the Affidavit of Merit statute. If my recent experience is an indicator, we may have now come full circle regarding whom the statute actually imposes the harshest burden upon.

The Affidavit of Merit first appeared on the professional negligence scene in 1995, when the NJ Legislature passed, N.J.S.A. 2A:53A-27 entitled "Affidavit Required in Certain Actions Against Licensed Persons" (otherwise known as the Affidavit of Merit Statute). The law provides, in pertinent part,

> "In any action for damages. . . resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the *plaintiff shall*, within *60 days following the date of filing of the answer* to the complaint by the defendant, provide each defendant with an affidavit of an *appropriate licensed person* that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices." *(italics mine)*

The Statute further provides that if such an affidavit is not obtained, "it shall be deemed a failure to state a cause of action". (N.J.S.A. 2A:53A-29).

The Act was later amended in 2004 in order to add a provision specific to medical malpractice matter, which provides,

> "In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in . . . (N.J.S.A.) 2A:53A-41"

N.J.S.A. 2A:53A-41 provides,

> "If the party against whom or on whose behalf the testimony is offered is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association and the care or treatment at issue involves that specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association, the person providing the testimony shall have specialized . . .in the same specialty or subspecialty. . .as the party against whom, or on whose behalf the testimony is offered."

It is not the purpose of this article to criticize N.J.S.A. 2A:53A-41 in any respect. As someone who has handled medical malpractice matters for over thirty years, I remember clearly the days when any doctor could come to court and criticize any other doctor, and the qualifications (or utter lack thereof) of the expert were for the jury to consider in determining the weight of that expert's testimony. N.J.S.A. 2A:53A-41 provides a useful threshold function to the admissibility of the testimony of an 'expert'.

However, contrary to its intended purpose, N.J.S.A. 2A:53A-27 has been a constant challenge to our Supreme Court, in an effort to preserve the statute, and at the same time prevent the injustices inherent in its application. To paraphrase one of my favorite judges in the unpublished (*officially* unpublished) opinion of *State v. Harris*, "Instead of pecking the statute to death, maybe it's time to just drive a stake through it."

One of the early reported decisions interpreting the Affidavit of Merit statute was the case of *Cornblatt v. Barow*, 303 N.J. Super. 81 (App. Div. 1997). In *Cornblatt*, a legal malpractice claim was dismissed because it had been supported by a

(Continued on page 5)

AFFIDAVIT OF MERIT STATUTE

(Continued from page 4)

"Certification", as opposed to an "Affidavit"; the certification had not set forth the qualifications of the author; and it was furnished beyond 60 days. The Appellate Division affirmed the dismissal and the Supreme Court granted Certification. The NJ Supreme Court reversed (153 N.J. 218)(1998). Hence began a line of cases by which the Court has 'enacted' a string of 'amendments' to N.J.S.A. 2A:53A-27, the net result of which has been to essentially ensure that the only suits that are ever dismissed by virtue of N.J.S.A. 2A:53A-27 are suits that would probably have died a natural death anyway, or never should have been filed in the first place.

Perhaps the most significant 'amendment' to the Affidavit of Merit statute occurred as a result of the matter of *Ferreira v. Rancocas Orthopedic Associates*, 178 N.J. 144 (2003). In *Ferreira*, plaintiff had obtained the affidavit of merit but neglected to serve it on the defendants within 60 days. After the 60 days had elapsed, but before the motions were filed, plaintiff served the affidavit of merit on the defendants. Defendants moved for a dismissal of the claim. The trial court dismissed the case because plaintiff had not timely furnished an affidavit of merit in accordance with the statute. The Appellate Division affirmed the trial court, and the Supreme Court granted certification. The Supreme Court reversed.

In all due respect, the affidavit of merit statute may be harsh, it may even be draconian, but it says what it says. In preparing to reverse the Appellate Division, the Ferreira Court gave us a harbinger of things to come: "the Affidavit of Merit statute applicable to malpractice actions was intended to flush out insubstantial and meritless claims . . .the statute was not intended to encourage gamesmanship or a slavish adherence to form over substance." 178 N.J. at 154. "Slavish adherence to form over substance"? - by applying the Affidavit of Merit statute according to its clear and unambiguous language?

In *Ferreira*, the Court again 'amended' the Affidavit of Merit statute by shifting the burden of plaintiff's compliance on to the trial court, and to the defendants. The decision gave rise to an early court appearance in all professional negligence claims, referred to by the Supreme Court as an "Accelerated Case Management Conference", more commonly referred to as a "Ferreira Conference". The purpose is to give plaintiff the opportunity to cure any failure to adhere to the Affidavit of Merit statute before suffering a dismissal of the claim.

The Ferreira Court also held that an affidavit of merit is not out of time if it is served beyond 60 days, as long as it is filed before the defense files a motion to dismiss. Therefore, "60 days" is only 60 days if the defendant promptly files a motion. Where does the statute say "within 60 days as long as the defendant files a motion to dismiss on day 61"?

Since *Ferreira*, it has not been legal malpractice on the part of a plaintiff to fail to file a timely affidavit of merit unless the defendant also commits legal malpractice by neglecting to immediately file a motion to dismiss. It seems that the Supreme Court is bound and determined not to allow the Affidavit of Merit statute to result in a dismissal of a claim that has any merit whatsoever.

The Affidavit of Merit statute does not say that the only claims that will suffer a dismissal for failure to comply with the statute are those claims which should never have been filed in the first place. It requires a similarly licensed expert Affiant as the licensed professional defendant to opine within 60 days that the case has merit. It is not this writer's intention to ever advocate "slavish adherence to form over substance". It is also not the point of this article to suggest that meritorious claims should ever be thrown out on procedural technicalities. There is another solution.

But first, we must discuss the most recent 'amendment' to the Affidavit of Merit statute, the case of *Buck v. Henry*, 207 N.J. 377 (2011). In *Buck*, plaintiff supplied not one affidavit of merit, but two. Plaintiff brought suit against a physician board certified in Emergency Medicine, alleging that the physician had negligently prescribed a sleep medication. Plaintiff supplied an affidavit by an emergency physician, as well as an affidavit by a physician specializing in psychiatry. The defendant moved for summary judgment, arguing that both affidavits did not meet the requirement of the statute because, at the time defen-

(Continued on page 6)

AFFIDAVIT OF MERIT STATUTE

(Continued from page 5)

dant had treated the plaintiff he was practicing Family Medicine.

Summary judgment was granted and, predictably, the Appellate Division read the statute literally and affirmed the dismissal. Certification was granted by the Supreme Court; and, yet again, putting the interest of justice ahead of the language of the Affidavit of Merit statute, the Supreme Court reversed. In so doing, the Court has added yet another provision to the statute that is nowhere in the statute. The Court held that, henceforth, it will be the burden of the defendant to "indicate in his answer the field of medicine in which he specialized, if any, and whether his treatment of the plaintiff involved that specialty." 207 N.J. at 396. Consequently, the defendant is now required to tell the plaintiff what type of affidavit to obtain.

