NEW JERSEY DEFENSE

NEW JERSEY DEFENSE ASSOCIATION

WINTER 2012

PRESIDENT'S MESSAGE

EDWARD J. FANNING, JR., ESQ.

Since our formation in 1966, the New Jersey Defense Association has been comprised of New Jersey's leading civil defense trial lawyers. Consistent with that storied history, on February 13, Marie Carey led a group of some of our organization's most experienced trial advocates in presenting our annual Trial College. Held annually at the Union County Courthouse, the Trial College is undoubtedly one of the premier trial advocacy training programs in the state. I'd like to thank Marie and our instructors for once again making it a tremendous success. I also would like to thank The Honorable James J. Hely, J.S.C. and The Honorable William L'E. Wertheimer, J.S.C. (Ret.) for participating in this year's seminar and offering their valuable insights on effective and ethical courtroom advocacy. Each of our break-out groups engaged in lively, interactive and engaging discussions and hands-on demonstrations. I am sure that all of our participants -- rookies and veterans, defense and plaintiffs' attorneys alike -- walked away with valuable tips that will help them better serve their clients as effective trial lawyers.

Continuing with our top-notch CLE, we are looking forward to our

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PRESIDENT'S MESSAGE

EDWARD J. FANNING, JR., ESQ.

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Products Liability Committee's upcoming seminar, sponsored jointly with the New Jersey Corporate Counsel Association. This year's seminar will be held on March 23, 2012 at the Hilton Woodbridge and will include a products liability update, an analysis of indemnification clauses and how to best protect our corporate clients, tips on how to protect the attorney-client privilege in the electronic age, and a discussion of emerging ethics issues in litigation. I would like to thank Charlie Cohen, Chair of our Products Liability Committee, for his efforts in organizing what will surely be an engaging and informative seminar.

As the weather warms and we move into the Spring, I am also looking forward to our annual convention in Boston from June 28 to July 1, 2012. We have a premier location: The Westin Copley Place, an elegant yet relaxed setting in the heart of Boston's Back Bay. The Westin overlooks Copley Square and the Charles River and is only a short stroll from Boston Commons, the Public Gardens, Beacon Hill, Newbury Street and Fenway Park. Many NJDA members are heading up to Beantown a day early to catch an afternoon game as the Red Sox take on the Blue Jays on Wednesday, June 27. In addition, on Friday afternoon and evening we will be hosting a Fenway Park tour and a private reception at the luxurious EMC Club located right behind home plate. Of course, all of this is in addition to our receptions at The Westin and our lineup of valuable CLE programming. Please mark your calendars now. I look forward to seeing you there.

Sincerely,

Ed Fanning

President, New Jersey Defense Association

46th ANNUAL NJDA CONVENTION

June 28—July 1, 2012

Westin Copley Place

Boston, Massachusetts

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HOW TO STOP COMMUNITY ASSOCIATION LAWSUITS AT THE DOOR: THE PROCEDURAL REQUIREMENTS OF RULE 4:32-3

BY: MICHAEL DOLICH, ESQ. AND THERESA GIAMANCO, ESQ.*

The rapid growth of common interest communities has changed the landscape of residential property ownership in modern society. Even though these communities often possess self-contained dispute resolution mechanisms, many clashes between the governing board and unit members ultimately end up in court. One under-utilized mechanism for defending community associations is to seek dismissal on the basis that the unit owner does not have standing to sue under New Jersey Rule of Court 4:32 -3, which sets forth the procedure for bringing a shareholder derivative action.

The derivative action corporate law principle can be applied to a lawsuit brought against a community association. The unit owner is analogous to a shareholder in a corporation. Determining whether a lawsuit is a derivative action or a direct action is crucial to the success of a defense under the derivative action statute. The key question in this analysis is whether the alleged conduct would bring about harm to the association or to the individual shareholder.

To set forth an individual action, a shareholder must allege an injury that is separate and distinct from other shareholders. In the community association context, a typical direct lawsuit might be for property damage to an individual unit owner or a slip and fall in a common area due to improper snow removal.

Conversely, if an aggrieved unit owner is individually seeking to remedy an association-wide issue, the claim should be brought as a derivative action. A breach of fiduciary duty claim against the board of directors generally should be brought as a derivative action. Also, any attempt to remove a board member from the association is typically a derivative action. If the lawsuit is derivative in nature, the plaintiff must contend with the highly procedural, and often overlooked standing requirements in R. 4: 32-3. That Rule provides:

> In an action brought to enforce a secondary right on the part of one or more shareholders in an association incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified and allege that the plaintiff was a shareholder at the time of the transaction complained of, or that the share thereafter devolved by operation of law. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees, and if necessary, from the shareholders such action as is desired, and the reasons

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RULE 4:32-3

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> for the failure to obtain such action or the reasons for not making such effort. Immediately, on the filing of the complaint and issuing the summons, the plaintiff shall give such notice of the pendency and object of the action to the other shareholders as the court by order directs. The derivative action may not be maintained if it appears that the plaintiff does not fairly represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. Rule 4:32-2(e) ("Settlement, Voluntary Dismissal, or Compromise") is applicable to actions brought under this rule.

The New Jersey Supreme Court recognized derivative actions as a possible cause of action in the context of homeowners association cases in Siller v. Hartz Mountain Assocs., 93 N.J. 370 (1983). In Siller, the Court described the association's board as occupying a position analogous to a corporation's board of directors. Id. at 382. The Court reasoned that the association had an exclusive right over maintenance, repair and replacement of the commonly-owned condominium elements. Accordingly, unit owners could not pursue individual claims for damage to these elements. Id. at 381. The Court determined that if a unit owner wished to act on a common element claim in the event the association failed to do so, "the unit owner's claim should be derivative in nature and the association must be named as a party." Id.

