NEW JERSEY DEFENSE

NEW JERSEY DEFENSE ASSOCIATION

SPRING 2012

PRESIDENT'S MESSAGE

EDWARD J. FANNING, JR., ESQ.

Just under one year ago I took the helm as President of this great organization. It has been an honor and a privilege to represent New Jersey's leading civil defense trial attorneys. I owe an incredible debt of gratitude to Maryanne Steedle, our exceptionally bright, energetic, organized and hard-working Executive Director. Maryanne made my term as President as smooth and successful as humanly possible. Past presidents had told me that the year would fly by and they were absolutely correct.

One of our top priorities for my year as President was to provide first-rate CLE while at the same time helping our members grow their practices. On March 23 the NJDA's Products Liability Committee, led by Charlie Cohen, presented another fantastic seminar, jointly sponsored with the New Jersey Corporate Counsel Association. This sold-out program again provided extremely high level and useful substantive content, including a products liability update, analysis of indemnification clauses, tips on protecting the attorney-client privilege in the electronic age, and emerging ethics issues in litigation. Thanks again to Charlie and our Products Liability Committee for their consistently excellent work.

I am also grateful to our President-Elect, Mark Saloman, for his hard work, wise counsel and diligence, particularly with respect to our newsletter. This is

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VOLUME 27, ISSUE 3 SPRING 2012

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PRESIDENT'S MESSAGE

EDWARD J. FANNING, JR., ESQ.

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the fourth installment of the newsletter during my term. I have spoken with many members of the bench and bar who have consistently praised the substantive quality of our newsletters as well as their direct relevance to everyday litigation practice. This issue is no exception. Mark has done such an excellent job that one of our board members recently suggested that Mark be nominated for a lifetime appointment as our Editor-In-Chief. Of course, we won't subject Mark to that and I have no doubt that our soon-to-be President-Elect, Michele Haas, will carry on Mark's fine work in the year to come.

As I head down the homestretch of my term as President, I look forward to our Annual Convention from June 28 to July 1, 2012 at the Westin Copley Place in the heart of Boston's Back Bay. We have an elegant venue at the Westin, a lineup of valuable CLE programming and many exciting events, including a tour of Fenway Park and a private reception at Fenway's luxurious EMC Club on Friday night. Fenway is currently celebrating its 100th anniversary. Even die-hard Yankees fans like myself have to admire Fenway's classic layout, charm, and its storied place in baseball history, most notably its place as the site of Bucky Dent's three-run home run over the Green Monster, which on October 2, 1978, propelled the Yankees to the playoffs and an eventual World Series title. Of course, convention attendees will have plenty of free time to enjoy Boston's many other cultural, theater and entertainment options, including nearby attractions such as Boston Commons, the Public Gardens, Beacon Hill and Newbury Street. I look forward to seeing you there.

Sincerely,

Ed Fanning

President, New Jersey Defense Association

46th ANNUAL NJDA CONVENTION

June 28—July 1, 2012

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NONE THE WISER: THE LAW DIVISION'S SPLIT DECISIONS ON WHETHER OUTSTANDING MEDICAL BILLS ARE ADMISSIBLE IN MINIMUM PIP CASES

BY: MICHAEL A. MALIA, ESQ., LL.M.*

Trial attorneys on both sides of the bar have wrangled with the issue of whether medical bills exceeding minimum PIP policy limits should be presented to the jury. With the holding in Wise v. Marienski, 425 N.J. Super. 110, 39 A.3d 947 (Law Div. 2011), the law division is now in conflict. The court in Wise held that evidence of the plaintiff's outstanding medical expenses above the minimum PIP policy limits are admissible, which directly contradicts Kim v. Kim, 2010 N.J. Super. Unpub. LEXIS 2302 (Law Div. May 24, 2010).

Kim v. Kim first addressed this issue

In Kim, the court held that outstanding medical expenses above the plaintiff's $15,000 PIP coverage were inadmissible at trial. 2010 N.J. Super. Unpub. LEXIS 2302 at *8. The plaintiff was involved in an accident resulting in medical expenses totaling $48,358.87, of which $38,004 were unpaid. Prior to trial, the defense moved to bar evidence of any unpaid bills. Id. at *1.

The court in Kim found that, pursuant to N.J.S.A. 39:6A-4, a standard automobile policy automatically included PIP coverage of $250,000. Id. at *3. However, N.J.S.A. 39:6A-4.3 offered various PIP coverage options, ranging from $150,000 to $15,000 per person, to reduce premium payments. Id. at *3-4. By purchasing a minimum PIP policy, the plaintiff in Kim opted to pay lower premiums in exchange for less PIP coverage. Id. at *3.

The court in Kim sought guidance from the Supreme Court in Roig v. Kelsey, 135 N.J. 500, 514 (1994), where the plaintiff attempted to recover uncompensated deductibles from the tortfeasor. Id. at *4. In Roig, the court found that the Legislature did not intend for an insured choosing a higher deductible for a premium reduction to be able to sue the tortfeasor for the below-deductibles. Id. This recovery would be available only if the Legislature reinstituted a fault-based system. Id. at *4-5. Additionally, after Roig in D'Aloia v. Georges, 372 N.J. Super. 246 (App. Div. 2004), the Court found that despite legislative amendments to AICRA, PIP co-payments and deductibles were still not recoverable against the tortfeasor. Id. at *5.

Under N.J.S.A. 39:6A-12, only uncompensated economic losses may be recovered. The Kim court found that an insured opting for lower premiums chooses to forego coverage for medical expenses that would be eligible for compensation. Id. at *5-6. These amounts are "collectible" and eligible for compensation under the standard policy available and are only excluded from PIP coverage pursuant to the option chosen under N.J.S.A. 39:6A-4.3. Id. at *7. For these reasons, the court in Kim held that the plaintiff could not recover damages against the tortfeasor that would have been collectible as PIP benefits under the N.J.S.A. 39:6A-4 standard policy. Id. If the plaintiff had chosen the standard PIP limits of $250,000, he would have received medical payments up to that amount; however, the court found that allowing the plaintiff to recover medical bills over the minimum PIP policy limits would be contrary to the purpose of legislative policy. Id. at *7.

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Wise v. Marienski reached the opposite conclusion

In Wise, the plaintiffs were driver and passenger of a vehicle that was rear-ended. 39 A.3d at 112. At trial, the defendant moved to bar evidence of the plaintiffs' outstanding medical bills above the limited PIP policy limit of $15,000. Id. at 113.

