

NEW JERSEY DEFENSE

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President's Message

Michele G. Haas, Esq.



It is bittersweet to know that my presidency is coming to an end, but I know our organization will be in good hands with our President-Elect, Mario Delano. I would like to thank everyone for their support for myself and NJDA. I am looking forward to attending the 48th Annual NJDA Convention at the Hyatt Chesapeake in lovely Cambridge, Maryland and handing over the reigns to Mario! I realized that I attended my first NJDA Convention in 2007 and was impressed with the camaraderie and welcome that I received from our members. I guess that's why I kept coming back! I've only missed one since I've started with NJDA and that was due to an ill-fated catch in the outfield with a bunch of ten year olds that resulted in an ACL injury!

It's quite a different experience to go from being a general member to holding a leadership position, especially president. The time commitment is huge but it's definitely worth it. I would encourage all of our members to devote some of their time to our organization. It's great to belong to an organization and reap the benefits but NJDA needs your help. I think you've got to "put in" to "get back." I'm not asking for much – maybe attend a seminar, join a committee, send us your ideas about future seminars or write an article.

We have produced several informative and successful seminars including by our newly formed Premises Liability Committee in May and an intimate and informative seminar by our ADR Committee with retired judge Joel Rosen in South Jersey. We have also filed two *amicus curiae* briefs with the New Jersey Supreme Court defending our organization's interests in the cases of Lippman, M.D. v. Ethicon, Inc. and Johnson and Johnson, Inc. regarding CEPA liability and Maida v. Kuskin regarding the use of a civil reservation in a civil action. I would like to thank Natalie H. Mantell, Esquire and Michelle M. Bufano, Esquire, both of Gibbons, and Aldo J. Russo, Esquire of Lamb Kretzer, respectively, for their hard work and dedication to the filing of these briefs on our behalf.

Michele Haas



"We have also filed two amicus curiae briefs with the New Jersey Supreme Court defending our organization's interests..."

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SUPREME COURT ADVISORY COMMITTEE ON EXPEDITED CIVIL ACTIONS

Jeffrey Bartolino, Esq.*



The Supreme Court Advisory Committee on Expedited Civil Actions recently issued a report that recommends a number of ideas designed to improve the timeliness in the disposition of civil cases and suggests a pilot program that would put that plan into action. If adopted, the Program would be implemented in three New Jersey counties. The comment period ended on June 18, 2014, with no indication of when the Supreme Court would make a decision on the proposal.

New Jersey Supreme Court Chief Justice Stuart Rabner announced the formation in May 2013 of the Supreme Court Advisory Committee on Expediting Civil Actions. The goal was to develop a program to achieve speedier justice, maintain due process and fairness to litigants, decrease litigation costs, and make the Court system more accessible to the public. Justice Faustino J. Fernandez-Vina and Thomas R. Curtin, Esq. were appointed as Co-Chairs of the Committee, and three Subcommittees were created: Trial, Pretrial and Education/Liaison.

The key recommendations of the Committee are as follows:

Pilot Program

The Pilot Program will be instituted in two vicinages for an expedited track for all Track I and Track II cases except for name changes, forfeiture, summary actions and OPRA matters. A party may object to inclusion by serving a letter of intent with reasons why the case should be removed, and presumptive grounds for removal are: 1) a request by all parties for removal; 2) multiple parties; 3) multiple or complex theories of liability, damages or relief; 4) need for extended discovery; or 5) any other factor that would impede a party's right to a fair resolution of the matter. A party must seek removal at least 10 days before the initial Case Management Conference (CMC), and a subsequent application for removal may be filed no later than 30 days prior to the discovery end date and for good cause shown based upon changed circumstances.

Pretrial

Parties are limited to form interrogatories and five supplemental interrogatories, 10 requests for production of documents, and either two depositions (Track I) or five depositions (Track II) without consent of the parties or by the court for good cause shown. Answers to form interrogatories must be served by plaintiff within 20 days of receipt of an Answer from adverse parties, and defendants must serve their answers to form interrogatories within 20 days of receipt of plaintiff's answers. For discovery disputes, the parties must "meet and confer" to resolve same, and send a joint written request in a one-page letter to the managing judge for an informal conference that presents the position of each party.

The initial CMC will be held within 45 days of the filing of the first responsive pleading, and shall address subjects like requests for exclusion from the Pilot Program, the parties' discovery plan, entry of a Scheduling Order, and setting a trial date that is within 45 days of the discovery end date. Executed HIPAA forms must be brought to the CMC in personal injury lawsuits, and cases in the Pilot Program shall not be subject to mandatory arbitration under R. 4:21A unless all parties request arbitration.

Cases will receive a trial date that takes priority over other cases on the same trial calendar, and may be adjourned once by consent of all parties. If a second trial date is adjourned at the request of the parties, it is returned to the general trial calendar.

Trial

Attorneys must submit factual stipulations, deposition/interrogatory readings, *in limine* or trial motions, and copies of proposed trial exhibits seven days before the trial date. Attorneys may also move to exclude witnesses whose testimony is cumulative, though there is no standard in the Report by which to judge that. Parties are limited to three peremptory challenges for Track I and II cases, and four challenges in Tracks III and IV. Additional challenges are allowed only when there are multiple adverse parties separately represented.

