NEW JERSEY DEFENSE

A Publication by the New Jersey Defense Association | Volume 30 Issue 4 | Summer 2015

President's Message

Mario Delano, Esq.

It really does feel like yesterday that I was handed the reigns of the New Jersey Defense Association from Michele Haas and now I am at the end of my one year term, ready to pass the presidency off to Greg McGroarty. When I first became active in the NJDA, I quickly learned about the high quality of our members, both personally and professionally. I honestly have to say I was not surprised at how hard working and helpful the members have been over the past year. What did surprise me is how many people volunteered to help without being asked. I have had the pleasure of working with several volunteer organizations over the years and getting people to help was always a common problem. Not so for the NJDA. This is a great organization with some of the best people you can hope to meet. It has been a privilege to serve as President.

Picking up where Michele left off, we continued to provide informative seminars as well as partnering with other groups from around the state to co-sponsor events with them. I was thrilled that both our Women in the Law and Auto Liability seminars were sell outs. We had members come forward to start new committees (Appellate Practice and Fraud) as well as our jumping into social media. We had members who chose to become more active, either by chairing a committee or being elected to the executive board. Thanks to all of you for your dedication to the Association.

In a few short weeks we will be at the Bedford Springs Spa and Resort for the 2015 Convention. There, our events will include seminars, a cooking class and our annual golf tournament. In addition, we will be recognizing two very deserving members as Young Lawyer of the Year and Attorney of the Year. At the convention Greg will be installed as President and Chad Moore as President-Elect. I know you both are going to be great with your fresh ideas and enthusiasm.

I do have to thank some individuals without whom this past year would not have been possible. First my wife Michelle and our three children who understand the importance of the NJDA even though it took me out of the house a "few" more times last year. I also need to thank Steve Foley, Jr. and Patti Adams for their support and advice during the past year. They are not only great partners, but great friends too. Last, but certainly not least is a very big thank you to our Executive Director, Maryanne Steedle who is absolutely the one who holds this all together.

I am writing this, my final President's Message, on the Thursday before Memorial Day weekend. As anyone from the Jersey Shore knows, tomorrow is the real start of summer. The cold weather is gone and when we wake up the sun will be shining. I think everyone should take at least one night, head to the ocean, pick a casual spot to eat outside with the special people in your lives and just watch the waves. Don't wait, do it now. The files will still be there tomorrow. Happy Summer!!!

In This Issue

New Jersey Defense Association

2014 - 2015

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

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

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

PRESIDENT-ELECT
Gregory McGroarty, Esq.
Wildenhain Crino, PC
95 Mount Bethel Road
Warren, NJ 07059
908-757-3900 ext 208
gmcgroarty@wcpclaw.com

VICE PRESIDENT NORTHERN REGION
John V. Mallon, Esq.
Chasan Leyner & Lamparello
300 Harmon Meadow Blvd.
Seacaucus, NJ 07094
201-348-6000
jvmallon@chasanlaw.com

VICE PRESIDENT CENTRAL REGION
Eric L. Probst, Esq.
Porzio Bromberg & Newman
100 Southgate Parkway
Morristown, NJ 07962
973-538-4006
elprobst@pbnlaw.com

VICE PRESIDENT SOUTHERN REGION
Theresa D. Giamanco, Esq.
Bennett Bricklin & Saltzburg
6000 Sagemore Drive
Marlton, NJ 08053
856-751-5285
giamanco@bbs-law.com

DIRECTORS 2012-2015

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

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

DIRECTORS 2013-2016

Aldo J. Russo, Esq.
Lamb Kretzer LLC
110B Meadowlands Pkwy
Seacaucus, NJ 07094
201-798-0400
ajr@lambkretzer.com

Richard C. Bryan, Esq.
Cipriani & Werner, P.C.
155 Gaither Drive
Mt. Laurel, NJ 08054
856-761-3800
rbryan@c-wlaw.com

DIRECTORS 2013-2016

Stephen Banks, Esq.
Dempster & Haddix
Centerpointe at Eastgate
161 Gaither Drive Ste 201
Mount Laurel, NJ 08054
856-778-7841
Stephen.Banks.aig.com

Natalie H. Mantell, Esq.
Gibbons, P.C.
One Gateway Center
Newark, NJ 07102
973-596-4533
nmantell@gibbonslaw.com

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

THE DILEMMA OF LIMITED PIP POLICIES FOR DEFENDANTS

*Gregory F. McGroarty, Esq. **

There was a point in time when the majority of Plaintiffs involved in automobile accidents had their medical bills paid in full by their No Fault Carrier. However, many consumers now opt for lower Personal Injury Protection (PIP) limits to reduce their premiums without really understanding the consequences of this tradeoff. One such consequence is that higher outstanding medical bills create an impediment to the settlement of relatively minor personal injury actions filed as a result of automobile accidents.

A standard automobile insurance policy automatically includes PIP coverage of $250,000.00. See N.J.S.A. § 39:6A-4. However, with the enactment of the Automobile Insurance Cost Reduction Act of 1998 (AICRA), consumers were permitted to purchase PIP policies with less than $250,000.00 of coverage. Now, there are multiple options available, which allows consumers to purchase less PIP coverage in exchange for lower premium payments. See N.J.S.A. § 39:6A-4.3. Consequently, when a person who has opted to purchase less than the standard PIP coverage files a personal injury lawsuit as a result of an automobile accident and that person's medical bills exceed his/her PIP coverage, the issue is whether or not those unpaid medical bills are admissible and/or recoverable at the time of trial. While this issue appears in many cases, the Appellate Division has not yet issued a published opinion that provides a definitive answer.

There are two conflicting trial court decisions that address this issue. The first case, most often relied on by defendants, is Kim v. Kim, 2010 WL 2220599 (Law Div. 2010). In Kim, the Plaintiff had a PIP policy with a $15,000.00 limit and $38,000.00 in outstanding medical expenses. Id. Relying on Roig v. Kelsey, which held that an insured who voluntarily chose an optional lower deductible in exchange for a lower premium could not recover that deductible, the Kim Court ruled that the plaintiff could not introduce his unpaid medical bills into evidence. See Kim, 2010 WL 2220559 (Law Div. 2010) (citing Roig v. Kelsey, 135 N.J. 500 (1994)). The Court reasoned that had the plaintiff selected the standard auto policy which included $250,000.00 of PIP coverage, and not opted for less coverage and lower premiums, his medical bills would have been paid and not admissible at trial. See Kim, 2010 WL 2220599 (Law Div. 2010).

The second case is Wise v. Marienski, a published Law Division case. In Wise, the Court held that N.J.S.A. § 39:6A-12 does not preclude recovery of medical expenses beyond those collectible or paid under a statutory PIP Plan, regardless of the limits of PIP coverage. Wise v. Marienski, 425 N.J. Super. 110, 121 (Law Div. 2012.) The Wise plaintiff had a PIP policy with a limit of $15,000.00 and unpaid medical bills in excess of $20,000.00. To support its position that the plaintiff's outstanding medical bills should be precluded from the evidence at trial, the defense argued that the holding in Kim dictates that N.J.S.A. § 39:6A-12 be interpreted to preclude plaintiff(s) from recovering medical expenses above and beyond those covered by their limited PIP Policies; that N.J.S.A. § 39:6A-12 bars the introduction of medical bills into evidence if they are collectible or paid under a standard Automobile policy; and that the standard automobile policy was defined by statute as requiring PIP coverage in the amount of $250,000.00, and therefore, plaintiff's medical bills were collectible or paid via a PIP policy. Id. at 112,114, 122, and 123.