The court conceded that prior cases illustrated "that the Legislature's broad intent in enacting AICRA could support a holding barring entry into evidence of medical expenses above plaintiff's $15,000 PIP limit." Id. at 120. However, the court was still "reticent to interpret the Legislature's intent so broadly as to so sharply contradict the unambiguous language of its enactments." Id. Moreover, since N.J.S.A. 39:6A-2(k) defines "economic loss" as "uncompensated loss of income or property, or other uncompensated expenses, including, but not limited to, medical expenses," the court in Wise could not interpret N.J.S.A. 39:6A-12 to preclude an automobile accident victim from recovering uncompensated economic losses from the tortfeasor. Id. at 121.

The Court in Wise distinguished Roig and D'Aloia because N.J.S.A. 39:6A-12 was subject to ambiguity as to copayments and deductibles. Id. at 121. The first paragraph of N.J.S.A. 39:6A-12 prohibited admitting evidence of copayments and deductibles, while the last paragraph preserved a right of recovery against a tortfeasor for "uncompensated economic loss sustained by the injured party." Id. Thus, the Roig court's broad inferences regarding the Legislature's intent were necessary to clarify the ambiguous statutory language, whereas the court in Wise found that such inferences should not be applied to contradict the Legislature's clear language. Id.

The court in Wise disagreed with the Kim court's analysis and conclusion that a "standard automobile insurance policy" "automatically includes PIP coverage of $250,000" and therefore any amount under that amount was "collectible" and excludable from evidence. Id. at 118-121. The court in Wise read N.J.S.A. 39:6A-2(n), 39:6A-4, and 39:6A-4.3 together to define a "standard automobile insurance policy" as providing for PIP coverage of medical expenses of at least $15,000. Id. at 122. Thus, according to the Wise court, any of the four PIP policy limit amounts in N.J.S.A. 39:6A-4.3 would fall within that definition. Id. The court found that if the Legislature intended a "standard" policy to provide only one level of coverage then it could have done so rather than providing for a range of coverages. Id. at 123. For these reasons, the court in Wise held that an "amount collectible" under N.J.S.A. 39:6A-12 depended on the insured's PIP policy limit, which in that case was $15,000, so the plaintiffs were only barred from admitting evidence of medical expenses under that amount. Id.

Wise dedicated the final part of its opinion to justifying its decision with policy considerations. Id. at 123. The court noted harmony with the long-recognized legislative purpose of preventing a double recovery of damages. Id. at 123-4. The court also considered the Legislature's intent to allow for consumer choice, finding that AICRA was devoid of any legislative intent to have insureds bargain for potentially bankrupting medical bills, in exchange for lower premiums. Id. at 124-5. The court found that the plaintiffs were not "having their cake and eating it, too" because their medical expenses were owed to the medical providers, were not instantly recoverable, and would require a lawsuit, discovery, proving liability, and the necessity and reasonableness of medical bills, which typically takes years. Id. at 125. Despite this rationale, the court indicated it was mindful of the Legislature's intent in enacting the no-fault legislation to eliminate minor claims and reduce trial backlog. Id.

Adesina v. Santana cites Wise but distinguishes its facts

The only post-Wise case is Adesina v. Santana, 2012 N.J. Super. Unpub. LEXIS 470 (App. Div. Mar. 5, 2012), where the Appellate Division

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reversed the lower court's decision barring the plaintiff from presenting outstanding medical bills and remanded for a retrial on the issue of economic loss during which the plaintiff could present medical testimony that the outstanding bills were reasonable and necessary.

In Adesina, the plaintiff, a passenger in a 2003 accident, was subject to the verbal threshold. Id. at *1. The jury found no permanent injury and the plaintiff appealed the lower court's ruling precluding evidence of outstanding medical bills. Id. The plaintiff's PIP policy limit of $250,000 was exhausted and the plaintiff had over $250,000 in outstanding medical bills. Id. at *3. The court in Adesina focused primarily on the trial court's barring the plaintiff from presenting evidence of outstanding medical bills due to alleged discovery violations, which the Appellate Division found to be an abuse of discretion. Id. at *13-14. The Appellate Division's only reference to Wise was as the last authority in a string cite for the "holding that N.J.S.A. 39:6A-12 does not preclude recovery of medical expenses beyond those collectable or paid under a standard PIP plan and noting defendant's concession that 'had plaintiffs incurred medical expenses one dollar in excess of $250,000, that minor expense would be permitted into evidence before a jury'." Id. at *15.

Where do we go from here?

The Wise and Kim holdings are irreconcilable, which may be the reason the Wise court spent the final part of its decision citing policy considerations to justify its result. However, these policy justifications seem somewhat contradictory and do not seem to take into account the practical application of its decision. The Wise court acknowledged that a subsequent civil suit to recover outstanding medical expenses could take years, which cuts against the court's comment that it was "mindful" of the Legislature's intent to eliminate minor claims and reduce trial backlog. As to the court's assertion that even if excess medical expenses are recovered, the expenses are owed to the medical providers, (which would somehow act as a deterrent to filing suit), that proposition ignores the situation where medical providers compromise their outstanding bills in the interest of trying to resolve a suit. In that situation, such a compromise results in the settlement proceeds being split between the medical providers, plaintiff's counsel, and the plaintiff.

The Wise court also allowed what the Kim court would not: an insured that both received the benefit of added savings from the premium reduction in choosing a minimum PIP policy, *and* was allowed the added benefit of recouping outstanding medical bills in a later civil suit. The Kim court's concern, similar to Justice Garibaldi's opinion in Roig, was that the Legislature never intended to leave the door open for fault-based suits in enacting the No-Fault Law. Moreover, these concerns can be taken a step further in the context of cases where breaching the verbal threshold may be questionable but the outstanding medical bills are sizeable. A jury hearing a substantial amount of outstanding medical bills may infer that the amount validates a permanent injury even if the underlying testimony concerning permanency may be less than convincing. Such a situation would not serve to deter the filing of suit but may encourage it.

Although the Appellate Division in Adesina briefly cited Wise in allowing a claim for outstanding medical bills to proceed, the Adesina court was not faced with a minimum PIP policy and relied on that distinguishing factor in rendering its decision. Therefore, the tiebreaker has not yet been cast, and we must wait for further guidance from either the Appellate Division or the Legislature on this issue.

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EMPLOYER LIABILITY FOR "INTENTIONAL WRONG"

BY GEORGE J. KENNY, ESQ.*

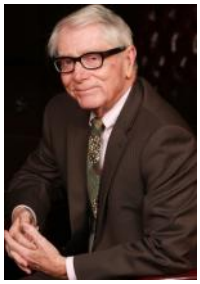
In 1911, New Jersey joined nine other states to create the nation's first permanent workers' compensation system, modeled after European laws of the 1890s. This legislation involved an historic trade-off, employees relinquishing their right to pursue common-law remedies for employers providing prompt medical care, temporary disability and a scheduled permanent disability award for injuries or death.

