A PUBLICATION BY THE NEW JERSEY DEFENSE ASSOCIATION / SUMMER 2019

NEW JERSEY DEFENSE

4 Recent Developments in The Admissibility of Expert Testimony

9 What Price Excess? Accurately Measuring Damages in an Excess-Verdict Bad Faith Claim

17 Expansion of Wrongful Death Damages in New Jersey Appears Unlikely

18 Supreme Court Grants Petition in Wrongful Imprisonment Case

20 O'Toole's Couch: What's Happening Now

Exponent®

Engineering and Scientific Consulting

Engineering and scientific consulting firm specializing in the investigation, analysis and prevention of accidents and failures, as well as third party support for issues related to products, process, health, and the environment.

Explore Exponent

www.exponent.com

Exponent works on a variety of litigation matters including:

- Product Liability
- Personal Injury
- Construction Defect/Delay
- Patent Infringement
- Environmental/Toxic Tort
- Insurance Claim
- Food Safety

For more information, contact:

Bette McKenzie
Client Services Manager
508.652.8582 • bmckenzie@exponent.com

Exponent is certified to ISO 9001

PRESIDENT'S LETTER

Dear Members of the New Jersey Defense Association and to New Jersey's esteemed Judiciary,

With the summer approaching and our annual convention right around the corner, I would like to say that it was truly an honor and a pleasure to serve as President of this fine Association for the 2018-2019 year. However, our accomplishments would not be attainable but for the hard work and dedication of our Executive Committee, Board of Directors, Committees and members.

When I first took office, I promised to continue the endeavors put forth by our recent Past Presidents. Through the help of many, we were able to expand our Newsletter, increase our exposure in the legal community, add to our list of seminars, increase our networking events and were able to market the NJDA as an organization of resources, education and philanthropic endeavors.

We had a very successful networking event this past April. The NJDA also sponsored two very well attended events at this year's State Bar Convention in Atlantic City, the Young Lawyers Social held on Wednesday, May 15, and the Young Lawyers Luncheon held on Thursday, May 16. This year, for the first time, our Philanthropy Committee, Chaired by Denise Luckenbach, Esq., organized "Volunteer Day" at the Community Food Bank of New Jersey. Our upcoming events include co-sponsoring the annual Jersey Shore Networking Social on July 12, 2019 at Bar Anticipations in Belmar and a Young Lawyers seminar on deposition strategies in Morristown on July 16, 2019. We have a full calendar of events scheduled for the remainder of 2019, and I encourage you to visit the NJDA website for registration information.

Now, more than ever, we need to seize the moment and continue on this path of success. I am confident that with the leaders we currently have slated to take the reins, better things are soon to come. With that I would like to personally thank President Elect Michael Malia for putting together four exceptionally edited issues of the New Jersey Defense newsletter and to wish him luck during his Presidency. Thank you to all the committee chairs who either contributed or had their members contribute articles this past year. Thank you to the authors of those articles. Also thanks to Secretary/Treasurer, John Mallon, for all his efforts and advice.

ALDO J. RUSSO, ESQ.

RECENT DEVELOPMENTS IN THE ADMISSIBILITY OF EXPERT TESTIMONY

BY ELIZABETH ROHAN, ESQ. OF KENNEDYS CMK

A reversal of the Appellate Division's "bright line" prohibition on expert testimony suggesting that a plaintiff magnified her symptoms; the Supreme Court's rejection of an expert opinion on causation as a net opinion; and a holding that a party witness' specialized knowledge did not require him to be identified as an expert witness are recent interesting cases regarding the admissibility of expert testimony in New Jersey.

In a welcome ruling for the defense bar, the Supreme Court in March reversed the Appellate Division's ruling in *Rodriguez v. Wal-Mart Stores*, 2109 N.J. LEXIS 273, with regard to whether defendant's medical experts should have been precluded from using terms like "somatization" and "symptom magnification" in their trial testimony and reinstated the verdict of no cause of action. The NJDA filed an *amicus curiae* brief which argued that the categorical bar adopted by the Appellate Division "improperly restricts the bounds of relevant expert testimony and violates the balancing test inherent in any *N.J.R.E.* 403 analysis."

In *Rodriguez*, plaintiff Alexandra Rodriguez was struck by a falling clothing display rack while shopping in a store owned and operated by defendant Wal-Mart Stores, Inc. in 2010. The rack struck Rodriguez's right elbow and hand and the rack was lifted off of her by one of her children, customers and the store manager. Her liability expert opined that the rack and displayed clothing weighed approximately 141 to 157 pounds. Rodriguez claimed immediate pain in her neck and back but denied medical attention because her children were with her. An MRI study revealed a right upper ulnar neuropathy. She had nerve decompression surgery on her wrist and elbow. In 2013, Rodriguez had a spinal cord stimulator implanted to relieve what she contended was persisting pain. She was diagnosed with Chronic Regional Pain Syndrome (CRPS), a chronic pain condition that most often affects one limb usually after an injury.

Rodriguez's past medical history included prior medical treatment for obstetric/gynecological issues, chronic abdominal pain, and psychiatric and psychological disorders. She was also involved in an automobile accident after the Wal-Mart incident and before her CRPS diagnosis.

Rodriguez filed a complaint which alleged that negligence by Wal-Mart in constructing and maintaining the clothing rack was the cause of her pain and CRPS. A doctor specializing in CRPS and a neurologist were called by plaintiff's counsel to testify at trial. Both doctors diagnosed Rodriguez as suffering from CRPS. Plaintiff's counsel asked the doctor specializing in CRPS whether he believed plaintiff was "somaticizing" in light of her history of depression. The doctor defined somatization as "the conversion of a psychological issue into a physical problem," and testified that in his expert opinion, the plaintiff was not somaticizing.

The defense called a neurologist and internist as Wal-Mart's first medical expert witness. He was not a psychiatrist, psychologist or other mental health specialist. He was asked by defense counsel whether the field of neurology overlaps with some of the "disciplines of psychiatry and some of the mental working[s] of the brain." He responded, "absolutely

because many disorders that involve the brain also affect your mood, behaviour, personality. And therefore, we do need to cross over and treat patients who have both psychological difficulties with the neurology difficulties." Although plaintiff's counsel had asked his own expert doctor if plaintiff was somaticizing, he objected to the defense neurologist's testimony claiming that the doctor's observations implying that plaintiff magnified her symptoms "invade[d] the province of the jury." The trial court excused the jury and conducted an evidentiary hearing pursuant to *N.J.R.E.* 104 to determine the admissibility of the testimony.

During the *N.J.R.E.* 104 hearing, the defense neurologist defined somatization as "a process where individuals describe experiencing symptoms of various types that are not accompanied by objective findings and interpretations." The doctor stated that "as a neurologist, I deal with this all the time. Patients are constantly referred to [neurologists] with subjective symptoms that may relate to the neurologic system that nobody else can explain…" When asked by plaintiff's counsel whether he would diagnose Rodriguez with a somatoform disorder even though he is not a psychiatrist, the doctor responded that he would from a neurology point of view, but he would "refer her to a psychiatrist to further investigate." The trial court allowed the defense neurologist to testify about somatization and symptom magnification subject to the judge's limiting instruction.

The defense neurologist explained to the jury that somatization is a "clinical state where one would present at different times with different complaints." He went on to clarify that, in the absence of a medical cause, "that type of history would then be referred to as a somatoform disorder, somatization." The doctor stopped short of diagnosing Rodriguez with a somatoform disorder but expressed "concerns" about the validity of the CRPS diagnosis. He opined that plaintiff's "psychological features" were "contributing to her clinical state in a great degree," and, as such, "one has to correct those other factors first before…talking about CRPS."

When defense counsel asked the doctor whether plaintiff could be magnifying her symptoms, the trial court instructed the jury "that ultimately you are the people that judge the credibility of the plaintiff." The defense neurologist explained to the jury that symptom magnification is "a response that seems to be excessive compared to what should be observed in a given situation for most individuals," and with respect to plaintiff, "There [were] some observations that would be compatible with symptom enhancement or magnification."

Defense counsel then offered the videotaped *de bene esse* deposition testimony of an internist and rheumatologist. Prior to playing the videotape, plaintiff's counsel objected to the testimony, arguing that the doctor should not be permitted to give his opinion on somatization and mental or emotional disorders because he is not a psychiatrist or psychologist. The court held a *N.J.R.E.* 104 hearing and denied plaintiff's objection, reasoning that even though the doctor "may not be the specialist that ultimately points to [somatization]…he has experience to be able to recognize it and to identify it and to do something about it."

On direct examination by defense counsel, the doctor testified that plaintiff's "diagnosis of CRPS is wrong." He noted plaintiff's "significant psychiatric history" and "long history of chronic pain," and concluded that "[i]t comes back to somatization again, psychological issues." On cross-examination by plaintiff's counsel, the doctor claimed that there was "no plausible explanation for [plaintiff's] pain." The trial court charged the jurors that only they determine the existence of facts upon which an expert relies and an expert's credibility.