(Continued on page 4)

(Continued from page 3)

The Wise court, however, rejected the arguments by the defense and found that the plain language of the statute provides for the recovery of all outstanding medical bills regardless of the limits of the PIP coverage. Id. at 125. The court reasoned "that Plaintiffs must labor without the assuredness of the no-fault system and subject themselves to the risk of indebtedness to medical providers" when they opt for lesser PIP coverage. Id. Further, the court noted that plaintiffs must go through discovery, prove liability, and prove the reasonableness of the medical bills to a jury without the certainty that their medical bills will be paid. Id.

Despite the holding in Wise, defendants continue to rely on the holding and reasoning of the Kim case. However, the trial courts appear reluctant to do so, and appear to be following the holding of the trial court in Wise.

Recently, the Appellate Division addressed the issue of outstanding medical expenses and limited PIP policies in the unpublished case of Kimble v. Lavista, 2014 WL 2533779 (App. Div. 2014). The Appellate Division, without further explanation, simply stated it agreed with the holding in Wise. See Kimble 2014 WL 2533779 (App. Div. 2014). Therefore, counsel for plaintiffs will cite Kimble to further their argument that outstanding medical bills that exceed the limited PIP policies of their clients should be admissible at the time of trial in the same way that they are when the medical bills exceed the standard PIP policy limits.

So what can defendants do to limit the exposure of their clients to the payment of medical bills that exceed the limited PIP polices of Plaintiffs? First, it should be argued that all medical bills should be reduced to the New Jersey PIP fee schedule. This argument is consistent with the holding in Kim as the outstanding medical bills would be treated as paid or payable by PIP. However, if the Court rejects the Kim case it will likely reject this argument as well since the fee schedule is only applied to medical bills that are paid or payable by PIP. It could be argued that the medical providers may not demand fees in excess of those listed on the PIP fee schedule. See N.J.S.A. 39:6A-4.6(c) and N.J.A.C. 11:3-29.6. Second, if the medical provider submitted its bills to the No Fault Carrier, it should be argued that by doing so the medical provider acquiesced in the applicability of the PIP fee schedule and should be bound to accept the fee schedule amount for these bills. Third, if the Plaintiff had health insurance including Medicaid or Medicare at the time of treatment, it could be argued that the plaintiff should have submitted those bills to the health insurance carrier for payment. While the medical bills would not be eliminated, and a lien could be asserted by the health care provider, the bills will likely be reduced by the plaintiff's insurance company's contractual rate or by the Medicaid/Medicare fee schedule, if applicable. And if the plaintiff elects not to treat with health care providers who accept his/her health insurance, it should be argued that the plaintiff has failed to mitigate his/her damages. Finally, Plaintiff must prove that the bills are reasonable and necessary. There are multiple methods to challenge the provider's charges including the retention of a medical billing expert, examining the provider's past billing history and payments accepted for the services rendered.

* **Gregory McGroarty is a Senior Associate at Wildenhain Crino, P.C. where he concentrates his practice on insurance defense litigation, insurance coverage litigation, and property damage litigation. He is the President-Elect of the New Jersey Defense Association and a member the Claims & Litigation Management Alliance.**

IN RE: ACCUTANE LITIGATION AND MULTICOUNTY LITIGATION: IT'S TIME TO CUT TO THE CHASE

Jodi Sydell Rosenzweig, Esq.*

On April 2, 2015, the Honorable Nelson C. Johnson, J.S.C., granted summary judgment to defendants, Hoffman-LaRoche, Inc. and Roche Laboratories, Inc., in the Accutane® Multicounty Litigation, finding the medication's post-April 10, 2002 warnings regarding the risk of Inflammatory Bowel Disease (IBD) adequate as a matter of law. *In re: Accutane Litig.*, 2015 WL 1504304 (N.J. Super. Law Div. Apr. 2, 2015). The Court also clarified New Jersey law regarding the presumption of adequacy afforded to prescription drug warnings approved by the federal Food and Drug Administration (FDA). *Id.* The opinion applies to New Jersey plaintiffs whose claims arose under the post-April 2002 warnings, as well as out-of-state plaintiffs with post-April 2002 warning claims, who reside in jurisdictions with comparable product liability laws. *Id.* at *1, *3-4, *13. Defendants have identified 800+ plaintiffs who first ingested Accutane® after April 2002. *Id.* at *2. Multicounty litigation involving prescription medications, filed by plaintiffs who reside in up to fifty states against New Jersey pharmaceutical companies, frequently lingers on for more than a decade. Judge Johnson's opinion shows that with proper case management and under appropriate circumstances, the courts can weed out cases in which the plaintiffs cannot satisfy their burden of proof even before the litigants complete case-specific discovery, saving the time, expense and resources of the parties, counsel and courts.

Multicounty Litigation. The Accutane® Litigation was designated a mass tort for centralized case management – now multicounty litigation (MCL) – in Atlantic County before the Honorable Carol E. Higbee, J.S.C., on May 2, 2005. NOTICE TO THE BAR, RE: Designation of Accutane® Litigation as a Mass Tort, Supreme Court Order (May 2, 2005) <https://www.judiciary.state.nj.us/notices/2005/n050113e.htm>; *see also* Supreme Court Order (Oct. 31, 2014) (amending May 2, 2005 Order and reassigning MCL to Judge Johnson) <https://www.judiciary.state.nj.us/notices/2014/n141105h.pdf>. When the plaintiffs first applied for centralization, there were 68 cases pending in the New Jersey courts. Accutane® Multicounty Litigation, Plaintiffs' Letter in Support of Request for Mass Tort Designation at 1 (Jan. 25, 2005) (Plaintiffs' Jan. 2005 Letter Request) <https://www.judiciary.state.nj.us/mass-tort/accutane/Accutane-01260.pdf>. Today, ten years later, the judiciary's website identifies 6,699 cases. Accutane® Case List (May 4, 2015) <https://www.judiciary.state.nj.us/mass-tort/accutane/acccase.pdf>.

Among the criteria for determining whether MCL designation is warranted is whether the cases involve "many claims with common, recurrent issues of law and fact that are associated with a single product." NEW JERSEY MULTICOUNTY LITIGATION (Non-Asbestos) RESOURCE BOOK, 4th Ed. at 5 (Nov. 2014) (MCL MANUAL) <https://www.judiciary.state.nj.us/mass-tort/non_asbestos_manual.pdf>. Indeed, in support of their request for centralization, plaintiffs argued, "The claims share common issues of law and fact, including …, whether defendant adequately warned of the risks of ingesting Accutane." Plaintiffs' Jan. 2005 Letter Request at 1. Plaintiffs further claimed, "Consolidation also eliminates the risk of duplicative arguments and inconsistent rulings" and "has the added benefit of streamlining the discovery process by allowing defendant to produce its relevant documents and witnesses once, as opposed to numerous times in the separate cases." *Id.* at 2.