As our Supreme Court explained in Dudley v. Victor Lynn Lines, Inc., 32 N.J. 479 (1960), "by accepting the benefits of the [Compensation Act], an employer assumes an absolute liability, but gains immunity from common-law suit, even though he be negligent, and the employee foregoes his right to sue his employer for negligence, but gains a speedy and certain, though smaller, measure of damages for all work-connected injuries, regardless of fault."

N.J.S.A. 34:15-8, which incorporated the tradeoff language, was amended in 1971 to provide that if an injury or death was compensable, an employer or co-employee might also be held accountable in a common-law action "for intentional wrong." Thus, the Legislature introduced a narrow opening to allow an employee to accept compensation benefits while providing the opportunity for the potentially greater rewards of a jury verdict if the employer caused the injury by an intentional wrong.

Pre-Millison/Laidow Cases

The key to determining the type of acts which may impose employer liability for intentional wrong claims lies in the Supreme Court cases of Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161 (1985) (occupational injury) and Laidlow v. Hariton Machinery Co., Inc. 170 N.J. 602 (2002) (traumatic injury). Prior to Millison, courts had given "intentional" wrong its commonly understood meaning, *i.e.*, as deliberate intention, beyond gross negligence or concepts importing constructive intent,



Bryan v. Jeffers, 103 N.J. Super. 522, 523-24 (App. Div. 1968), certif. denied, 53 N.J. 581 (1969). The threshold was not even met by an employer willfully and wantonly failing to undertake known safety and health procedures for the protection of its employees. Arcell v. Ashland Chemical Co., 152 N.J. Super. 471 (App. Div. 1977). That remains the law to this day. Kaczarawska v. Nat'l Envelope Corp., 342 N.J. Super. 580, 587 (App. Div. 2001).

The Millison/Laidlow Standard

Millison involved employee exposure to asbestos with resultant pathology. The employees charged du Pont with (a) intentionally exposing them to asbestos in the work place, (b) deliberately concealing from them the risks of exposure to asbestos and (c) fraudulently concealing from them specific medical information known by du Pont's own physicians through physical examinations that revealed disease already contracted by the workers from this asbestos exposure. It was only on this last claim that the Court held du Pont to have committed "intentional" wrong, fraud being an intentional act.

For employee recovery, the Court required that the tortious act be "sufficiently flagrant so as to constitute 'intentional wrong'" in light of the Legislature's intent to compensate work-related disability claims exclusively within the Compensation Act. The Court realized that an overly broad interpretation of the "intentional wrong" language in N.J.S.A. 34:15-8 would swallow up the exclusivity provision of the Act, "since virtually all employee accidents, injuries and sicknesses are a result of the employer or a co-employee intentionally acting to do whatever it is that may or may not lead to eventual injury or disease." 101 N.J. at 177. The Court also held that

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the employer in committing the intentional act must have had knowledge of the "strong probability" that commission of the act would, with "substantial certainty," lead to injury. 101 N.J. at 179.

To establish a *prima facie* common-law case against the employer under Millison, the employee must therefore prove these two elements to satisfy what the Court termed the "conduct" prong of the analysis. Millison and his co-employees would be allowed common-law recovery only if their employer's fraud went "well beyond failing to warn of potentially-dangerous conditions or intentionally exposing workers of the risks of disease." It required plaintiffs to prove that du Pont "actively misled the employees who had already fallen victim to the workplace risk." 101 N.J. at 182.

In Laidlow, the operator of a rolling mill was required to manually insert bars into a mill's channel guide and then apply hand pressure to properly feed the bars into the rollers. Laidlow was severely injured when his glove was caught in the unguarded nip point as he was pushing a bar into the channel, an event which occurred solely because the employer, Hariton, had removed the safety bar which would have prevented just such an injury. See also Mabee v. Borden, Inc., 316 N.J. Super. 218 (App. Div. 1998) (affirming denial of employer's summary judgment motion where two safeties were disabled by the employer, leading to the employee's injuries).

Laidlow argued that the combination of his employer (a) disabling the safety guard, together with (b) its deception of OSHA by replacing the guard whenever OSHA representatives inspected the plant, presented a triable issue of "intentional wrong." 170 N.J. at 609-610. The Court held that intentional wrong occurs when the employer, knowing that the consequences of its intentional wrong acts are substantially certain to result in harm to the employee, then acts on such knowledge. 170 N.J. at 613. As an alternative to proving an intent to commit wrong, the Court held that the employee may prove "subjective harm" by demonstrating the employer knew the consequences of its intentional wrongful act would, with substantial certainty, result in injury to the employee.

The Supreme Court refined application of its intentional wrong language in Mull v. Zeta Consumer Products, 176 N.J. 385 (2003) and Crippen v. Central Jersey Concrete Pipe Co., 176 N.J. 397 (2003).

In Mull, the employer disengaged critical safety devices on equipment being operated by the employee, despite (a) knowledge of a prior accident, (b) expressed safety concerns by other employees, and (c) prior OSHA citations which were not rectified by the employer, which satisfied the intentional wrong criteria. In Crippen, the Court held that an employer's failure to cure hazardous conditions in violation of a specific directive issued by OSHA, coupled with its intentional deception of OSHA, constituted actionable intentional wrong. In each of these decisions, the Supreme Court directed its concerns to injuries arising out of work in production facilities. But see Tomeo v. Thomas Whitesell Construction Co., Inc., 176 N.J. 366 (2003) (arising from non-production injury).

In addition to the cases cited above, there are more than a dozen unpublished Appellate Division decisions and one U.S. District Court opinion which affirm summary judgment in favor of the employer, and one Appellate Division opinion which reverses denial of the employee's summary judgment motion and enters judgment in favor of the employer.

The Role of OSHA

Pre-accident employer violations of OSHA regulations are not evidence of intentional wrong. Such violations provide evidence of negligence. Kane v. Hartz Mountain Indus., Inc., 278 N.J. Super. 129, 144 (App. Div. 1994), aff'd o.b., 143 N.J. 141 (1996); Alloway v. Bradlees, 157 N.J. 221, 236-37 (1999), but not evidence of "intentional" wrong.

However, as Laidlow, Mull and Crippen teach us, a pre-accident citation by OSHA for violation of its regulations which has not been addressed,

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or where the employer defrauds OSHA by advising it that the violation has been cured or an OSHA direction complied with, can furnish evidence of intentional wrong.