\ The Buck Court observed that "the failure to file an appropriate affidavit within the statutory time limits may result in a dismissal of even meritorious cases." Id. at 383. The Court then stated, once again, that "The purpose of the Affidavit of Merit statute is to weed out frivolous complaints, not to create hidden pitfalls for meritorious ones." Id. In *Buck*, there was a dissenting opinion which observed that the Court has not only "transform(ed) the obligation that our Legislature chose to place on plaintiffs into a burden imposed on defendants," but that the Court has also "engraft(ed) requirements onto the statute that defy the Legislature's intent." Id. at 396-97.

THERE WE HAVE IT. Compliance with Affidavit of Merit statute is now the responsibility of the *trial court* (Ferreira conference), *the defendant* (filing a motion immediately after 60 days, as well as telling the plaintiff what type of affidavit to obtain); and even then, it is clear that our Supreme Court stands ready to reverse the dismissal of any professional negligence case that can pass the straight face test. If the case is not utterly ridiculous, N.J.S.A. 2A:53A-27 is probably not going to apply to it.

In the 15 years since the Affidavit of Merit statute has been law, the bar has been lowered almost all the way to the floor; and if anyone should ever happen to trip over it, certification will probably be granted by our Supreme Court. In all due respect to a well meaning statute, if the intent of the Legislature was to only create an obstacle for cases that would eventually have gone up in smoke anyway, how does one legislate that? Good intentions are not always capable of being turned into good legislation. The position the Court seems to be taking with respect to N.J.S.A. 2A:53A-27 would be akin to suggesting that there is something wrong with the grand jury system if it ever "true bills" an innocent person, or "no bills" a guilty one. Preliminary barriers to entry are inherently flawed. If a system cannot accept the fact that an early barrier to entry will occasionally work an injustice, then the system ought not to have a preliminary gate keeping requirement. I, for one, would be just as happy to see the Affidavit of Merit statute go the way of the old Rule 4:21 "Medical Malpractice Panel." And, I should not have lost that summary judgment motion.

* Herb is a Senior Litigation Attorney and Staff Counsel for CNA, specializing in the defense of medical negligence claims, and is Chair of the NJDA's Professional Liability Committee.

ENDNOTES

[1] In a recent unreported Appellate Division decision, Cornejo v. Kansagra (decided September 19, 2011), the Court held that N.J.S.A. 2A:53A-41 should be govern the qualifications of an author of an affidavit of merit, holding that the statute effectively overruled the case of Wacht v. Farooqui, 312 N.J. Super. 184 (app. Div. 1998), which had held that a doctor in one area of specialization could author an affidavit of merit against a doctor in another area of specialization if there was an overlap between the two separate areas of practice. Cornejo is currently on certification to the NJ Supreme Court.

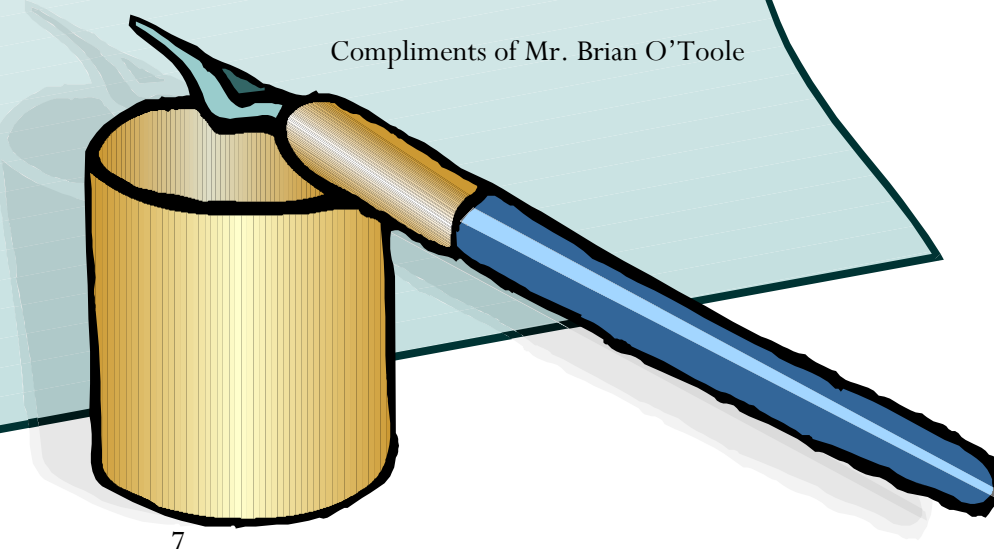
[2] In a recent concurring opinion in Paragon Contractors, Inc. v. Peachtree Condominium Association, 202 N.J. 415, 427 (2010), it should be noted that Justice Rivera-Soto referred to the Ferreira Conference as "yet another example of well-intentioned but fundamentally misguided judicial tinkering."

A Christmas Quiz

1. How did George Bailey know that his life had returned to normal in It's a Wonderful Life?
2. What was Scrooge's Christmas present to his housekeeper, Mrs. Dilbert, in A Christmas Carol?
3. What was the Grinch's dog's name in How the Grinch Stole Christmas?
4. Irving Berlin's "White Christmas" debuted in the movie Holiday Inn? T or F
5. What toy did Ralphie want most for Christmas in A Christmas Story?
6. Who unexpectedly shows up at Clark Griswold's house lighting in Christmas Vacation?
7. What time was the close of business at Scrooge and Marley in A Christmas Carol?
8. What song did Bert the cop and Ernie the cabdriver serenade George and Mary with on their wedding night in It's a Wonderful Life?
9. What was the head elf's name in The Santa Clause?
10. What was Uncle Billy's pet at Bailey Savings & Loan in It's a Wonderful Life?
11. Where did Ralphie's family end up eating Christmas dinner in A Christmas Story?
12. In Meet Me in St. Louis, what classic Christmas song did Judy Garland debut?

Answers on page 18

Compliments of Mr. Brian O'Toole



WINNING PRESCRIPTION MEDICINE PERSONAL INJURY CASES ON MOTION: THE APPELLATE DIVISION AFFIRMS *BAILEY V. WYETH, INC. AND DEBOARD V. WYETH, INC.*

BY: CHARLES W. COHEN, ESQ. AND ERIC K. BLUMENFELD, ESQ.*

New Jersey is home to many of the world's leading pharmaceutical companies. Indeed, New Jersey boasts on its official web page that it is "the global epicenter of the pharmaceutical industry."[1] It is no surprise then that New Jersey is also home to an extensive amount of litigation concerning prescription medicines. The Mass Tort program (which now also handles certain litigation under a more neutrally named "centralized management" system) is composed in large part of personal injury litigation involving prescription medicines. The Mass Tort courts, which sit in Atlantic, Bergen, and Middlesex counties, preside over dockets that are large because many plaintiffs choose to file prescription medicine lawsuits in New Jersey state court. Whether this is because it is simply logical to sue a company in its home jurisdiction or because law firms representing plaintiffs perceive New Jersey state court to be a more hospitable venue for them than federal court (and actively market this perception when soliciting referrals)[2] is a matter of debate among counsel who practice in the area.

