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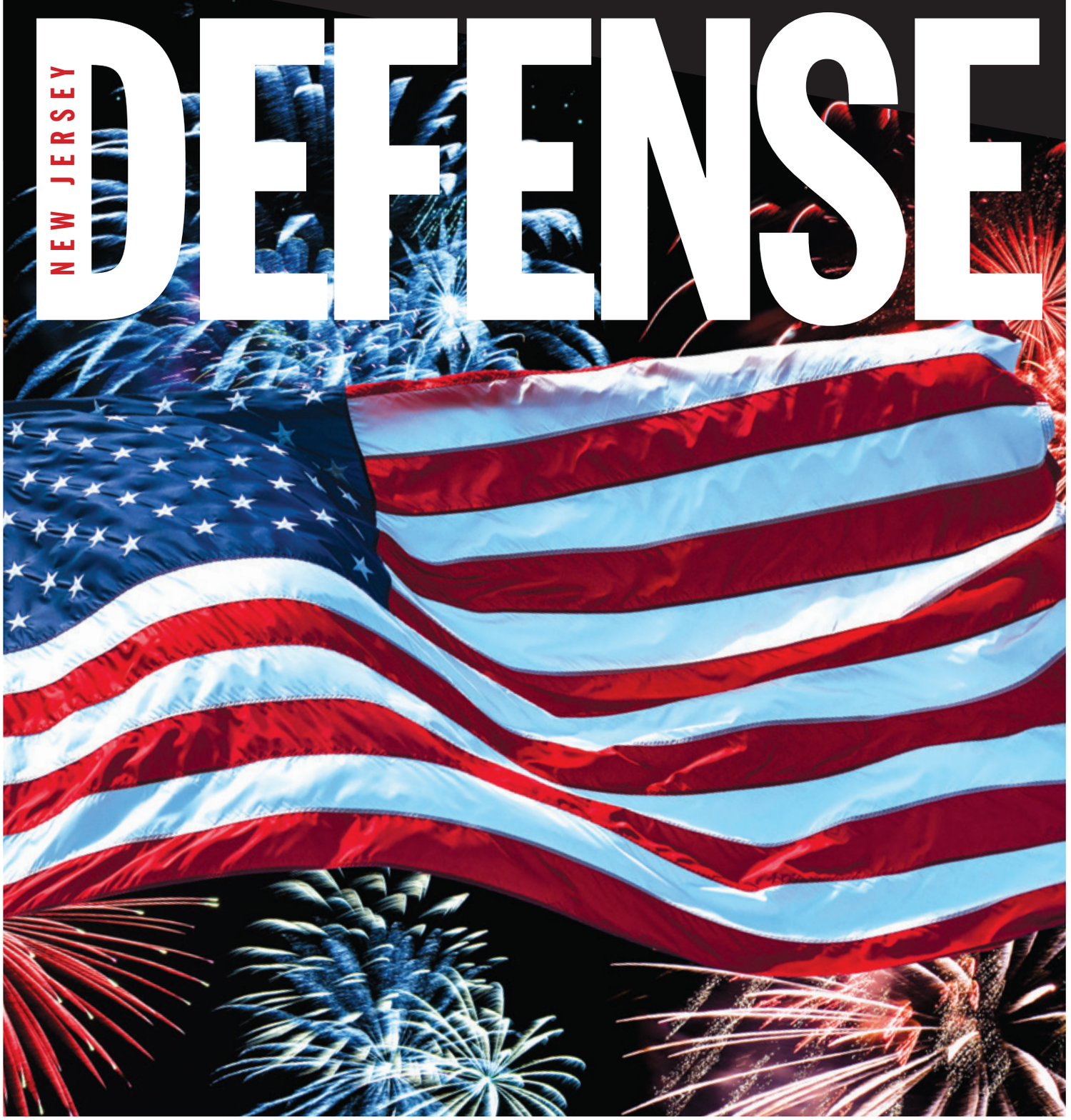
NEW JERSEY DEFENSE



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PRESIDENT'S LETTER

Warm summer days are fast approaching, as is the end of my tenure as President of the NJDA. In my last formal address to the membership and the respected members of our judiciary, I would like to sincerely thank you for the opportunity to serve this Association for the 2022-2023 term. As I reflect on the past 12 months, I am proud of all we have accomplished together, all while navigating the challenges of a post-pandemic legal landscape. Inflation and increasing costs have presented difficulties on all fronts. Constrained judicial resources have resulted in uncertainty for many litigating attorneys throughout the state. My mission when assuming presidency was to ensure that we as an organization evolve with the changing times, and it has certainly been a year of growth, in several respects.