A classic derivative action lawsuit actually encompasses two causes of action: it is an action to compel the corporation to sue and it is an action by a shareholder on behalf of the corporation to redress harm to the corporation. See In re Prudential Ins. Co. Derivative Litigation, 282 N.J. Super. 256, 274 (Ch. Div. 1995).

Courts have long been cognizant of the potential for abuse inherent in shareholder derivative actions and that such lawsuits may have a detrimental impact on corporate governance. In re PSE & G Shareholder Litig., 173 N.J. 258, 278 (2002); see Shields v. Murphy, 116 F.R.D. 600, 606-07 (D.N.J. 1987) (expressing concern over "overzealous" attorneys filing "premature" suits, "motivated more by their personal financial gain than their desire to protect shareholders"). Rule 4:32-3's requirements for standing are intended to decrease the potential for abuse posed by derivative actions. The following sections will address the salient standing requirements and discuss defense strategies in the context of homeowners associations.

DEMAND AND DEMAND FUTILITY

Pursuant to R. 4:32-3, "[t]he complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees, and if necessary, from the shareholders such action as is desired, and the reasons for the failure to obtain such action or the reasons for not making such effort." According to this provision, a plaintiff is required to make demand unless excused from doing so under state law. In re PSE & G, *supra*, at 278. The demand requirement is aimed at ensuring that shareholder plaintiffs use courts as the last resort to bring about desired change by requiring that the shareholder "exhaust his intra-corporate remedies before bringing a derivative action." Id. at 270. The demand requirement applies to both shareholder and unit owner plaintiffs.

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RULE 4:32-3

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The only narrow exception to the requirement that shareholders make demand upon the corporation's board of directors prior to instituting a derivative action is if demand would be futile. The shareholders must show either (1) "the corporation itself has refused to proceed after suitable demand," or that (2) demand should be excused by extraordinary conditions." See In re Cendant Corp. Derivative Litig., 189 F. R. D. 117, 127 (D.N.J. 1999).

If the plaintiff alleges demand-futility, New Jersey courts have adopted the test established by the Supreme Court of Delaware in Aronson v. Lewis, 473 A.2d 805 (1984). Under this test, a trial court must determine "whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." Id. at 814; see also In re Prudential, *supra*, at 275.

"Courts have set high standards for excusing pre-suit demands on the directors because the policy behind the requirement of making demand: recognition that management rests with the Board and its presumptive business judgment, and the desire for the avoidance of unnecessary litigation." Pullman-Peabody Co. v. Joy Mfg. Co., 662 F. Supp. 32, 35 (D.N.J. 1986). In deciding whether to dismiss a shareholder's suit for failure to make demand, the court "is generally limited to the pleadings. In re PSE & G, *supra*, at 287. As such, "[c]onclusory allegations of fact or law unsupported by allegations of specific fact are insufficient." In re Prudential, *supra*, at 276.

The burden is on the plaintiff to show specific facts meeting at least one prong of the Aronson test, and defendant has the burden of satisfying the business judgment rule. Id. at 287.

According to the demand requirement, a shareholder must exhaust intra-corporate remedies before going to the court. Often, the plaintiff-unit owner does not make a pre-suit demand. The defense should determine all available methods of redress in the association's by-laws and argue that the unit owner failed to pursue those avenues.

SIMILARLY SITUATED MEMBERS

Rule 4:32-3 states that "[t]he derivative action may not be maintained if it appears that the plaintiff does not fairly represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."

New Jersey courts have not precisely defined this requirement. Generally, the court must determine whether the alleged injury belongs to the corporation or if it involves a special injury that does not affect all shareholders. Strasenburgh v. Straubmuller, 146 N.J. 527, 550 (1996). When determining whether the action is derivative or an individual claim, courts look at the nature of the wrong alleged in the complaint and not the plaintiffs' designation of the injury. Id. at 551; see also Hague v. Rica, 2008 WL 2329897 (App. Div. 2008) (unpublished) (holding that the LLC member's claims were derivative where the wrong alleged, namely the taking of company monies, was a wrong to the company and the member suffered no special injury not suffered by other members).

Generally, breach of fiduciary duty claims against directors are considered derivative claims, unless there is a particularized injury to the shareholder. Strasenburgh, *supra*, at 552. If the alleged breach of duty causes a distinct injury, shareholders may sue directly. For example, selective dissemination of information to one shareholder is not considered derivative because the unfair dealing only af-

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fects shareholders that were deprived of that information. Id. at 552; see also Kahn v. Rusckowski, 2010 WL 2696856, *5 (App. Div. 2010) (unpub).

Another example is based on the principle that diminished value to corporate shares resulting from the injury is considered indirect harm to the shareholder. Strasenburgh, *supra*, at 549. By analogy, a unit owner's contention that the value of his or her home has decreased due to action or inaction by the board is likewise indirect harm, and a derivative action is the only appropriate remedy.

The similarly situated representation requirement may prove to be the most elusive. Those in tight-knit common interest communities will usually appear to be in a similar situation with respect to most transactions by the association. However, just because the particular issue complained of may ultimately impact all members in one way or another, it does not follow that they are similarly situated for the purpose of bringing the derivative action.

As the matter proceeds, it may become apparent that other members are not necessarily aggrieved by the issue complained of by the specific plaintiff. As an example, not all unit owners may wish to have a particular board member removed from the association. One must bear in mind that the underlying purpose of a derivative action suit is to permit a shareholder to act as the association itself and assert a right belonging to the association, not a right or interest particular to the shareholder. The derivative action statute does not permit a lone dissenter to speak on behalf of the rest of the association members.