Early discovery in MCL is, in fact, targeted at the production of defendants' documents and depositions of defense

(Continued on page 6)

(Continued from page 5)

witnesses. Case-specific discovery is a different animal because so many plaintiffs are non-New Jersey residents. *See*, *e.g.*, *Rowe v. Hoffman-La Roche, Inc.*, 189 *N.J.* 615, 621 (2007) (noting *amici curiae* requested that the Court take judicial notice that since 1996, over 90% of the mass-tort claims against pharmaceutical companies in New Jersey courts have been brought by out-of-state plaintiffs).[1] After the production of plaintiffs' fact sheets – the MCL equivalent to answers to Interrogatories – defendants begin record collection, which is a burdensome and time-consuming process, involving voluminous healthcare providers, pharmacies, third-party payors and employers. Upon receipt of sufficient records, the defense notices each plaintiff's deposition, but scheduling may be difficult because non-resident plaintiffs must travel to New Jersey. Thereafter, defendants are required to file motions for commissions to compel discovery in other states in order to depose out-of-state prescribing and treating physicians, as well as other non-resident fact witnesses. *See*, *e.g.*, MCL MANUAL at 22. Depositions are scheduled at the convenience of these out-of-state witnesses, and therefore, counsel must coordinate their travel plans to accommodate the witnesses. As a result, case-specific discovery can linger on. If defendants' documents and witnesses are sufficient to answer legal questions that may dispose of hundreds of cases, motions should be entertained as soon as practicable.

Law of the Case. Between 2008 and 2012, the Accutane® MCL Court denied five motions to dismiss which were based on the adequacy of the warnings. *In re: Accutane Litig.*, 2015 WL 1504304, *2. Judge Johnson held the law-of-the-case doctrine inapplicable because the predecessor judge did not have the benefit of "new controlling authority" regarding the evidentiary burden required to rebut the presumption of adequacy afforded to FDA-approved warnings under the New Jersey Products Liability Act (NJPLA). *Id.* at *3 (citing *Bailey v. Wyeth, Inc.*, 424 *N.J. Super.* 278 (Law Div 2008), *aff'd sub nom*, *DeBoard v. Wyeth, Inc.*, 422 *N.J. Super.* 360 (App. Div. 2011), *certif. denied*, 211 *N.J.* 274 (2012). Today, when FDA-approved warnings are adequate and plaintiffs cannot produce evidence to rebut the presumption, there is no reason to delay – the time is right to grant summary judgment.

Adequacy of Warnings and Learned Intermediary Doctrine. In *In re: Accutane Litig.*, Judge Johnson framed the issue under *N.J.S.A.* § 2A:58C-4: "'taking into account the characteristics of, and the ordinary knowledge common to the prescribing physician' did the warning communicate adequate information of the danger that IBD was a risk associated with the ingestion of Accutane?" 2015 WL 1504304, *2. The Court dedicated much of the opinion to a detailed recitation of Accutane®'s post-April 10, 2002 warnings in various materials provided to physicians, pharmacists and patients and Findings of Fact based on defendants' warning system. *Id.* at *5-9. After discussing the role of the FDA, *id.* at *9, Judge Johnson explained the long-established learned intermediary doctrine: "a pharmaceutical manufacturer generally discharges its duty to warn the ultimate user of prescription drugs by supplying physicians with information about the drug's dangerous propensities." *Id.* at *11 (quoting *Niemiera v. Schneider*, 114 *N.J.* 550, 559 (1989). The judge also noted the NJPLA has codified the learned intermediary rule by evaluating the adequacy of warnings according to the standard of the prescribing physician's ordinary knowledge – "adequate warnings in prescription drug cases are ones which are sufficient to reasonably inform physicians of ordinary education[,] training and experience." *Id.* at *11 (citing *N.J.S.A.* § 2A:58C-4). Finally, the Court held:

Taken as a whole, the warning system crafted by Defendants conveys a meaning as to potential

(Continued on page 7)

(Continued from page 6)

> risks and consequences that is unmistakable. It is inconceivable to this court that the reasonable dermatologist (or any physician, generally) of ordinary intelligence, education, training and experience could examine the materials comprising the warning literature and not immediately conclude that Accutane has been associated with life-altering side effects, including IBD.

Id. at *13.

Rebuttable Presumption. Plaintiffs argued the Court was required to engage in a subjective analysis of the testimony of each plaintiff's prescribing physicians before dismissing a case based upon the adequacy of the warnings to the learned intermediary. 2015 WL 1504304, *11. This is where the rebuttable presumption comes into play. *See id.* at *12 (citing*N.J.S.A*. § 2A:58C-4). The statute provides, in pertinent part, "If the warning or instruction given in connection with a drug … has been approved or prescribed by the federal Food and Drug Administration under the 'Federal Food, Drug, and Cosmetic Act,' …, a rebuttable presumption shall arise that the warning or instruction is adequate." *N.J.S.A*. § 2A:58C-4. Judge Johnson explained that New Jersey's Supreme Court has characterized the presumption as a "super-presumption," "and only in the 'rare case' will damages be assessed against a manufacturer issuing FDA-approved warnings." 2015 WL 1504304, *12 (citing *Kendall v. Hoffman-La Roche, Inc.*, 209 *N.J.* 173, 195 (2012) (quoting *Perez v. Wyeth Lab., Inc.*, 161 *N.J.* 1, 24 (1999)). Specifically, "absent deliberate concealment or nondisclosure of after-acquired knowledge of harmful effects, compliance with FDA standards should be virtually dispositive" that a pharmaceutical company has satisfied its duty to warn. *Id.* (citing *Perez*, 161 *N.J.* at 24; *Rowe*, 189 *N.J.* at 626). Alternatively, in order to rebut the presumption, plaintiffs must present proof of the manufacturer's "economically driven manipulation of the post-market regulatory process." *Id.* (quoting*McDarby v. Merck & Co.*, 401 *N.J. Super.* 10, 63 (App. Div. 2008), *appeal dismissed as improvidently granted*, 200 *N.J.* 267 (2009)).

Plaintiffs asserted, "[T]here was economically driven manipulation of the post-marketing regulatory process," and defendants' "strategy to downplay the IBD risk [was] proven to be deliberate." 2015 WL 1504304, *13. Notably, the predecessor judge found plaintiffs failed to prove such assertions at prior trials. *Id.* Here, Judge Johnson held plaintiffs failed to produce evidence to rebut the presumption despite the opportunity to do so, and therefore, Accutane®'s post-April 2002 "warnings [were] entitled to the benefit of our state's rebuttable presumption of adequacy and [were] deemed adequate as a matter of law." [2] *Id.*

Choice of Law and Non-Resident Plaintiffs. Having made its ruling under New Jersey law, the Court will dismiss the claims of New Jersey plaintiffs who first ingested Accutane® after April 10, 2002 upon submission of an appropriate form of Order. However, many of the 800+ plaintiffs do not reside in New Jersey. Recognizing that when there is a true conflict, the law of the place of injury should apply, 2015 WL 1504304, *3 (citing *P.V. v. Camp Jaycee*, 197 *N.J.* 132, 143 (2008)), Judge Johnson acknowledged that it will be necessary to examine whether the laws of the relevant jurisdictions are in harmony with New Jersey's. *Id.* at *4. Accordingly, and in order to perform an appropriate choice-of-law analysis, the Court instructed the parties to submit briefs identifying: (1) the cases, plaintiffs and jurisdictions in which the claims arose under the post-April 2002 warnings; (2) the jurisdictions that have adopted the learned intermediary doctrine and that permit the adequacy of warnings to be decided as a matter of law; and (3) the jurisdictions which have heavier burdens of proof than New Jersey (under those circumstances, no choice-of-law analysis is necessary because the plaintiffs'

(Continued on page 8)

(Continued from page 7)

claims must fail). *Id.* at *4, *13.