The jury unanimously determined that plaintiff failed to prove by a preponderance of the evidence that Wal-Mart was negligent and thus liable for her injury. The Appellate Division reversed the jury verdict and remanded the case for a new trial. *Rodriguez v. Wal-Mart Stores, Inc.*, 449 *N.J. Super.* 577, 599 (App. Div. 2017). The appellate panel held that expert testimony from a doctor, presented as a medical opinion, that "characterizes a plaintiff as a `malingerer' or a `symptom magnifier,' or some other negative term impugning the plaintiff's believability" is "categorically disallowed" at a civil jury trial under *N.J.R.E.* 403. *Id.* at 596.

The Appellate Division found the trial court's limiting instruction insufficient to "ameliorate the undue harm of admitting the expert opinion." *Id.* at 598. The court noted that it was the sole and exclusive function of the jury to determine the credibility of the testimony of a witness and "[w]e do not allow one witness to comment upon the veracity of another witness." *Id.* at 591. The court further stated, "Experts may not offer such testimony because credibility is an issue which is peculiarly within the jury's ken and with respect to which ordinarily jurors require no expert assistance." *Id.*

With respect to the defense neurologist who was not a mental health specialist, the court determined that he was not qualified to testify about "symptom magnification and related concepts" because he "lacked appropriate qualifications." *Id.* at 597 n. 9.

The Supreme Court stated that the trial court's decision to admit the disputed terms "somatization" and "symptom magnification" and plaintiff's past medical history depended first upon their relevance, as defined in *N.J.R.E.* 401. The Court noted that relevant evidence is inadmissible under *N.J.R.E.* 403 when its probative value is significantly outweighed by "its inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the issues in the case." *Id.* at 26. However, "[t]he mere fact that evidence is shrouded with unsavory implications is no reason for exclusion when it is a significant part of the proof," I*d., citing Rosenblit v. Zimmerman*, 166 *N.J.* 391, 410 (2001). The Court stated that it has repeatedly observed that determinations of admissibility under *N.J.R.E.* 401 and 403 are "fact-specific evaluation[s] of the evidence in the setting of the individual case." *Id., citing State v. Cole,* 229 *N.J.* 430, 448-49 (2017).

The Supreme Court said the balancing test under *N.J.R.E.* 403 is a "delicate situation that requires the trial court to carefully weigh the testimony and determine whether it may be unduly prejudicial." *Id.* at 27. That is so because of the expert witness' "singular status in the courtroom." *Id.* Consequently, the Supreme Court has instructed trial courts "to ensure that the expert does not usurp the jury's function" and "opine on the credibility of witnesses." *Id.*

The Court found that the testimony of Wal-Mart's neurologist expert witness on "somatization" and "symptom magnification" was relevant because "somatization" was first described in detailed testimony by plaintiff's medical expert and because the defense neurologist's testimony challenged plaintiff's

theory of causation in this negligence action. *Id.* at 32-33. The Court noted that the relevance of this testimony was underscored by the fact that CRPS is a diagnosis of exclusion that required plaintiff's physicians to rule out all of her previous mental health issues and accidents as possible factors prior to reaching a CRPS diagnosis. *Id.* at 33.

The Court found that there was sufficient credible evidence for a jury to conclude that plaintiff's subjective complaints of pain were inconsistent with the objective medical evidence and concluded that the defense neurologist's testimony about plaintiff's possible "somatization" was probative and correctly admitted by the trial court. *Id.* at 34.

In applying *N.J.R.E.* 403 to the term "symptom magnification," the Court stated that courts should conduct a "fact-specific evaluation of the evidence in the setting of the individual case" to determine the admissibility of prejudicial evidence and the trial judge did so in his case. *Id.* at 36. The Court approved of the trial court's "appropriate" instruction to the jury before the defense neurologist's testimony and its credibility charge prior to the start of jury deliberations.

With regard to the term "malingering," the Supreme Court disagreed with the Appellate panel's determination that the term "symptom magnification" conveys the same notion as malingering and disagreed with the bright-line rule categorically excluding that term. The Court noted that the term "malingering" raises "heightened concerns" since it may implicate credibility and therefore a medical expert's use of the term must be "carefully scrutinized applying an *N.J.R.E.* 403 balancing test, reviewed on appeal under an abuse of discretion standard." *Id.* at 38.

The Court affirmed the Appellate Division's ruling that the trial court properly admitted plaintiff's past medical history – including her psychiatric history – pursuant to *N.J.R.E.* 401 and 403. Because they held that the trial court did not abuse its discretion by allowing defendant's medical experts to use terms like "symptom magnification" and "somatization," the Court reversed that part of the Appellate Division's judgment and reinstated the jury's verdict of no cause of action for the defense.

In *Townsend v. Pierre*, 221 N.J. 36 (2015), the Supreme Court set forth a useful analysis of the net opinion rule in the context of a negligence case. *Townsend* involved a fatal motor vehicle collision which occurred at an intersection in Willingboro Township. The accident occurred when driver Noah Pierre was turning left after stopping at a stop sign and collided with a motorcycle, whose driver died as a result. According to Pierre, as she approached the intersection, shrubbery on the property at the intersection initially obstructed her view, but she "edged up" into the intersection, starting and stopping four times before attempting the left turn. Pierre testified that when she made her final stop, the shrubbery no longer impeded her view.

Plaintiff alleged that the property owner and tenant negligently maintained overgrown shrubbery on the property next to the intersection. The critical issue on appeal was the admissibility of plaintiff's liability expert report by an engineer who concluded that "[t]he restricted substandard and unsafe intersection sight distance was a significant contributing cause of the accident" and Townsend's death. *Id.* at 48. The expert discounted Pierre's testimony that she did not turn until she had a clear view of oncoming traffic, based on her statement that her view was impeded before she edged into the intersection. *Id.*

All of the defendants filed motions to bar plaintiff's expert report as a net opinion. The trial court granted the motion to strike the report, however the Appellate Division reversed the grant of summary judgment in favor of the property owner and tenant because it held the court had abused its discretion when it determined that the report constituted a net opinion. *Id.* at 49.

The Supreme Court stated that the net opinion rule is a "corollary of *N.J.R.E.* 703…which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." *Id.* at 53-54. The rule requires that an expert "give the why and wherefore that supports the opinion, rather than a mere conclusion." *Id.* at 54.

The Court noted that while "The net opinion rule is not a standard of perfection" it does mandate that experts "be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." *Id.* at 54. The Court stated that when an expert speculates, "he ceases to be an aid to the trier of fact and becomes nothing more than an additional juror." *Id.*

The Court found that the expert's qualifications within his expertise as an engineer were unchallenged, however his opinion as to the issue of causation diverged from the evidence. Specifically, the expert's assertion that Pierre's testimony that when she turned left, her view of the traffic at the intersection was unimpeded was wrong. The Court found that in this crucial respect, the expert's testimony was an inadmissible net opinion and was properly rejected as a net opinion by the trial court.

In *E&H Steel Corp. v. PSEG Fossil, LLC*, 455 *N.J. Super. 12* (App. Div. 2018), the Appellate Division held that it was an abuse of discretion for a trial court to preclude a lay witness' testimony on the grounds that his technical and arcane knowledge transformed him into an expert witness. The case was a breach of contract action arising out of a purchase agreement. Plaintiff was a successful bidder for a proposal to fabricate structural steel for equipment in a power station owned and operated by the defendant. Plaintiff based its unit prices on documents and specifications submitted with the bid package. After the contract was executed, Plaintiff alleged that defendants produced 47 new drawings that differed significantly from the drawings in the bid package. Defendant denied plaintiff's requests for a revision and re-pricing of the units and a contract that conformed with new drawings. Plaintiff fabricated the steel according to the new drawings and submitted change orders for its increased time and labor due to the changes in the drawings. Defendant refused change order requests for anything other than increased tonnage.

Plaintiff filed a construction lien and complaint alleging that defendant breached the contract when it presented the new drawings which required additional time and labor yet failed to approve its change order requests. Defendant filed a counterclaim for breach of contract and dismissal of the lien. Defendant moved for summary judgment. Plaintiff's principal witness was a vice president of the company and licensed professional engineer who had answered extensive interrogatories and had been deposed but had not been designated as an expert. He testified about how the change in drawings affected the fabrication process and pricing and necessitated an increase in the rate.