In September, the Appellate Division handed down an opinion that should cause plaintiffs some pause. The opinion, issued in a consolidated appeal of *Deboard v. Wyeth* and *Bailey v. Wyeth*, ___ N.J. Super. ___, 2011 WL 4482558 (App. Div. Sept. 29, 2011), affirmed the summary judgment Judge Happas granted to Wyeth and Pharmacia & Upjohn on the basis of the substantial presumption of adequacy that the New Jersey Products Liability Act, N.J.S.A. 2A:58C-1 to -11 ("PLA"), accords a prescription medicine label that complies with U.S. Food and Drug Administration ("FDA") regulations.

The PLA provides that "[i]n any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction. . . ." N.J.S.A. 2A:58C-4. "If the warning or instruction given in connection with a drug. . . has been approved or prescribed by the federal Food and Drug Administration . . . a rebuttable presumption shall arise that the warning or instruction is adequate." *Id.*

Rule of Evidence 301 governs evidentiary presumptions except as the law may otherwise provide. *See N.J.R.E.* 301. As a general matter, "[i]f evidence is introduced tending to disprove the presumed fact, the issue shall be submitted to the trier of fact for determination. . . ." *Id.* But the New Jersey Supreme Court has held that the PLA requires a product-liability plaintiff to present evidence of intentional misconduct in order to rebut the PLA's presumption of adequacy. In *Perez v. Wyeth Laboratories., Inc.*, 161 N.J. 1 (1999), the Court held that "[f]or all practical purposes, absent deliberate concealment or nondisclosure of after-acquired knowledge of harmful effects, compli-

(Continued on page 9)

PRESCRIPTION MEDICINE CASES

(Continued from page 8)

ance with FDA standards should be virtually dispositive" of failure-to-warn claims *Id.* at 25; *see also Rowe v. Hoffman-La Roche, Inc.*, 189 N.J. 615, 626 (2007).[3] In 2008, the Appellate Division announced a "hitherto unrecognized legal basis" to overcome the N.J.S.A. 2A:58C-4 presumption; it held that substantial proof of "manipulation of the post-market regulatory process" would also rebut the statutory presumption of adequacy. *McDarby v. Merck & Co., Inc.*, 401 N.J. Super. 10, 63 (App. Div. 2008).

Notwithstanding the N.J.S.A. 2A:58C-4 presumption, Mass Tort practitioners have seen numerous prescription medicine cases go to trial. Indeed, there is a standard jury charge embodying the N.J.S.A. 2A:58C-4 presumption.[4] This charge reads:

> Defendant has offered evidence that the warnings and instructions were approved or prescribed by the Federal Food and Drug Administration. Plaintiff [*disputes that and further*] contends that even if so approved, the warnings were still inadequate. Compliance with F.D.A. warnings and instructions does not mean necessarily that the warnings were adequate, but such compliance, along with the other evidence in this case, may satisfy you that they were. Defendant has the burden of proving that the warnings and instructions were approved by the F.D.A. If there has been compliance with the F.D.A. action, than [*sic*] [*plaintiff*] has the burden of proving that the approved warnings or instructions were, nevertheless, inadequate. You may find that the warnings or instructions were inadequate despite the F.D.A. approval.

But defendants also invoke the N.J.S.A. 2A:58C-4 presumption on motion, seeking to avoid the cost and uncertainty of a jury trial. While not the first decision to find that a prescription medicine's warning was adequate as a matter of law,[5] Judge Happas's opinion was notable because she specifically relied on the N.J.S.A. 2A:58C-4 presumption of adequacy and held that plaintiffs' ability to rebut the presumption is limited. The Appellate Division's opinion is itself notable because it affirms "substantially on the basis of the well-considered and exhaustive opinion of Judge Happas in the *Bailey* matter, which we have determined to be well supported by the evidence and legally unassailable." *Deboard*, 2011 WL 4482558, at *1, *aff'g* 2008 WL 8658571 (Law Div. July 11, 2008).

Judge Happas's opinion found that the N.J.S.A. 2A:58C-4 presumption is stronger than the ordinary presumption and can only be rebutted if plaintiffs present proof of "(i) deliberate concealment or nondisclosure of after-acquired knowledge of harmful effects ("*Perez/Rowe*" exception) or (ii) manipulation of the post-market regulatory process ("*McDarby*" exception). *Bailey*, 2008 WL 8658571, at *15 (internal citations omitted). For the latter, plaintiffs can only overcome the presumption if they produce "substantial evidence." *Id.* (internal citation omitted).

Judge Happas found that the *Perez/Rowe* exception did not apply because plaintiffs failed to present any evidence of deliberate concealment or nondisclosure of after-acquired knowledge of harmful effects. To the contrary, their expert, the frequently-used Suzanne Parisian, admitted that she was not accusing either Wyeth

(Continued on page 10)

PRESCRIPTION MEDICINE CASES

(Continued from page 9)

or Upjohn of deliberate concealment or nondisclosure. *Id.* at *17.

With respect to the *McDarby* exception, the plaintiffs claimed that they could overcome the N.J.S.A. 2A:58C-4 presumption because Wyeth (1) should have conducted more testing; (2) put specific representations in the Prempro label which it knew to be untrue; (3) minimized or discounted studies that showed an increased breast cancer risk; (4) was the subject of FDA regulatory letters concerning marketing issues; and (5) ghost wrote articles. Judge Happas rejected each of these claims. She rejected the claim that the defendants should have conducted more testing because she found this is a claim plaintiffs can always make, which makes it ineffective against the strong N.J.S.A. 2A:58C-4 presumption. *Id.* at *18. She rejected the misrepresentation and minimization claims because she found no evidence to support them. *Id.* at *19. She rejected the FDA regulatory letter claim because Wyeth had addressed the FDA's concerns, which showed that any conduct was not intentional. *Id.* Finally, she rejected the ghost writing claim as being irrelevant because the articles did not affect the "implementation of what the FDA requested be in the Premarin or Prempro labeling or diluted the warnings on these drugs." *Id.*

Plaintiffs claimed that the *McDarby* exception applied to Upjohn because its medicine was being used by doctors "off-label." In other words, doctors were using the Upjohn medicine for purposes other than the purposes specifically contained as approved uses in the medicine's prescribing information. However, Judge Happas found that this fact did not affect the outcome. She found, based on the record, that "[t]he FDA was well aware that physicians were prescribing progestin products off-label with estrogen products" during the relevant period. *Id.* at *20. The Court further determined that, in any event, the specific facts in the record did not support a finding of intentional wrongdoing:

> Even if the court were to accept plaintiffs' argument that the FDA is powerless to require specific warnings regarding prescription medicines that are prescribed off-label unless there is a "pending application before the FDA," the Provera timeline reveals that Provera [Upjohn's progestin prescription medicine] was before the FDA on pending applications in 1991 and 1998. On both occasions, the FDA found the inclusion of any specific warning language associating combination use with an increased risk of breast cancer to be unverified.

Id. at *21. Finally, the Court held that the other specific conduct plaintiffs claimed supported the *McDarby* exception did not show intentional conduct "by Upjohn which caused the warnings on the Provera label to be diluted or the dissemination of information determined by the FDA to belong in the Provera labeling to be delayed." *Id.*

By affirming *Deboard/Bailey* "substantially on the basis of the well-considered and exhaustive opinion of Judge Happas in the *Bailey* matter, which [it] determined to be well supported by the evidence and legally unassailable," the Appellate Division has provided new ammunition for defendants seeking to win prescription medicine cases on motion. Of course, Judge Happas noted that she had a broad record before her, which allowed her to make detailed findings in favor of defendants, and which allowed the Appellate Division to affirm those findings. Defendants in future cases now have a

(Continued on page 11)

PRESCRIPTION MEDICINE CASES

(Continued from page 10)

roadmap to the record they should try to develop as they litigate their own cases.