Opening statements in Track I cases are limited to no more than 30 minutes, with the same amount of time allowed in uncomplicated Track II cases and no more than 60 minutes for complex cases in that Track. Track III and IV cases allow for up to 90 minutes for opening statements.

Summations are limited to 30 minutes in Track I and uncomplicated Track II cases, or up to 90 minutes for complex matters in the latter Track. Track III and IV cases allow for summations no more than 120 minutes.

Attorneys may *voir dire* proffered experts in all Tracks, and attorneys may mutually agree to present expert testimony by video recording or reports rather than live testimony.



Commentary

The Report has predictably generated many opinions from diverse groups, from both the plaintiffs' and defense bar.

For critics, the mandatory nature of all Track I and II cases in the Program is troubling, as the opt-out provisions consist largely of "presumptive grounds" for removal, with no guarantee of same. Failing that, a party must file an application for good cause shown at least 30 days before the end of discovery, which standard is likely to vary by county. Many parties see nothing wrong with the current expedited trial program, which is voluntary.

The limitations on discovery have been criticized as too restrictive, and hampering the effective presentation by counsel of their case. Related to that, the difficulty in defining cumulative testimony so as to bar it renders the preparation for trial uncertain at best. Some question whether a CMC within 45 days of filing an Answer will meaningfully establish firm discovery deadlines, and the time period for discovery does not account for continuing medical treatment in personal injury actions.

Some parties have gone on record that trial courts should always grant an adjournment when all parties consent, in the absence of extraordinary circumstances.

For the critical stage of jury selection, many parties have been vocal in their opposition to limiting peremptory challenges to three, as well as the time limits on opening statements and summations. Most commenters focus on the fact that the present system works quite well, is not unduly time-consuming, and the recommendations are not likely to improve efficiency—though they may impair the quality of the presentation—of the conduct of a trial.

Finally, some commenters believe that having a sufficient number of trial judges available for ready cases is the only meaningful way to produce the efficient and timely administration of justice sought by the Committee.

Some of the positives that have been identified by various commenters include the following:

---savings on the expenses associated with litigated matters

- greater assurance that a plaintiff has his/her case fully ready at the time of filing the Complaint, given the various discovery requirements by the date of the CMC
- more efficient handling of discovery disputes, much like the federal system does
- no requirement to have matters arbitrated, saving time and expense
- a more streamlined approach for the truly simple cases
- an opt-out option that is generous to the party who chooses to proceed outside of the expedited program
- as a Pilot Program limited to three counties, it can be modified/abandoned depending on the results during the pilot period.

Summary

Much time and effort went into the creation of the Report by the Advisory Committee, and the many parties weighing in on the pros and cons of the concept was predictable. Time will tell if the Committee's recommended Program becomes a reality, where it will be conducted, how long it will last, and whether it achieves the lofty goals it has envisioned.

*** Jeff Bartolino, Esq.**

Jeff is an Assistant Vice President in the General Claims Department for New Jersey Manufacturers Insurance Company (NJM) in Trenton, NJ. He is a 1983 graduate of Rutgers School of Law. He clerked for the Hon. Richard Cohen (Chancery) and spent 7 years with the New Jersey Deputy Attorney General's Office before beginning as a General Claims Staff Attorney at NJM in 1991. He is a member of the Mercer County Bar Association and Defense Research Institute. He is also an active member and co-chair of the Insurance Committee with the New Jersey Defense Association. He can be reached at jbartolino@njm.com.

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Upcoming NJDA Seminars



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THE APPELLATE DIVISION CLARIFIES THE LAW OF NUISANCE, TRESPASS AND STRICT LIABILITY IN CONNECTION WITH ENVIRONMENTAL CLAIMS AND DENIES THE EXPANSION OF A BREACH OF GOOD FAITH AND FAIR DEALING TO THIRD-PARTY INSURERS

Jacob S. Grouser, Esq.*

On March 18, 2014, the Appellate Division upheld the trial court's decision in Ross v. State Farm Fire & Casualty, et al., which dismissed Plaintiff's claims against homeowner defendants for trespass and nuisance and claims against the homeowner defendants' insurers for bad faith that arose from a leaking underground storage tank. 2014 N.J. Super. LEXIS 568 (App. Div. 2014).



The pertinent facts of Ross are as follows: the underlying matter sought damages from neighboring homeowners for contamination associated with a leaking underground storage tank under theories of nuisance and trespass and against the homeowners' insurers for bad faith. The underground storage tank at issue was owned by Ellman from 1988 until 1999, at which time she sold her property to Lowitz. During her ownership, Ellman maintained insurance with High Point Preferred Insurance Company. Before purchasing the property, Lowitz hired ANCO Environmental Services, Inc. to conduct testing of the UST, which did not detect a leak. Lowitz was initially insured through State Farm and was later insured by New Jersey Manufacturers. In 2003, Lowitz entered into an agreement to sell the property and environmental testing performed by the buyer revealed a leak.

Plaintiff, John Ross, purchased a neighboring home (2 doors down) in July of 2004. He was married to his wife, Pamela, in 2007. In that same year, oil from the Ellman/Lowitz property was discovered to have migrated onto the Ross property. Thereafter, Plaintiffs put Lowitz' insurers on notice of the contamination and Lowitz' insurers proceeded to remediate the Ross property and obtained a No Further Action letter from the NJDEP, without any cost to the Ross'.