Our members are the backbone of this organization and our year-long membership drive proved to be a success. We welcomed the increased presence and participation from several of our long-standing members who have taken on more active roles within the association. With significant contribution from the board, a call-to-action has helped the NJDA welcome new faces and voices to the continuing effort to expand our impact and proverbial footprint. Thank you to all who assisted in these efforts by nominating new chairs and co-chairs, encouraging attendance at our meetings by inviting members of substantive committees and of course to those who responded to the call.

Together, we continued several of our annual traditions. The NJDA hosted a very successful golf outing at Copper Hill in the fall. Our holiday party at Spring Lake was a wonderful opportunity to celebrate and reunite in-person once again. Seminars including, but not limited to, Women & the Law, Auto Liability and Insurance Law were all well-attended. This year, we continued our philanthropic efforts, including the virtual food drive benefiting the Community Food Bank of NJ, a clothing collection for Dress for Success and donated funds raised from raffling wine baskets to support charitable organizations. Of course, none of this would have been possible without the support of our valued sponsors, dedicated members and above all, the tireless efforts of our Executive Director, Maryanne Steedle.

Internally within the organization, efforts were taken to update and revamp our medical directory and the List Server Agreement. We also welcomed the newly created Cannabis Law Substantive Committee to our organization and look

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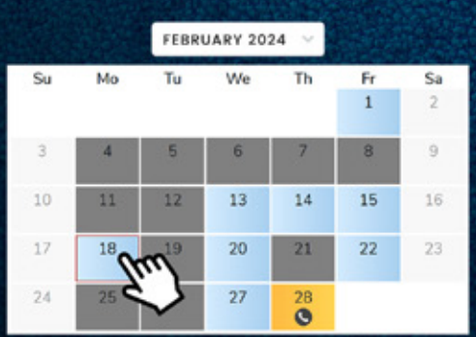

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forward to their inaugural presentation at Convention. Upcoming events include a Young Lawyers seminar & Networking Event on Thursday May 25, and volunteer day at the Community Food Bank on June 2nd. Please join us!

In an effort to move the needle forward, the NJDA was at the forefront of addressing several statewide concerns, including proposed bills related to the verbal threshold application in DUI cases, responding to modifications made to the Model Civil Jury Charges and arguing against presumptive conditional requirements for independent medical examinations. Our Women & the Law Committee obtained board approval for the inaugural "Marie A. Carey 'Ladder Down' Award," aimed at rewarding efforts in recruitment, retention, advancement and promotion of women and diverse attorneys as well as encouraging the commitment to service and social responsibility in diversity, equity, inclusion and belonging arenas. Today, more than ever before, the NJDA is seeking to promote change, beyond simply creating awareness in this arena, and this award is just one small step toward that end.

I take great pride in having played a small role in advancing this organization forward and into the very capable hands of our next leader, Rob Luthman, and his slate of leaders who, no doubt, have great things instore. While my term as President may be ending, my commitment to continuing forward and spearheading efforts to promote this organization and all that it represents, certainly is not.

I hope to see many of you at the NJDA's 57th Annual Convention on June 22-25 at The Willard InterContinental in Washington, D.C., a celebrated landmark, just steps away from The White House and surrounded by historical monuments and world-renowned museums and galleries. The planned CLE program includes an esteemed panel of our members on techniques combatting plaintiff's trial tactics, defense strategies for addressing diminished value, utilizing social media in the legal setting, ethical issues related to client communications, the latest information on cannabis law in New Jersey and our annual civil case law update. Our sponsor, Exponent, will also provide an expert presentation on utilizing human factors for risk mitigation in healthcare. Do not miss this opportunity to network with NJDA members and sponsors, both old and new, obtain valuable CLE credits and enjoy a weekend away with your family.

I wish you all a happy and healthy summer and look forward to continuing our efforts together, under new leadership, this fall.

MICHELLE O'BRIEN, ESQ.