*Charles W. Cohen is a partner at Hughes Hubbard & Reed LLP, and currently serves as the Chair of the NJDA Products Liability Committee. Eric K. Blumenfeld is counsel at Hughes Hubbard & Reed LLP, where he focuses his practice on products liability and complex civil litigation.

ENDNOTES

[1] *State of New Jersey Business Portal*, OFFICIAL WEBSITE FOR THE STATE OF NEW JERSEY, http://www.nj.gov/njbusiness/industry/pharmaceutical (last visited Nov. 3, 2011).

[2] *See, e.g.,* letter from Arthur Luxenberg (Dec. 29, 2004), *available at* http://druganddevicelaw.net/Vioxx%20forumshopping%20letter.pdf.

[3] The plaintiffs in *Bailey* argued that *Perez* addressed only pharmaceuticals that were advertised directly to consumers ("DTC"), but Judge Happas held that the *Perez* Court recognized that the presumption applies to all pharmaceuticals. *Bailey*, 2008 WL 8658571, at *16 ("Contrary to plaintiffs' argument, the presumption crafted in *Perez* was not confined to DTC advertising").

[4] *See Charge 5.40D-4: Design Defects--Defenses, 2-3* http://www.judiciary.state.nj.us/civil/charges/5.40D-4.pdf (last revised Oct. 2001).

[5] For example, New Jersey courts have found the labeling for Accutane was adequate as a matter of law with respect to possible birth defects. *Banner v. Hoffman-LaRoche, Inc.,* 383 N.J. Super. 364 (App. Div. 2006); *Clark v. Hoffman-LaRoche, Inc.,* No. ATL-L-67-05 (Law Div. May 2, 2006), *available at* http://www.judiciary.state.nj.us/mass-tort/accutane/hoffman_mod_050306.pdf.

NJDA Office

Maryanne Steedle

Executive Director

P.O. Box 463 • Linwood, NJ 08221

Phone 609-927-1180 Fax 609-927-4540

njdefenseassoc.com

IS YOUR *WOOLLEY* DISCLAIMER REALLY ENOUGH TO PRESERVE EMPLOYEES' AT-WILL STATUS IN NEW JERSEY?

BY ALYCHIA L. BUCHAN ESQ.*

In the absence of an employment contract, New Jersey employers have historically been able to discharge employees for cause or for no cause at all. Even where assurances of job security, permanent employment or the like are made to an at-will employee no contract exists unless the "employee furnishes … consideration additional to the services incident to employment." *Savarese v. Pyrene Manufacturing Co.*, 9 N.J. 595, 599 (1952). Over the past two decades, however, the rules governing at-will employees have been limited and modified by both statutory and judicially-created exceptions. Indeed, two recent decisions suggest that the rules of the at-will employment doctrine may be changing yet again.

The Need For A *Woolley* At-Will Employment Disclaimer

In *Woolley v. Hoffman-La Roche, Inc.*, 99 N.J. 284, *modified*, 101 N.J. 10 (1985), New Jersey's Supreme Court forever changed the at-will employment doctrine. The Court held that, absent a clear and prominent disclaimer, an implied promise contained in an employment manual and/or company policy may create an enforceable contract. After *Woolley*, the New Jersey Supreme Court further modified the at-will employment doctrine in *Troy v. Rutgers*, 168 N.J. 354 (2001). There, the Court held that a representation made by an employer directly to the employee may create a contractual right, even where the employee does not furnish any additional consideration but for continued employment.

Since *Woolley* and *Troy*, employment lawyers have counseled human resources professionals and employers about the need for prominent and conspicuous disclaimers in employment manuals and handbooks to avoid falling into the trap created by these judicially-created exceptions. It is now common practice among employers across the State (or at least should be) to reinforce their employees' at-will employment status by inserting in their employee manuals and other policies, offer letters and employment contracts—in very prominent locations—disclaimers that employment is at-will and that such employment status can only be modified by a written agreement executed by a high-ranking corporate executive. Questions remain, however, as to the effectiveness of these so-called "*Woolley*" disclaimers.

Does A *Woolley* Disclaimer Continue To Be Enough To Preserve Employees' At-Will Status?

Two recent New Jersey cases—one decided by the New Jersey, Appellate Division, *Lapidoth v. Telcordia Technologies, Inc.*, 420 N.J. Super. 411 (App. Div. 2011) and one decided by a district court for the District of New Jersey, *Kuker v. Eclipsys Corp.*, No. 10-cv-5544, 2011 WL 4089583 (D.N.J., Sept. 8, 2011)—suggest that these disclaimers are no longer foolproof and may not afford employers complete protection from breach of contract claims.

Lapidoth v. Telcordia Technologies, Inc.

In *Lapidoth*, the Appellate Division required an employer to honor a promise of reinstatement following maternity leave. Despite the employer's an-

(Continued on page 13)

WOOLLEY DISCLAIMER

(Continued from page 12)

nually distributed, clear and conspicuous employment-at-will disclaimer and the lack of any further consideration beyond continued employment, the Court found that the promise created a binding contract.

Sara Lapidoth was a long-term employee of Telcordia Technologies, Inc. and its predecessor company, Bell Communications Research (collectively, "Telcordia"). During her employment with Telcordia, the company's Code of Business Ethics ("Code") contained the following at-will employment policy:

> This Code of Business Ethics as well as each of the policies, practices, and procedures contained in it and every other Telcordia document, is not a contract of employment and does not create any contractual rights, either expressed or implied, between the company and its employees. The policies, practices, and procedures described in this Code may be changed, altered, modified, or deleted at any time, with or without prior notice from information in this code when making decisions related to employment with Telcordia.
>
> Telcordia employees are employees-at-will. This means that employees have the right to terminate employment at any time, with or without grounds, just cause or reason and without giving prior notice. Likewise, Telcordia has the right to terminate the employment of any of its employees at any time with or without grounds, just cause or reason and without giving prior notice.

Telcordia posted the Code on its website and annually distributed it to all employees. In addition, when Lapidoth commenced employment with Telcordia she signed an employment application acknowledging that "acceptance of an offer of employment does not create any contractual rights, either express or implied, between the company and me." Lapidoth requested, and was granted, a six-month maternity leave for the birth of her tenth child. The letter granting her the maternity leave reiterated the company's maternity policy, which stated in pertinent part, "[t]his leave is granted with a guarantee of reinstatement up to 12 months to the same or comparable job…Reinstatement is not guaranteed if your job is declared surplus or the number of hours you request to work at the time of reinstatement is different than when the Leave commenced." Lapidoth had previously requested and received leaves of absence for the births of her nine other children, subject to the same policy.

Lapidoth requested an additional six-month leave. That same day, Telcordia approved her request and again notified Lapidoth in writing that so long as she did not request a change in hours and her position was not declared surplus, reinstatement of her position was guaranteed at the end of her leave.