Based upon the above, Plaintiffs filed a Complaint against Lowitz, Ellman, State Farm, New Jersey Manufacturers and High Point. In their Complaint, Plaintiffs alleged negligence, strict liability, Spill Act Liability, trespass and nuisance.¹ Towards the conclusion of discovery, the insurers filed motions for summary judgment, which were granted by the trial court. Ellman and Lowitz also filed for summary judgment motions which were granted by the court.

On appeal, Plaintiffs sought review of the court's decision to dismiss the private nuisance and trespass claims against Ellman and Lowitz, and the bad faith claim against NJM and State Farm.

The *per curiam* decision of the court noted that summary judgment as to the nuisance and trespass claims was appropriate. Specifically, the court noted that in order to establish a nuisance or trespass, one must establish an unreasonable interference with the use and enjoyment of land by meeting the factors set forth in the Restatement (Second) of Torts § 822 (1979). Section 822 of the Restatement states in relevant part:

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities

In applying the Restatement to Plaintiffs' claims, the trial court found that no reasonable juror could conclude that the homeowner defendants were negligent in maintaining the underground storage tank and that the migration of oil was not caused by an intentional or negligent act. The Appellate court agreed and noted that "liability for private nuisance is not imposed without proof of some fault, unless, of course, there is intentional or hazardous activity requiring a higher standard of care, or some compelling policy reason, in which case liability is strict or absolute." The Appellate Division also noted that the same limitation applied to trespass.

With regard to the second prong of the Restatement, the Appellate Division extended the holding in Binieck v. Exxon Mobil Corp., 358 N.J. Super. 587 (Law. Div. 2002) and found the storage of home heating oil was not an abnormally dangerous activity to which strict liability may attach.

With regard to the insurer defendants, the Appellate Division agreed with the comprehensive written statement of reasons by Judge Bauman that noted there was no basis as a matter of law for Plaintiffs to assert a direct claim alleging breach of the covenant of good faith and fair dealing against the homeowners' insurers, absent a fiduciary duty or special relationship. Specifically, the Appellate Division noted that the Plaintiffs were injured by the carriers' insureds and were precluded from filing a direct claim against the insurers absent of an assignment of rights. Additionally, while Plaintiffs argued that they were third-party beneficiaries of the contracts of insurance, the Appellate Division found that the contracts of insurance were not intended at the outset to confer a benefit on the Plaintiffs. Finally, the Appellate Division found that there were no public policy considerations to allow Plaintiffs' claims to proceed.



The Ross decision, although unpublished, provides clarification as to the status of the law as it relates to nuisance, trespass and strict liability claims that arise from heating oil contamination. Specifically, Ross extended the holding in Binieck to claims involving heating oil contamination and clarified that specific conduct (ie. recklessness or negligence) must be proven in order to prevail. Additionally, the Ross panel confirmed the holding in Caldwell Trucking PRP Group v. Spaulding Composites Co., 890 F. Supp. 1247 (D.N.J. 1995) which noted that "actions by a third party against an insurer are prohibited absent some statutory or contractual provision permitting direct action" and extended it to claims beyond those just arising under the New Jersey Spill Act.

ENDNOTE

¹ The Spill Act claim was withdrawn as Plaintiffs had not incurred any cleanup and removal costs.

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THE PATIENT SAFETY ACT - POST-APPLEGRAD: PRIVELEDGE HAS IT'S PRICE

Herbert Kruttschnitt, III, Esq.*



Within healthcare there is a Catch-22 that has existed for many years - a tension between getting to the bottom of a bad outcome and, at the same time, not throwing one's self on a sword in an eventual courtroom battle. This tension is clearly felt whenever a hospital Risk Manager and a doctor or nurse discuss an untoward event. It is essential that our health care professionals continually strive to improve; and the ability to engage in open self-critical analysis is necessary to that end. To what degree, then, should our legal system thwart, or chill, that important process? In this article, we will address the nuances and pitfalls of (what is sometimes referred to as) the privilege of 'self critical-analysis', the Patient Safety Act (See: N.J.S.A 26H-12.25), and the recent case of Applegrad v. Bentolila, 428 N.J. Super. 115 (App. Div. 2012); cert. granted 213 N.J. 47 (2012).

Let's start with the premise that all privileged communications are a compromise between two established, and important, policy considerations. They all represent a clash between an absolute search for the truth, and the overriding sanctity of certain discussion. Cases like Applegrad will always be confusing because they are, essentially, attempts to reconcile two concepts that are almost by definition at odds.

Nobody can dispute that the cornerstone of our legal system is a search for the truth. Every litigated matter is an attempt to recreate an event in the past as accurately as it can be recreated. To that end, one could argue, anything that fosters that process should be encouraged. If, for example, the same witness gives an account of key facts on more than one occasion, to the extent they are inconsistent, what could be the reason to withhold either version from the trier of fact. In a genuine search for the truth, all versions should be discoverable. All inconsistencies are relevant. Admissions can be very damning. The truth will out.

On the other hand, there are to be exceptions to the general rule, that whatever has been said about the circumstances giving rise to a lawsuit should be brought into the light. They are communication privileges, of which there are several. The law recognizes that, in certain specific settings, communications should be unfettered by the fear of how those words will play out in court. Communication privileges are, almost by definition, in conflict with a no holds barred quest for the truth.