Conclusion. The New Jersey Legislature, Appellate Division and Supreme Court have paved the way for early resolution of meritless failure-to-warn claims in multicounty litigation against pharmaceutical companies without needless, interminable case-specific discovery. Judge Johnson merely provided the "how to." There is no reason to delay until completion of case-specific discovery or the first bellwether trial. If the evidence reveals that the warnings are adequate, and the presumption cannot be rebutted, the time is always ripe to cut to the chase and relieve the courts, counsel and parties from the unnecessary burdens of expensive and time-consuming discovery and trial.

END NOTES

[1] New Jersey remains a forum of choice for out-of-state plaintiffs with claims against New Jersey pharmaceutical companies. *See*, *e.g.*, 2013-2015 REPORT OF THE SUPREME COURT COMMITTEE ON THE RULES OF EVIDENCE, PART II, § I *N.J.R.E.* 702 SUBCOMMITTEE REPORT at 15 <http://www.judiciary.state.nj.us/reports2015/evidence2.pdf> (Jan. 15, 2015) (noting a 2008 McCarter & English study showed 27,718 (or 93%) of the 29,703 mass tort cases involving ten specific products were filed by non-New Jersey residents); *Id.* at § II, DOCUMENT 5: Letter from Marcus Raynor, President, New Jersey Civil Justice Institute at 1-2 (May 8, 2014) (noting McCarter & English revisited its study in 2012; was unable to obtain data for every mass tort that year; but did determine from data in the majority of cases that little had changed).

[2] As of the writing of this article, it remains to be seen whether plaintiffs will appeal.

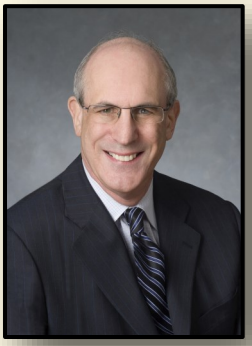
* **Jodi Sydell Rosenzweig is counsel at Drinker Biddle & Reath LLP in the Florham Park office. She devotes much of her practice to drug and medical device defense litigation and represents pharmaceutical companies in multicounty and multidistrict litigation and before both the trial and appellate courts. Jodi can be reached at jodi.rosenzweig@dbr.com.**

New NJDA Members:

William Davis – Cipriani & Werner, P.C.
James Green – Cipriani & Werner, P.C.
Evan S. Harris - Gibbons, P.C.
Scott Heck - Gordon & Rees
Marc Jones - Cipriani & Werner, P.C.
Jonathan Lauri – Weir & Associates
Matthew Mitchell – Cipriani & Werner, P.C.
W. Jonathan Weir, II - Weir & Associates
Matthew S. Rydzewski – Marshall Dennehey Warner Coleman and Goggin

The Role of Video Surveillance in Defending Amusement Facilities

*Lary I. Zucker, Esq.**



Video surveillance cameras in amusement and recreation facilities often provide very useful evidence in defending and defeating liability lawsuits brought by injured patrons. In the course of my practice, I often advise amusement owners and operators to be liberal with the installation of such equipment as a proper means of risk management. Camera placement should include views of the parking lot and all areas of the interior of the building, including the front desk where patrons review and sign waivers and releases.

Video surveillance has proven particularly useful in defending and defeating roller skating rink liability cases. Ever since New Jersey adopted the New Jersey Roller Skating Rink Safety and Fair Liability Act of 1991 (N.J.S.A. 5:14-1 et. seq.), plaintiffs and their lawyers have tried to create new liability arguments to avoid the assumption of risk section of the statute (N.J.S.A. 5:14-6) which is a complete defense to a lawsuit for injuries resulting from those assumed risks. Quality video surveillance footage, that is properly used, can help disprove the three main liability arguments that rink owners face -- lack of supervision on the skating floor, defective rental skates, and defects in the premises. Based on my professional experience, here are four examples that demonstrate the utility of video surveillance in defending personal injury claims.

Case #1 – The "leaky roof":

The plaintiff claimed that there was a leak in the roof of the skating rink which resulted in a puddle of water forming on the floor. The plaintiff's complaint alleged that he fell after he skated through the puddle of water.

The rink operator admitted that on the day of the plaintiff's alleged accident, there was a leak in the roof which resulted in a puddle of water on the floor. However, he recalled that the puddle of water was immediately covered up and he was not aware of anyone who claimed that they fell as a result of the water on the floor.

A review of the videotape of the roller skating session proved that no one skated through the puddle. However, about 60 feet away from the puddle, a large male roller skater wearing a Reggie White Eagles Jersey fell as he was leaving the skating floor. The skater could be observed removing his skates and immediately walking out of the rink.

After reviewing this videotape, I called the plaintiff's attorney and asked him a simple question: what was your client wearing on the day of the accident? When he called back to tell me that his client was wearing a Reggie White jersey, I told him about the videotape. A few days later, plaintiff's counsel dismissed his client's case with prejudice. The attorney explained that his client had returned to work and was "too busy" to pursue this lawsuit. I was able to close my file just five days after I opened it.

Case #2 – The "defective" skate:

The plaintiff sustained a serious injury when the front wheel on his right rental skate suddenly jammed as he was skating on the rink. After the accident, his rental skates were inspected and found to be in good working order. They were tagged and bagged and retained in the rink office in accordance with risk management guidelines published by the Roller Skating International Trade Association. The accident was also filmed by two different surveillance cameras in the rink. When we reviewed the video, we can see that moments before the plaintiff lost

(Continued on page 12)

(Continued from page 11)

his balance and fell, he turned to his right to wave to a spectator who was standing off to the side of the rink. After waving, he tried to resume skating but he lost his balance and his feet flew out from under him as if he had slipped on a banana peel. We were able to retain a defense expert to review the video and explain the real cause of the accident which was the plaintiff's loss of balance and not a defect in the skate. The jury returned a defense verdict.

Case #3 – The "dangerous" condition on the skating rink floor:

A 10-year-old child wearing inline skates claimed that he injured his ankle after the wheel of his right skate became caught in an expansion joint that surrounded the skating rink floor. This expansion joint was approximately one-inch wide and was located between the outer edge of the wooden floor and wall. The plaintiff claimed that he was skating near the wall when his wheels got caught in the expansion joint, causing him to lose his balance and fall.

The session surveillance video disproved the plaintiff's claim, but it did show that the plaintiff was lacking ability to slow his speed or come to a stop wearing roller skates. Rather, the plaintiff stopped himself by crashing into the closest available wall. Just before this incident occurred, the plaintiff was skating towards a wall with his arms out in front of him when he suddenly lost his balance and fell backwards. His right skate went out in front of him and his momentum caused his skate to crash into the wall above the joint. The joint had nothing to do with this accident. I sent the video to the plaintiff's attorney who agreed to dismiss the Complaint even before we filed an Answer.

Case #4 – "I never read the waiver"

In a matter involving a water park personal injury claim, the plaintiff had signed a written waiver and release but denied that he had time to read it when it was presented to him. A video camera pointed at the main desk where releases are signed proved that he received the release and read both sides of the document before signing it.

As these examples illustrate, attorneys defending such personal injury claims should always seek first to review any existing video footage – what the camera captures may well indeed hold the keys to the successful defense of the case.