While Lapidoth was out on leave, management decided to convert her part-time position into a full-time position and found that Lapidoth's colleague was the more suitable candidate for the new full-time position. There were no available positions to offer Lapidoth, so her employment with Telcordia was terminated.

Lapidoth commenced a lawsuit against Telcordia alleging, among other things, that the company breached a contract to reinstate her employment at the conclusion of her leave. The trial court found that Lapidoth failed to establish this breach of contract claim and dismissed same because she was an at-will employee who did not work under a contract and Telcordia's Code contained a clear disclaimer that her employment was at-will. Further, the trial court found that the two letters authorizing her leaves of absence did not alter the at-will relationship because: (1) they "were sent to her personally" and "were not policy letters or form letters ap-

(Continued on page 14)

WOOLLEY DISCLAIMER

(Continued from page 13)

plicable to all employees"; and (2) there was no evidence of sufficient consideration as Lapidoth gave up nothing in exchange for the company's promise of reinstatement. The Appellate Division disagreed and reinstated Lapidoth's breach of contract claim.

While reiterating that absent a contract, employment in New Jersey is at-will, the Appellate Division noted that a contract for employment may arise from a company policy under *Woolley*, or from a promise made by the employer directly to the employee pursuant to *Troy*. The Court then looked at Telcordia's two letters and found that even though the company's "Code and employment application provided that employment was at-will and that nothing in the Code or any of [the employer's] other policies, practices, and procedures created any contractual rights, [its] letters relating its policy on maternity leave seemed to contradict those general provisions." 420 N.J. Super. at 426. It concluded that a reasonable employee could interpret the two letters as promising reinstatement as they contained company-wide policy and were enforceable promises made to a particular employee. Further, the Court noted that Lapidoth relied on these letters and had forgone attempting to seek other employment or returning to work early in exchange for the promise of reinstatement.

Kuker v. Eclipsys Corporation

In *Kuker*, a district court for the District of New Jersey permitted a former employee to proceed on a breach of contract claim despite the employer's clear and conspicuous at-will employment disclaimer and written policy that at-will status could not be modified absent a written agreement signed by the company's president—which the employee knew and acknowledged several times.

Kristine Kuker went out on an approved medical leave of absence during her employment. While on leave, company representatives allegedly made several oral representations promising her reinstatement when she was fully recovered and able to return to work. At the conclusion of her medical leave, however, Eclipsys failed to reinstate Kuker.

Kuker suited Eclipsys, alleging unlawful discharge. The district court permitted Kuker to amend her complaint to include a breach of contract claim. Relying on *Lapidoth*, the district court held that, if true, the company's oral representations created a contract by which Eclipsys agreed to reinstate Kuker and that Kuker's reliance on these representations in not seeking other employment and in not attempting to return to work earlier or to work from home and/or on a part-time basis could support a finding of valid consideration. The district court dismissed the company's at-will disclaimer and no oral contract policy as "irrelevant and [had] no bearing on whether Defendant entered into a contract to reinstate Plaintiff." 2011 WL 4089583 at *3.

Making Your *Woolley* Disclaimer More Effective

These decisions are the most recent reminders that employers must draft and monitor all employee communications carefully, even where employment-at-will policies are clear. Indeed, periodic dissemination of at-will employment statements alone may not be enough to preserve an employee's at-will status in New Jersey. Based on *Lapidoth* and *Kuker*, once an employer announces a company policy or makes a promise to a particular employee that can be reasonably interpreted as providing job security, such a policy or promise may trump the employee's at-will employment status, even with the presence of a *Woolley* disclaimer.

Woolley disclaimers can be made even more effective by adhering to the following:

- Avoid creating contractual rights in company policies or practices, unless you intend to live up that contractual obligation. A policy that is more generous then what the law requires, even with a

(Continued on page 15)

WOOLLEY DISCLAIMER

(Continued from page 14)

Woolley disclaimer, may now become an enforceable contract.

- Communicate clearly. It is what an employee may reasonably interpret management's statements to mean, rather than what management may actually have meant (or want to change), that will decide the issue.

- Avoid deviating from company policies. For example, a court may look to a company's practice or history of reinstating employees at the conclusion of a leave to determine whether an employee may enforce a communication promising reinstatement.

Consultation with an experienced employment counsel on these issues can also help to ensure the preservation of employees' at-will employment status.

* Alychia L. Buchan is an attorney in the labor and employment department of Proskauer Rose LLP. Her practice is devoted to representing and counseling management on employment-related matters.

NJDA SEMINARS

Women and Law
November 11, 2011
Hilton Woodbridge, Iselin, NJ

Left to Right:
Hon. Mary Costello, Michelle Annese,
Hon. Margaret Mary McVeigh, Hon. Karen Cassidy,
Hon. Jamie Happas, Marie Carey, Stephanie Cohen,
Martha Lynes, Kathleen Reilly,
Jeanne Marino, Lauren Handler

Auto Liability Seminar
Jointly sponsored with
Insurance Council of NJ
November 22, 2011
Hilton Woodbridge, Iselin, NJ

Left to Right:
Richard Williams, Jr., Michael Marone,
Chad Moore, Robert Luthman

COMMITTEE CHAIRS 2011/2012

Amicus Curiae
Stephen J. Foley, Jr., Esq.
Campbell Foley Delan & Adams
601 Bangs Avenue
Asbury Park, NJ 07712
732-775-6520
sfoleyjr@campbellfoley.com

By-Laws
J.R. Peter Wilson, Esq.
Jonathan R. Westpy Law Offices
100 Eagle Rock Avenue
East Hanover, NJ 07936
973-526-3700
j.r.peter.wilson@thehartford.com

Convention
Mark A. Saloman, Esq.
Proskauer Rose
One Newark Center
Newark, NJ 07102
973-274-6038
msaloman@proskauer.com

Diversity Committee
Joanne Vos, Esq.
Greenbaum Rowe Smith & Davis
99 Wood Avenue South
Iselin, NJ 08830
732-549-5600
jvos@greenbaumlaw.com

Natalie Watson, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-622-4444
nwatson@mccarter.com

Finance
Michele Haas, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 07901
732-545-4717
mhaas@hoaglandlongo.com

Legislative
Philip R. Lezenby, Jr., Esq.
200 Haddonfield-Berlin Road
Gibbsboro, NJ 08026
856-566-5701
lznlaw@aol.com

LongTerm Planning
Kevin J. DeCoursey, Esq.
Cooper Maren
959 Rt. 46 East
Parsippany, NJ 07054
973-257-2100
kdecoursey@aol.com

Medical Directory
Michael J. Leegan, Esq.
Hack Piro O'Day Merklinger Wallace & McKenna
30 Columbia Turnpike
Florham Park, NJ 07932
973-301-6500
mleegan@hpomlaw.com

Membership
Michael J. Leegan, Esq.
Hack Piro O'Day Merklinger Wallace & McKenna
30 Columbia Turnpike
Florham Park, NJ 07932
973-301-6500
mleegan@hpomlaw.com

Kevin J. DeCoursey, Esq.
Cooper Maren
959 Rt. 46 East
Parsippany, NJ 07054
973-257-2100
kdecoursey@aol.com