Following two days of testimony by this witness at a *Rule 104* hearing to determine whether the plaintiff required an expert to establish a *prima facie* case, the trial court granted defendant's motion for an involuntary dismissal. The court found the witness' testimony "very technical, extremely arcane, very detailed, and something that the jury would have to hear in order to understand the difference in the plans." The court determined that due to its technical nature, it was expert testimony. Since plaintiff had not designated the witness as an expert and he was the only witness proffered to support plaintiff's claim, plaintiff's claims were dismissed. Plaintiff then sought to amend its interrogatories to designate the witness as an expert, but the judge denied the motion based on a lack of "exceptional circumstances."

A bench trial was held on the counterclaim, at which the court restricted the scope of that lay witness' testimony. The judge concluded that the defendant failed to prove any breach of contract by plaintiff and prevailed on one back charge for $345,890. Plaintiff's claims for recoupment and set-off were denied because plaintiff lacked expert testimony.

The Appellate Division held that the trial court abused its discretion by precluding the witness' testimony. While it agreed with the judge that the testimony was "technical, arcane, and involved specialized knowledge," it found that the nature of the testimony did not transform the engineer into an expert witness. The Court stated, "The fact that a person with technical knowledge of facts relevant to a dispute may also qualify as an expert in the particular field associated with those facts does not convert his or her testimony based on personal knowledge of specific facts into expert testimony under *N.J.R.E.* 702 and 703. *Id.* at 186. The Court further stated, "The fact that the transaction itself involved technical information and processes generally outside the knowledge of an average juror, and that [the witness] was qualified to explain those processes did not transform him into an expert witness. Any opinions expressed by [the witness] arose from his personal dealings with the project and knowledge of the field." *Id.* The Court held that the witness' testimony was proper admissible lay opinion testimony and he was not required to be designated as an expert witness or prepare a report in order to testify.

Elizabeth Rohan is an associate at Kennedys CMK in Basking Ridge. She defends companies and individuals in personal injury, construction, wrongful death and product liability litigation at the trial and appellate levels.

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
Robert E. Bartkus	Florham Park	(973) 635-6300	☑
Hon. Raymond Batten (Ret.)	Haddonfield	(856) 795-2121	☐
Elliot M. Baumgart	Upper Montclair	(973) 744-4000	☐
Katherine Benesch	Princeton	(609) 375-2603	☐
Steven J. Blumenthal	Mt. Laurel	(856) 581-4134	☑
Hon. Peter F. Boggia (Ret.)	Clifton	(973) 470-0800	☑
Hon. John M. Boyle	Westfield	(908) 233-6800	☑
Jennifer L. Brandt	Springfield	(973) 912-9292	☑
Hon. Tom Cavanagh, Jr. (Ret.)	Tinton Falls	(732) 733-6200	☑
Theo Cheng	Princeton Jct.	(917) 459-3669	☑
Hon. R. Benjamin Cohen (Ret.)	Somerset	(908) 333-6208	☑
Hon. Harriet E. Derman (Ret.)	Warren	(908) 757-7800	☐
N. Janine Dickey	Bridgewater	(908) 295-7900	☐
Hon. Peter Doyne (Ret.)	Hackensack	(201) 489-9110	☐
Hon. William A. Dreier (Ret.)	Bridgewater	(908) 252-4372	☑
Neal M. Eiseman	Roseland	(201) 612-4444	☑
Hon. Mark B. Epstein (Ret.)	New Brunswick	(732) 545-4717	☐
Dennis A. Estis	Iselin	(732) 476-2512	☑
Hon. Michael Brooke Fisher (Ret.)	Avalon	(856) 332-7741	☐
John F. Gelson	Little Silver	(732) 919-1044	☑
Bonnie Blume Goldsamt	Hackensack	(201) 487-1622	☑
Sheryl Mintz Goski	Florham Park	(973) 520-8520	☑
Roger B. Jacobs	Roseland	(973) 226-6663	☑
Laura A. Kaster	Princeton	(609) 921-0095	☑
Hon. John Keefe (Ret.)	Red Bank	(732) 224-9400	☐
Hon. Virginia Long	Lawrenceville	(609) 895-3335	☐
Robert E. Margulies	Jersey City	(201) 333-0400	☑
Suzanne M. McSorley	Lawrenceville	(609) 987-6663	☑
Peter J. Michaelson	Rumson	(732) 758-6500	☐
Lewis Pepperman	Lawrenceville	(609) 895-7260	☑
F. Peter Phillips	Montclair	(973) 509-9667	☑
Terri Reicher	Wayne	(973) 865-1069	☑
Hon. Joel B. Rosen (Ret.)	Cherry Hill	(856) 488-7716	☐
Hon. Anthony Sciuto (Ret.)	Fort Lee	(201) 585-9111	☐
Hon. Marguerite Simon (Ret.)	Springfield	(973) 379-4200	☑
Richard H. Steen	Princeton	(609) 895-0071	☑
Hon. Barbara B. Wecker (Ret.)	Newark	(973) 643-3700	☐
Hon. Deanne Wilson (Ret.)	Mendham	(908) 879-2013	☑

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

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

The National Academy of Distinguished Neutrals is an invitation-only professional association of over 1000 litigator-rated mediators & arbitrators throughout the US and Neutral Database Partner to the national defense bar (DRI) and sponsor of the trial bar (AAJ). For info, visit www.NADN.org/about

WHAT PRICE EXCESS? ACCURATELY MEASURING DAMAGES IN AN EXCESS-VERDICT BAD FAITH CLAIM

BY ROBERT J. CAHALL[1]

INTRODUCTION

Case law generally suggests two (2) metrics for an insured's damages in an excess verdict, third party liability claim scenario. These metrics are based upon either the face amount of the excess judgment or the reputational harm to the insured. However, the existing approaches only make sense when excess-verdict bad faith claims are rigidly evaluated as "all or nothing" propositions.

The nature of excess verdict bad faith claims inherently conflates the question of the insurer's liability for bad faith with the measure of damages recoverable. This should not be so. Instead, the amount of the verdict should not be given meaningful consideration when determining if the insurer acted in bad faith. Consistent with longstanding principles of contract law, the issue of whether an insurer breached the implied covenant of good faith and fair dealing must be judged from the perspective *of the insurance carrier* based on the information then-available to it. If, and only if, the legal standard for bad faith is met should the case proceed to evaluate the damages recoverable.

Given the contractual nature of these claims, the insurer should be liable only for the amount of the excess judgment (if any) that falls above the reasonably foreseeable range of verdicts. Under this framework, an insurer could be found liable for bad faith failure to settle but nevertheless owe no damages because the *reasonable* settlement range was within the liability limits, even if that is not what a jury ultimately awarded. Reliance or focus on the actual jury verdict clouds the issue and, worse, provides an improper and misleading "anchor" number for a jury.

1. Measure of Damages in Excess Verdict Bad Faith Claim.
A. "Payment Rule" Versus "Judgment Rule."

In most cases where an insurer, acting in "bad faith," has failed to resolve a claim against the policyholder within the liability limits and a corresponding verdict and judgment is entered against the insured in excess of the liability limits, the measure of damages seems, on the surface, quite simple: the full amount of the excess judgment against the policyholder. To this end, some jurisdictions have adopted a "judgment rule," whereas other jurisdictions adhere to the "payment rule." *See generally* 146 AM. JUR. PROOF OF FACTS 3d 421, § 29 (Originally published in 2015).

Under the "payment rule," insurers are not liable for excess exposure if there is a covenant not to execute against the insured's assets or if the insured is "judgment proof," such as via insolvency or bankruptcy. *See, e.g., Dydek v. Dydek*, 288 P.3d 872, 886 (N.M. Ct. App. 2012). In contrast, under the "judgment rule," the amount of the excess judgment against the insured is the measure of damages, regardless of whether the insurer "has paid, can pay, or must pay" the excess amount of the judgment. *See id.*

Reasonable policy arguments can be made for either approach. For example, in *Dydek, supra*, the New Mexico Court of Appeals noted that applying the "payment rule" would artificially reduce the insurer's liability for bad faith based upon the financial status of the policyholder. The Court concluded, applying New Mexico law, that policy considerations "support the use of the excess judgment as a minimum measure of damages." *Id.* at 887.

On the other hand, one commentator has argued that, if the insured is relieved of excess liability (such as via a covenant not to execute), it is no longer the amount of the excess judgment which "truly injures the insured." *See* Allan D. Windt, 1 INSURANCE CLAIMS AND DISPUTES § 5:20 (6th ed.). Instead, under this view, it is merely the existence of an unpaid judgment which may affect the insured's credit worthiness and reputation that causes damage, and it is the value of that much more limited (perhaps unquantifiable) damage, which should be recoverable. *Id.*

New Jersey jurisprudence has thus far followed the "judgment rule." In *Yeomans v. Allstate Insurance Co.*, 130 N.J. Super. 48, 52 (App. Div. 1974), the Appellate Division concluded that, if an insurer's bad faith failure to settle is proven, the insured's *prima facie* case of damages is "the difference between the policy limit and the excess verdict." According to the *Yeomans Court,* the burden then shifts to the insurer to "demonstrate that settlement could not have been achieved within the policy limits or for the policy limit plus any amount the insured would have been willing to contribute."