* **Lary I. Zucker chairs the Amusements, Sports & Recreation Liability Practice at Marshall Dennehey Warner Coleman & Goggin. Resident in the firm's Cherry Hill office, he may be reached at lizucker@mdwcg.com.**

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

NEW JERSEY CHAPTER

www.NJMEDIATORS.ORG

The following attorneys are recognized for

Excellence in the field of Alternative Dispute Resolution

NAME	BASED IN	PHONE	CALENDAR
Caroline Petrilla	Bordentown	(609) 372-2373	☑
N. Janine Dickey	Bridgewater	(908) 295-7900	
Hon. William Dreier (Ret.)	Bridgewater	(908) 722-0700	☑
Hon. Jack Lintner (Ret)	Bridgewater	(908) 722-0700	
James D. Hamilton Jr	Cherry Hill	(856) 795-6400	☑
Hon. Joel B. Rosen (Ret.)	Cherry Hill	(856) 488-7716	
Hon. Peter F. Boggia (Ret.)	Clifton	(973) 470-0800	☑
Jennifer L. Brandt	Cranford	(908) 272-9393	☑
Hon. Anthony Sciuto (Ret.)	Fort Lee	(201) 585-9111	
Harold I. Braff	Jersey City	(201) 333-0400	
Robert E. Margulies	Jersey City	(201) 333-0400	☑
Hon. Virginia Long	Lawrenceville	(609) 895-3335	☑
Suzanne M. McSorley	Lawrenceville	(609) 987-6663	☑
Lewis Pepperman	Lawrenceville	(609) 895-7260	☑
Hon. Anthony Gibson (Ret.)	Linwood	(609) 601-6624	
Patrick R. Westerkamp	Matawan	(732) 672 3222	☑
F. Peter Phillips	Montclair	(973) 509-9667	☑
Vincent A. Cino	Morristown	(973) 538-6890	☑

NAME	BASED IN	PHONE	CALENDAR
Hon. Mark B. Epstein (Ret.)	New Brunswick	(732) 545-4717	
Hon. Barbara Wecker (Ret.)	Newark	(973) 643-3700	
Katherine Benesch	Princeton	(609) 375-2603	
Laura A. Kaster	Princeton	(609) 921-0095	☑
Richard H. Steen	Princeton	(609) 895-0071	☑
Hon. John Keefe (Ret.)	Red Bank	(732) 224-9400	
Roger B. Jacobs	Roseland	(973) 226-6663	☑
Peter L. Michaelson	Rumson	(732) 758-6500	
Hon. Benjamin Cohen (Ret.)	Somerset	(908) 333-6208	☑
Hon. Marguerite Simon (Ret.)	Springfield	(973) 379-4200	☑
Elliot M. Baumgart	Up. Montclair	(973) 744-4000	☑
Bonnie Blume Goldsamt	Verona	(973) 857-6220	☑
Barbara Weisman	Verona	(973) 239-0757	☑
Hon. Harriet E. Derman (Ret.)	Warren	(908) 757-7800	
Terri Reicher	Wayne	(973) 839-9401	☑
Hon. John M. Boyle (Ret.)	Westfield	(908) 233-6800	☑
Steven J. Blumenthal	Williamstown	(856) 809-1235	☑

Check preferred available dates or schedule appointments online directly with the state's top neutrals

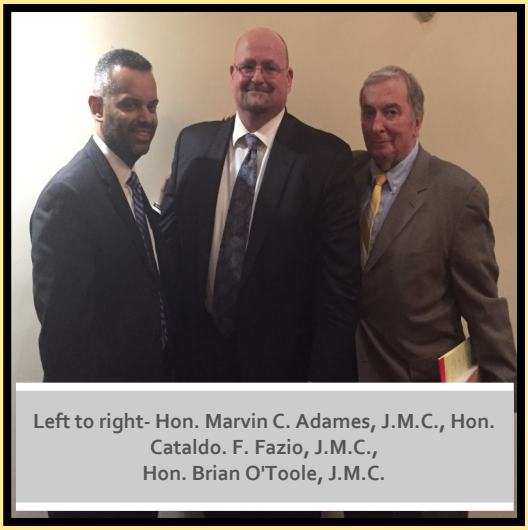
Avoid hours of scheduling phone tag with parties...
NJMediators.org is free, funded by Academy members

The National Academy of Distinguished Neutrals is an invitation-only professional association of over 900 litigator-rated mediators & arbitrators throughout the US and Neutral Database Partner to the national trial bar (AAJ) & defense bar (DRI). For more info, please visit www.NADN.org/about

Spring Continuing Education Seminars

March 23, 2015

The Young Lawyers Committee presented a seminar entitled "How to Survive The Early Years of Practice: Practical tips for Young Lawyers." It was held at the law offices of Hoagland Longo Moran Dunst & Doukas in New Brunswick, NJ and was attended by over 30 young attorneys. Edward Fanning, Jr.'s presentation focused on deposition techniques and strategies. Natalie Mantell and Mark Saloman discussed the "do's and don'ts for young lawyers," and Charles Lanzalotti made a presentation on "how to win your first trial." The Young Lawyers Committee plans to make this helpful seminar an annual spring event.



Left to right- Hon. Marvin C. Adames, J.M.C., Hon. Cataldo. F. Fazio, J.M.C., Hon. Brian O'Toole, J.M.C.

April 16, 2015

"The Do's and Don'ts of Municipal Practice" co-sponsored with the Hudson County Bar Association Young Lawyers and the Hispanic Bar Association Young Lawyers.

April 28, 2015

The ADR Committee presented a seminar entitled "Everything you need to know about Mediation and Arbitration but were afraid to ask." Michael Malia moderated the discussion, which included Michael Needleman presenting an overview of the Arbitration Act and the Mediation Act and corresponding case law, as well as the Hon. Joel B. Rosen (Ret.) providing valuable insight into mediating cases and ethical considerations. Jeffrey Dashevsky and Joseph Kania, along with the rest of the panel provided their personal experiences and addressed other topics, including whether to arbitrate or mediate and which cases are best suitable for mediation versus arbitration.

NEW JERPRESENTED BY THE NJDA

Substantive Committee Chairs 2014-2015

ADR

Michael Malia, Esq.
Pringle Quinn Anzano, P.C.
701 7th Avenue
Belmar, NJ 07719
732-280-2400
mmalia@pringle-quinn.com

Appellate Practice

Natalie H. Mantell, Esq.
Gibbons, P.C.
One Gateway Center
Newark, NJ 07102
973-596-4533
nmantell@gibbonslaw.com

Automobile Liability

C. Robert Luthman, Esq.
Weir & Associates
108 Straube Center Blvd - Ste 17
Pennington, NJ 08534
Rluthman@weirattorneys.com

Construction Law

Michael J. Leegan, Esq.
Goldberg Segella
902 Carnegie Center
Princeton, NJ 08540
609-986-1320
mleegan@goldbergsegalla.com

Employment Law

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

Environmental Law

Joanne Vos, Esq.
Maraziti Falcon & Healy
150 JFK Parkway
Short Hills, NJ 07078
973-912-9008
Jvos@mfhenvlaw.com

Jacob Grouser, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
jgrouser@hoaglandlongo.com

Fraud

Michael Malia, Esq.
Pringle Quinn Anzano, P.C.
701 7th Avenue
Belmar, NJ 07719
732-280-2400
mmalia@pringle-quinn.com