THE STANDARD OF POSSIBILITY FOR CROSS-EXAMINATION UNDER ALLENDORF V. KAISERMAN ENTERS., 266 N.J. SUPER. 662 (APP. DIV. 1993)

BY MICHAEL J. MCCAFFREY, ESQ.*

In the common case of alleged bodily injury from an actionable traumatic event, frequently the plaintiff has been injured in a preceding accident, or has a relevant, documented, or demonstrable, pre-existing condition. At trial the defendant would intend to use that historical evidence to likely persuasive effect. To estop that effort, the plaintiff usually moves the court for an order in *limine* precluding any and all use of that evidence. In support of the motion plaintiffs in New Jersey now usually adduce Allendorf v. Kaiserman Enters., 266 N.J. Super. 662 (App. Div. 1993).

Plaintiffs point to Allendorf as ground for prohibiting evidential use of records showing pre-accident injury, lesion, or symptom unless, they say, a competent expert witness is prepared to testify that the lesion or symptom at issue now "probably" is a manifestation of the preceding abnormal condition.
The argument is a problem for the defense because rarely, if ever, does defendant's medical expert agree that a plaintiff has limitation, or pain, from any cause; and rarely does plaintiff's expert, other than in a case of claimed "aggravation," agree that plaintiff has limitation, and pain, caused by a previous injury or condition.

This brief article proposes that Allendorf does not hold the conclusion for which plaintiffs cite the opinion. As Allendorf incorporates language from several preceding opinions, we start our analysis with the earliest decided significant case considered in Allendorf.

The earliest case is Paxton v. Misiuk, 34 N.J. 453 (1961). Plaintiff was a passenger in an automobile involved in an accident. He claimed bodily injury. At trial the court permitted defendant to cross-examine plaintiff on the circumstances, and effect, of his five previous accidents, apparently each with previous injury. The court permitted de-

fendant's medical expert to opine, on ground of plaintiff's testimony, that abnormality of plaintiff's spine may have preceded the accident. The jury found no cause for action. The court denied the motion for new trial.

On appeal plaintiff complained that the trial court's permitting such cross-examination was error. He argued that evidence of previous accidents was inadmissible because for each and every prior accident defendant had failed to provide evidence that the present limiting condition probably resulted from each one of those accidents.

In considering that argument the Court wrote that cross-examination in principle would be appropriate to show that a physical present physical condition is the result of "an earlier accident or pre-existing condition." Id. at 460. It observed in *dictum* that there must be "competent proof from which it could be found that the injury was thus attributable to the earlier event." Id.

The Court viewed the "crux" of the appeal to be which test of admissibility would be appropriate, "probability" or "possibility." The Court then superficially reviewed the "overall testimony" of the medical experts. Id. at 462. The court concluded that the "possible" connection of previous accidents with the present claimed injury was "fortified" by the testimony of defendant's doctors, who were of the opinion that the present injury was in existence for at least six months prior to the date of the x-ray, and "could have occurred" at the time of a previous accident or accidents. Id. The court noted evidence that plaintiff had failed to complain after the "present accident" of pain in the area of claimed injury. Id. Of significance to the Court, two experts for plaintiff had conceded that previous injury "might have" caused the subluxation at issue.

The Court held that the trial court "was justified in ruling that testimony as to the possible effects of the prior accidents was competent and produced a jury question" regarding the cause of plaintiff's present condition. Id. at 463. The Court opined that therefore the cross-examination had been proper, because the test of admissibility of such evidence was one of "possibility," rather than of "probability."

One year later was published the opinion in Dalton v. Gesser, 72 N.J. Super. 100 (App. Div. 1962). The plaintiff was a passenger injured in a vehicular accident. She claimed that the most recent accident caused headache. At trial her medical witness was cross-examined regarding hospital records showing previous complaints of headache. Plaintiff herself in testimony conceded previous headache, but declared that she had made a substantial recovery before the most recent accident. Defendant rested without producing medical proof. The jury returned a verdict of no cause for action. Plaintiff appealed the denial of her motion for a new trial.

On appeal the court agreed that evidence of other "possible" causes was admissible. The court cited Paxton for the proposition that a plaintiff may be cross-examined about prior injury to show that his present physical condition did not result solely from defendant's negligent act, but was caused, wholly or partially, by an earlier accident or condition. Id. at 114 (citing Paxton, supra, at 460). The court reversed the trial court's denial of a new trial, on ground of an error in the charge. The court did not find error in cross-examination of plaintiff's expert witness, or in cross-examination of the plaintiff, regarding possible other cause for the averred symptoms.