However, *both* of the foregoing metrics of damages discussed in the case law are viewed through the perspective *of the insured policyholder*. A plausible, though underdeveloped, legal framework would view the measure of damages through the perspective *of the insurance carrier*, **prior** to the entry of an excess verdict and judgment. That is to say, perhaps an even more technically precise measure of damages is not necessarily the amount of a verdict *or* the amount of the reputational harm inflicted upon the insured, but rather, the amount (within a defined range) of the *reasonably foreseeable* excess verdict damages, measured from the standpoint of a reasonable estimation prior to the verdict.

2.Contractual Nature of Excess Verdict Bad Faith Claims Justifies Consideration of a Third Measure of Damages.

At their core, New Jersey excess-verdict bad faith claims are contractual in nature. They arise from the implied duty of good faith and fair dealing. *See Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am.*, 65 N.J. 474, 484 (N.J. 1974). While it is true that, under contract law, "[a] breaching party can be liable for damages far in excess of the value of the contract," the touchstone inquiry remains whether, at the time the contract was made, the breaching party had "reason to foresee" those damages. See *Coyle v. Englander's*, 199 N.J. Super. 212, 220 (App. Div. 1985). In the context of a breach of fiduciary duty, the law may take a somewhat broader view of what qualifies as a recoverable consequential damage vis-à-vis the value of the contract itself. See *Paris of Wayne, Inc. v.*

Richard A. Ajar Agency, 174 N.J. Super. 310, 321 (App. Div. 1980) (holding that the plaintiff could recover approximately $58,000 in consequential damages notwithstanding the real estate broker's commission of a mere $300 when the broker secured a rental property for the plaintiff which was ultimately deemed ineligible for commercial manufacturing, thereby requiring the plaintiff to cease its clothing manufacturing production business).

The Supreme Court of New Jersey has reiterated the *contractual* nature of excess verdict bad faith claims, but in conclusory fashion, asserted that the measure of damage is the "entire judgment":

Despite language in the case law referring to the relationship between the insurer and its insured as something akin to a "fiduciary relationship," it remains unmistakable that, at its core, a Rova Farms bad faith claim is a **simple breach of contract claim**, one that perforce must assert that, by failing in bad faith to compromise a claim within the policy limits prior to a verdict, the insurer has breached the implied contractual covenant of good faith and fair dealing and, therefore, should be liable for the entire judgment and not just to the extent of the policy limits.

Wood v. New Jersey Mfrs. Ins. Co., 206 N.J. 562, 577 (N.J. 2011) (emphasis added). The Court went on to note that an excess verdict bad faith claim "is and always has been a **breach of contract**." *Id.* at 578 (emphasis added). Likewise, even in those cases that have given passing reference to awarding "punitive" damages against the insurers, the courts have generally adhered to the longstanding rule that punitive damages are not available in contractual claims, including contractual claims by policyholders against insurance carriers. *See generally Ellmex Construction Co., Inc. v. Republic Insurance Co.*, 202 N.J. Super. 195, 206 (App. Div. 1985).

Because of the somewhat unique nature of excess-verdict bad faith claims, the issue of liability often collapses into the issue of damages. That is, while the excess verdict may state a *prima facie* case of damages, its existence does not, unto itself, establish a bad faith failure to settle. *Penn Nat'l Ins. Co. v. Grp. C Commc'ns, Inc.*, 2018 WL 3625424, at *9 (App. Div. 2018) ("Mere rejection of an offer to settle within the policy limit and a verdict at trial in excess thereof **is not enough by itself to establish bad faith.**") (citing *Radio Taxi, infra*) (emphasis added). Instead, an insurer's alleged bad faith is measured by a "reasonableness" standard, and a decision not to settle must be made after a timely and thorough investigation of the claim, including a realistic assessment of the probable verdict outcomes. *See New Jersey Mfrs. Ins. Co. v. Nat'l Cas. Co.*, 393 N.J. Super. 340, 353-54 (App. Div. 2007); *Princeton Ins. Co. v. Qureshi*, 380 N.J. Super. 495, 503-03, 997 (App. Div. 1995). Accordingly, if a large, excess verdict is ultimately rendered, if this verdict was ***not*** "reasonably anticipated," the insurer may bear no liability, at all, leaving the policyholder "on the hook" for the excess amount above the liability limits. *See Palmer v. New Jersey Mfrs. Ins. Co.*, 2017 WL 6398789, at *3 (App. Div. 2017) ("We concur with the trial judge that the large jury verdict in plaintiff's favor was not reasonably anticipated and was not reflective of plaintiff's own, much – lower, pretrial settlement positions.").

Thus, the case law evaluating an insurer's ***liability*** for bad faith for failure to settle views the question through the lens of what was reasonable *at the time of the alleged breach* (i.e., at the time the insured declines to settle the case within limits). At the same time, the measure of the insured's ***damages*** in the event liability is proven is measured by the verdict outcome, regardless of how disparate the verdict may be from the reasonably foreseeable outcome range. Arguably, the more disparate these figures are, the stronger the insurer's liability defense becomes specifically *because* the result was so unanticipated. Yet, this creates an obvious perverse outcome or incentive; the *more* excess exposure faced by the insured, the *less* likely the insured may be obtained protection under an excess-verdict theory.

The logical problem with this framework is that it presupposes an "all or nothing test." That is, if liability attaches, the carrier must pay the entire excess verdict, regardless of how much (or little) the verdict exceeds the policy limits. If liability does not attach, then the insurer owes nothing above policy limits. Thus, this metric becomes the *de facto* measure of *both* liability and damages.

One can easily envision hypothetical scenarios where a more moderated approach is both fairer and sounder. For example, in the context of a case involving a $1,000,000 liability limit, a settlement demand of $800,000, and a reasonably anticipated verdict range of $700,000-$900,000, all of the operative figures are *within* the $1,000,000 limits. If the jury returns a verdict of $5,000,000, much of which is based upon subjective or intangible aspects of the claim such as pain and suffering or alleged future earning impairment, the fairness of holding the carrier responsible for an excess $4,000,000 judgment is questionable. If, again hypothetically, this excess verdict is not reduced via *remittitur* and the amount of the award is upheld on appeal, then there is a judicial determination that the verdict did not shock the judicial conscience.

There is, however, considerable daylight between the standard of a verdict that is "reasonably foreseeable" under the standards of *Rova Farms* and its progeny versus a verdict that "shocks" the judicial conscience. *Compare Cuevas v. Wentworth Grp.*, 226 N.J. 480, 513 (N.J. 2016) ("Although these awards are probably on the high end, like the trial court and the Appellate Division, we cannot say that they are so 'wide of the mark,' so 'pervaded by a sense of wrongness,' so 'manifestly unjust to sustain,' that they shock the judicial conscience.") *and Quereshi*, *supra*, 380 N.J. Super. at 502 (noting that an insurer's "decision not to settle must result from weighing, in a fair manner, the probabilities of a favorable or adverse verdict in the trial of a covered damages suit against the insured.") (*quoting Bowers v. Camden Fire Ins. Assoc.*, 51 N.J. 62, 71 (N.J. 1968)). Thus, merely because a large jury verdict may survive efforts to reduce the amount does not render it outside the range of what an insurer should have reasonably foreseen when declining a settlement within policy limits.

Utilizing the hypothetical discussed above, perhaps a carrier could and should have reasonably foreseen a verdict of $1,600,000, or even more generously, $2,400,000 dollars (which is *more than three times* the demand). It is a different question, however, if a verdict of over *five times* the likely settlement range is reasonably foreseeable, and if the insurer's failure to settle justifies liability for *entire* excess verdict if liability is proven.

Of course, potentially, the insurer may escape liability altogether, on the argument that, given the information available to it *prior* to the verdict, it did not act unreasonably or in bad faith, as defined by *Rova Farms* and its progeny. If, however, the factfinder were to conclude that, given the proofs then available, the insurer acted in bad faith by not settling the claim for $800,000 given a reasonably foreseeable (if very high) verdict range of $1.6 to $2.4 million, under the *existing* legal framework, the insurer will be responsible for the *entire* $5,000,000 verdict.

Strong policy or equitable arguments could be made that it is fairer for an insurance carrier to bear this burden than it is for the policyholder, given the insurer's control of the defense. Yet, the legal and conceptual soundness of this argument may be questioned on the same "foreseeability" grounds discussed above. A more legally accurate measure of compensable damages may be the highest verdict/ judgment that could have been reasonably foreseen *prior to the verdict being rendered*, not merely an amount that fails to shock the judicial conscience.