A couple of clear examples are statements made to one's priest, and statements made to one's attorney. Nobody would dispute that those are privileged communications. Yes, there are times when it would help in the search for the truth to know what a person said to their lawyer, or in the confessional; but we have deemed those settings off limits. Quite simply, in certain instances we have decided that it is more important to shield the communication than to disclose it, even if the words expose the truth.

The test for whether communications, in those two contexts, are privileged is a relatively black & white test. If it is a priest/penitent or lawyer/client setting, regardless of what was said, it can not be divulged, even if it aids in a search for the truth in a court of law. It is the *setting* that protects the communication, plain and simple. There may be instances in which the *setting* is open to interpretation, but that does not change the extent of the privilege once the setting is found to have been a privileged setting. Was Robert Kardashian, Esq., O.J. Simpson's lawyer, or was he just a friend who happened to have a law degree? Was former NFL player Rosie Greer, O.J. Simpson's spiritual advisor, or was he a friend who just happened to be a minister? Interesting issues, but the point is that once the nature of the setting has been determined, we don't parse the words. The words are all protected.

In healthcare, in theory at least, communications in the context of the Patient Safety Act are supposed to be similarly privileged. But, I would not necessarily count on that – at least not for the time being. At first glance, a fair reading of the Patient Safety Act is that it extends absolute confidential protection to all documents, materials and information developed by a health care facility through the PSA process. However, Applegrad v. Bentolila, the first

(Continued on page 10)

significant court decision on the scope and interpretation of the PSA, seems to be telegraphing that the Patient Safety Act privilege is going to be very strictly construed, and is not going to be easy to sustain.

The lawyer/client, priest/penitent setting, and Patient Safety Act are known as “absolute” privilege communications. By contrast to absolute privileges, there are also “qualified” privileges. In the setting of health care, there are examples of both. Peer Review documents, Root Cause Analysis documents and other investigations into “sentinel events” such as Risk Management investigations have been historically subject to a qualified privilege. On the other hand, Patient Safety Act inquiries are supposed to be subject to an absolute privilege. At least, that is what the Patient Safety Act seems to say. So, what does Applegrad tell us?

A good argument can be made that all such healthcare related inquiries are intended to improve patient safety and prevent future bad outcomes. That to the extent they promote patient safety they should all be free, open, and without fear of reprisal. However, until the Patient Safety Act, such discussions were subject only to a qualified privilege. Prior to the Patient Safety Act, health care related self-critical discussions were governed by case law which required a court to sort through the communications and distinguish between facts and opinions or conclusions. To the extent the investigative materials had preserved facts, they were discoverable. To the extent they contained opinions or conclusions, they were (in theory although not always in practice) not discoverable. See: Christy v. Salem Hospital, 366 N.J. Super. 535 (App. Div. 2004)

The Patient Safety Act arguably changed that, but in the last paragraph of the Statute, it circled back, and preserved the gray area of qualified privilege. The statute ends with a provision that nothing in the Act shall affect the discoverability of any information otherwise discoverable in accordance with Christy v. Salem Hospital. However, Christy was actually a case involving the discoverability of “Peer Review” documents. The case was decided a couple of months before the Patient Safety Act was enacted into law.

When I first read the Patient Safety Act, and saw the reference to Christy, my first thought was, how does one reconcile a qualified privilege case into an absolute privilege statute without inviting the court to thwart the entire legislative intent of the Act. Christy and the Patient Safety Act undeniably represent a conflict between absolute and qualified privileges. Why did the legislature introduce confusion into the Patient Safety Act’s absolute privilege by citing a qualified privilege court decision?

In determining if the priest/penitent or lawyer/client privilege applies to a communication, we go no further than to determine the setting in which the statements were made. We do not parse the words to decide which words are discoverable and which are privileged. That exercise, however, is exactly what Christy did in the context of health care related investigations, prior to the passage of the Patient Safety Act.

Proponents of the Patient Safety Act probably thought the legislature was finally creating an environment in health care in which backward looking discussions into untoward outcomes could be freely and openly discussed. Establish a process in accordance with the Act, and to the end that the discussions promote patient safety, the discussions would be absolutely privileged. Christy had turned health care investigations into a minefield in which nobody could know for sure whether the discussions were privileged or whether the discussions were discoverable. Every motion Friday, judges would be left to make that decision well after the discussions had been held and memorialized.

Aside from the Patient Safety Act, in regard to other self-critical discussions within health care courts would look at the documents and determine which of the discussions deserve to be protected. Such is the nature of a qualified privilege. The Patient Safety Act was felt to have changed that. The recent case of Applegrad v. Bentolila recognizes the distinction between the absolute privilege accorded to Patient Safety Act investigations and the qualified privilege accorded to all other, albeit similar, investigations. But, (healthcare provider) don’t make one wrong step or your Patient Safety documents will be as discoverable as all the rest.

The Court in Applegrad makes it very clear that if Patient Safety Act investigative communications are to be given an absolute privilege, those communications, and resulting investigative materials, must have been

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“developed exclusively by a health care facility through the PSA process. (NJSA 26:2H-12.25(f) & (g). (Said the Court) if, however, such items have been created or developed through any other, even similar, process then they are obtainable (if they meet the Christy test)” Said simply, PSA documents are absolutely privileged, but only if they are exclusively PSA documents, and only if they were created through strict adherence to the PSA process, and only if they are not even tangentially related to another non-PSA process.