New Jersey Defense
Mark A. Saloman, Esq.
Proskauer Rose
One Newark Center
Newark, NJ 07102
973-274-6038
msaloman@proskauer.com

Public Relations
Joanne Vos, Esq.
Greenbaum Rowe Smith & Davis
99 Wood Avenue South
Iselin, NJ 08830
732-549-5600
jvos@greenbaumlaw.com

Technology
Charles P. Hopkins, II, Esq.
Law Offices of Charles P. Hopkins, II
200 Schultz Drive
Red Bank, NJ 07701
732-933-7901
charles.hopkins@cna.com

Trial College
Marie Carey, Esq.
Law Offices of Gregory Sutton
325 Columbia Turnpike
Florham Park, NJ 07932
973-443-9100
marie.carey@usaa.com

Young Lawyers
Scott T. Glennon, Esq.
The Law Offices of William E. Staehle
1200 The American Road
Morris Plains, NJ 07950
973-606-5661
sglennon@travelers.com

Maritza Braswell, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-622-4444
mbraswell@mccarter.com

70 CHAPMAN PLACE

BY BRIAN O'TOOLE, ESQ.

Since I am essentially a walking ambassador for Ireland, most people believe I am one hundred percent Irish. I am proud to advise that my mother's maiden name was Helen Grimm, which makes me fifty percent German. My grandfather, Joseph Grimm, had five brothers and all of them were carpenters by trade. Together, they built the house I grew up in at 70 Chapman Place, Irvington. It was an imposing structure of three floors and a full basement. My mother, father and brother, Joe, and I occupied the first floor, my aunt and uncle and cousins, Mary and Lee, lived on the second floor and my grandparents lived on the third floor. Unfortunately, my grandfather died when I was only two, so I never got to know him. But it was wonderful being surrounded by family. In addition, three other aunts and uncles and their families lived within two minutes of us.

Needless to say there were always gangs of kids roaming about the house and the area that seemed to attract us the most was the cellar and furnace room. The house was heated by coal and there were three huge furnaces, one for each unit. Right next to the furnaces were large coal bins and an array of tools to deal with the coal. For some reason, we thought it was great sport to roll around in the coal. Of course, this was after she read us the riot act for turning all our clothes into a spectrum that went from gray to black.

Perhaps the most fun we had with coal was hanging around when Otto Schmidt and his assistant, Clarence (no relation to Clarence from It's a Wonderful Life) came to deliver our coal. They had an enormous dump truck filled to the top and they had to back it up over our lawn, lift the bed of the truck as high as it would go and then set up the coal chute. When they pulled the hatch open, the coal came spewing down the chute at a hundred miles per hour. The sound it made was like a small earthquake. Since we were one of the last houses to still be heated by coal, the spectacle drew quite a crowd of neighborhood kids. My grandmother thought we lost half the delivery by kids taking souvenirs.

Coal was not the only thing we got delivered. At 5:30 every morning a large man we called Big Mike would deliver our milk, butter and eggs. The side door of 70 Chapman had an oak cabinet built into its side with three compartments for our three families. Every other day, we received two quarts of white milk and one quart of chocolate in glass quart containers. My mom would use that quart of chocolate milk as leverage with us. I remember her warning "If you don't do your homework, no chocolate milk this week." I also vividly remember the sounds Big Mike would make clanking bottles and then thinking to myself that I had another hour and a half to sleep.

Like most of the bigger houses in Irvington, we had a detached two car garage. My grandparents never owned a car. Our garage and driveway also served as "wiffle ball stadium". My cousin, Lee, and I comprised one team and there were five other teams, for a total of six. Lee and I are closer than brothers, because while brothers might fight, Lee and I never did. We took turns being captain of our team and we had a regular schedule with the other ten kids. Our left field foul line was a twenty five foot pine tree and the right field foul line was grandma's lilly of the valley bed. As I get older, I seem to remember us winning a lot more games than we did, but none of us will forget my mom's homemade cookies that she would bring out on a wooden tray after we had been playing for awhile.

Our apartments on the first and second floors seemed very large to me then, but are probably small by today's standards. The coolest apartment of all, however, was grandma's. From her kitchen window, she had a view of the New York skyline. I might add that this view provided us many opportunities to see Perry Winkle's plane. (As you know, Perry is Santa's Chief Elf.) In grandma's bedroom she had a large four-poster bed covered by a brown fury blanket. When my parents went out or entertained on Saturday nights, my brother and I got to sleep in grandma's apartment. She was a fabulous cook and after stuffing us with delica-

(Continued on page 18)

70 CHAPMAN PLACE

(Continued from page 17)

cies, (her specialty was Hungarian Gulosh), we sat in front of her radio and listened to the "Lone Ranger". When I got a little older, she let me listen to "The Inner Sanctum" with its classic creaking door opening.

No story about 70 Chapman would be complete without describing our Christmas decorations. To steal a line from Clark Griswald, "my father taught me everything I know about outdoor illumination". He also believed that there was no such thing as too many Christmas lights. The day after Thanksgiving, we hauled all the lights out of the cold storage which sat right next to the coal bin in the cellar. Our first objective was always our big pine tree (left field foul line). My dad was not a very nimble or athletic man, but he always managed to get to the top of the pine tree with a string of Christmas lights in tow. He refused to allow my brother or me to do this because he thought it was too dangerous. Invariably, my mother would poke her head out a window and say "Walter, you're going to spend Christmas in the hospital." He always made it back down, however, and we had to say the lights were perfectly positioned to prevent him from going back up! The rest of the decorations were much safer to put up, but sometimes harder. We had the type of lights wherein one bulb would knock out the whole string. As you can imagine my brother and I spent quite a bit of time looking for that one bad bulb. The final touch was always the lighted wreath over our front door. I'm sure our display was nothing more than average, but my dad thought it was nothing short of Rockefeller Center.

Sometimes, when I'm on my way to an arbitration or deposition in the Irvington area, my car automatically draws me to 70 Chapman Place. I'm sure there are substantial changes, but, I don't see them. I only see and feel those childhood memories of growing up in a magical place surrounded by the people I loved.

Let me take this opportunity to wish you all a joyous holiday season and a blessed Christmas with the hope that my story might rekindle some fond memories of your own.

A Christmas Quiz

Answers from page 7

1. He found ZuZu's petals in his vest pocket
2. A Guinea (a gold coin)
3. Max
4. False – it debuted in the movie White Christmas
5. A Red Rider BB Gun
6. Cousin Eddie
7. 7 p.m.
8. "I Love You Truly"
9. Bernard
10. A raven
11. A Chinese Restaurant
12. "Have Yourself A Merry Little Christmas"

Grading Scale

1 – 3 correct: Ebenezer Scrooge	4 – 6 correct: The Grinch
7 – 9 correct: George Bailey	10 – 12 correct: The Jolly Fat Man Himself!