Unit owners may attempt to satisfy this requirement by producing evidence that a certain percentage of unit owners are in agreement with the grievance. There is a substantive difference between a derivative cause of action by shareholders to enforce secondary or a derivative rights and a claim asserted in a class action to enforce primary rights that belong to several individuals. In the derivative context, the alleged wrong was committed against the corporation. Any recovery by the plaintiff is a benefit to the corporation. Whereas, in a class action suit, the representative plaintiff has been directly harmed and sues on behalf of himself and other similarly situated shareholders. Valle v. North Jersey Automobile Club, 125 N.J. Super. 302, 307 (Ch. Div. 1973). Even if the unit owner plaintiff garners support for his cause, he must still show that the right to sue belongs to the association and not to the members individually in order to maintain a derivative lawsuit.

CONCLUSION

Reliance on the derivative action rule is an effective way to eliminate, or at least limit, unit owner lawsuits brought against community associations. The procedural requirements of R. 4:32-3 often present a difficult if not insurmountable hurdle for the unit owner to overcome.

* Michael Dolich is a member and Theresa Giamanco is an associate with Bennett, Bricklin & Saltzburg in Marlton, NJ. Michael specializes in the defense of individuals and businesses in a wide variety of personal injury matters including premises liablility claims and claims of defamation, toxic tort claims, civil rights violations and wrongful death. Theresa focuses her practice on civil defense litigation matters.

WHAT IS A "PREEXISTING CONDITION"? DO WE REALLY UNDERSTAND *SCAFIDI?*

BY HERBERT KRUTTSCHNITT, III, ESQ.*

Recently, a colleague stopped into my office to discuss a case he is defending. It is a nursing home matter involving a patient who developed several decubitus ulcers. As we were discussing his case, I took a phone call from another colleague who was getting ready to start a trial involving an industrial accident and a plaintiff who died following the accident–allegedly due to negligence of the physicians who were caring for him. Ironically, both conversations turned into discussions about Scafidi v. Seiler.

After discussing the nursing home case and the industrial accident case, I found myself pondering: Do we really understand Scafidi? The purpose of this article is to discuss the concept of Scafidi, related cases, and to explore what I believe is the misunderstanding as to what constitutes a "preexisting condition." In the end, I will suggest that Scafidi may be a very under-utilized weapon in the defense attorney's arsenal. I honestly believe, after discussions with both of my colleagues, that "preexisting condition" and Scafidi have a place in the defense of both cases.

Before beginning the discussion, I would like to clear up one common misconception. When we talk about "preexisting condition," a hinge concept in any Scafidi analysis, we must not confuse it with the "egg-shell plaintiff." The egg-shell plaintiff is not a "preexisting condition"; it is a *preexisting potential* for a greater injury than might have been expected. This writer does not suggest that Scafidi would ever be appropriate in the defense of a case in which the plaintiff sustains injuries far greater than an ordinary person would have sustained, due to factors inherent in and unique to that individual. Let us put that potential misunderstanding aside right at the start. There is a difference between an "egg-shell plaintiff" and one who has a "preexisting condition" that a jury should be permitted to consider as one of the causes of the injuries claimed. Let us now turn to what I suggest is the beginning, the medical malpractice case brought by Mrs. Mary Fosgate (and family) against Dr. Anthony Corona.

Mary Fosgate began treating with Dr. Corona in early 1963. Her complaints included persistent cough, fatigue, loss of appetite and malaise. For six plus years, and more than 120 office visits, Dr. Corona treated Mrs. Fosgate conservatively–with cough medicines and vitamins. In July 1969, during a hospitalization following an auto accident, it was discovered that Mrs. Fosgate had advanced pulmonary tuberculosis. Mrs. Fosgate, her son, daughter-in-law, and two grandchildren filed suit against Dr. Corona. Having resided together, all had been exposed to the infection during the years it went undiagnosed.

Fosgate v. Corona, 66 N.J. 268 (1974), is one of the earliest cases in which a court wrestled with the concept of an alleged injury that was, in fact, a consequence of a preexisting condition. The claim against Dr. Corona was the failure to diagnose tuberculosis. Obviously, the defendant had not actually caused that condition and the defense argued he should not be held responsible for injuries which preceded his involvement with the patient. Before Mrs. Fosgate ever consulted Dr. Corona, she already had tuberculosis. At trial, plaintiff argued that the defendant should be liable for the entirety of her injuries. Defendant argued that he should not be held

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accountable for all injuries because, at most, he delayed the diagnosis and permitted the condition to advance. He did not cause it.

The trial court charged the jury that Mrs. Fosgate "is entitled to an award of damages only if the jury finds that her illness or condition was aggravated or made more severe as a result of the alleged malpractice and only to the extent of such aggravation or acceleration." Plaintiff appealed following what she considered an unsatisfactory verdict. The Appellate Division found that the jury charge was proper and affirmed. The Supreme Court granted certification and, in an opinion written by the late Justice Sullivan, the Court reversed and remanded for a new trial. However, in sending the matter back for a new trial, the Court made clear that defendant should not be responsible for all injuries. The defendant should only be held responsible for a quantum of damages based on the aggravation. Mrs. Fosgate should not be compensated for her "preexisting condition."