Undoubtedly, this "third" approach to measuring damages would necessitate a "case within a case" in the bad faith trial, *requiring* expert or other evidence to establish the range of reasonably foreseeable verdicts in the underlying case (and, potentially, subjecting the claimant to summary judgment absent such testimony). This, in turn, would complicate a previously mechanical and straightforward damages calculation.

Yet, it may also provide for a fairer outcome to both litigants. Insurers would be liable only for those amounts reasonably foreseeable, rather than the entire, potentially unforeseeable result. At the same time, an insured would have the ability to prevail on a bad faith claim by establishing *liability* for bad faith based upon a settlement range that may be considerably *lower* than the eventual verdict, yet higher than the insurer's top offer prior to trial. The insured would in turn lose the ability to recover full damages for the excess verdict but face less risk of a complete loss in an "all or nothing" proposition.

2. The Amount of the Underlying Verdict Should Not Be Admissible in the Bad Faith Trial.

Directly related to the measure of recoverable damages is the question of whether the factfinder should be advised of the amount of the excess verdict. The factfinder's task is to evaluate the reasonableness of the insurer's decision to reject a settlement demand *prior* to the trial and verdict. Inherently, no one, including the insurer, has the benefit of knowing what the eventual jury will award in a given case.

New Jersey case law generally supports this view:

Reference is directed to a comment said to have been made by the trial court after the verdict for Mrs. Myers and during the argument of a motion for a new trial that the proof showed 'lopsided liability' in favor of the injured plaintiff. The remark was excluded expressly at the trial of this case and the allusion to it is improper. Additionally, it is obvious that such statement could not have been considered by a jury in deliberating upon the issue of whether the decision of the carrier not to settle the case resulted from a good faith judgment. **A jury would be confined to an evaluation of the facts on which that judgment was reached.**

Radio Taxi Serv., Inc. v. Lincoln Mut. Ins. Co., 31 N.J. 299, 308 (N.J. 1960) (emphasis added). More recently, in affirming a trial court's conclusion that the insurer did not act in bad faith when it failed to settle within policy limits, the Appellate Division observed:

As Judge Gummer aptly wrote on the last page of her opinion, "[i]n hindsight, perhaps it was a mistake in judgment [for NJM] not to accept the Offers to Take Judgment or to file the trial de novo after the arbitration. **However, a mistake is not bad faith and the perfect vision of hindsight is not the lens through which our courts assess compliance with good-faith obligations.** *Radio Taxi*, [supra,] 31 N.J. at 312.

Palmer v. New Jersey Manufacturers Ins. Co., 2017 WL 6398789, at *3–4 (App. Div. 2017) (emphasis added).

Advising a jury of the amount of the excess verdict-particularly if it substantially exceeds the policy limits-is essentially an invitation for the jury to measure the insurer's conduct with the benefit of hindsight. The legal standard is not based on what *actually* happened, but rather, what an insurer should have reasonably anticipated could happen.

CONCLUSION

Litigating excess-verdict bad faith cases has many conceptual nuances, including the calculation of damages and its overlap with the determination of liability. From a *policy* standpoint, competing arguments can reasonably be made as to where the risk of loss should rest, given the fiduciary nature of liability insurance contracts. From a purely *legal* standpoint, however, mechanical reliance on the "judgment rule" may not be adequately justified by the existing jurisprudence on contractual damages.

---

[1] Shareholder, McCormick & Priore, P.C., Philadelphia, PA & Wilmington, DE.

CONGRATULATIONS!

SUPREME COURT VICTORY

Congratulations to Michael Marone and Stephen J. Foley, Jr. on the defense win in the New Jersey Supreme Court's March 26, 2019 decision in Joshua Haines v. Jacob W. Taft, et al.

CONGRATULATIONS TO RYAN RICHMAN FOR BEING PROMOTED TO PARTNERSHIP

Congratulations to Ryan Richman for being promoted to partnership at McCarter & English, LLP in April 2019.

TRIAL COURT VICTORY

Congratulations to Cory J. Rothbort of Sellar Richardson, P.C. who recently received a verdict in his favor. The trial concerned claims for personal injury of two separate plaintiffs, a husband and wife, both of whom were subject to the limitation on lawsuit threshold. Trial was held before the Honorable Thomas R. Vena, J.S.C. of Essex Vicinage and lasted six days. After approximately an hour of deliberations, the jury unanimously found that neither plaintiff sustained a permanent injury proximately caused by the accident at issue and returned a verdict of "no cause" for the defense.

THE CENTER FOR
FORENSIC ECONOMIC STUDIES
Research ■ Analysis ■ Litigation Support

There is only room for one on the stand.
Have the Best in the Box.

CFES

2010-2016 winner of the Legal's Best Of Survey for Forensic Economics.

215.546.5600
cfes@cfes.com
www.cfes.com

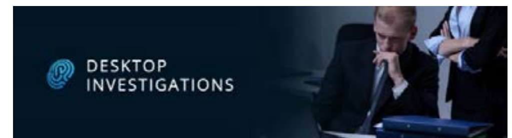
NEW JERSEY OFFICE
4 Industrial Way West
Eatontown, NJ 07724
P: (732) 544-2008
F: (732) 544-2038

PROFESSIONAL
CLAIMS SOLUTIONS

PENNSYLVANIA OFFICE
175 Strafford Avenue
Suite 1
Strafford, PA 19087
Toll Free: (877) 277-2008

TRUSTED BY THE LEADING INSURANCE & LEGAL PROFESSIONALS

Professional Claims Solutions field services New Jersey, New York, Eastern Pennsylvania and Northern Delaware. PCS also provides numerous nationwide services.



WWW.PROCLAIMSSOLUTIONS.COM

RECORD RETRIEVAL BUILT FOR *SPEED* AND ACCURACY

Investing in technology is only part of the equation. It also takes the right people to achieve success. We've built an organization to make record retrieval fast, accurate, and extremely efficient.

Learn how LCS is getting authorizations signed in minutes, not days!

Jennifer Perras, Regional Account Manager
jperras@legalcopyservices.com
877-949-1113 / legalcopyservices.com

www.themcsgroup.com

Philadelphia ~ Newark ~ Boston
Mt. Laurel ~ Pittsburgh ~ Chicago
Houston ~ Miami ~ Santa Ana

Providing Quality Support Services to the Legal Community since 1979!

RECORDS RETRIEVAL

- **Authorization & Subpoena Requests**
- **MCSDirect: Electronic Record Retrieval**
- **Online Ordering of Medical Records**
- **Online Status for all Record Requests**
- **Online Records Repository**
- **Free Document Distribution Resources**
- **Medical Record Analysis / Nurse Review**
- **Medical Record Chronologies**

COURT REPORTING
Court Reporting & Deposition Services
Video Conferencing & Video Depositions
Interpreters, Conference Rooms~and more

DOCUMENT SUPPORT SERVICES
Copying & Scanning ~ Trial Exhibit Boards
Oversized & Color ~ XR/MRI Copy & Scan
Bates Numbering ~ and more
Free Pickup & Delivery

***** CONTACT MCS TODAY FOR PREFERRED PRICING FOR NJDA MEMBERS *****

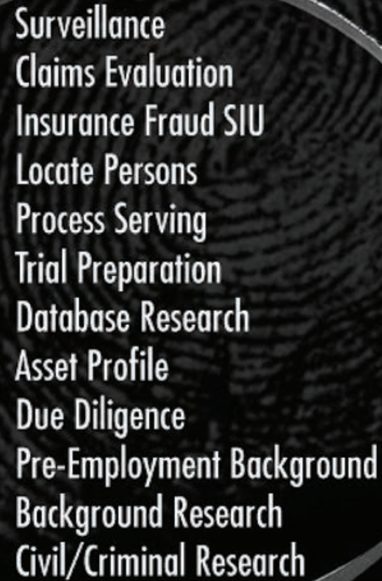
David Horn: 973-679-7859, dave.horn@themcsgroup.com   Sandra Muldoon: 201-306-5252, sandra.muldoon@themcsgroup.com

The MCS Group, Inc., 375 McCarter Highway, Newark, NJ 07114—Ph: 800-546-3480—www.themcsgroup.com

ADM

Information Services, LLC

When you need to know, you need to know us



6 Pompton Ave Ste 15 Cedar Grove NJ 07009
570 Taxter Road, Suite 275, Elmsford, NY 10523
Phone: 800.691.7020 / Fax:973.239.1999 /info@adminfoservices.com / www.adminfoservices.com

Complex Questions. Answered.

Rimkus Consulting Group, Inc. is a worldwide provider of forensic consulting services to insurance companies, law firms, corporations and government agencies. Rimkus assists clients in the responsive and timely resolution of claims and disputes. The company's team of professional engineers, scientists, and technical specialists is recognized for its commitment to service excellence by local, national and international business communities.