Insurance Law

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

Daniel Toadvine, Esq.
NJM
301 Sullivan Way
West Trenton, NJ 08628-3496
609-883-1300
dtoadvine@njm.com

Philanthropy

Denise M. Luckenbach, Esq.
Sellar Richardson, P.C.
293 Eisenhower Pkwy Ste 170
Livingston, NJ 07039
973-992-6677
dluckenbach@sellarrichardson.com

Premises Liability

Jeff Maziarz, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
jmaziarz@hoaglandlongo.com

Products Liability

John Chester, Esq.
Porzio Bromberg & Newman
100 Southgate Parkway
Morristown, NJ 07962
973-538-4006
jtchester@pbnlaw.com

Professional Liability

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

Public Entity Law

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

Aldo J. Russo, Esq.
Lamb Kretzer LLC
110B Meadowlands Pkwy
Seacaucus, NJ 07094
201-798-0400
ajr@lambkretzer.com

PIP

Robert Cappuzzo, Esq.
Chasan Leyner & Lamparello
300 Harmon Meadow Blvd
Seacaucus, NJ 07094
201-348-6000
rcappuzzo@chasanlaw.com

Workers' Compensation

Stephen Banks, Esq.
Dempster & Haddix
161 Gaither Drive Ste 201
Mount Laurel, NJ 08054
856-778-7841
Stephen.Banks.aig.com

George C. Roselle, III, Esq.
Lamb Kretzer LLC
601 Pavonia Ave.
Jersey City, NJ 07306
201-798-0400
gcr@lambkretzer.com

Vidya Prasad, Esq.
Dempster & Haddix
160 Gaither Drive
Mt. Laurel, NJ 08054
856-439-5422
vidyapras@gmail.com

Removing the "Roadblock": New Jersey's Supreme Court Signals A Dramatic Expansion of Whistle-blower Protection for Garden State Employees

*Mark A. Saloman, Esq.**

When enacted in 1986, New Jersey's Conscientious Employee Protection Act (CEPA) was intended to protect any employee who discloses to a supervisor or a public body, or refuses to participate in, any deception or misrepresentation which may defraud various parties, including patients, customers, employees, or government entities. Over time, New Jersey courts interpreted CEPA as protecting an employee who reports illegal or unethical workplace activities of employers. During oral argument of the potentially groundbreaking *Lippman v. Ethicon*, held on January 20, 2015, New Jersey's Supreme Court questioned whether CEPA protects an employee who, in the course of providing advice and counsel as part of her normal job duties, successfully persuades her employer to avoid a potentially unlawful course of conduct—but is then summarily fired because the employer perceives her to be a "roadblock" to its otherwise unlawful plans. If the questions posed by the Court are any indication, then companies with New Jersey-based employees should brace themselves for yet another significant expansion of CEPA.

The *Lippman* Case

Dr. Joel Lippman served as Ethicon, Inc.'s World-Wide Vice-President of Medical Affairs and Chief Medical Officer. His job involved reviewing possible adverse effects of Ethicon products and serving on the company's Quality Board, where he was part of a committee responsible for reviewing and making decisions regarding product safety.

After his employment was terminated in 2006, Lippman claimed he was a whistleblower because he was fired as a result of various recommendations he made to upper management as part of his role as CMO and Quality Board member. In rejecting this assertion, the trial court found that Lippman's very job duties required him to raise concerns implicating the health and safety of the general public and, therefore, his push for recalls of allegedly dangerous products could not rise to the level of an "objection" or other protected activity that would trigger CEPA's protection.

The appeals court was subsequently asked to either adopt or reject the argument that a category of so-called "watchdog" employees are exempt from the protection of CEPA. The Appellate Division held that an employee's job title or responsibilities are not dispositive of whether the employee presents a CEPA claim. Indeed, a so-called "watchdog" is just another "employee" under the auspices of CEPA. Yet the appellate court went one step farther and reversed the trial court, holding that CEPA protects employees hired to be in-house whistleblowers—even when they are simply performing the tasks that they were hired and paid to perform.

What Is The Fate Of The "Roadblock"?

A theme raised by the Supreme Court during oral argument was whether a company can lawfully fire an employee who, through discussion and debate as a normal part of her job duties, successfully convinces her employer to avoid potentially unlawful conduct. To frame the issue, the Court posed the example of a (fictitious) employee hired and paid to provide accurate advice to upper management concerning potential violations of a law or rule or mandate of public policy. The company, wishing to dump toxic waste in a river, asks the employee for advice on whether it can lawfully do so. The Court's fictitious employee does not "oppose" the employer's "practice" but provides

(Continued on page 16)

(Continued from page 15)

reasonable advice and sound counsel that successfully persuades the company not to violate the anti-pollution law. After adhering to the employee's advice, however, the company fires her for the sole reason that it deems her to be a "roadblock" to the company's albeit unlawful desired course of future conduct. Does CEPA protect the so-called "roadblock" from discharge in retaliation for her advice and counsel? The Supreme Court appeared interested in answering that question in the affirmative.

What's Next For New Jersey Employers?

It is perfectly normal (and oftentimes expected) for the "roadblock," like other employees, to advocate strong opinions within the company about legal affairs, business strategy, and the public welfare. Internal, debate-based decisionmaking is an important and effective method of compliance control and risk management. To succeed, robust discussion and even contentious debate is expected. Such interaction may even descend into a power struggle over methodology, best business practices, and institutional influence. But at the end of the day, the "roadblock" is an employee like any other who must respect and, at times, accede to the demands of the employer—unless those demands are to engage in acts that are unlawful. It stands to reason that only unlawful demands fall outside the scope of regular employment.

Yet, the Supreme Court appears poised to dispense with CEPA's requirement that an employee "object" to an unlawful corporate practice, telegraphing that the statute also should cover any employee who is fired after counseling—and successfully convincing—a company to avoid the possibility of future unlawful conduct as part of her normal job functions. Under the potentially geometric expansion of CEPA, everyday employees who regularly investigate alleged misconduct and monitor corporate compliance with applicable laws, rules, and regulations will necessarily be transformed into "whistleblowers" simply by working in their chosen profession. Indeed, any "roadblock" who debates or questions or renders advice about a potential violation of law or public policy during the normal course of her daily work will be deemed to be engaging in "protected" activity. In addition to a flood of CEPA claims, another unintended consequence of such an expansion of the statute is the creation of at-will employees who cannot be the subject of an adverse employment action without simultaneously triggering a potential CEPA violation—regardless of their performance. Such "untouchable" employees, who do not accept criticism or are fiscally irresponsible or ignore feedback or cannot get along with coworkers or are underperforming are not engaging in protected activity; yet the Supreme Court has intimated that any "roadblock" employee should be able to assert a CEPA claim so long as she is performing her normal job duties.

Whether the Supreme Court rejects the well-developed precedent allowing employers the right to disagree with their employees, even "roadblock" employees, without triggering CEPA remains to be seen. The Court's final decision on this important issue is eagerly awaited.