The reason for the reversal was because the Court felt that the trial judge should have made it clear to the jury that, if the damages were to be limited to the aggravation, it should be *defendant's burden of proof* to so limit; not plaintiff's burden. If there was a failure of proof on the issue of apportionment, the jury should default to awarding plaintiff a verdict for all injuries, rather than speculate on the extent of Mrs. Fosgate's disease when she came under the care of the defendant. Otherwise, the Court agreed that the defendant should have the opportunity to limit the verdict to the damages incurred exclusively as a result of his negligence–the extent to which his negligent treatment had actually made plaintiff's condition worse.

Justice Sullivan cited opinions from Supreme Courts of Hawaii, Colorado, and Idaho, as well as the Restatement of Torts. "Preexisting condition" was a concept that legal theoreticians had long discussed, but few courts had actually addressed.

Sixteen years after Fosgate, the Supreme Court, in an opinion written by Justice Stein, decided Scafidi v. Seiler, 119 N.J. 93 (1990). Scafidi was a case in which an infant had been born premature and the jury found that the doctor had negligently failed to administer tocolytics in order to arrest the labor. The trial court charged the jury according to standard "proximate cause" concepts. The trial court instructed the jury that, in order for plaintiff to prevail on causation, the jury must find that the negligence of Dr. Seiler was "a cause which necessarily set the other causes in motion and was a substantial factor in bringing about the injury complained of. . . . a cause which naturally and probably led to, and might have been suspected [sic] to produce the injury complained of." The jury answered "no" to that question.

Of course it did. The "cause" which "set in motion" Danielle Scafidi's premature birth was the fact that her mother, Jamie Scafidi, had gone into premature labor. As the Supreme Court in Scafidi pointed out, in cases "in which the plaintiff's injury can be traced to a single cause, the standard instruction on proximate cause. . . the cause which necessarily set the other causes in motion" is the correct approach. However, "in cases in which the defendant's negligence combines with a *preexisting* condition to cause an injury, the standard charge on proximate cause could confuse or mislead a jury." (Italics in original).

The nub of the Scafidi decision, I suggest, is that, "in the context of harm resulting from both a plaintiff's preexisting condition and a defendant's

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negligent discharge of duty . . . the jury (should be permitted) to consider whether defendant's negligence increased the risk of harm and whether such increased risk was a substantial factor in producing the harm." The upshot of Scafidi is that "relaxing the causation requirement might correct a perceived unfairness to some plaintiffs who could prove *the possibility* that the medical malpractice caused an injury but could not prove the probability of causation." (Italics added).

That is the tradeoff. If plaintiffs want the benefit of a relaxed "causation requirement," they must also accept the fact that "a defendant whose acts (only) aggravated a plaintiff's preexisting condition (should be) liable only for the amount of harm actually caused by that negligence." Said another way, "the defendant should be subject to liability only to the extent that he tortiously contributed to the harm by allowing a preexisting condition to progress or by aggravating or accelerating its harmful effects, or to the extent that he otherwise caused harm in excess of that attributable solely to the preexisting condition."

Thus, Scafidi gave us a "modified standard of proximate causation, limited to that class of cases in which a defendant's negligence combines with a preexisting condition to cause the harm–as distinguished from cases in which the deviation alone is the cause of the harm." That is a significant modification of the traditional causation standard, through a recognition that causation can be apportioned between a preexisting condition and the defendant's negligence.

This has translated into a jury question which asks the jury to apportion between the "preexisting condition" and the negligence of the defendant. The court will then mold the verdict to reduce the entire award by the percentage attributable to the "preexisting condition" – an exercise that has become known as a "Scafidi reduction." It is a percentage apportionment among the *causes* of plaintiff's overall injury.

When considering whether Scafidi might apply to a given case, one must not be too myopic. That is the trap into which many lawyers (and trial judges) fall. The preexisting condition and the negligence do not have to be inextricably intertwined. It can be argued that the preexisting condition does not have to be the condition being treated, nor does it have to relate directly to the negligence of the defendant. A preexisting condition can be *any condition* capable of leading to the same outcome, even in the absence of defendant's negligence.

This is the key to distinguishing Scafidi from the classic egg-shell plaintiff, in which the defendant must pay for all injuries even though an inherent condition may have caused those injuries to be more severe than one might have expected. The egg-shell plaintiff has the inherent *potential* for greater harm than might have been expected to occur under the circumstances. However, absent the defendant's negligence, no harm would have occurred. In a Scafidi case, there must be a *condition* that *preexists* the alleged negligence, which condition also has the potential to have resulted in the same outcome, absent negligence.

In other words, whenever the plaintiff has a condition, any condition, which has the capacity to have produced the same adverse outcome, it should be appropriate to argue Scafidi and apportion causation. Many attorneys, as well as courts, do not consider a case to be a Scafidi case unless the preexisting condition was the very condition being treated. The leading cases do not explicitly so state and it is

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not a logical conclusion. It is the nexus between the preexisting condition and the injury that is being compared to the nexus between the negligence and the injury. The comparison of independent causes, when an injury has more than one cause, is what makes it a Scafidi case.

In the case of Ginsberg v. St. Michael's Hospital, 292 N.J. Super. 21 (App. Div. 1996), the Appellate Division permitted a case to be submitted to a jury for consideration under Scafidi in which the preexisting condition was an underlying cardiac condition and the negligence was the administration of an overdose of insulin. The plaintiff's expert testified that the insulin overdose had hastened the decedent's demise by increasing his risk of going into cardiac failure. The defense expert testified that the decedent's cardiac condition would have resulted in his death within weeks to months even if the insulin overdose had not been administered. The negligent treatment was for the patient's diabetes. The preexisting condition was an underlying heart disease. The "Scafidi reduction" was based on the fact that the patient might have gone into cardiac failure due to his heart condition, even absent the insulin overdose.