That opinion was followed by the opinion in Ratner v. General Motors Corp., 241 N.J. Super. 197 (App. Div. 1990). There plaintiff claimed to have suffered injury when her 1980 Buick Regal accelerated uncontrollably. Defendant sought to read to the jury from a book, the **Physician's Desk Reference.** The proposed reading was a summary of possible side effects incident to medications plaintiff was using. The trial judge ruled that defendant had the right to produce evidence of possible alternative causes of plaintiff's discomfort, relying upon Paxton, and Dalton.

The appellate court held that reading to the jury excerpts from the **PDR** was improper because "possible side effects" listed in the **PDR** did not have a tendency to prove a material fact. The court noted that there was no suggestion in the record that plaintiff had suffered any side effect listed in the **PDR**. The court agreed parenthetically that plaintiff had been wrongly surprised. Id. at 205. The court did not challenge or recast *dictum* from Paxton. The court did not suggest that expert medical testimony would always be a prerequisite to cross-examination on possible alternative causes of a plaintiff's symptom, or otherwise prohibit inquiry into medical possibility.

Next came the well-known opinion in Davidson v. Slater, 189 N.J. 166 (2007). Plaintiff in that case suffered injury from vehicular accidents in years 1997, 2001, and 2003. The trial court granted defendant's motion for summary judgment, on ground that plaintiff had failed to produce medical testimony in support of a Polk comparative analysis, as part of an AICRA verbal threshold presentation, in the context of a non-aggravation claim.

On appeal the Court held that plaintiff's non-aggravation cause of action should not have been dismissed for his failure to provide a comparative medical analysis. Citing Paxton, and in *dictum*, the Court wrote that it has long recognized the right of every defendant, in response to an allegation that his negligence has caused injury, to demonstrate by competent evidence that the injury "could" have been caused, wholly or partly, by an earlier accident, or the symptom by pre-existing condition. Id. at 187. The Court issued no more comprehensive identification of what testimony or documentation would be "competent evidence."

That line of opinions was contemplated in, and brings us to, Allendorf. There plaintiff's misadventure started with an elevator that was not functioning properly. As plaintiff entered the elevator, the recalcitrant door compressed plaintiff against the frame of the elevator's car, to her injury. Plaintiff claimed that she had suffered seizures as a consequence of the incident.

At trial a neuropsychiatrist for plaintiff, Raquel Gur, testified that seizures now were caused by the recent injury. On cross-examination defendant confronted Gur with evidence that plaintiff had complained previously of similar seizures. Gur equivocated on how that new information would change her opinion. Gur allowed that had she possessed that information she would have been compelled to "check a little bit more into the family story and so this was moving upper and higher on the list for cardiac." She went on to say of the history that "it might be significant relating to cardiac disease, and it might also be significant…for other causes of the seizures" at issue, such as a condition of the heart, or the brain, or by abuse of a toxic element. Essentially she conceded that

plaintiff's seizures perhaps were, or could be, the result of some condition other than injury suffered in the mishap, but she refrained from reaching a firm, new conclusion on the cause of recent seizures.

On appeal after a verdict adverse to the plaintiff, the primary issue was application of the doctrine of *res ipsa loquitor.* The secondary issue was claimed error of the court's admitting into evidence the pre-accident medical history. Plaintiff argued that the trial court erred in permitting testimony to occasions when plaintiff fainted, or lost consciousness, before the accident. She proposed that defendants were required to present expert testimony to support the conclusion that her "seizure disorder" in fact existed before the accident, or in fact was not caused by the accident.

In considering that argument, initially the Allendorf court wrote in *dictum* that the required logical relationship between evidence of a prior injury or condition, relating to an issue of medical causation, "generally" must be established by "appropriate expert medical opinion." Id. at 672 (citing Ratner v. General Motors Corp., supra, at 203-206). And there, with that inherently vague word, and in that inherently unbounded phrase, the court perhaps unintentionally laid upon litigants' tables the morsel of *dictum* which plaintiffs have extracted from the opinion, and which they serve to the court at trial in support of their motions in *limine*.

The citation to Ratner can be misleading, because Ratner did not hold that always medical opinion, appropriate or otherwise, would be necessary. The court in Ratner was concerned with a very narrow, and specific, issue: the use of a book's content in cross-examination, in-lieu-of a physician's testimony. Nothing expressed in Ratner, or in Allendorf, supports the proposition that affirmative medical testimony is always necessary to cross-examination of a plaintiff, or an expert witness, on what is possible.