This article originally appeared on the March 4, 2015 edition of NJBIZ.COM. It can be found at http://www.njbiz.com/article/20150304/INDINSIGHTS/150309907/removing-the-roadblock-new-jerseys-supreme-court-signals-a-dramatic-expansion-of-whistleblower-protection-for-garden-state-employees

* **Mark A. Saloman is a partner in the Berkeley Heights, New Jersey office of FordHarrison LLP, where he handles complex employment litigation at the state and federal levels and advises clients throughout the country on all aspects of employment law. On behalf of the Employers Association of New Jersey, Mr. Saloman submitted an amicus curie brief to the Supreme Court in the Lippman matter.**

Upcoming Events:

Women and the Law Seminar
Wednesday, November 11, 2015
8:30 a.m. -12:30 p.m.
4 CLE Credits
Hotel Woodbridge at Metropark
Iselin, NJ

Auto Liability Seminar
Co-Sponsored with ICNJ
Tuesday, November 24, 2015
8:30 a.m. – 1:00 p.m.
4.7 CLE Credits
Hotel Woodbridge at Metropark
Iselin, NJ

GUARDING THE BACK DOOR AFTER JAMES V. RUIZ

*Michael J. McCaffrey, Esq.**

On July 2, 2010, a Mr. Ruiz stopped his car at a toll booth on the Atlantic City Expressway, decided that going backward at that moment would be better than going forward, and backed his car into the car of a Mr. James. At trial defendant's expert witness testified that he had read the report of the radiologist who first interpreted the CT of plaintiff's spine. On cross-examination plaintiff's attorney asked: "And what did you learn from that report?" In sustaining an objection the judge warned plaintiff's counsel that he was "not going to back door the radiologist's opinion into this case."

In closing argument plaintiff's attorney, persistent in his effort to open the back door, pronounced that the opinion of his medical expert "is consistent with what the radiologist saw." The court sustained an objection and instructed the jury to disregard the comment.

On appeal judgment for defendant was affirmed, in James v. Ruiz, 440 N.J. Super. 45 (App. Div. 2015). The appellate court, failing to express pleasure with the argument of the plaintiff's attorney, and "emphatically" agreeing with the trial judge, held that an attorney may not question a testifying expert about "consistency" when "the manifest purpose of those questions is to have the jury consider for their truth the absent expert's hearsay opinions about complex and disputed matters." Id. at. 51. The court noted correctly and with real-world acumen that the perceived purpose of presenting to the jury the opinion of a non-testifying doctor is to have that opinion serve as a "tie-breaker." The evil identified by the court would be to have the jury "fed" what would be essentially the "net opinion" of the non-testifying radiologist, without testimony on why the radiologist reached that opinion.

James provides a very well-written education on the proper use and serial effect of N.J.R.E. 403, 703, 801 (c) and 808, with pithy adage from two precedential cases, Brun v. Cardoso, 390 N.J. Super. 409 (App. Div. 2006) and Agha v. Feiner, 198 N.J. 50 (1996). Like a Shakespearean drama, the opinion frets upon human motivation and infirmity, including among its cast of characters fact, datum, duty, "bootstrapping," questions in guise, improper conduits, incumbent obligation, circumvention, and the noxious opinion lurking to be "slipped in through the proverbial back door." The case reiterates several rules of evidence:

- Opinion or diagnosis contained in a business record is admissible if trustworthy. James, supra, at 61. See, N.J.R.E. 803(c)(6); Brun, supra.

- An opinion or diagnosis in a business record shall be excluded unless the motive, duty and interest of the declarant, the complexity of the subject matter and the likelihood that the

(Continued on page 19)

(Continued from page 18)

opinion is accurate tend to establish its trustworthiness. James, supra, at 62. See, N.J.R.E. 808 (a rule of exclusion not of admission).

- A hearsay fact or datum may be recited by a testifying expert when the fact or datum is relied upon reasonably by other similar experts. James, supra, at 65. N.J.R.E. 703; Agha, supra.

- There is a distinction between relying on others and repeating what others say. James, supra, at 71-72 (citing C. Mueller & L. Kirkpatrick, Evidence, §7.10 (4th ed. 2009)).
- An expert must rely upon the opinion, fact or datum for it to be admissible. James, supra, at 64. [The specific issue of reliance should be easily resolved, perhaps in a hearing under R. 104, by asking the expert if he could reach his opinion without the fact or datum].
- It is improper to cross-examine a witness about inadmissible hearsay documents upon which he has not relied. James, supra, at 76.

A court's applying those rules or principles, in ruling on an objection, would encounter issues not entirely resolved in James. One such issue would be the distinction between an "opinion" and a "fact or datum." In a footnote James recognizes that epistemological elephant in the room, but finds it unnecessary to resolve the issue or define the terms.

Another issue would be the impossibly arcane inquiry necessary to discern the motive, duty, and interest of the professional declarant, and the depth or degree to which he contemplated litigation, to determine the "reliability" or "accuracy" of an opinion, fact or datum. The court in James, on no stated grounds, expresses its confidence in the impartiality of the radiologist upon whom plaintiff ostensibly relied, and in doing so whistles past the graveyard, as it is not uncommon for a plaintiff's attorney to commend to his or her client a physician in whom the attorney has confidence. Defense attorneys see the same experts in case after case. We see plaintiffs go to predictably identifiable radiological facilities. The radiologist, the orthopedist, the pain-management specialist and other professionals cannot all fail to recognize the economic value of providing a reliably favorable opinion on such matters as causal relationship and severity of injury. Surely not every physician would be shocked to learn that a person involved in an accident is considering litigation. Often the physician's intake sheet has a line for the name of the attorney.

Therefore, considering all of the above, in posing an objection to a question at trial that verily heaves an unfair shoulder against the back door of the courtroom, the defense attorney, with citation to James, Brun, Agha, and the rules of evidence identified above, may argue that:

(1) the opinion, fact or datum is a statement offered for its truth and therefore is inadmissible hearsay;

(Continued on page 20)

(Continued from page 19)

(2) the statement was not made in the regular course of business and therefore is inadmissible hearsay;
(3) the statement is not trustworthy, as the method, purpose and circumstance of its preparation so show;
(4) the motive, duty and interest of the declarant precludes the accuracy and trustworthiness of the statement;
(5) the declarant's contemplation of litigation precludes the accuracy and trustworthiness of the statement;
(6) the complexity of the subject matter renders the statement inadmissible hearsay;
(7) the statement or diagnosis involves a contested, critical issue in dispute;
(8) the statement is an opinion and not a fact or datum;
(9) the testifying expert has not relied upon the opinion, fact or datum and is simply repeating what one other has said;

and should all else fail,

(10) the opinion would confuse the jury. The success of the argument would ensure that the declarant be subjected to cross-examination, "the greatest legal engine ever invented for the discovery of truth."

*** Michael J. McCaffrey since 1992 has been certified by the Supreme Court of New Jersey as a Civil Trial Attorney. He received a B.A. (Philosophy) from Rutgers University in 1978 and was graduated from the Indiana University School of Law, where he was selected through a writing competition to serve on the Indiana Law Journal.**

GONE FISHING

Brian O'Toole, Esq.

In order to develop an interest in fishing, you really need a close friend or family member to spark that interest at an early age. In my case, that relative was my Uncle Leo, affectionately known as "The Bull." His son, Lee, and I grew up together fishing at the Bull's side. Lee is my first cousin and best friend, and we've shared an enormous number of fishing adventures. I hesitate to put a number on it, lest I be accused of fisherman's tales. Our first fishing expedition took place at the Shark River Basin in Belmar. The three of us, accompanied by my brother, Joe, would spend an entire day catching snappers (small bluefish) with a bamboo pole, a bobber and hook. The trick was to let the bobber go completely under water before pulling up on the line. It was also no small feat to lift the fish over the rail. Our success rate couldn't have exceeded 25 percent. In the final analysis, it all came out in the wash, since we always threw the snappers back.