What of citations issued by OSHA for violations determined on post-accident investigation? In the second Millison case, Millison v. E.I. du Pont de Nemours, 226 N.J. Super. 572, 591-95 (App. Div. 1988), aff'd, 115 N.J. 252, 256 (1989), the court held that neither post-accident citations or investigation findings are admissible as evidence of intentional wrongdoing because they represent hearsay and opinions as to violations of the law, and this kind of evidence would constitute undue prejudice with a clear capacity to cause an unjust result.

N.J.S.A. 34:15-40 Reimbursement

Section 40 of the Compensation Act provides that upon recovery from a "third party," by settlement or judgment, the employee is responsible to reimburse the employer for its compensation lien from the proceeds. Does that reimbursement requirement apply to recovery from the employer itself? In Calalpa v. Dae Ryung Co., Inc., 357 N.J. Super. 220 (App. Div. 2003), certif. denied, 176 N.J. 278 (2003), the court held that, for reimbursement purposes, the employer is considered to be a "third party" defendant from whom the employee has recovered by settlement or judgment. The court stated that the tort litigation is the equivalent of a "third party" action for purposes of N.J.S.A. 34:15-40. As the "functional equivalent" of a third party action, the employer and its compensation carrier have the same right of reimbursement under Section 40 as if the employee had recovered from a party unrelated to the employment contract.

Insurance Coverage for the Employer

General liability policies exclude coverage for the insured's intentional wrong. In N.J. Mfrs. Ins. Co. v. Joseph Oat Corp., 287 N.J. Super. 190 (App. Div. 1995), certif. denied, 142 N.J. 515 (1995), that exclusion was held to apply to statutory intentional wrong claims against employers. However, in Charles Beseler Co. v. O'Gorman & Young, Inc., 188 N.J. 542 (2006), the Supreme Court overruled Joseph Oat and held that the language of the employer liability part of the workers' compensation policy, which excludes "bodily injury intentionally caused or aggravated by [the employer]," does not apply to the intentional wrong action contemplated under N.J.S.A. 34:15-8 as construed by Millison, Laidlow, Mull, and Crippen. The Appellate Division had held that the policy exclusion encompasses only those injuries which an employer intends to inflict and not injuries which the employer inflicts as an incidental result of its intentional wrongful act. In its *per curiam* affirmance, the Court used the "substantially certain" requirement of Millison and Laidlow to hold that the language of the policy exclusion "clearly excludes only injuries that result from a subjective intent to injure." 188 N.J. at 548.

Thereafter, many workers' compensation insurers introduced new exclusionary policy language for "any and all intentional wrongs within the exception allowed by N.J.S.A. 34:15-8 including but not limited to bodily injury caused or aggravated by an intentional wrong" committed by the employer or its employees "which is substantially certain to result in injury." As a result of this new exclusionary language, directed to the court's holding, in Charles Beseler and its companion case, N.J. Mfrs. Ins. Co. v. Delta Plastics Corp., 380 N.J. Super. 532 (App. Div. 2005), affirmed,188 N.J. 582 (2006), employers faced with intentional wrong actions are now most likely without liability coverage, which can have an unmeasured, but substantial, effect on business—particularly smaller businesses which might not have financial resources to withstand substantial verdicts. It is also an issue which can give rise to broker malpractice suits for a broker's failure to recognize this gap in coverage and to either advise their policyholder clients of their lack of coverage or attempt to secure specific coverage in the market.

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EMPLOYER LIABILITY

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The Van Dunk Case

The Supreme Court presently has before it the case of Van Dunk v. Reckson Associates, 415 N.J. Super. 490 (App. Div. 2010), certif. granted, C-470, No. 66,949 (Jan. 27, 2011), orally argued on October 12, 2011, in which numerous issues relating to intentional wrong actions against employers are being considered or reconsidered. Van Dunk will give clearer direction as to how the Court, in its present composition, views (a) the nature of an "intentional" wrong; (b) the "substantial certainty" test; (c) the role of an institutionalized program that constitutes "wrong," as contrasted with employer culpability for a single act which stems from reflexive conduct; (d) the evidential role of OSHA's post-accident investigation and citations; and (e) the vitality of the "context" prong (the degree of egregiousness of the intentional act, which the trial or motion judge alone must determine).

Predictions as to the effect of Van Dunk on this area of the law are on shaky ground. The only comment to be offered is, Stay tuned.

*** George J. Kenny is a partner in the Roseland office of Connell, Foley LLP. A certified trial attorney, George argued the case of Van Dunk v. Reckson Associates, described above.**

RESIDENTIAL ENVIRONMENTAL CONTAMINATION FROM UNDERGROUND STORAGE TANKS—WHAT EVERY LAWYER SHOULD KNOW

BY: MARC S. GAFFREY, ESQ.*
AND ASHWATH TRASI, ESQ.*

Introduction

Every general practitioner will eventually encounter a circumstance where, in representing a client in either a real estate transaction or a probate matter, the property at issue is contaminated with a hazardous substance caused by a leaking underground storage tank (UST). This article defines the legal consequences homeowners, prospective home buyers and real estate professionals face as a result of such a circumstance, and the ways they can avoid or minimize liability.

Overview

In 1976, New Jersey enacted the Spill Compensation and Control Act ("Spill Act") imposing strict liability on anyone "who has discharged," "or is in any way responsible for the discharge of any hazardous substance, for the cost of the cleanup and remediation of contamination resulting from the discharge." A "discharge" under the Act is defined by N.J.S.A. 58:10-23-11b "as any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of New Jersey." The Spill Act's broad definition of "discharge," and its imposition of strict liability, leaves homeowners exposed to high costs associated with cleaning and

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remediating contamination on their property for contamination they did not intend, did not know of or did not directly cause. Such circumstances are largely the result of leaking USTs.

Homes heated by oil utilize such tanks but homes heated by electricity or natural gas may also contain USTs abandoned long after they switched to different heat sources. USTs pose environmental concerns due to their potential to leak oil into the soil and groundwater, damaging the environment and creating potential health risks. The average cleanup costs for just one leaking USTs is about $50,000 and long term groundwater cleanup where potable water supplies have been affected can cost several million dollars over time.

Given the potential financial burdens posed by leaking USTs, homeowners and real estate professionals should be aware of their existence on properties, the potential problems that may result from them, the precautions that can be taken to protect against liability and avoid further costs, and sources of compensation for the costs.

Causes of Storage Tank Leaks and Potential Hazards

UST leaks may result from a number of factors. One common cause is tank corrosion. A steel tank buried underground will naturally rust and one day develop a hole causing oil to leak if not properly monitored and maintained. The amount of time this takes to occur is based on such factors as the age of the tank, the moisture content of the soil, the thickness of the tank, and the geology of where the tank is buried. Other causes include the improper fueling of tanks resulting in tank overfills, and the improper installation of tanks underground making them susceptible to corrosion and leaking.