The point is that there are many lost opportunities for a defendant to request a causation apportionment and that it is a useful defense tactic in the appropriate case. When Scafidi was decided, it was widely considered a victory for plaintiffs. The causation standard was almost reduced to a mere possibility. However, in the years that have followed, the "Scafidi reduction" has been a saving grace for the defense in many cases in which an "all or nothing" approach to damages was a potential disaster.

A few years ago, I tried a cardiac surgery case involving a young woman who had undergone a mitral valve replacement. The valve failed in the recovery room and the patient died before they could get her back into surgery. The surgeon who replaced the valve had turned the surgery over to his assistant to close. Plaintiff's expert testified that the surgeon should have taken greater measures to ensure the integrity of the valve before allowing his assistant to close the patient.

The defense expert testified that, under the circumstances, if the valve had failed before the patient had been closed, while the patient was still on the operating table, the patient would probably still have died. The surgeon would probably not have been able to repair the valve because the condition of the heart muscle was so friable that it would not have been able to hold the valve and withstand the blood pressures. The jury found against the surgeon–and apportioned the causation: 96% "preexisting" and 4% "increased risk" due to the negligence. We can discuss whether 4% should qualify as a "substantial factor," but suffice it to say it does. There is probably no situation left in which even the slightest degree of negligence will not qualify as a "substantial factor." However, a net verdict of 4% is about as good a Scafidi reduction as one can get, and I'll take it.[1]

When my colleague came into my office the other day to discuss his nursing home case, he was dealing with a patient who developed bed sores because she allegedly had not been adequately turned and repositioned. Most plaintiffs who develop bed sores do so, allegedly, because they have not been consistently turned and repositioned; but most also have preexisting comorbidities which predispose them to bed sores. And there are times when, even under the absolute best of circumstances, bed sores are simply unavoidable. Poor mobility, poor nutrition, poor hydration, poor kidney function, poor pe-

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ripheral circulation, and a host of other medical conditions are frequent *preexisting conditions* which place patients at risk. These are medical *conditions* which, even in the absence of negligence, are still capable of leading to decubitus ulcers. Regular turning and repositioning of these patients will reduce the risk of decubitus ulcers, but is not guaranteed to prevent them. Why can a bed sore case not be a Scafidi case?

When my other colleague called to discuss his industrial accident case, in which the injuries were made worse and the resulting death had been caused by subsequent alleged malpractice, I suggested that the industrial accident injuries should be considered to be "conditions" which "preexisted" any medical malpractice by codefendants. Not only was it to his advantage to ask for an apportionment of causation rather than an apportionment of negligence, it is also a much less confusing concept for the jury to grasp in cases involving successive, independent acts. In both the decubitus case and the industrial accident case, I submit, it would be appropriate to allow the jury to apply Scafidi.

Recently, I was preparing with a colleague for a trial involving a claim of physical therapy malpractice. The patient had sustained a serious fracture of the humerous and had an open reduction with plates and screws. Before beginning therapy the patient had also developed adhesive capsulitis of the shoulder. The physical therapist had allegedly over-rotated the patient's arm, resulting in a re-fracture. The plaintiff was claiming damages to the full extent of the lost use of the arm.

Our contention was that this was not a "you take the plaintiff as you find him" (all or nothing) situation. This was an arm and shoulder which came to our client with *preexisting conditions*. The fracture would have healed, as it did after the re-injury. However, the shoulder, our expert opined, would likely never have achieved a normal range of motion again, even if the re-injury had not occurred. Our trial brief included Scafidi.

Having been fortunate to have been a member of the law firm that defended both Scafidi and Verdicchio, my partners and I spent many hours discussing the concepts of "preexisting condition," "substantial factor," and "increased risk." One might accuse me of seeing a Scafidi issue in more cases than it belongs, but any case that has the ability to limit a verdict strictly to those damages truly caused by the defendant's negligence should have a place in all of our trial notebooks. And a net verdict of 4% is still pretty close to a win in my book.

FOOTNOTE:

[1] See Verdicchio v. Ricca, 179 N.J. 1 (2004) and Reynolds v. Gonzalez, 172 N.J. 266 (2002).

*Herb Kruttschnitt, III, Esq. is 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.

NJDA TRIAL COLLEGE

Monday, February 13, 2012

Union County Courthouse

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ON LAD'S HORIZON: WHAT EMPLOYERS NEED TO KNOW ABOUT THE FUTURE OF NEW JERSEY STATE EMPLOYMENT DISCRIMINATION LAW

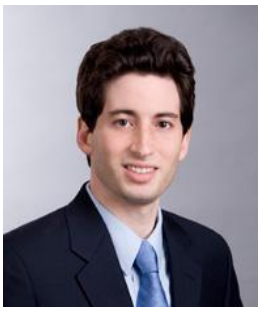
BY DANIEL L. SAPERSTEIN, ESQ. AND LUCAS A. MARKOWITZ, ESQ.*

At the onset of the New Year, New Jersey employers should reexamine the year that was and prepare for the year ahead. Since 2011, there have been several legislative proposals and judicial challenges intending to enlarge the umbrella of employment discrimination protections for applicants and employees.

The New Jersey state legislature has introduced a series of proposals that would amend New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. §§ 10:5-1 to -49, to insulate a host of classes from employment discrimination. Indeed, these proposals would prohibit or substantially limit discrimination based on pregnancy, childbirth or breastfeeding; credit history; and criminal record. Although not directly amending LAD, the proposed "Healthy Workplace Act" – which would prohibit workplace bullying regardless of protected class status under LAD – portends a significant expansion of New Jersey state employment discrimination law.