Much to the contrary, the court in Allendorf held that Gur's evasive and inconclusive testimony did indeed provide the "appropriate" expert's medical opinion to establish the required logical relationship. The court reached that opinion without evidence that Gur had relied upon a medical record, or an imaging study of the brain, or medical statistic, to reach her conclusion. The court noted that Gur had appropriately relied upon no evidence other than plaintiff's thin, self-reported medical history. Id. at 674. The court concluded that musings of Dr. Gur, based upon that history alone, together with her experience and education on what conditions could cause a seizure, provided "appropriate," sufficient, and probative medical evidence. The court commented incidentally that evidence of a pre-accident history would be admissible "for the purpose of impeaching the credibility" of a witness. Id.

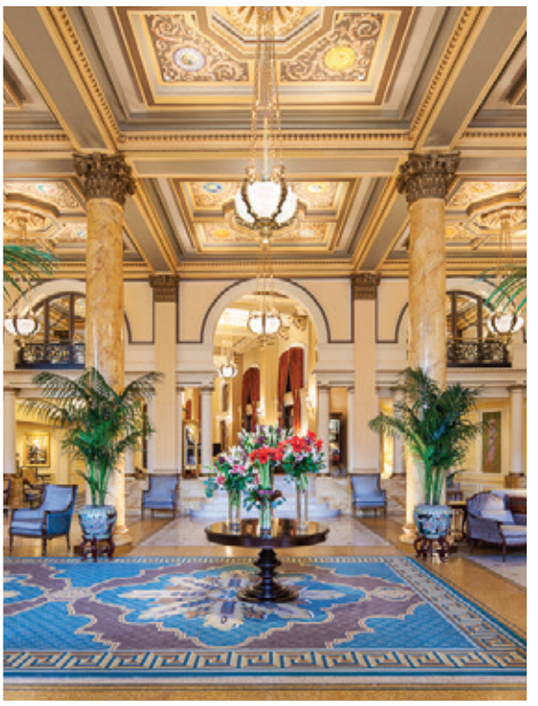
It should be emphasized that Allendorf neither provided a prescription, a criterion, for what would be "generally" an "appropriate" medical opinion, nor insinuated that medical testimony would be in every case a necessary fundament to cross-examination on possible other causes of claimed affliction. Nevertheless, the court did find the testimony of Dr. Gur to exemplify such appropriate opinion, however seemingly speculative it had been.

Thus, upon the facts and testimony in that case, the court in Allendorf issued a holding contradictory to the broad, prohibitory rule proposed by many plaintiffs. The court's holding introduced no new law of evidence or view of relevance. An advocate's analysis may benefit from recalling that *dictum* is surely not a holding.

For those reasons one would conclude correctly that Allendorf holds no such conclusion as that for which plaintiffs extol the opinion. At trial a defendant may urge upon the court the conclusion, suggested in the cases cited above, that the necessary logical relationship between a symptomatic post-accident condition, and a pre-accident disorder, may be established by "possibility" rather than by "probability." One could argue that plaintiffs recognize commonly that questions about possibility, without more, are appropriate. In apparent agreement with our conclusion, at trial plaintiffs routinely ask defendant's medical expert about possible causes of pain, or possible effects of an accident. Can an accident cause a herniated disc? Can a herniated disc cause pain? Courts most invariably allow such overreaching questions, without a foundational showing that such questions are informed by forces generated in the plaintiff's accident, or refer to a condition of the specific plaintiff.

Under the holdings, and the *dictum*, in Paxton, Dalton, Ratner, Davis, and Allendorf, a plaintiff's testimony to previous pain or limitation alone usually would be sufficient, competent evidence of such relevant possibility. Alternatively, cross-examination of plaintiff's medical witness, or examination of defendant's medical witness, may provide evidence of the needed logical relationship. A court at trial should permit defendant's cross-examination of a plaintiff, or of an expert witness, on the commonality of "possible" bodily degeneration, or the content of "possibly" relevant medical documentation, or on plaintiff's history, without a proffer of other supportive medical opinion.