In addition to costs homeowners may incur from cleaning contamination from UST leaks, there are health risks to be considered. Heating oil contains carcinogens which would severely compromise the quality of drinking water if leaked into the groundwater. In addition, toxic chemicals contained in heating oil can emit vapors that can migrate through the subsurface and into indoor air spaces of overlying and nearby buildings through a process known as vapor intrusion.

Potential Defenses and Claims against Responsible Parties

Property owners can assert defenses to NJDEP actions and seek contribution from other potentially responsible parties under certain sections of the Spill Act. N.J.S.A. 58:10-23.11g(d) provides for an "innocent purchaser" defense, where 1) the property was acquired after the discharge of a hazardous substance at the property; 2) at the time of the acquisition, the person did not know and had no reason to know that any hazardous substance had been discharged at the property; 3) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance and is not a corporate successor to the discharges or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to the Spill Act; and 4) the property owner gave notice of the discharge to the NJDEP upon its discovery. Purchasers of property on or after September 14, 1993, face a more stringent requirement for showing they "had no reason to know" of a discharge of a hazardous substance than purchasers prior to that date.

Under N.J.S.A. 58:10-23.11g(d), all homeowners are required to show they had "undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property" in order to show they had no reason to know of a discharge of a hazardous substance on their property. For purchasers of property on or after September 14, 1993, an "appropriate inquiry into previous ownership" means "a performance of a preliminary assessment, and site investigation (if the preliminary assessment indicates that a site investigation is necessary), pursuant to N.J.S.A. 58:10B-1, *et seq.*" (the

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Brownfields and Contaminated Site Remediation Act)—clearly a more stringent requirement than for pre-September 14, 1993 purchasers, for whom an "appropriate inquiry" is "based upon generally accepted good and customary standards" based on the industry standard at that time. Thus, many homeowners cannot find protection under this defense.

Pursuant to N.J.S.A. 58:10-23.11(f)(a)(2), a party who cleans up and removes a discharge of a hazardous substance has "a right of contribution against all other dischargers and persons in any way responsible for the a discharged hazardous substance or other persons liable for the cost of the cleanup and removal of that discharge of a hazardous substance." If the leak occurred prior to one's ownership of the property, prior owners may be responsible parties on the hook for contribution. It is thus important to determine the age of the leak during the investigation and removal of the tank, through the analysis of forensic evidence. An investigation should also be made into any contractors or other parties who may be responsible for handling or installing the tank, or delivering its fuel, as their faulty work may have caused the leak.

New Jersey's state courts have not decided whether parties liable for contribution under this section of the Spill Act are "jointly and severally liable" as they would be when the NJDEP files an action against dischargers pursuant to N.J.S.A. 58:10-23g (c)(1), or just "severally," in which case each responsible party is liable only for its share of the costs. New Jersey federal court cases, like SC Holdings, Inc. v. AAA Realty Co., 935 F.Supp.1354 (D.N.J. 1996), have determined such liability to be several.

Finally, a property owner affected by a leaking UST can make a claim to New Jersey's Spill Compensation Fund ("Spill Fund") established under the Spill Act for the purpose of providing compensation for damages resulting from the discharge of hazardous substances. The Fund is primarily generated from taxes on the initial transfer of each barrel of petroleum and other hazardous substances from facilities. This may be useful if the party truly responsible for the UST's leak cannot be found. It is important to remember that such claims must be filed no more than one year from the date of discovery of the damage, and the person making the claim must be an "innocent purchaser" and cannot be responsible for the discharge in any way.

Precautions

Based on the potential hazards caused by underground heating oil tanks, it is imperative that potential home buyers require that the seller make all information regarding USTs on the site available, and conduct a site investigation to determine if there are any hazardous substances on the property, prior to closing. Such provisions should actually be included in the contract because real estate form contracts do not normally include them. This allows a buyer to back out of the transaction with his/her deposit monies where the property is compromised by the presence of a UST and ensures that the seller cannot shift his/her responsibilities upon the buyer. The buyer should review actual reports produced from site investigations to determine whether proper methods were used in searching for underground storage tanks and the presence of hazardous substances.

Where hazardous substances are found to have been discharged from a UST, a buyer that is still interested in the property may negotiate with the seller to perform the necessary remediation as a condition to purchasing the property. Before agreeing to go through such a process, it is important that the buyer verify that the seller has sufficient financial means to fund the remediation, including valid homeowner's insurance covering the costs, as well as sufficient income in case insurance is unavailable. If the seller is unable to fund the remediation, it is possible that the buyer may get stuck with the costs.

Banks and mortgage companies would require the same due diligence in requiring a site assessment of properties containing USTs before in-

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vesting in them because their ownership interest makes them responsible parties for discharges on the property. Real estate brokers may face liability under the Consumer Fraud Act, and penalties from the NJ Real Estate Commission under New Jersey's Department of Banking and Insurance, for failing to disclose the existence, or likely existence of a UST or ordering insufficient environmental tests on a property where a UST is known to be present. Failing to exercise diligence in determining the existence of USTs and advising buyers of their existence constitute violations of New Jersey's Real Estate Licensing statute and the New Jersey Administrative Code governing the Conduct of Business in Real Estate Transactions, which could result in a broker having his/her license suspended, or even revoked.

The UHOT Program and Recent Legislation

To facilitate real estate transactions facing delays associated with the removal of residential underground heating oil tanks, the Unregulated Heating Oil Tank ("UHOT") program was created under the NJDEP to allow fully-remediated, unregulated residential oil tanks, to move expeditiously through the DEP review process. Under the program, the DEP relies on environmental professionals holding a Subsurface Evaluator Certification to certify that all cleanup activities associated with a leaking unregulated tank are in accordance with DEP regulations, and that any existing contamination was remediated to the most restrictive cleanup standards. The summary of cleanup activities are reviewed by DEP case managers, and those cases that warrant more in depth evaluation, are placed in a more rigorous audit program. Audits require detailed reviews of all submitted reports to on-site inspections or collection and analysis of environmental samples, to ensure the strict enforcement of public health and environmental standards.

On May 7, 2009, the Site Remediation Reform Act ("SRRA") was signed into law. Prior to this act, the NJDEP supervised the remediation of all polluted sites, approving site remediation plans and certifying the completion of remediation by issuing a No Further Action Letter. The SRRA instead requires parties to hire a Licensed Site Remediation Professional ("LSRP") to supervise the remediation and issue Response Action Outcomes ("RAO") upon the completion of remediation.