SUPREME COURT: WRONGFUL DEATH CLAIMS BARRED BY NO-PAY, NO-PLAY LAW

By David B. Wright, Esq.*

N.J.S.A. 39:6A-4.5(a) bars uninsured drivers from suing personal injuries sustained in car accidents. The question to be decided in Aronberg v. Tolbert was whether the law bars a wrongful death claim brought by the uninsured driver's heirs. The Appellate Division ruled that the estate did have a cause of action for wrongful death. However, the Supreme Court, in a decision made on August 29, 2011, overturned the Appellate Division and held that the bar of N.J.S.A. 39:6A-4.5(a) applies to wrongful death claims so that the estate has no recovery.

Lawrence Aronberg's insurance coverage with Allstate was cancelled due to non-payment of premiums. Following his death in a car accident, his mother sued and alleged both a survival claim and a wrongful death claim. The trial court granted the defendant's motion for summary judgment on the survival claim, but denied it as a wrongful death claim. The Appellate Division affirmed.

The Appellate Division's rationale was that the wrongful death claims "belongs to" the estate, not the decedent. For that reason, it was not illogical to bar the decedent's survival claim but allow the estate's wrongful death claim.

The purpose of N.J.S.A. 39:6A-4.5(a) is two-fold: it ensures "that an injured, uninsured driver does not draw on the pool of accident-victim insurance funds to which he did not contribute" and "gives the uninsured driver a very powerful incentive to comply with the compulsory insurance laws." According to the Appellate Division, neither of these goals would be furthered by barring a wrongful death claim. In fact, barring the wrongful death claim would tend to "punish...innocent family member." Thus, even though the decedent could not have asserted a cause of action for his personal injuries had he lived—thus eliminating the survival claim—the same is not true of his heirs' wrongful death claim.

The Appellate Division vote was 2-1 with a well-reasoned dissent by Judge Fisher. As Judge Fisher pointed out, the majority's holding "creates the anomalous circumstance that had Aronberg lived—no matter how seriously injured or maimed and regardless of the extent to which his injuries would have impacted his dependents—he would have no remedy, but his heir may proceed on her cause of action because Aronberg died as a result of the same circumstances."

In reversing the Appellate Division, the Supreme Court essentially adopted the dissent's rationale. Justice Albin, writing for a unanimous Court, noted that the Wrongful Death Act provides that the mother could recover in her lawsuit only if her son would have been "entitled...to maintain an action for damages resulting from the injury" had "death...not ensued." Because her son, an uninsured motorist, could not have maintained a cause of action had he lived due to the statutory bar of N.J.S.A. 39:6A-4.5(a), his heirs cannot recover under the Wrongful Death Act.

The Supreme Court could not have ended its analysis there: the estate has no greater right or cause of action than the decedent would have if he had not died. However, because of the Appellate Division's concern that barring the claim would have "punished an innocent mother...for the failure of her son to insure his car," it went further.

The purpose of the Wrongful Death Act, according to the Supreme Court, "was to place families who lost a close family relative—because of acts of a tortfeasor—in no worse position economically than if the relative had lived." However, the Act does not suggest that "a claim that a victim cannot bring life can only spring forth in the event of his death." Therefore, the heirs do not have a greater right than the deceased possessed himself. Because the decedent could not have "maintain[ed] an action for damages resulting from the injury" had death "not ensued," his mother had no ground for filing a wrongful death action.

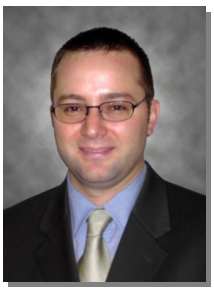
(Continued on page 22)

ONCE AGAIN, THERE IS NO PAIN OR SUFFERING—DAMAGES THAT IS—IN NEW JERSEY'S WORKERS' COMPENSATION

BY ROBERT J. FITZGERALD, ESQ.*

KEY POINTS:

- The new amendments do NOT provide damages for pain or suffering in New Jersey workers' compensation for delayed payment of benefits.
- The determination of sanctions or penalties rests solely with the New Jersey Workers' Compensation Judge.
- The enforcement of an order for financial sanctions or penalties in New Jersey workers' compensation can rest with the Superior Court.



In *Stancil v. Ace USA*, 418 N.J. Super. 79 (February 1, 2011), the New Jersey Appellate Division has once again concluded that there are no damages for pain or suffering in New Jersey workers' compensation. In *Stancil*, the petitioner sustained a compensable work injury in May 1995. On September 12, 2007, the compensation judge ordered the respondent to pay certain outstanding medical expenses as required by prior orders. The judge also awarded a counsel fee of $2,000 to the petitioner for services rendered in procuring such enforcement relief. Subsequently, on October 29, 2007, the judge conducted a hearing on the petitioner's motion to compel compliance with the orders. The respondent's counsel conceded that the respondent knew of its obligations under the orders but had not complied.

The judge found that the respondent's defalcation was blatantly willful and clearly intentional. However, he felt constrained because he lacked contempt powers. Although the judge acknowledged that he had some ability to impose fines and sanctions, he did not do so. The judge awarded the petitioner's counsel an additional fee of $1,500 and referred him to the Superior Court for further relief.

The petitioner then filed his Superior Court complaint. He alleged that the respondent wantonly refused to comply with orders of the compensation court, resulting in a delay or denial of necessary medical treatment and causing him pain and suffering and a worsening of his medical condition. The Superior Court found that the petitioner had exhausted his administrative remedies and the matter was properly before the Superior Court. However, the Superior Court concluded that amendments to the enforcement scheme made it clear that the remedies specified in the Act and regulations were exclusive, no common law claim was permitted and the role of the Superior Court was limited to enforcement proceedings. Therefore, the Superior Court dismissed the complaint with prejudice.

On Appeal, the petitioner argued that the new amendments authorized a civil action for pain and suffering damages. However, the Appellate Division upheld the dismissal of the civil complaint in a lengthy decision analyzing the history of the recent amendments to the New Jersey Workers' Compensation Act dealing with penalties. The court first looked at Section 28.2 which increased the powers of compensation judges:

> If any employer, insurer, claimant, or counsel to the employer, insurer, or claimant, or other party to a claim for compensation, fails to comply with any order of a judge of compensation or with the requirements of any statute or regulation regarding workers' compensation, a judge of compensation may, in addition to any other remedies provided by law:
>
> (a) impose costs, simple interest on any moneys due, an addi-

(Continued on page 21)

(Continued from page 20)

tional assessment not to exceed 25 percent of moneys due for unreasonable payment delay, and reasonable legal fees, to enforce the order, statue or regulation;

(b) impose additional fines and other penalties on parties or counsel in an amount not exceeding $5,000 for unreasonable delay, with the proceeds of the penalties paid into the Second Injury Fund;

(c) close proofs, dismiss a claim or suppress a defense as to any party;

(d) exclude evidence or witnesses;

(e) hold a separate hearing on any issue of contempt and, upon a finding of contempt by the judge of compensation, the successful party or the judge of compensation may file a motion with the Superior Court for enforcement of those contempt proceedings; and

(f) Take other actions deemed appropriate by the judge of compensation with respect to the claim.