Applegrad tells us that, in order to become entitled to the absolute PSA privilege, the investigation must meet a very strict test of the integrity of the PSA process. A health care facility can not cloak an investigation with an absolute PSA privilege by simply calling it a PSA investigation. Giving people titles like “Patient Safety Officer”, when they are also performing functions that are not exclusively PSA related does not accord those activities with an absolute privilege. In short, while recognizing the PSA Absolute Privilege, Applegrad has created another minefield even less objective than the Christy test. If the PSA process was, in the least bit, influenced by the Peer Review Process, the Root Cause Analysis process, the Risk Management process, or any other preexisting self-critical analysis inquiry, the Patient Safety Act absolute immunity is lost.

The takeaway for now seems to be that any investigation which was performed before the Patient Safety Act, or any other investigation which is still being performed, can not be cloaked with absolute immunity by calling it a “Patient Safety” function. The only investigations that are given absolute immunity are those which are exclusive to the Patient Safety Act. Risk Managers, Quality Assurance Committees, Mortality and Morbidity Committees, Sentinel Event reports – these things existed before the Patient Safety Act, exist still, and can not be brought under the penumbra of the Patient Safety Act by calling them by a new name. Regardless of whether those investigations can be said to now pertain to ‘patient safety’, they will not be accorded the protection of the Patient Safety Act.

For the time being at least, within health care, there are still two types of privileges that apply to investigative materials. There is the Christy qualified privilege, which protects only opinions and conclusions but does not protect factual statements memorialized in such investigative materials. And, there is now the PSA absolute privilege, which protects all statements, facts learned, conclusions reached and opinions drawn from such investigations – but only if such investigation can be shown to have been conducted within the letter of, and exclusively in pursuit of, the Patient Safety Act. For the time being, on motion Fridays we will now have judges not only applying the Christy test to all non-PSA investigations, but we will also have judges dissecting PSA investigations and applying the Applegrad test. Even though it may be called a Patient Safety Act investigation, is it really, truly, to the satisfaction of the court an honest to goodness PSA document – or just a Peer Review document by another name.

Just a thought, and then we will withhold judgment until the Supreme Court has decided the issue. If an Episcopalian penitent confesses to a Catholic priest, would the court decide that the discussion is not privileged? Would the court decide that a discussion between a priest and penitent is not privileged because the penitent has also confessed other sins, at other times, to a lay person? Would the court decide that a confession between a priest and penitent is not privileged because the priest also serves as principal of the parish school? That is apparently the reasoning of the Applegrad decision.

Certification Granted – further clarification to be announced.

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NJDA FILES *AMICUS* BRIEF TO ADDRESS EFFECT OF *LIPPMAN V. ETHICON INC.* ON NEW JERSEY PHARMACEUTICAL AND MEDICAL DEVICE INDUSTRY

Natalie H. Mantell, Esq.*



In *Lippman v. Ethicon Inc.*, 432 N.J. Super. 378 (App. Div. 2013), the Appellate Division expanded the scope of “protected activity” under the Conscientious Employee Protection Act (“CEPA”) to include the regular job duties of “watchdog” employees — those whose job involves ensuring a company’s compliance with various laws and reporting any perceived or anticipated violations to the employer.¹ It held that the plaintiff, Dr. Joel Lippman, engaged in whistleblowing merely by doing his job — by participating in the deliberative decision-making process regarding product quality and safety, weighing product risks and benefits, and assessing the type of corrective action needed, if any, when notified of a potential issue with a product.

Lippman departed from another published Appellate Division decision, *Massarano v. N.J. Transit*, 400 N.J. Super. 474 (App. Div. 2008), and several unpublished appellate decisions, which held that CEPA “protected activity” excludes an employee’s regular job duties; it requires “object[ing] to or refus[ing] to participate in” an “activity, policy or practice of the employer” that the employee reasonably believes is unlawful. See *Massarano*, 400 N.J. Super. at 490-91; *N.J.S.A.* 34:19-3c. The Supreme Court of New Jersey granted the defendants’ Petition for Certification, likely due, at least in part, to the split of authority.

As an organization representing civil defense attorneys in many different practice areas, NJDA has a unique perspective related not only to employment defense, but also to product liability defense (and many other practice areas) within New Jersey’s pharmaceutical and medical device industry. NJDA sought leave to appear as *amicus curiae*, arguing that the continued exclusion of an employee’s regular job duties from CEPA “protected activity” allows employers to ensure that “watchdog” employees are aiding the employer in achieving compliance with its legal obligations, without subjecting itself to CEPA liability based solely on the employee’s regular job functions. NJDA further argued that expanding “protected activity” as *Lippman* did conflicts with CEPA’s plain language and public policy, and the public policy behind other laws governing the pharmaceutical and medical device industry such as the Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-399f, and its Medical Device Amendments, 21 U.S.C. §§ 360c-360m, FDA regulations, and New Jersey’s Product Liability Act (“PLA”), *N.J.S.A.* 2A:58C-1 *et seq.*²

The PLA, for example, reflects the public policies of tolerating a reasonable level of risk, promoting public health, and protecting New Jersey’s pharmaceutical and medical device industry from undue economic burden. In that regard, the PLA codifies the learned intermediary doctrine, which absolves a manufacturer from product liability if it adequately warns the prescribing physician of the known or knowable product risks so that the physician can weigh those risks against the product’s benefits before prescribing it. See *N.J.S.A.* 2A:58C-4; *Banner v. Hoffmann-La Roche Inc.*, 383 N.J. Super. 364, 375-76 (App. Div. 2006), *certif. denied*, 190 N.J. 393 (2007).