*** Michael J. McCaffrey since year 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, Bloomington, where he was selected through a program of competitive writing to serve on the Indiana Law Journal.**



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NEIGHBORING STATES, NUANCED DIFFERENCES: COMPARING NEW JERSEY & NEW YORK NEGLIGENCE DEFENSE LITIGATION

BY ALAN ALBERT, ESQ., PARTNER, STONBERG HICKMAN PAVLOFF, LLP*

Though separated by mere miles, courthouses in New Jersey and New York operate under entirely different procedural gospels. While New Jersey practitioners look to our New Jersey Court Rules, our brethren in New York turn to their own set of Court Rules as well as the Civil Practice Law and Rules (CPLR) and the New York Codes, Rules and Regulations (NYCRR). Although the states' substantive and procedural laws mirror each other in many respects, practitioners who cross the river are well advised to understand the variations in litigation features encountered in New York. Some of the key differences are discussed below:

1. Note of Issue versus Discovery End Date. In New York, the Courts use the Note of Issue instead of a Discovery End Date. Once the deadline is reached and all discovery is complete, the plaintiff files a Note of Issue (often the NOI deadline gets pushed forward at discovery conferences). The defendant can then Move to Vacate the Note of Issue (there is a short window to enjoy the lighter standard), enter a Stipulation, or a conference is held to change the deadline. Importantly, Motions for Summary Judgment must usually be filed within 60 days from filing of the Note of Issue. Also importantly, case law is settled that expert witness disclosures can be made even after the Note of Issue is filed, within a "reasonable time before trial."

This has the effect of taking much of the pressure off both sides, for example holding off on having medical films reviewed, or retaining economic experts until closer to trial. By contrast, in New Jersey, if one has not served an expert report before the discovery end date, the expert may be precluded from testifying. In New York premises liability negligence matters, plaintiffs tend to serve "narrative" medical expert reports as an exception and rarity, and many cases seem to settle with none ever being served.

2. Expert Witness Disclosures. New York differs greatly from New Jersey when it comes to expert discovery. In New York, parties file a 3101(d) Expert Witness Disclosure, which sets forth basic expert qualifications and subject matter of expected testimony but need not enclose an expert *report* (other than Independent Medical Examination reports). Such a practice is unheard of and insufficient in New Jersey. For instance, in New York, engineering reports, economic reports and other non-medical expert reports need not be served – ever. If, however, a party files a motion for summary judgment on liability (especially if they rely on an engineering expert's affidavit) and one's opposition is

predicated in part upon their engineering expert's opinions, one will want to make an Expert Witness Disclosure and serve a rebutting Expert Affidavit.

It should be noted that, in New York, sometimes a plaintiff will disclose their liability expert and their expert's opinions for the first time as an exhibit in support of their Motion for Summary Judgment. This is not the case in New Jersey. For that reason, in New York, a defense lawyer may preemptively retain an engineering expert and conduct a site inspection if there are viable defenses and expert testimony would be needed or beneficial. Motions for Summary Judgment's in New York are often a discovery tool to flush out the opinions of the opposing party's experts.

3. Strategic Timing of Expert Witness Disclosures. As alluded to above, on some occasions, a plaintiff will serve an expert witness disclosure, for example an engineer, and state the basic details of their expected testimony in generic fashion. On these occasions, it can be extremely beneficial to retain one's own engineering expert, perform a site inspection, and ask the expert to perform a full-blown engineering evaluation. However, one may wish to serve a similarly vague rebutting Expert Witness Disclosure, with legally sufficient disclosure details, but *not enclose an affidavit or report*. This is because until one receives the plaintiff's Engineering Affidavit or report, one will not know exactly what allegations are being made, or what opinions will be being proffered. As such, it is preferable not to oppose same "in a vacuum," giving the plaintiff opportunities for workarounds. Finally, it should be noted that the 3101(d) Expert Witness Disclosures are signed by the *attorney* and not by the expert.

4. Discovery Motions. New York practitioners file Discovery Motions very sparingly in comparison with their New Jersey counterparts. Firstly, every litigated matter is case managed. Each case receives a Preliminary Conference Order setting fortha discovery schedule. Thereafter, Compliance Conferences are held, or since Covid, usually Compliance Conference Consent Orders are submitted. Further, the Court Rules (separate from the CPLR) discourage the filing of discovery motions, and in fact they are treated as a "last resort." Further, the New York Court Rules require an actual phone call be made to adverse counsel prior to filing a discovery motion.

5. Time Frame for Litigation. In New York, unlike New Jersey, it is not uncommon for a case to sit for over a year with no action other than the filing of the Complaint, Answer, Proof of Service of Process, and frequently, plaintiff's Motion for Default Judgment against non-appearing parties. Unlike New Jersey, a Motion to Request Default is required and, if it lacks sufficient detail/affidavits, it may be denied. As such, to move a case along, defense counsel may wish to file an RJI and Request for a Preliminary Conference once the parties have all answered and a Motion for Default has been filed against non-appearing parties. This will assist in obtaining the Bill of Particulars, Response to Demand for Discovery and Inspection, medical authorizations, and medical and non-economic damages.