This article does not intend to alarm employers, but to provide caution and guidance on what the future may hold. As it stands, LAD has not been amended since 2007 and, as recently as 2011, the Third Circuit held that LAD could not be read to include familial status among the classes protected against employment discrimination. Nevertheless, employers should begin to contemplate the ways in which they would address the potential changes that are proposed.

LAD – As It Stands



LAD presently makes it an unlawful employment practice to discriminate against an employee or prospective employee on the basis of race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer. LAD provides for a private right for the unlawful employment practices enumerated therein, including retaliation, and allows for a full range of remedies, including equitable relief (such as reinstatement) and monetary awards encompassing front and back pay, compensatory damages, emotional distress damages, attorney's fees, and, even in some cases, punitive damages. In addition to the private right of action, employers that violate LAD may be subject to penalties not to exceed $50,000.

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LAD's list of protected employment classes has remained static for the last few years as a result of legislative inaction and judicial rendering. As noted above, in Iovanella v. Genentech, Inc., No. 11-1266, 2011 WL 5833170 (3d Cir. Nov. 21, 2011), the Third Circuit recently did not construe LAD to include familial status as a class protected against employment discrimination. In support of its decision, the Third Circuit cited to the lone New Jersey state court decision addressing the issue, Bumbaca v. Township of Edison, 373 N.J. Super. 239 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005), which reached the same conclusion. Relying on the plain text of LAD, the Third Circuit also noted that the Act expressly protects familial status in the housing context and, given its conspicuous absence from the list of unlawful employment practices, the Legislature's intent was manifest.

LAD – As It May Change

Although the Third Circuit's ruling refused to expand LAD's employment protections, the New Jersey state legislature has introduced several pieces of legislation that would enlarge the scope of the statute.

Pregnancy/Breast Feeding

In 2011, both the New Jersey State Assembly and Senate introduced bills, A.B. 1496 & S.B. 3060 (2010-2011), respectively, that would amend LAD to prohibit workplace discrimination on the basis of pregnancy, childbirth, or breast-feeding, and, as the title states, require employers to provide a daily break for breast-feeding mothers. The bill was reintroduced in the Senate, S.B. 886 (2012-2013), earlier this year and would directly amend LAD to provide aggrieved employees with a private right of action and generous remedies. An employer found to have violated LAD also would be subject to its penalty provisions.

Although S.B. 886 would create another protected class under LAD, this addition does not forebode dramatic consequence for the workplace. Indeed, many New Jersey employers are covered by federal discrimination law, i.e., Title VII of the Civil Rights Act of 1964, which protects the status of pregnancy, childbirth, and related medical conditions. It should be noted that, with respect to breast-feeding, some federal courts have held that Title VII does not apply. See, e.g., Equal Employment Opportunity Comm'n v. Houston Funding II, Ltd., No. 4:11-cv-02422, slip op. (S.D. Tex. Feb. 2, 2012). At the state level, LAD protects gender, a classification broad enough that employers not covered under federal discrimination law – in an abundance of caution – tend to extend appropriate accommodations and protections to pregnant and breast-feeding employees.

Credit History/Financial Status

In 2011, New Jersey was at the vanguard of "hiring practices" law, as it became the first and only state to prohibit employers from discriminating against the unemployed in job postings, N.J.S.A. §§ 34:8B-1 to 34:8B-2. Furthermore, in Rea v. Federated Investors, 627 F.3d 937 (3d Cir. 2010), cert. denied, No. 10-1507 (Oct. 3, 2011), the Third Circuit held that the Bankruptcy Code permits private employers to refuse to hire an applicant based on his or her bankruptcy status – a decision followed by two other circuit courts to date (Burnett v. Stewart Title Inc., 635 F.3d 169 (5th Cir. 2011)) and (Myers v. Toojay's Mgmt. Corp., 640 F.3d 1278 (11th Cir. May 17, 2011)). Further changes to standard employer hiring (and personnel) practices have been on the horizon for some time.

Beginning in 2009 and continuing into 2012, the Assembly has repeatedly introduced a bill (currently A.B. 2360 (2012-2013)) that would amend LAD to make it an unlawful employment practice to

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discriminate against an applicant or employee because of his or her credit history or financial status.

Although this bill has languished in the legislature, seven states have either banned or significantly restricted the use of credit checks performed on applicants and employees. Given this recent trend, the likelihood that the bill will pass may have increased.

Criminal Records/Background Checks

In 2012, the Assembly proposed another bill, A.B. 2300 (2012-2013), that would supplement LAD to prohibit employers from taking certain actions against applicants based on their criminal record. First, the bill would prevent an employer from requesting on its initial written application information about an applicant's criminal record unless (1) the applicant applied for a position for which any federal or state law or regulation creates a mandatory or presumptive disqualification based upon a conviction for a specific offense; or (2) pursuant to federal or state law or regulation, employers cannot hire applicants convicted of a specific offense. The bill expressly states, however, that these exceptions only allow an employer to request information about the specific convictions that would disqualify an applicant pursuant to federal or state law or regulation.

Second, this bill allows an employer to inquire about an applicant's prior criminal record during an interview conducted after a review of the initial written application determines that the applicant has preliminary eligibility for the position. The bill, however, further disallows an employer from inquiring into whether an applicant has ever been arrested, charged with a crime, convicted of a sealed non-criminal offense, or adjudicated as a juvenile delinquent.

Similar to the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., any employer who performs a background check on an applicant must (1) inform the applicant that a criminal background check may be requested in connection with the application for employment and obtain written consent from the applicant before conducting the criminal background check; (2) notify the applicant within 30 days that a criminal background check was requested and provide the names and address of the reporting agency or company; and (3) allow the applicant, upon the applicant's written request, to review the criminal background check.