In addition, the Supreme Court of New Jersey has recognized that the Legislature enacted the PLA with the intent to “limit the liability of manufacturers so as to balance the interests of the public and the individual with a view towards economic reality.” *Rowe v. Hoffmann-La Roche Inc.*, 189 N.J. 615, 623-24, 626 (2007) (internal quotation omitted). To that end, the PLA contains a rebuttable presumption of adequacy for FDA-approved product warnings, which the Court has described as a “virtually dispositive” “super-presumption.” See *N.J.S.A.* 2A:58C-4; *Perez v. Wyeth Labs., Inc.*, 161 N.J. 1, 25 (1999) (noting that presumption is “virtually dispositive” of

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failure-to-warn claims under PLA); *Rowe*, 189 N.J. at 626 (same); *Kendall v. Hoffmann-La Roche Inc.*, 209 N.J. 173, 195, 197 (2012) (stating PLA imposes “virtually dispositive” “super-presumption”).

But what if a “watchdog” employee does not perform his or her job appropriately? NJDA’s amicus brief argued that, to comply with state and federal laws and regulations, employers need to be able to discipline “watchdog” employees when they are not properly balancing product benefits and risks to promote public health. That can occur if the employee is too lenient or too conservative — by allowing a product with severe risks to potentially harm the public even if there is a reasonable alternative or by keeping a product with substantial benefits from the public instead of managing its risks. And, NJDA argued, employers need to be able to discipline these employees without fear of exposing themselves to CEPA liability based solely on the employee’s normal job duties.

NJDA’s motion for leave to appear as *amicus curiae* is currently pending before the Supreme Court of New Jersey. The Court has not yet set a date for oral argument.

ENDNOTES

¹ The court specifically defined a “watchdog” employee as someone “who by virtue of his or her duties and responsibilities, is in the best position to: (1) know the relevant standard of care; and (2) know when an employer’s proposed plan or course of action would violate or materially deviate from that standard of care.” See *id.* at 410.

² Although *Lippman* involves the pharmaceutical and medical device industry, it could affect other regulated industries involving products, including automotive, consumer products, agriculture, food and beverage, and healthcare.

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THE DISTORTION OF THE BRIGHT LINE RULE

Aldo J. Russo, Esq.*

I was recently asked by our organization if I would prepare an Amicus Curiae brief on behalf of the New Jersey Defense Association on an issue that I never imagined would reach our state's highest Court. I accepted the task and I, along with my partner George C. Roselle, battled the issue of Civil Reservations at the municipal court level, R. 7:6-2.

The distortion of the civil reservation rule arises from an action for personal injuries that allegedly arose out of an automobile accident involving the plaintiffs and defendants. Plaintiff, Bruce Maida, claims that on March 28, 2010 he was struck by the Kuskin vehicle at the intersection of Hudson Avenue and Harding Road in Red Bank, New Jersey. In addition, plaintiff is claiming that Kuskin fled the scene of the accident. Defendant, Michael Kuskin, maintains that his vehicle did not strike the plaintiff, but that there was an altercation resulting in the plaintiff punching his vehicle and verbally berating him.

Michael Kuskin was subsequently charged with N.J.S.A. 39:4-129, leaving the scene of an accident, and N.J.S.A. 39:4-130, failure to report an accident. At the time of the municipal court appearance, Mr. Kuskin accepted a plea offer of the lesser offense, failure to report, and same was placed on the record.

The civil reservation was not placed on the record. It was, however, granted after the court received a letter that same day from Mr. Kuskin's attorney requesting same. The civil reservation was entered into the court's disposition sheet. The defendant thought that this would be the end and the plea could never be used in a civil trial. Unfortunately, this would not be the case.

On June 27, 2011, the plaintiffs filed a personal injury action. On or about August 16, 2011, the defendants, through their counsel, filed an answer denying the accident. During motion practice, counsel for the plaintiffs succeeded in obtaining an order from the motion Judge allowing the use of the plea regardless of the fact that an order was entered by the court rendering the plea inadmissible in any subsequent civil action. The motion Judge ruled that the defendant failed to properly seek a civil reservation because the defendant was required to make the request "in open court on the record contemporaneously with the plea of guilty." Nowhere in R. 7:6-2 does it require that the request has to be made at the time of the plea. The Appellate Division summarily reversed and our Supreme Court has granted cert.

The briefs already submitted by the plaintiff and the New Jersey Association for Justice suggest a three step "bright line" rule is needed for justice to be served. We have taken the position, however, the Rule, the appendix to the Rule, the comments following the Rule and the Victims Bill of Rights statute provide all the guidance that is needed. What the NJAJ is suggesting is the following;

1. The victim shall be provided with notice of the hearing; notice of the plea agreement; and, if requested by the defendant, notice of the civil reservation.
2. The plea agreement and the request for civil reservation shall be presented on the record in open court at the time that the guilty plea is accepted.
3. The court shall determine the factual basis for the guilty plea and the defendant shall testify under oath as to the facts that support the charge.