As time went on, we graduated to fishing for flounder and fluke on party boats. Back in those days a half day ride was $10.00 and a full day was $17.00. We would usually go in the afternoon, utilizing the logic that the Captain would go to school (no pun intended) on what happened in the morning. We also found that most of the "old salts" would fish in the morning, which was fine with us because they were usually quite cranky. Our favorite boat was the "Miss Manasquan" that later became "The Piper." The Captain was an old sea urchin by the name of George "Blackie" Walsh. If you were casting a sea epic, Blackie would be your man for the Captain of the pirate ship. He was powerfully built and his handshake was like a vice. He had a soft spot for Lee and me, however, and he knew we couldn't afford to go out very often. As a result, when we were hanging around the dock as they were preparing to pull out, Blackie would say, "I suppose you guys want to come along as mates?" Before Blackie could change his mind, we were in the stern washing bait. Because of our many good times with Blackie, both Lee and I vowed that when we got older, we would have our own fishing boat.

Eventually, we started going out on all day bluefish boats. Our favorite was the "Jamaica," which still operates out of Bogan Basin in Brielle. Bluefish are really fun to catch because they put up such a fight. The biggest problem on a blue boat is the fact that you are literally shoulder to shoulder with the guy next to you. When you hook a fish, the standard procedure is to walk the fish to the back of the boat. As you might imagine, this resulted in many tangled lines and temper flare ups, especially if someone had a bite and he lost it because someone else was walking his line to the back. The theory is that you walk your line back and over the other lines, thus avoiding tangles. Believe me, this certainly doesn't work all the time. There is always a "pool" for the biggest fish. Till this day, on fishing boats Lee is usually an odds on favorite to win it. The first time I went out on a party boat, I caught the largest fish. Unfortunately, I wasn't in the pool. Needless to say, that never happened again.

(Continued on page 22)

(Continued from page 21)

Lee believes that if someone else is catching fish and you're not, its because they're doing something that you're not. Consequently, he will always check the successful fisherman's rigging, sinker and what bait they are using and how they're using it. While there is certainly an element of luck involved, to catch fish consistently you have to have the right bait and equipment. It is also vital to know where and at what time you should be fishing. Lee gets a lot of his information from Bogan's Basin and from Al Ristori, the Star-Ledger fishing columnist, As a result of Lee's astute research, he has earned the nickname of "The Fishing Doctor."

For about the last ten years the fishing I most enjoy is surf fishing. We have a beachfront house in Manasquan and I enjoy going out about 6:00 in the morning to fish for striped bass. (It is interesting to note I have no problem getting out of bed to fish, but would complain bitterly if I had to get up at the same time to go to work.) Fishing at dusk is also a relaxing, peaceful endeavor. Sometimes I use a lure, but most often I fish on the bottom with clams. Once again, surf fishing is an area where Lee really excels. In an average summer season he'll catch over fifty bass, while I'm fortunate to catch five or six. One thing we both agree on is that we throw everything back. The second biggest thrill after catching the fish is letting it go back out to sea. The legal limit for a "keeper" is 28 inches, but it really irks us when we see someone keep a female who is ready to spawn; no matter how big she is.

To be honest, the surf is so beautiful as the sun is coming up or about to set, that I am often glad my reverie isn't interrupted by a fish on the line. I can't tell you how many of my problems have been solved when it was just me, the sand and the surf. What a wonderful way to start or finish the day.

I'll leave you with an age-old fishing adage:

When the wind is north, don't venture forth,

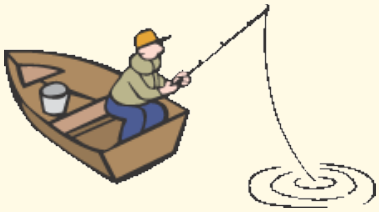
When the wind is south, fishing's in doubt.

When the wind is east, fishing is least and

When the wind is west, fishing is best.

Okay, so I never bought a fishing boat, but those happy memories are intact, and, if you're looking for me this summer, don't use a cell phone, just check the surf at dawn and dusk.

Let me take this opportunity to wish you a glorious, fun-filled summer and remember, "You can't catch a fish unless your line is in the water."



Committee Chairs

2014-2015

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

By-Laws
J.R. Peter Wilson, Esq.

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

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

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

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

Long Term Planning
Kevin J. DeCoursey, Esq.
Cooper Maren & Nitsberg
959 Rt. 46 East
Parsippany, NJ 07054
973-257-2100
kDecour1@progressive.com

Medical Directory
Michael J. Leegan, Esq.
Goldberg Segalla
902 Carnegie Center
Princeton, NJ 08540
609-986-1320
mleegan@goldbergsegalla.com

Membership
Michael J. Leegan, Esq.
Goldberg Segalla
902 Carnegie Center
Princeton, NJ 08540
609-986-1320
mleegan@goldbergsegalla.com

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

New Jersey Defense **Newsletter**
Gregory McGroarty, Esq.
Wildenhain Crino, PC
95 Mount Bethel Road
Warren, NJ 07059
908-757-3900 ext 208
gmcgroarty@wcpclaw.com

Public Relations
Joanne Vos, Esq.
Maraziti Falcon & Healy
150 JFK Parkway
Short Hills, NJ 07078
973-912-9008
Jvos@mfhenvlaw.com

Technology
Charles P. Hopkins, II, Esq.
908-601-3100
Charles.hopkins.esq.bc.edu

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

Young Lawyers
Ryan Richman, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-622-4444
rrichman@mccarter.com

Co-Chair

Michelle O'Brien
Graham Curtin
4 Headquarters Plaza
Morristown, NJ 07961
973-401-7155
mobrien@grahamcurtin.com

New Jersey Defense Association
P.O. Box 463
Linwood, NJ 08221

PRESORTED STANDARD
US MAIL 08401
PERMIT #3374

49th Annual NJDA Convention

Omni Bedford Springs Resort, Bedford, Pennsylvania

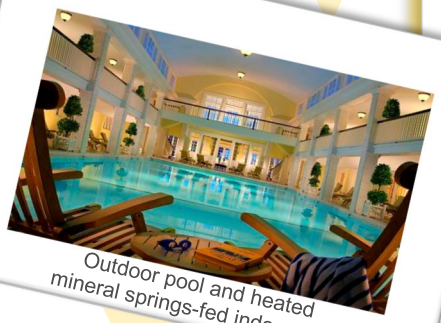
From the luxurious guest room accommodations and delectable dining venues, to cutting edge conference rooms - the resort has preserved the original historic charm with the addition of modern creature comforts.

June 25 - 28, 2015

TripAdvisor's Top 10 Relaxation Hotels in the US

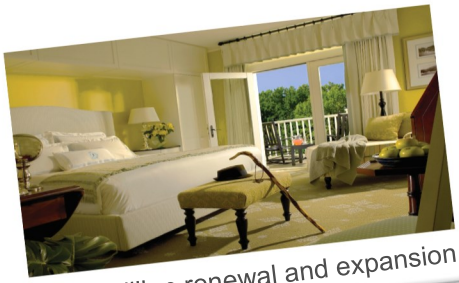
AAA Four Diamond Resort

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