Offices Nationwide

RIMKUS
CONSULTING GROUP, INC.
Forensic Engineers and Consultants

800.580.3228 www.rimkus.com

WHEN YOU NEED TO ANSWER
HOW, WHEN AND WHY

FORENSIC CONSULTANTS
OF NORTH AMERICA

520 Fellowship Road • Suite E-504
Mount Laurel, NJ 08054
856-780-5658

www.fc-na.com

- Civil/Structural Engineering
- Mechanical Engineering
- Electrical/Electronic Engineering
- Construction Defect and Construction Liability/OSHA Claims
- Vehicle Accident Reconstruction
- Toxicology/Pharmacology
- Product Liability
- Premises Liability including Slip/Trip and Fall
- Human Factors
- Vocational Rehabilitation Assessments
- Forensic Accounting/Loss of Income
- Fire Origin and Cause
- Hail Claims

Our highly qualified team of experienced experts boasts a 50-year track record of success.

Accident Reconstruction • Product Liability • Industrial Hygiene

41 General Warren Boulevard
Malvern, PA 19355
610-296-2250

ces-experts.com
info@ces-experts.com

923 Haddonfield Road, Suite 300
Cherry Hill, NJ 08002
856-324-8246

EXPANSION OF WRONGFUL DEATH DAMAGES IN NEW JERSEY APPEARS UNLIKELY

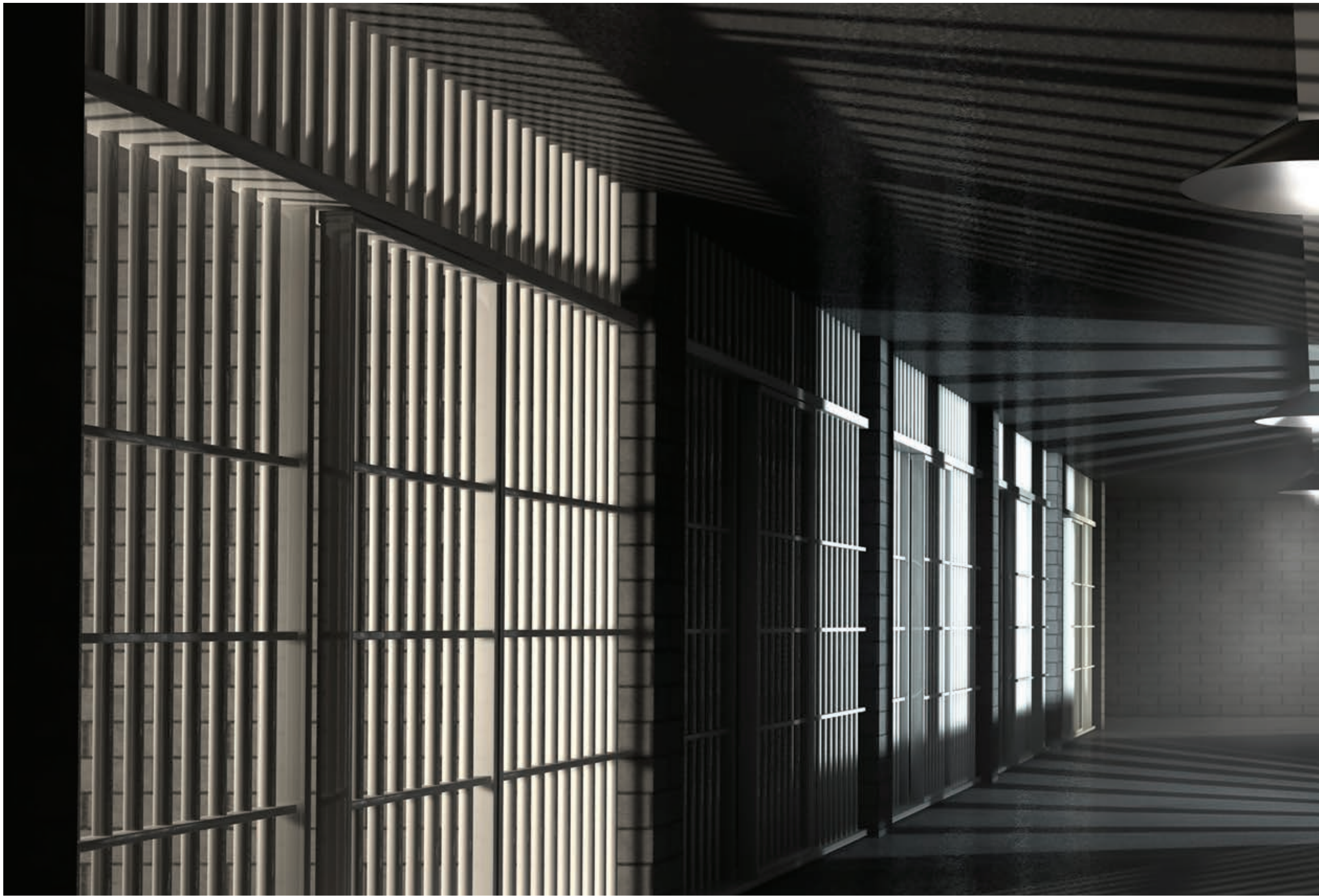
BY TIMOTHY FREEMAN, ESQ.

On April 5, 2018, the New Jersey Senate Judiciary Committee pushed forward Senate Bill S-1766, which was designed to expand recoverable wrongful death damages to include "mental anguish, emotional pain and suffering, loss of society, and loss of companionship." The bill was then referred to the Senate Budget and Appropriations Committee, where it has languished for the past year. In order for it to become law, it must be approved by the Senate and signed into law by Governor Murphy. The bill appears to have stalled due to opposition from the business community and state and local governments, and ultimately appears unlikely to become law in New Jersey in the near future, primarily due to its impact on the economy and the potential for increased insurance costs.

The current version of New Jersey's Wrongful Death Act, *N.J.S.A.* 2A:31-5, permits the recovery of "pecuniary injuries resulting from the death," as well as "hospital, medical, and funeral expenses incurred for the deceased." The New Jersey Supreme Court has interpreted this statute to permit recovery for financial loss, calculated as the actual monies that the decedent would have earned and contributed for the benefit of the survivors, and the reasonable value of the services, assistance, care, training, guidance, advice, counsel and companionship that would have been provided to the survivors. *See Green v. Bittner*, 85 *N.J.* 1 (1980). The value of such services is "confined to what the marketplace would pay a stranger with similar qualifications for performing such services." *Id.* at p. 12. As such, juries are required to disregard the emotional aspect of such damages when rendering verdicts and to conduct a purely economic analysis based on the evidence presented.

Senate Bill S-1766, the proposed amendment to New Jersey's Wrongful Death Act, would permit the jury to award damages specifically for "mental anguish, emotional pain and suffering, and loss of society and companionship." The quantum of such damages would be subject to the jury's discretion; and is thereafter subject to reversal or remittitur only if it is so outrageous that it "shocks the judicial conscience." Such a nebulous and subjective standard creates the potential for vastly disparate verdicts in wrongful death matters. The potential for disparate verdicts, depending on the subjective judgment of the jury, has always been present in civil jury trials, but is likely to be exacerbated by introducing damages for emotional harm into the wrongful death analysis because such damages are hard to conceptualize and difficult to accurately quantify. Such uncertainty is likely to lead to increased difficulty in reaching settlements in wrongful death cases due to the inherent complexity in evaluating defendants' potential exposure where the jury is permitted to consider the "mental anguish, emotional pain and suffering, and loss of society and companionship" resulting from the loss of a loved one.

Although damages for mental anguish and emotional pain and suffering resulting from the death of a loved one are indeed real and significant, the potential for vastly greater exposure for companies doing business in New Jersey, medical professionals, state and local governments, and individuals involved in accidents will inevitably result in higher liability insurance premiums. Advocates for Senate Bill S-1766 argue that increased insurance premiums are a small price to pay to correct unjust outcomes that occur where decedents are people with little or no income or earning capacity, such as children, stay-at-home spouses, or elderly people. Wrongful death damages for such decedents under the current version of New Jersey's Wrongful Death Act are dramatically less than those that are recoverable when the decedent is a middle-aged, high earning professional with multiple dependents. Advocates argue that it is fundamentally unfair to value the lives of decedents differently based upon their earning potential. This argument has moral and logical appeal, but there are economic consequences to its implementation. Such consequences should be evaluated in the context of neighboring states such as New York, Pennsylvania, and Connecticut, which do not permit recovery for mental anguish or emotional pain and suffering to the extent contemplated in Senate Bill S-1766. The fact that Senate Bill S-1766 has not advanced during the past year suggests that there has been strong pushback from New Jersey's business community, as well as the state and local governments, whose budgets are already under increasing pressure from other rising costs. It bears noting that former-Governor Jon Corzine vetoed similar legislation ten years ago. In sum, the fact that Senate Bill S-1766 has languished for over a year suggests that the economic realities associated with expansion of wrongful death damages are prevailing in the battle with advocates who favor full compensation for the emotional pain and suffering caused by the death of a close family member. The tides of opinion on this issue have evolved over time, however, and it remains to be seen how this will play out in the long run.