[N.J.S.A. 34:15-28.2]

Subsection (e) conferred contempt authority on compensation judges and specified that, upon a finding of contempt, a motion for **enforcement** could be made in Superior Court. The Appellate Court then looked at the legislative history behind the amendment, including a discussion of the series of newspaper articles published in the *Star-Ledger* in April 2008 and the New Jersey Legislative hearings in May 2008. The Appellate Division specifically noted that there were several proposed amendments that would have more greatly expanded the contempt powers of the compensation judge to refer cases to Superior Court for contempt proceedings, rather than just enforcement:

> This series of events makes clear that the Legislature added *N.J.S.A. 34:15-28.2* to the statutory scheme to address circumstances in which insurance carriers flout compensation judges' orders and refuse to pay for employees' medical expenses. It is equally clear that in considering the remedy for this problem, the Legislature considered and expressly rejected the broader remedy of referring the matter to the Superior Court for other administrative, civil, and criminal proceedings. Instead, the Legislature replaced that proposed provision with the enacted provision relating to contempt proceedings.

Critical to the Appellate Division's analysis was that the associated new rule, N.J.A.C. 12:235-3.16, also added provisions pertaining to contempt powers and Superior Court proceedings. This replaced the more general provision in the old rule authorizing compensation judges to simply "refer matters for other administrative, civil or criminal proceedings." The Appellate Division concluded that under the new framework, the new Section 28.2 and associated new rule fully addressed the petitioner's situation:

> Specific and clearly defined procedures and remedies are now provided. They were developed by the Legislature and Division to address and reform shortcomings in the previous scheme. The general provision authorizing referral to Superior Court for "other... civil...proceedings," which could conceivably be interpreted as authorizing a common law action, has been eliminated.

(Continued on page 22)

WORKERS' COMPENSATION

(Continued from page 21)

> These changes persuade us that the beefed-up enforcement measures were intended by the Legislature to fall within the Act's exclusivity scheme. In considering and enacting the reform measures, the Legislature was undoubtedly aware of the concerns we had recently expressed. If authorization of a common law action was intended as a remedy for an insurer's willful noncompliance with a compensation court order, we think the Legislature would have said so. Instead, it authorized stricter sanctions and prescribed a clear line of authority for enforcement.

The Appellate Division also rejected the petitioner's argument that willful noncompliance with an order should fall within the "intentional wrong" exception of the Act. The court reasoned that the exception has been consistently applied only to conduct by an employer or co-employee in the workplace, not to a party's conduct after the claim occurs.

This is the court's first significant decision regarding the Act's amendments pertaining to penalties and enforcement. The decision makes clear that the determination of sanctions for contemptuous behavior, and the amount of the financial penalties associated with such behavior, remains the sole purview of the Workers' Compensation Judge. While the number of workers' compensation cases dealing with the issue of contempt or sanctions is relatively small, carriers and self-insureds, as well as their legal representatives, should remain vigilant to ensure that the timely payment of benefits is accomplished. Failure to do so can lead to significant and unnecessary financial exposure.

Further, in recent years, the court has become increasingly sensitive when dealing with issues of non-compliance. Therefore, carriers and self-insureds should be equally sensitive and implement procedures to avoid late payments, as mere negligence on behalf of the employer (as opposed to intentional conduct) is enough for imposition of a penalty. If you have any questions regarding whether your organization's benefit payment procedures are in compliance with the new amendments to the New Jersey workers' compensation law, contact your defense counsel immediately.

* Robert J. Fitzgerald is a shareholder in Marshall, Dennehey, Warner, Coleman & Goggin where he devotes his practice to workers' compensation defense litigation. Robert is based in Cherry Hill and can be reached at 856.414.6009 or rjfitzgerald@mdwcg.com.

WRONGFUL DEATH CLAIMS

(Continued from page 19)

The Supreme Court acknowledged that allowing the mother to sue would have been "a more sympathetic result." However, it is noted that N.J.S.A. 39:6A-4.5(a) places a strong incentive on drivers to buy auto insurance to protect not just themselves, but also their family members. Thus, it was not the law that punished the family, but the driver who failed to obey that law.

Needless to say, this case will have limited application because of the simple fact that few fatal claims involve uninsured drivers. However, it serves as a prime example of the Supreme Court looking past the sympathy and instead applying a common sense logic to the goals of N.J.S.A. 39:6A-4.5(a).

* David B. Wright is an attorney with Amy F. Loperfido & Associates.

SUBSTANTIVE COMMITTEES 2011/2012

ADR
Matthew Tharney, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-622-4444
mtharney@mccarter.com

Automobile Liability
Chad Moore, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
973-545-4717
cmoore@hoaglandlongo.com

Construction Law
Thomas Madden, Esq.
Hack Piro O'Day Merklinger Wallace & McKenna
30 Columbia Turnpike
Florham Park, NJ 07932
973-301-6500
tmadden@hpomlaw.com

Employment Law
Brian Chabarek, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
bchabarek@hoaglandlongo.com

Michelle Annese, Esq.
Proskauer Rose
One Newark Center
Newark, NJ 07102
732-274-3200
mannese@proskauer.com

Environmental Law
Joanne Vos, Esq.
Greenbaum Rowe Smith & Davis
99 Wood Avenue South
Iselin, NJ 08830
732-549-5600
jvos@greenbaumlaw.com

Jacob Grouser, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
973-545-4717
jgrouser@hoaglandlongo.com

Insurance Law
Gerald Strachan, Esq.
Strachan & Hatzell
1700 Market Street
Philadelphia, PA 19103
215-255-6400
jerry.strachan@AIG.com

Jeffrey Bartolino, Esq.
301 Sullivan Way
West Trenton, NJ 08628-3496
609-883-1300
jbartolino@njm.com

Philanthropy
Gregory McGroarty, Esq.
Litvak & Trifolis
45 Horse Hill Road
Cedar Knolls, NJ 07927
973-359-0090
gmcgroarty@litandtrif.com

Products Liability
Charles Cohen, Esq.
Hughes Hubbard & Reed
101 Hudson Street Suite 3601
Jersey City, NJ 07302
201-536-9220
cohen@hugheshubbard.com

Professional Liability
Herbert Kruttschnitt, Esq.
Law Offices of Charles P. Hopkins, II
200 Schultz Drive
Red Bank, NJ 07701
732-933-7900
herbert.kruttschnitt@cna.com

Public Entity Law
Natalie Watson, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-622-4444
nwatson@mccarter.com

Workers' Compensation
Stephen Banks, Esq.
Florio & Kenny
100 Hudson Street
Hoboken, NJ 07030
201-659-8011
stephen.banks@floriokennylaw.com

Michele Haas, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
mhaas@hoaglandlongo.com

NEW JERSEY DEFENSE ASSOCIATION

Maryanne Steedle,
Executive Director
P.O. Box 463
Linwood NJ 08221

Tel: 609-927-1180
Fax: 609-927-4540
E-mail: njda@comcast.net

We're on the Web!
njdefenseassoc.com

N. J. D. A.

46th ANNUAL NJDA CONVENTION

June 28—July 1, 2012

Westin Copley Place

Boston, Massachusetts

- ✪ **Ideally located in the heart of Boston's Back Bay**
- ✪ **Enjoy world class shopping, dining & entertainment in the city nicknamed the "Cradle of Liberty"**
- ✪ **Walk the Freedom Trail to learn about Boston and American history**
- ✪ **Indulge in the hotel's Gretacole® Spa**

PRESORTED STANDARD

US MAIL 08232

PERMIT #247