In essence, they are requesting that N.J.S.A. 39:5-52 and R. 7:6-2 be amended to eliminate the civil

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reservation. The distinction being created by the plaintiff and the NJAJ is that while the plea would be inadmissible, the factual basis, under oath, would be allowed into evidence in a civil trial. The reasons behind the Appellant and NJAJ's position could not be more transparent. While arguing that it is protecting accident "victims" rights, it would seem that the intent is to take advantage of a municipal court defendant pleading guilty to a traffic violation in order to further a plaintiff's interest in a subsequent civil action. There is nothing about a municipal court defendant testifying under oath that protects the accident "victim" except insofar as it may give the plaintiff an advantage in a civil action wherein liability is disputed.

We submitted that a bright line rule already exists in The Victims Bill of Right and R. 7:6-2 . N.J.S.A. 39:5-2 clearly states that "A victim of a motor vehicle accident as defined in this section shall, **UPON HIS REQUEST**, be provided in writing...." information concerning the prosecution of the traffic tickets etc. In this matter, there is no evidence that the plaintiff ever made any such request. Despite this fact, it is undisputed that the plaintiff was provided notice of the hearing. A review of the provisions of N.J.S.A. 39:5-52 reveals that the only items to which a "victim" of a motor vehicle accident is entitled is that, if that "victim" makes a request, said "victim" will be provided in writing by the court adjudicating any offense arising out of the motor vehicle accident, certain enumerated information. This would include information about the victim's role in the court process, advanced notice of the date, time and place of the initial appearance by the defendant, submission to the court of any plea agreement, trial and sentencing; notification of the case disposition including the trial and sentencing, notification of any decision or action in which the defendant, if applicable, would be released from custody and information about the status of the case from the date the offense was committed to the final disposition or release of the defendant.

Furthermore, if the "victim" has sustained a bodily injury as defined in N.J.S.A. 2C:11-1, the victim will be given an opportunity to consult with the prosecutor prior to either dismissal of the case or filing of a proposed plea negotiation.

Rule 7:6-2 specifically states:

"Pursuant to paragraph (a)(1) of this rule, when a plea agreement is reached, its terms and factual basis that supports the charges shall be fully set forth on the record personally by the prosecutor, except as provided in Guideline 3 for Operations of Plea Agreements."

The intent of the rule and requirement that a factual basis be ascertained is to protect the municipal court defendant by ensuring that said defendant is aware of the nature of the charges against him as well as the consequences of his guilty plea. If the court is satisfied that the defendant understands the nature of the charges as well as the effect upon the defendant of his guilty plea, that is all that is constitutionally required to protect the interest of the municipal court defendant for whom the rule was designed to protect. In addition, the Rule calls for the Prosecutor to place on the record the factual basis, not the defendant. Guideline 3 to the Appendix located on page 2501 of the 2014 edition of the New Jersey Court Rules (GANN), also allows for the prosecutor to forgo personally appearing and "the prosecutor may submit to the court a Request to Approve Plea Agreement, on a form approved by the Administrative Director of the Courts, signed by the prosecutor and defendant." "The factual basis is required only when there are indicia, such as contemporaneous claim of innocence, that the defendant does not understand enough of the nature of the law as it applies to the facts of the case to make a truly voluntary decision on his own." State v. Mitchel 126 N.J. 565, 567-78(2009) citing McCarthy v. United States, 394 U.S. 459(1969) and State v. Barboza, 115 N.J. 415, 421(1989).

Therefore, the civil reservation would be entered as a matter of course unless the victim or the State can show good cause why the reservation should not be accepted. State v LaResca, 267 N.J. Super 411, 421 (App. Div. 1993)

In conclusion, the common sense underlying the rule regarding civil reservations is that the plea and

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factual basis, if required, are not admissible. One without the other renders Rule 7:6-2(a)(1) useless. If the Appellants and NJAJ are successful in their plight and the Court requires that a municipal court defendant testify, under oath at the time of the plea in order to establish a factual basis, then that sworn statement taken by the municipal court Judge at the time of the plea and entry of the civil reservation could be admissible in a subsequent civil trial. A municipal court defendant will now find it to his advantage to proceed to a trial where the finding of guilt or innocence by the municipal court Judge is always inadmissible. The backlog of cases in each Municipal Court would result in enormous and unnecessary expenditure of time and resources by the Courts, the municipalities and the litigants appearing before these Courts.

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THE TRIPLE CROWN

BRIAN O'TOOLE, ESQ.



I recently had the opportunity to attend the 146th running of the Belmont Stakes, me and 125,000 other racing fans. The crowd was hoping to see the coronation of California Chrome as the 12th winner of the Triple Crown. This prize hasn't been claimed since 1978 when Affirmed beat Alydar by a nose. There were two other winners in the seventies, Seattle Slew in 1977 and the immortal Secretariat in 1973, who won the Belmont Stakes by an incredible 31 lengths. Prior to Secretariat, there had not been a Triple Crown winner since Citation in 1948, a gap of 25 years.

I have been to some outstanding sporting events in my lifetime, but I have never experienced the electricity I felt in entering Belmont Park on that Saturday morning. Our day got off to a good start when a couple young men with a cooler realized they could not take their beverages of choice into the park. They solicited our assistance in disposing of their icy cold contraband. I pride myself in never turning away someone in need. Cheyenne, Ray and I pitched in and did our share. Once completing this task, we entered the park where we encountered several young ladies who were handing out all sorts of promotional material for California Chrome as our next Triple Crown winner. Once we got to our seats in the Grandstand, we began the business of selecting the winners of the first two races and the "Daily Double." (You win the Daily Double if you correctly select the winner of the first two races.) Since the "Belmont Stakes" was the eleventh race, we had ten races to get through. Ray selected two winners, but Cheyenne and I went a brilliant 0 for 10. This is what happens when I don't have my wife, Sunny, with me. She is an outstanding handicapper. Neither one of us is going to give up our day job!