SUPREME COURT GRANTS PETITION IN WRONGFUL IMPRISONMENT CASE

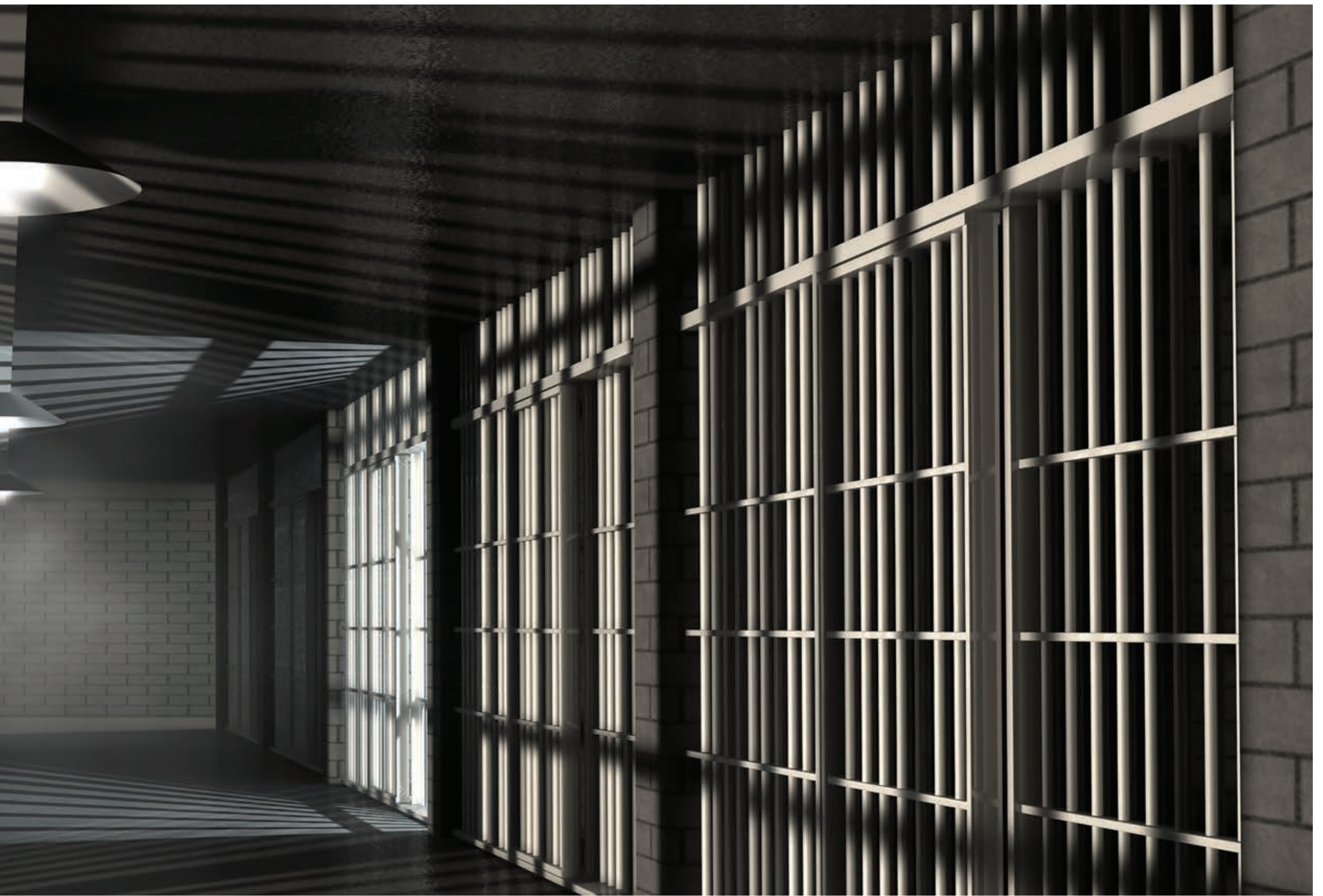
BY FRANCIS X. GARRITY

The New Jersey Supreme Court has granted a plaintiff's Petition for Certification to review the applicability of the Tort Claims Act, *N.J.S.A.* 59:1-1, *et seq.* ("TCA") to a claim of wrongful imprisonment arising out of malpractice by a public defender and the Office of the Public Defender ("OPD") (*Nieves v. Office of the Public Defender*, Supreme Court of New Jersey, C-769 September Term 2018, No. 082262). The Petition was granted on the heels of the Attorney General announcing the formation of a Conviction Review Unit to address claims of actual innocence of persons who have exhausted all appeals and post-conviction petitions.

The Court in Nieves will address the issue of immunity for public defenders under the TCA for malpractice and whether the TCA has any applicability to claims of "loss of liberty."

Antonio Nieves had served twelve (12) years in prison upon a conviction for sexual assault and was released upon a showing of evidence of ineffective assistance of counsel. After the conviction was overturned, the State ordered DNA tests that unequivocally exonerated Nieves. In the malpractice action against the OPD and his attorney, the Attorney General raised the TCA as a bar to recovery contending that Nieves had met neither the verbal threshold of permanent loss of a bodily function nor medical treatment expenses in excess of $3,600.00 as required under 59:9-2(d) of the TCA. Nieves contended that the TCA had no applicability to his claim against his attorney and that his claim for loss of liberty was an objective loss independent of the TCA's verbal threshold.

Nieves supported his position by citation to the reported decision of *Delbridge v. Office of Public Def.*, 238 *N.J. Super.* 288 (Law Div. 1989) aff'd sub nom. *A.D. v. Franco*, 297 *N.J. Super.* 1 (App. Div. 1993), cert. denied 135 *N.J.* 467 (1994).



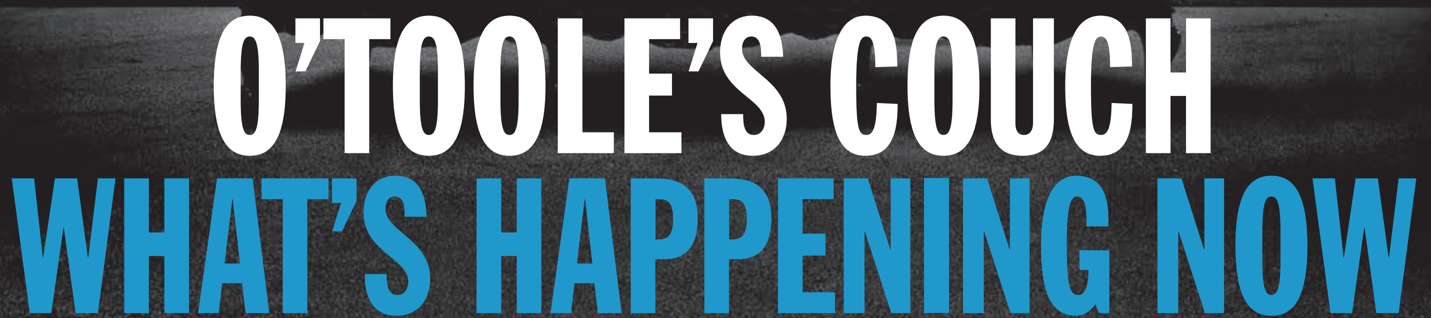
There Judge Villanueva held that the TCA had no applicability to claims of malpractice against public defenders acting as criminal defense attorneys. The court's rationale was that once retained, the attorney's public function ceased and his sole obligation was to the client and not to the sovereign. Further, the public defenders' enabling statute, *N.J.S.A.* 2A:15A-1, *et seq.*, requires competent legal representation for indigent persons accused of crimes without regard for the "public fisc" placing it in direct conflict with the TCA which is grounded in protection of the public fisc.

In support of his claim as to the TCA's applicability, the Attorney General relied upon the Supreme Court's holding in *Rogers v. Cape May Office of the Public Defender*, *208 N.J.* 414 (2011). There the Court, without addressing the threshold question of whether the TCA applied to the public defender, held that the notice requirements of the TCA applied at the point of accrual of the cause of action against the attorney. Thus, the State argued that by implication the Supreme Court had held that the TCA applied to the OPD.

In an unreported Opinion, the Appellate Division held that Rogers was controlling, that the TCA applied, and that plaintiff's inability to meet the verbal threshold requirements of the TCA, i.e. significant permanent injury and $3,600.00 in medical expenses, precluded recovery. The Opinion was silent as to the implications of the reported opinion in *Delbridge* or how the verbal threshold requirements of the TCA could apply to plaintiff's claim of loss of liberty.