Furthermore, like Article 23-A of the New York's Correction Law, an employer cannot deny employment based solely upon an applicant's prior criminal record unless (1) there is a direct relationship between one or more of the previous criminal offenses and the specific employment sought; or (2) the granting of employment would involve an unreasonable risk to property or to the safety or welfare of specific persons or the general public. The employer shall consider (1) the specific duties and responsibilities related to the employment sought and the bearing, if any, that the criminal offense for which the person was previously convicted will have on the applicant's ability to perform one or more such duties or responsibilities; (2) evidence of the applicant's rehabilitation (including a certificate of rehabilitation issued to the applicant pursuant to law), and (3) the amount of time which has elapsed since the criminal offense.

If an employer denies employment based solely upon an applicant's criminal record, it shall within five days provide the applicant in writing the reasons for such denial. An employer who violates any provision of the bill is subject to a civil penalty of not more than $10,000 for a first offense and not more than $20,000 for a subsequent offense.

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Healthy Workplace Act

Although not directly amending LAD, S.B. 333 (2012-2013) or the "Healthy Workplace Act," would make it an unlawful employment practice for an employer to subject an employee to abusive conduct or to permit an abusive work environment, or retaliate against an employee for opposing any such practice under the proposed Act. "Abusive conduct" is broadly defined to include the malicious conduct of an employer or employee in the workplace that a reasonable person would find hostile or offensive. Under the proposed Act, abusive conduct may include, but is not limited to, repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance. Additionally, an "abusive work environment" is a workplace in which an employee is subjected to abusive conduct that is so severe that it causes physical or psychological harm to the employee.

Employers who violate the proposed Act would face a private right of action, as well as a fine not to exceed $25,000. The bill expressly provides an affirmative defense to an action regarding an abusive work environment that the employer exercised reasonable care to prevent and promptly correct the abusive conduct, and the aggrieved employee failed to take advantage of appropriate preventative or corrective opportunities provided by the employer. The available remedies are in addition to any remedies provided under the workers' compensation laws, except that if a person elects to receive worker's compensation in connection with the abusive workplace conduct in lieu of brining a separate legal action, then he or she shall not be permitted to recover double damages under a separate legal action pursuant to the Act.

New Jersey courts have held consistently that LAD is not a general civility code. See, e.g., Heitzman v. Monmouth County, 728 A.2d 297, 304 (App. Div. 1999), overruled on other grounds, Cutler v. Dorn, 196 N.J. 419 (2008). And while the Healthy Workplace Act does not directly amend LAD, its enactment would substantially undercut LAD's limited purpose. Indeed, by and large, LAD's intent is to protect a limited class of persons based on their immutable characteristics or deeply-held beliefs.

A number of state legislatures have already proposed similar bills, including New York. If New Jersey follows suit, new policies and training may be necessary to address regulations likely to stem from the proposed Act if it becomes law.

Takeaways

The New Jersey state legislature has introduced a number of bills which, if enacted, would likely expand the groups of applicants and employees protected by LAD and other employment discrimination laws. Employers should take note of the prospect of passage, as each of these bills (or close variants) either have been proposed or passed by other states. Employers should likewise brace for changes in hiring practices and employee policies if these bills become laws.

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FAREWELL ANGEL
BY BRIAN O'TOOLE, ESQ.

In January, I had the honor to argue in front of the New Jersey Supreme Court on the case of McDougall v. Lamm. This case presents for review the proposition that the relationship between man and his companion animal is different and of a higher order than that of man with an inanimate object designated as property, and this is entitled to a different place within the social justice system. The plaintiff argues that since the State has a recognized policy that emotional distress is a compensable injury when a bystander witnesses serious injury or death to a family member, this policy should apply to the loss of a companion dog or other pet that may likewise be considered a "family member." For those of you who may follow my column, you realize that as an avowed animal lover, defending against this proposition was difficult, especially considering the egregious fact pattern involved. In fact, as I write this article my dog, Shamus, is eyeing me suspiciously.

The facts are brief. On June 7, 2007, Joyce McDougall was walking her maltipoo dog, Angel, on a public street in Morris Plains. A maltipoo is a mixture of a Maltese and a poodle. In fact, you could almost fit Angel in your pocket. Without warning, the Lamm dog, a large mixed breed, came running from the home of her master growling and snarling. The defendant's dog grabbed plaintiff's dog by the neck, shook her violently several times and dropped her to the ground dead, all literally right in front of Joyce McDougall. The plaintiff filed suit for damages for the value of the dog and for her emotional distress, based upon what she had witnessed. Plaintiff was asking the Court to expand the doctrine set forth in Portee v. Jaffee, 84 N.J. 88 (1980) to include a companion pet. To establish her relationship with Angel, Ms. McDougall testified that she owned Angel for 10 years and that now that her husband had moved out of their marital home and her three sons were grown and gone, Angel was her sole companion. Ms. McDougall spent all of her time with Angel and had trained Angel to do an amazing number of things, including dancing on her hind legs and singing by making a "wooo" sound. During her testimony, Ms. McDougall broke down.

Judge Stephen Smith initially heard defendant's Motion for Summary Judgment on the Portee issue and stated in pertinent part:

> I watched my own pet as a young person get run over by a car and there is certainly a great deal of emotion associated with that, and perhaps things may change and perhaps you may be the person to change them, but for now a pet is a chattel and you're not entitled to the relief that you're looking for in this lawsuit.

Judge Robert Brennan, hearing the case without a jury, awarded the plaintiff $5,000.00 as the replacement value of the dog, given her highly trained state, but denied emotional distress damages to the plaintiff.