6. Time to file for Reconsideration and Time to Appeal. In New Jersey, the deadline to file for Reconsideration or Appeal of an Order or Judgment does not actually begin to run until the Final Judgment and Order is entered. See Rule 4:49-2; see also Bender v. Walgreen Eastern Co., 945 A.2d 120 (App. Div. 2008) (Alan Albert on the Appellant brief). However, in New York, the clock begins to tick after filing of the Note of Entry of the Order. Interlocutory appeals are permitted in New York on all motions. See CPLR 5513.

While the aforementioned list is not exhaustive, it offers a broad overview of the differences between New York and New Jersey litigation which should be considered by practitioners when crossing state lines to litigate defense matters.

***Alan Albert, Esq., admitted since 2004, is the New Jersey Partner at Stonberg Hickman Moran. He specializes in insurance defense cases, specifically premises liability, construction accidents, construction defects, and auto and commercial vehicle accidents.**

DEFENSE WINS

Okai, Michel v. Pohl, et al.: – Trial April 17, 2023 – April 19, 2023. Mercer County Vicinage, L-2144-19. Plaintiff was struck in the rear by defendant after stopping his vehicle due to another vehicle making a U-turn on New York Avenue in Trenton, NJ. The vehicle making the U-turn did not remain on the scene. Over plaintiff's objection, the Court permitted liability allocation as to the phantom vehicle pursuant to Krzykalski v. Tindall, 232 N.J. 525 (2018). The jury returned a verdict finding the phantom driver 40% negligent and defendant 60% negligent. The jury concluded that plaintiff's injuries did not vault the limitation on tort threshold and issued a no-cause verdict in defendant's favor. Defense attorney C. Robert Luthman, Esq. of Weir Attorneys, Ewing, NJ.

HOT TOPICS & TAKEAWAYS: SOCIAL MEDIA AND CELL PHONE DISCOVERY AND ENFORCING SETTLEMENT AGREEMENTS AND ARBITRATION PROVISIONS

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

The Appellate Division recently issued three published decisions in a broad range of subject areas impacting litigation which could be useful for your practices, and which are summarized herein.

1. Discoverability of social media posts and cell phone records.

In *Davis v. Disability Rights New Jersey, et al.*, A-0269-22, A-0270-22 (N.J. Super. App. Div. Mar. 16, 2023), the Appellate Division affirmed the trial court's finding that the plaintiff's private social media posts and cell phone records were discoverable. At issue on appeal were two discovery orders, the first granting in part and denying in part plaintiff's motion to quash a subpoena to her cellular provider; and the second granting in part and denying in part defendants' motion to compel plaintiff to provide copies of her private social media posts, profiles and comments.

In *Davis*, the plaintiff, a senior staff attorney with defendant Disability Rights filed suit under the New Jersey Law Against Discrimination alleging emotional and physical distress claiming she was terminated because she needed accommodations for her lupus condition and cancer diagnosis. Plaintiff claimed in interrogatory answers that she suffered ongoing emotional distress due to defendants' discrimination which led to physical manifestations, including terrible migraines, insomnia, and worsening of her diabetes and blood pressure.

Defendants demanded plaintiff produce copies of her private social media posts. After plaintiff refused, defendants moved to compel all social media content concerning any emotion, sentiment or feeling of plaintiff, as well as events that could reasonably be expected to evoke emotion, sentiment or feeling. Plaintiff opposed, stating she never posted anything related to Disability Rights, the defendants or any claims in the case. Defendants also subpoenaed plaintiff's cell phone provider for a two year period of records, which plaintiff moved to quash arguing they were private and defendants failed to show a compelling need. Defendants asserted the records were evidence of her work performance and should be provided pursuant to the liberal discovery rules.

The trial judge entered two orders, granting in part and denying in part the parties' motions. The judge narrowed the scope of the defendants' social media post request,

reducing the date range (three years) and scope of the requests. The order gave plaintiff twenty-one days to fully comply and provided that plaintiff shall be made available for a deposition on any topics that reasonably flow from the discovery. The judge also narrowed the scope of the cell phone records, ordering the provider to produce the documents to plaintiff to redact for entries occurring outside of normal business hours and/or for non-work purposes; and serve both a redacted copy on defendants and an unredacted copy, complete with an appropriate *Vaughn* index and privilege log, within 14 days. Plaintiff appealed both orders.