However, as of May 7, 2012 changes in the SRRA went into effect so that the LSRP may no longer issue a RAO for cases where the only area of concern being remediated is a discharge from an unregulated heating oil tank. Residential heating oil tanks fall under this category and cases involving contamination from them must be processed through the UHOT Program.

Conclusion

In summary, environmental contamination issues resulting from leaking USTs are often complex and convoluted and best left to attorneys that engage in this practice on a daily basis. It is highly recommended that when a simple transaction becomes complex due to the issues presented above, that outside counsel be consulted.

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PRODUCTS LIABILITY SEMINAR

Updates and Strategies to Protect the Company

March 23, 2012

Hilton Woodbridge, Iselin, NJ

Speakers from Left to Right: Eric Blumenfeld, Charles Cohen, Eric Probst, Heather Siegelheim, John Chester, Robert Cook
Not Pictured: Natalie Mantell

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THE DEFENDANT MANUFACTURER IN YOUR PRODUCTS LIABILITY CASE JUST DECLARED BANKRUPTCY. NOW WHAT?

BY ROBERT M. COOK, ESQ.

The bankruptcy of a defendant product manufacturer can leave both plaintiffs' and co-defendants' attorneys scratching their heads. What now? Where do we go from here? However New Jersey's Product Liability Act provides a framework that will give both plaintiffs and defendants a chance to weather the bankruptcy storm.

Parties learn that a defendant declared bankruptcy when they receive a notice of suggestion of bankruptcy. The bankrupt defendant files this simple document in the court where the action is pending. In response to the notice, some counties sua sponte dismiss the defendant. If the defendant is not dismissed, federal bankruptcy laws require that the action be stayed as to the bankrupt defendant only, *unless* the plaintiff stipulates that the damages recoverable from the bankrupt defendant are capped by that defendant's insurance limits and the plaintiff obtains leave of the stay from the bankruptcy court. The catch here is that the bankrupt defendant could be self-insured with a high self-insured retention; as a result, there is no insurance policy for a plaintiff to proceed against, rendering the bankrupt defendant judgment proof. Examples of this situation include the bankruptcies of Chrysler LLC and General Motors. Both companies had high self-insured retentions and were dissolved, as opposed to reorganizing, in bankruptcy.

When the bankrupt defendant is not insured, plaintiff can move the state court to sever the action as to the bankrupt defendant so that it can continue against the remaining defendants. The remaining defendants can, of course, object to the severance of the bankrupt defendant and ask the court to stay the entire case until the bankrupt defendant emerges from bankruptcy. However, the trial court will usually sever the action and allow plaintiff to proceed against the non-bankrupt defendants.

Once the bankrupt defendant is dismissed or severed, the plaintiff and co-defendants may look to find another strictly liable party to fill the shoes of the bankrupt defendant. The product seller is a potentially strictly liable defendant. New Jersey's product liability act imposes strict liability on any "manufacturer ***or seller*** of a product." N.J.S. 2A:58C-2. And the Act defines "seller" very broadly as any person, who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles; blends; packages; labels; markets; repairs; maintains; or otherwise is involved in placing a product ***in the line of commerce***. N.J.S. 2A:58C-8. Sellers of real property; providers of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skills, or services; and any person who acts only in a financial capacity with respect to the sale of a product are not product sellers under the Act. Id.

The seller of a defective product is strictly liable under the Act, but the Act does provide sellers with an out. The seller may file an affidavit certifying the correct identity of the manufacturer of the

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BANKRUPTCY OF DEFENDANT MANUFACTURER

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product which allegedly caused the injury. N.J.S. 2A:58C-9 sets forth the information that must be included in the affidavit. Upon filing the affidavit, the product seller shall be relieved from all strict liability claims. Practically, "filing" means filing a summary judgment motion and supporting the motion with the affidavit. The seller may still be directly, as opposed to vicariously, liable if the seller exercised significant control over the design or manufacture of the product, created the defect or knew or should have known of the defect. N.J.S. 2A:58C-9. Accordingly, the Act's "seller's defense" only applies to a traditional "innocent" or "pass through" seller.

The seller's defense will generally relieve innocent sellers from strict liability, but not if the product manufacturer declared bankruptcy. A product seller shall be subject to strict liability if the product manufacturer has no attachable asset or has been adjudicated bankrupt and a judgment is not otherwise recoverable from the assets of the bankruptcy estate. Id. Chrysler LLC and General Motors fit perfectly into this exception. Both of those entities were dissolved as part of their bankruptcies. When the product manufacturer is bankrupt an otherwise innocent seller becomes potentially strictly liable for the product under the Act.

However, if the product at issue is made up of component parts all may not be lost for the product seller when the product manufacturer is bankrupt. The question to ask is what is the defective product at issue? Often times the allegedly defective product is a component part of a larger piece of equipment, such as the seatbelt or tire of an automobile. New Jersey's form interrogatories require plaintiffs, as part of the preliminary information they have to provide before defendants are required to answer the Form C(4) interrogatories, to identify the parts or systems claimed to be defective when the product is a motor vehicle or has component parts. Additionally defendants are required to identify the entity that designed, manufactured, assembled, package, distribute, advertise, installed, serviced and/or maintain the allegedly defective part(s) or system(s). Form C(4) interrogatory no. 1.

In the event that the overall product manufacturer is bankrupt, but the manufacturer of the alleged defective component part has been indentified, the product seller can file an affidavit identifying the component manufacturer as the solvent manufacturer of the allegedly defective product in order to relieve the seller of strict liability under the Act. Plaintiffs need to keep this provision of the Act in mind when deciding what parties to name in their product liability lawsuits.

Plaintiffs also have to keep in mind the statute of limitations. In a typical situation an accident occurs and plaintiff files a complaint against an auto manufacturer alleging only, for example, defective brakes. Litigation ensues. During the course of discovery the auto manufacturer identifies the selling dealership and the brake manufacturer in its answers to the form C (4) interrogatories, but plaintiff does not join either the seller or the component manufacturer. At some point after the statute of limitations expires, the auto manufacturer files for bankruptcy. Is it now too late for a plaintiff to join the seller and/or the component manufacturer?

The Act tolls the statute of limitations as to the product manufacturer if a plaintiff files a complaint against a seller. But the Act does not toll the statute of limitations as to sellers when suit is commenced against a manufacturer. Technically, in the example above it is too late for a plaintiff to sue the selling dealer and the manufacturer. But equitable arguments may prevail. Plaintiff arguably had no

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BANKRUPTCY OF DEFENDANT MANUFACTURER

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reason to sue the component manufacturer or the dealership prior to the manufacturer's bankruptcy. More likely than not, the issue will come down to whether the seller or component manufacturer is prejudiced as a result of being joined in the litigation after the expiration of the statute of limitations.