As the day wore on, more people continued to enter the park. It got to the point where it took at least a half hour to place a bet or get a hot dog and a beer. Although it was a complete mob scene, everyone was very civil and polite. I should also add that most of the crowd was extremely well-dressed. The young ladies wore dresses with matching hats and many young men wore suits. I have never seen more bowties in my life. (This would have pleased my father because he always wore bowties.)

Then the magic moment arrived, the call to post for the Belmont Stakes. The race is preceded by the Post Parade in which all eleven horses strut their stuff in front of the wildly cheering grandstand crowd. Next, Frank Sinatra, Jr. sang "New York, New York" accompanied by the crowd, and finally the call by the race announcer, Tom Durkin, that "they're all in line" and "they're off!" California Chrome moved easily through the first half mile of this mile and a half race and was poised in 3rd place entering the top of the stretch. When he was literally right in front of us, his jockey, Victor Espinosa, urged him on and gave him the whip. The horse responded by taking the lead, but unfortunately, due to the length of the stretch run, could not hold it. California Chrome finished in a dead heat for 4th place. When the announcer proclaimed Tonalist the winner, you could hear a pin drop. The entire crowd was stunned. 125,000 people came to the stark realization that their wonder horse had been defeated. The blanket of white carnations would not rest on his back and he would join a long list of truly great horses who could not attain racing's most coveted jewel. (Probably the

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most agonizing defeat at Belmont came in 2004 when Birdstone caught Smarty Jones at the wire to win by a nose.)

The post mortems after the race will talk about how the 1 ½ mile distance does many a gallant horse in and how difficult it is for the winner of the Kentucky Derby and the Preakness to take on fresh horses in the Belmont whose owners have intentionally held them out of the Preakness which is three weeks before. Most thoroughbreds probably race only 2 or 3 times in a year, yet prospective Triple Crown winners are expected to complete three Grade One stakes races in five weeks. The Kentucky Derby is 1 ¼ miles on the first Saturday in May, the Preakness is 1 3/16 miles which is 2 weeks later and the Belmont is 1 ½ miles three weeks after the Preakness. Obviously, the most difficult race is last when our prospective winners are well spent.

The discussion will include changing the rules or the times and distances. Obviously, the races could be spread further apart and the distances lessened. You could also require horses to race in all three events, assuming they remain healthy. Unfortunately, any change would seem to lessen the magnitude of the feat. Truly any future Triple Crown winner will have to be a magnificent horse. As to what the future of the Triple Crown will be, only time and public opinion will determine. I for one would rather wait for that future champion, utilizing the same ground rules. Hopefully, our twelfth champion is only a year away.

There is also the strong possibility that California Chrome's next race will be the Haskell, which is New Jersey's premier Grade I stakes race. The Haskell will be run at Monmouth Park, which is really a fabulous place to enjoy a racing card. Put July 27 on your calendar and I'll see you there.

For our readers who might be contemplating horse ownership, let me leave you with this axiom, "Slow horses eat just as much as fast horses."

Let me take this opportunity to wish you all a wonderful summer and remember, there's no better way to start a summer weekend than a Friday afternoon at the races.

Prior Triple Crown Winners:

1919 – Sir Barton
1930 – Gallant Fox
1935 – Omaha
1937 – War Admiral
1941 – Whirlaway
1943 – Count Fleet
1946 – Assault
1948 – Citation
1973 – Secretariat
1977 – Seattle Slew
1978 – Affirmed
20?? – ??

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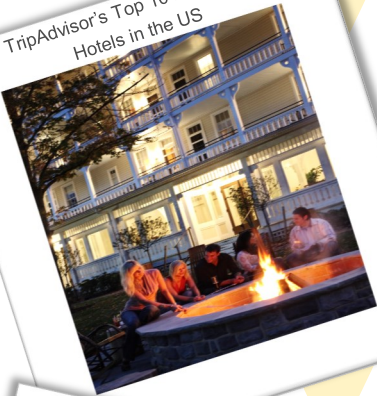
49th Annual NJDA Convention

Omni Bedford Springs Resort Bedford, Pennsylvania

From the luxurious guest room accommodations and delectable dining venues, to cutting edge conference rooms - the resort has preserved the original historic charm with the addition of modern creature comforts.

June 25 - 28, 2015

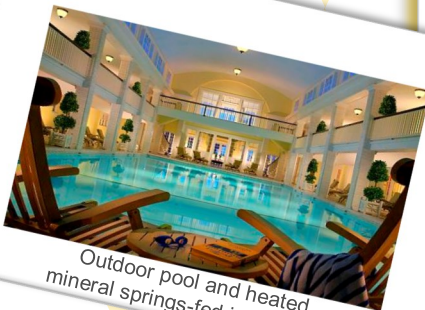
TripAdvisor's Top 10 Relaxation
Hotels in the US



AAA Four Diamond Resort



Donald Ross/A.W. Tillinghaust
designed 18 hole golf course



Outdoor pool and heated
mineral springs-fed indoor pool



Springs Eternal Spa featuring treatments
with local mineral waters



\$120 million renewal and expansion