The Appellate Division in affirming the trial court, stated:

> In the final analysis, we conclude that if a cause of action for the emotional distress of a dog owner in watching the shocking and violent death of her dog is to be recognized, such recognition should come either from our Supreme Court or from the Legislature.

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FAREWELL ANGEL

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On behalf of the defendant, I argued that there was no effective way to limit the class of what might be considered a "companion animal." Therefore, this Portee expansion might effectively be to the entire animal kingdom. Even opposing counsel conceded at oral argument that he would have difficulty including reptiles. Additionally, I argued how would the Court define the class of people who might have a cause of action. Would it be limited to just that person who had that special companion relationship or would it be the pet's entire immediate family, or extended family for that matter.

I also cited the Law Division case of Harabes v. Barkerly, Inc., 348 N.J. Super. 366 (Law Div. 2001), in which claims for both emotional distress and loss of companionship were made. Judge Graves in his well reasoned decision set forth the public policy considerations for out of state cases which disallowed the Portee expansion. That case also touched on the problems that juries might have in evaluating claims for non-economic damages involving the loss of pets, since there really are no guidelines for such an award. I even pointed out the problems the Court would face in situations involving car accidents with animals and veterinary malpractice cases.

There can be no doubt that emotionally your heart goes out to Ms. McDougall because her fact pattern is especially shocking and brutal. Unfortunately, there is an old adage that hard cases make bad law. I suspect that may be the case here.

Oral argument in front of the Supreme Court took place on January 4, 2012. We'll let you know what happens.

Shamus, stop looking at me!

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CAN "EXCESS" MEAN LESS? A BROADER INTERPRETATION IN CARDIOVASCULAR INJURIES

BY: KRISTY N. OLIVO, ESQ.*

KEY POINTS:

- The court interprets N.J.S.A 34:15-7.2, dealing with cardiovascular claims and what "in excess of the wear and tear of the claimant's daily living" means.
- Previously, it was held that a petitioner's activity at work had to be in excess or more than his activity at home for a cardiovascular claim to be found compensable.
- According to newest case law, if a petitioner's inactivity at work is greater than his or her activity at home, a workers' compensation claim can also be found compensable.

In New Jersey workers' compensation cases dealing with cardiovascular injuries alleged to be related to employment, N.J.S.A 34:15-7.2 applies. Specifically, Section 7.2 states:

> *In any claim for compensation for injury or death from a cardiovascular or cerebral vascular causes, the claimant shall prove by a preponderance of the credible evidence that the injury or death was produced by the work effort or strain involving a substantial condition, event or happening in excess of the wear and tear of the claimant's daily living and in reasonable medical probability caused in a material degree the cardiovascular or cerebral vascular injury or death resulting therefrom. Material degree means an appreciable degree or a degree substantially greater than de minimus.*

Perhaps the most typical case involving cardiovascular work injuries is the petitioner who sustains a myocardial infarction after working a strenuous heavy-duty job where there is testimony that those activities which caused the heart attack were in excess or more than their activities outside of work. Clearly, this is the kind of case that the Legislature was considering when it contemplated and wrote Section 7.2. However, with the recent unpublished case of James Renner v. AT&T, Docket No. A-2393-10T3, 2011 N.J. Super, Unpub. LEXIS 1668 (App. Div., Dec. June 27, 2011), the court is moving toward a broader interpretation of §7.2 which may ultimately open up employers and their insurance carriers to much more exposure than they anticipated from the plain language reading of this section.

The holding in Renner finds that not only are employers and insurance carriers liable when the job activities are more than the activities of a claimant's daily living, but also when the job activity is less than the claimant's activities outside of work.

In Renner, the workers' compensation judge awarded dependency benefits to James Renner, husband to decedent and employee Cathleen Renner, who died of a pulmonary embolism. This employee not only worked a 40-hour week at the office but also worked from home, sometimes during all hours of the day and night. The petitioner's medical expert opined that sitting for an extended period of time

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CARDIOVASCULAR INJURIES

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precipitated stasis of blood flow that led to the formation of

blood clots and that her work effort of sitting at her desk for long periods of time contributed to a material degree in causing her death, despite other risk factors, including obesity. In addition, there was testimony that although the petitioner led a sedentary life in and out of work, there was additional testimony that her work inactivity was greater than her non-work inactivity, or to put it more plainly, her work activity was less than her home activity. The court applied §7.2 and found this claim compensable.

This case raises questions and concerns. How will this affect future claims? How can less activity mean "in excess of the wear and tear of the claimant's daily living"? Does "in excess" mean more activity? Less activity? Or has it now been interpreted to mean either? Do employers and insurance carriers now have to worry about jobs that are less active than the employee's life outside of work? Would this include every sedentary duty job? How will this impact employees who are obese or out of shape? For these type of conditions, the first thing that is recommended is more exercise and activity. So what is the outcome of a case where an employee sits behind a desk all day? A desk job by its very description is just that, a job that requires you to sit at a desk all day. It would be foreseeable that an expert would testify that if the employee was more active at work (taking into consideration that some employees

can spend an average of 40-50 hours a week working), then perhaps they would have been less obese or in better shape and, therefore, it would have been less likely that they would have sustained the cardiovascular condition.

Are employers now supposed to make sure that their employees are just as active at work as they are at home? Do they need to go so far as to require some type of exercise, perhaps a gym class such as required in high school? While this may seem like an overreaction or just plain silly, one still must ask the question: just how responsible are employers for the health habits of their employees? Just where is that line drawn? Employers must also be cautioned that this is a double-edged sword because based on this case, they can now be penalized if the work activity is more than home activities or if the work activity is less than the activity at home.

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