There are a couple of additional issues to keep in mind regarding joining product sellers and component manufacturers. It is possible that the seller was a party to the litigation but was dismissed, as a result of filing the affidavit discussed above, before the defendant manufacturer filed for bankruptcy. If this is the case, plaintiff should consider filing a motion to vacate under R. 4:50-1. And don't forget about personal jurisdiction; if the seller/component manufacturer was not a New Jersey entity, a jurisdictional analysis will be critical.

In summary, bankruptcy of a manufacturer in a product liability case does not necessarily mean the end of all strict liability claims. Plaintiffs should investigate whether or not the bankrupt defendant is insured and whether or not they should petition the bankruptcy court to lift bankruptcy stay. If the bankrupt defendant is not dismissed by the court plaintiff should move to sever the claim against the bankrupt defendant and proceed against the remaining defendants. Don't forget about the product seller; remember that New Jersey's Product Liability Act broadly defines the term seller. If the product issue is a complex piece of machinery, remember to evaluate the liability and defenses of each component part manufacturer. Finally, be mindful of the statute of limitations for each potential defendant. Keeping this information in mind will help plaintiffs and defendants weather the storm of a product manufacturer declaring bankruptcy during litigation.

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Mark Your Calendars.....

Monday, November 12, 2012
Women and the Law
8:30 am—12:30 pm Hilton, Woodbridge, Iselin, NJ

Tuesday, November 20, 2012
Auto Liability Seminar
8:30 am—12:30 pm Hilton, Woodbridge, Iselin, NJ

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THE JERSEY SHORE

BY BRIAN O'TOOLE, ESQ.

Since I was five years old, my family always spent the last two weeks of June at the Jersey Shore. (We rented in June because the rates were cheaper, but my mom always told us June was the best because the houses were cleaner since we were the first tenants of the season.) I remember staying in Belmar, Spring Lake and Point Pleasant, but once we found Manasquan, we never went anywhere else. The delightful part of Manasquan is that you could rent within a block of the beach and you didn't have to bother with bathhouses or any beach restrictions, you just bought a beach badge and walked right onto the beach. In those days, you needed a badge if you were 10 or older. Needless to say, I celebrated many ninth birthdays! We stayed in several bungalows in Manasquan until we rented the Bube House. Thereafter, we always stayed with George Bube, an eccentric man who could spin a simple hello into a half hour dissertation about beach erosion. But George and my father grew to be great pals and George always said that if he sold his Manasquan house, it would be to my father because he knew how much Dad loved it.

I was also blessed to vacation with my Aunt Marie and Uncle Lee and their two children, Mary and Lee, my cousins and life long friends. They rented a home in Wanamassa, which was about a half hour ride from Asbury Park Boardwalk. Asbury Park in those days was wonderous. Convention Hall was a stately structure and was home to band concerts featuring Joe Basille, New Jersey's legendary bandleader. It also featured wrestling and boxing matches and Lee and I got to see Chuck Wepner knock out a local favorite. There was also nothing like seeing a movie at the Paramount Theater, just down the boardwalk from Convention Hall. The orchestra and balcony were enormous and it really felt like you were attending a special event just seeing a movie. The seats were plush and the popcorn was only fifty cents. I saw one of my favorite movies there, John Wayne in "The Horse Soldiers." Fortunately, the grand old building was renovated in 2007 and now produces summer theater.

And then there was the lake area with the famous mural of "Tillie" adorning the Palace Amusement building that housed the carousel. Of course, no evening was complete without dropping something into the lake while you rode the U-Pedal boats. The Midway area was also a lot of fun and none of the games were over 25 cents. Our favorite was always Huey, the four foot man who guessed your weight. He made all the girls happy because he never guessed any of them weighed over 120 pounds. Unfortunately, except for The Stone Pony and a couple of other bars, all this is largely gone, with only memories remaining.

Tillie as painted on the Palace Amusements building.

As we became of drinking age, or slightly before, our entertainment spots changed. One of our favorite haunts was Jimmy Byrnes' Sea Girt Inn. The place was always packed and they had several bands every night. You could always count on seeing Finn Tracy, Seton Hall Prep's famous basketball coach, behind the bar mesmerizing his patrons with his colorful lore. We also frequented the Sandbar (now Leg-

THE JERSEY SHORE

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getts) and the Osprey, with the world's longest bar, in Manasquan because they were walking distance from home. When we really felt classy we would visit the fabulous hotels in Spring Lake. The Breakers served cocktails on their open veranda overlooking the Atlantic and the Essex and Sussex bar was spectacular with its mahogany and Tiffany lamps. Thankfully, the Breakers Hotel is still in operation, but the Essex and Sussex has now been converted to condominiums. The summer before the changeover I took my three children to the Essex and Sussex so that they could have a taste of old world grandeur. Oh well, nothing lasts forever. For all you shore bar afficionados, some other places we visited were Martell's Tiki Bar in Point Pleasant, The Red Ranch in Brielle, and the Surf Club in Ortley Beach. Remember those days?

Currently, there is an issue in the news of Point Pleasant bars closing at midnight. Obviously, the bar owners want to stay open until two a.m., but my mother always said, "Nothing good happens after midnight." For the patrons, they just have to make judicious use of last call.

The television show, "The Jersey Shore" has brought much notoriety to South Jersey, mostly in a negative way. Personally, I have never watched the show but from what I read about Snooki and her cohorts in crime, they are a far cry from the young men and woman who are affectionately known as "the baby boomers."

The Jersey Shore will always hold a special place in my heart, and while much has changed, its character of offering a wonderful place to enjoy and relax has not. I submit the proof is in the pudding when we see how people from so many other states flock to New Jersey to enjoy their summers.

Unfortunately, my father didn't live long enough to buy the Bube house, but George made the same offer to my wife, Sunny, and me. We wound up purchasing the bungalow my family rented for so many years. We have since had the house renovated and now we, our children and our grandchildren enjoy Manasquan together.

On behalf of all of us at the New Jersey Defense Association,
I wish you a safe summer filled with fun.

THE NEW JERSEY SUPREME COURT PLACES ANOTHER REQUIREMENT UPON LITIGANTS UNDER THE AFFIDAVIT OF MERIT STATUTE

BY: NICHOLAS A. RIMASSA, ESQ.*

In Buck v. Henry, 207 N.J. 311 (2011), plaintiff Robert Buck was diagnosed with mild depression and insomnia by the defendant, physician James Henry, M.D. Dr. Henry prescribed Zoloft and Ambien. Weeks later, plaintiff took an Ambien and fell asleep while inspecting his gun. He awoke in the middle of the night to what he thought was a ringing phone. With his gun in his right hand, plaintiff allegedly reached for the phone with his left and somehow discharged gun into his mouth, resulting in serious and permanent injuries.