Addressing the social media posts, the Appellate Division agreed that plaintiff had a privacy interest in her social media posts, but found no merit to plaintiff's claim that her private social media posts were off limits based upon her LAD emotional distress claim. R. 4:10-2 permits discovery of all relevant, non-privileged information; and the rules do not extend a privilege to private social media account information. In concluding the social media posts were discoverable, the court referenced other situations where privacy interests yielded to discovery of relevant information, such as personal financial information, medical records and psychological/patient communications. The court also cited federal cases recognizing the discoverability of a plaintiff's private social media content. The Appellate Division agreed with the trial judge's limitations on the social media discovery, but remanded for the trial judge to include an in-camera review process to ensure plaintiff has recourse to allow the judge to assess posts she believes are not discoverable.

Turning to the cell phone records, the Appellate Division again considered the liberal discovery rules in also concluding the trial judge did not abuse his discretion in entering the cell phone records order. The order valued plaintiff's privacy rights by allowing her to redact records of personal calls and texts made and received during workdays and non-workdays and required plaintiff to provide a *Vaughn* index to justify her claim that certain redacted calls should not be disclosed to the defendants. The order only provided defendants with a record of plaintiff's work-related calls and texts. Thus, the Appellate Division rejected plaintiff's request to apply the heightened good cause *Ullmann* test both to the cell phone records and social media posts.

Takeaway: A targeted rather than broad approach to discovery will be more successful when seeking social media posts and/or cell phone records.

2. Enforceability of settlement agreements resulting from mediation.

In *Gold Tree Spa, Inc. v. PD Nail Corp.,* A-3748-21 (N.J. Super. App. Div. Mar. 28, 2023) the Appellate Division found no valid settlement where the settlement was not reduced to a writing signed by all parties. This lawsuit stemmed from a dispute over the sale of two nail salons. Defendants made a down payment and acquired possession, but the sales were not finalized because negotiations broke down, resulting in a suit claiming breach of contract and breach of an agreement to purchase the nail salons. The parties agreed to mediation, which resulted in the mediator drafting a settlement agreement. A few hours after the mediation, plaintiff refused to sign the agreement after telling her attorney she did not want to settle, resulting in defendants filing a motion to enforce the settlement.

The trial court denied the motion to enforce the settlement because the parties failed to reach a valid agreement, citing *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., LLC,* 215 N.J. 242, 262 (2013), which required the terms of the settlement to be reduced to writing and signed by the parties before mediation concluded. Finding the settlement agreement unenforceable, the Appellate Division affirmed the trial court's decision, relying upon *Willingboro's* broad bright-line rule: "[t]o be clear, going forward, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforceable." 215 N.J. at 263.

Takeaway: A settlement agreement during mediation will not be enforceable unless it is signed by all parties before concluding mediation.

3. Enforceability of arbitration provisions in commercial contracts.

In *County of Passaic v. Horizon Healthcare Services, Inc.* A-0952-21 (N.J. Super. App. Div. Feb 08, 2023) the Appellate Division found an arbitration provision enforceable even though it lacked express language waiving the parties' right to seek relief in a court of law because the sophisticated parties possessed relatively equal bargaining power.

Plaintiff brought suit against the defendant for breach of contract by failing to implement certain modified reimbursement rates under a self-funded health benefit plan. Defendant quickly and successfully moved to compel arbitration based on a stipulation in their written agreement that in the event of a dispute under the agreement the parties would submit the dispute to binding arbitration under AAA. Plaintiff appealed, claiming the arbitration was unenforceable because it lacked the explicit waiver of access to the courts language prominently featured in *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014).

Rejecting plaintiff's argument, the Appellate Division began its analysis relying upon the express general policy favoring arbitration as a means of settling disputes that would otherwise be litigated in court contained in the Federal Arbitration Act (9 U.S.C. §§ 1 – 16) and New Jersey Arbitration Act (*N.J.S.A.* 2A:23B-1 to -36). The court reviewed whether there was mutual assent based on the parties' sophistication and negotiations. In holding that *Atalese's* express waiver requirement was inapplicable, the court relied upon the parties' sophistication, facts distinguishing this case involving commercial parties from *Atalese* and other Supreme Court decisions, which focused on the unequal bargaining power or "adhesional" nature of consumer or employment contracts.

Takeaway: The lack of a provision expressly waiving the right to seek relief in a court of law will not bar enforcement of an arbitration provision in a commercial contract involving sophisticated parties.

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