Plaintiff filed suit against Dr. Henry, a board certified emergency medicine physician, alleging medical malpractice. Plaintiff also sued sanofi aventis, alleging product liability. Plaintiff served two affidavits of merit, one from a psychiatrist and another from a specialist in emergency medicine. Counsel for Dr. Henry timely objected via letter to the emergency room physician's affidavit, stating his client was providing care and treatment in the field of family medicine when treating plaintiff.

The trial court did not conduct a Ferreira case management conference despite Dr. Henry's request. Instead, the Court issued an order that all affidavit of merit issues had been addressed.

Dr. Henry filed a summary judgment motion attacking the sufficiency of the affidavits of merit and through his certification that he specialized in family practice medicine when providing care and treatment. Plaintiff opposed, arguing the psychiatry affidavit of merit was sufficient because treating a patient with insomnia fell within the "general practice" of medicine. Plaintiff further argued that one cannot be a specialist in family medicine absent board certification. Relying heavily upon Dr. Henry's certification, the trial court granted his motion and the Appellate Division affirmed in an unpublished opinion.

The Supreme Court reversed and remanded. The Court relied on the fact that plaintiff did not have Dr. Henry's certification – which proved he was a family-medicine practitioner when treating plaintiff – until the motion for summary judgment was filed. The Court was critical of the trial court's failure to conduct a Ferreira conference, surmising that had it done so, the "conference likely would have led to the filing of a judicially acceptable affidavit and obviated the need for the summary-judgment motion that led to the dismissal of plaintiff's cause of action." The reliance placed on the Ferreira conference issue was surprising in light of the fact that the very same Supreme Court, in another recent affidavit of merit case, explicitly held that the failure of a trial court to conduct a Ferreira conference cannot be used to toll the timelines in the statute. See Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 425-26 (2010).

Ultimately, the Court carved out a requirement that, moving forward, "a physician defending against a malpractice claim (who admits treating the plaintiff) must include in his answer the field of medicine in which he specialized, if any, and whether his treatment of the plaintiff involved that specialty." As the Court noted, "[t]here are no villains here, but we have a record that bespeaks confusion" and found this was not the type of meritless lawsuit the affidavit of merit was intended to "weed out."

The unique set of facts underlying the Court's ruling illustrates the age old axiom that bad cases make bad law. So much so, the Court even

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AFFIDAVIT OF MERIT

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went so far as to say "[t]his case presents a perfect example of the pitfalls facing a plaintiff's attorney."

As in other opinions, the Supreme Court confirmed that the Affidavit of Merit statute was intended to "flush out insubstantial and meritless claims." Buck concerned a severely injured plaintiff with what appeared to be a facially meritorious case as suggested by the two physicians willing to subscribe to affidavits of merit. Thus, the Supreme Court appeared to brush aside plaintiff's failure to strictly comply with the Affidavit of Merit statute, instead chalking plaintiff's errors up to some mere technicality and then worked backwards to make its decision work. In doing so, however, the Court created another obligation for defendants in professional malpractice cases − under a statute originally intended to create requirements for plaintiffs to satisfy before bringing suit.

The Court's new directive, which is not based upon any statute or reported decision, appears to make at least one issue crystal clear: more reported decisions in the quest for clarity and guidance concerning the Affidavit of Merit statute will be forthcoming in the future.

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ONE FOR THE GOOD GUYS

The NJDA is introducing a new column for the association's Newsletter titled ONE FOR THE GOOD GUYS which will include recent defense trial victories in New Jersey Courts—or anywhere else. If you would like to submit a case for this article, please contact Michele Haas, Esq. at mhaas@hoaglandlongo.com or 732-545-4717.

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N. J. D. A.

New Jersey Defense Association

2013 Convention

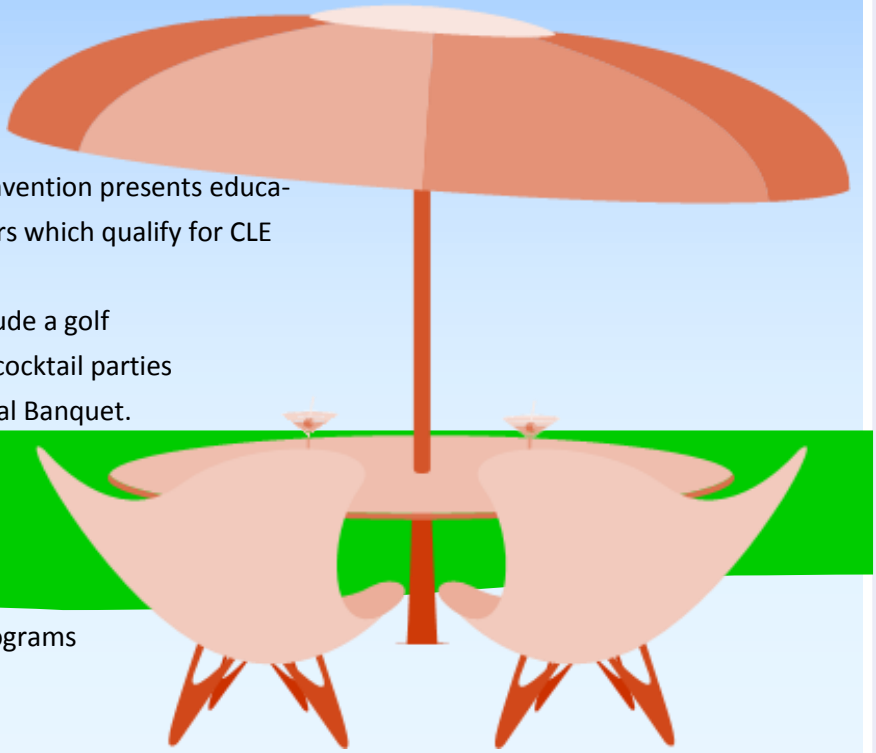
June 27—June 30

47th Annual

Skytop Lodge, Skytop, PA

Skytop Lodge is a classic vacation retreat in the Pocono Mountains. Accommodations include rooms in the historic Main Lodge, serene deluxe cottages or golf views from the Inn. Enjoy the new Adventure Center featuring a 30ft. rock climbing wall, Tree Top Adventure Course, golf and the top rated Pocono Spa. Dine in the legendary Windsor Dining Room or try the Lake View Restaurant for meals overlooking the lakes and golf course.

Skytop offers something for everyone!



The NJDA Convention presents educational seminars which qualify for CLE credits.

Activities include a golf tournament, cocktail parties and the Annual Banquet.

Children's Programs are provided.