In *Ferri v. Ackerman*, 444 U.S. 193 (1979) the United States Supreme Court refused to apply sovereign immunity to federal public defenders noting that such attorneys should be held to the same standards in representing indigent defendants as attorneys representing defendants with the ability to pay. The New Jersey Supreme Court will have to decide whether criminal defense attorneys practicing under the auspices of the Office of the Public Defender will be held to the same standard as privately retained attorneys or be protected by the TCA. Concomitantly, the Court will have to decide whether the issue of standards to be applied to public defender attorneys falls into the Court's exclusive Constitutional power to regulate attorneys precluding the application of the TCA. The Court's decision will have profound societal impact.

Francis X. Garrity is a principal in the firm of Garrity, Graham, Murphy, Garofalo & Flinn, P.C., attorneys for Antonio Nieves.



O'TOOLE'S COUCH
WHAT'S HAPPENING NOW

After being semi-retired for nearly two years, changes have certainly occurred in my daily life. Hanover Township has expanded its municipal court schedule to meet their ever-increasing caseload. Every week there are 75 to 100 cases being heard. Drunk Driving charges are heard on a separate calendar once a month, which requires an additional five hours of court time. The upside of this work is that no prior preparation is required on my part, compared to years of being a trial attorney with days of file review before each court day. Now, occasionally reviewing legal briefs is a piece of cake. Quarterly judges' meetings are also a requirement, and, I must admit they are extremely informative in our ever-changing judicial climate.

Arbitrations in four counties are also a regular part of my work routine. These are enjoyable in that I get the opportunity to see old friends and colleagues from my 44-year career as a trial attorney. Granted, most of the attorneys seem to be getting younger and younger with every year.

Each week I visit the residents at Lyons Veterans' Hospital. Here my gift of gab comes in handy. I read them the newspaper and watch CNN and CNBC. An update of what's happening in the world seems to bring about quite a dialogue. Many of these men also enjoy discussing their days of service, no matter how long ago that was. A game of chess or checkers is also possible with several of these newly-made friends.

The Old Guard is a club I have recently become active in. Nearly 100 attendees and various speakers participate weekly. Most recently the speaker was Dan Stringham who undertook the climbing of Mt. Everest in Nepal. He shared "one of the most dangerous and physically demanding challenges known to mankind, and the life lessons this experience taught him." And, he's not done yet; a relatively young man, he has two more mountains to climb, one being in the Antarctic. The Guard also has a Chess Club that I participate in weekly. Certainly, there are many activities addressing varied interests.

As I have mentioned before, I always review the Morris School District Community School brochure for lectures of interest to me. My preferences are in the field of "History". Recently these included the "1940s Flashback," "The Tehran Conference," and "Life on the Home Front During World War II." The latter given by the Honorable Judge Kenneth C. Mackenzie – All the years of judgeship must have contributed to his lecturing expertise, because he is the best! History's not your thing? How about literature, arts, languages? Really, there is something for everyone.

The past couple of years of my semi-retirement has allowed Sunny and me to tour Scotland, Switzerland, Nashville and Memphis. We also spent a relaxing week in Cancun (and will certainly return there.) We are discussing a river cruise to France and Germany, and would like to see Spain and Portugal.

I'm sure as time moves on there will be plenty of other things for me to integrate into my schedule. For now, life is good and there is still some Guinness in the refrigerator!

OFFICERS & COMMITTEES

OFFICERS

CHAIRPERSON OF THE BOARD
Natalie H. Mantell, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-639-7926
nmantell@mccarter.com

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

PRESIDENT-ELECT
Michael A. Malia, Esq.
Peri & Stewart, LLC
2150 Highway 35, Suite 250
Sea Girt, NJ 08750
732-359-0220
mmalia@peristewart.com

SECRETARY-TREASURER
John V. Mallon, Esq.
Chasan Lamparello Mallon &
Cappuzzo, P.C.
300 Lighting Way
Secaucus, NJ 07094
201-348-6000
jvmallon@chasanlaw.com

VICE PRESIDENTS
NORTHERN REGION
Nicole Cassata, Esq.
Chasan Lamparello Mallon &
Cappuzzo, P.C.
300 Lighting Way
Secaucus, NJ 07094
201-348-6000
ncassata@chasanlaw.com

CENTRAL REGION
Juliann Alicino, Esq.
Hoagland Longo Moran Dunst &
Doukas, LLP
40 Paterson Street
New Brunswick, NJ 08902
732-545-4717
jalicino@hoaglandlongo.com

SOUTHERN REGION
Robert M. Cook, Esq.
Goldberg Segalla
301 Carnegie Center Dr., Suite 200
Princeton, NJ 08540
609-986-1380
rcook@goldbergsegalla.com

DIRECTORS

2016 – 2019
Michelle M. O'Brien, Esq.
Purcell Mulcahy & Flanagan
One Pluckemin Way
Bedminster, NJ 07921
908-306-6707
mobrien@pmflawfirm.com

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

2017 – 2020
C. Robert Luthman, Esq.
Weir Attorneys
2109 Pennington Road
Ewing, NJ 08638
609-594-4000
rluthman@weirattorneys.com

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

2018 – 2021
Brian Chabarek, Esq.
Davison Eastman Muñoz Lederman &
Paone, P.A.
100 Willow Brook Road, Suite 100
Freehold, NJ 07728
732-462-7198
bchabarek@demlplaw.com

Katelyn E. Cutinello, Esq.
Cocca & Cutinello, LLP
89 Speedwell Avenue, Suite 1450
Morristown, NJ 07960
973-532-7700
kcutinello@coccalaw.com

DRI STATE REPRESENTATIVE
Natalie H. Mantell, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-639-7926
nmantell@mccarter.com

COMMITTEES

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

BY-LAWS
J.R. Peter Wilson, Esq.

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

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

FINANCE
John V. Mallon, Esq.
Chasan Lamparello Mallon &
Cappuzzo, P.C.
300 Lighting Way
Secaucus, NJ 07094
201-348-6000
jvmallon@chasanlaw.com

LEGISLATIVE
Katherine Lyons, Esq.
NJM
301 Sullivan Way
West Trenton, NJ 08628-3496
609-883-1300
klyons@njm.com

LONG TERM PLANNING
Kevin J. DeCoursey, Esq.
Cooper Maren Nitsberg Voss &
DeCoursey
485 Route 1 South, Bldg. A,
Suite 200, Iselin, NJ 08830
732-726-7180
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 Voss &
DeCoursey
485 Route 1 South, Bldg. A,
Suite 200, Iselin, NJ 08830
732-726-7180
kDecour1@progressive.com

NEW JERSEY DEFENSE
Michael A. Malia, Esq.
Peri & Stewart, LLC
2150 Highway 35, Suite 250
Sea Girt, NJ 08750
732-359-0220
mmalia@peristewart.com

PUBLIC RELATIONS/ SOCIAL MEDIA
Ryan Richman, Esq.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102
973-622-4444
rrichman@mccarter.com

Michelle O'Brien, Esq.
Purcell Mulcahy & Flanagan
One Pluckemin Way
Bedminster, NJ 07921 908-306-6707
mobrien@pmflawfirm.com

SEMINARS
Gregory F. McGroarty, Esq.
Cooper Maren Nitsberg Voss &
DeCoursey, 485 Route 1 South, Bldg.
A, Suite 200, Iselin, NJ 08830
732-362-3289
gregory_f_mcgroarty@progressive.
com

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

TRIAL COLLEGE
C. Robert Luthman, Esq.
Weir Attorneys
2109 Pennington Road
Ewing, NJ 08638
609-594-4000
rluthman@weirattorneys.com

TRIAL COLLEGE & WOMEN AND THE LAW
Marie A. Carey, Esq.
Law Offices of Marie A. Carey, Esq.
325 Columbia Turnpike
Florham Park, NJ 07932
973-443-9100 marie.carey@usaa.com

YOUNG LAWYERS
Christopher A. Rojao, Esq.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102
973-622-4444 crojao@mccarter.com

Katelyn E. Cutinello, Esq.
Cocca & Cutinello, LLP
89 Speedwell Avenue
Suite 1450
Morristown, NJ 07960
973-532-7700
kcutinello@coccalaw.com

SUBSTANTIVE COMMITTEE

CHAIRS AND VICE CHAIRS

ADR & FRAUD
Michael A. Malia, Esq.
Peri & Stewart, LLC
2150 Highway 35, Suite 250
Sea Girt, NJ 08750
732-359-0220
mmalia@peristewart.com

ADR
Michael J. Needleman, Esq.
Reger Rizzo Darnall LLP
2929 Arch Street
Philadelphia, PA 19104
215-495-6513
mneedleman@regerlaw.com

APPELLATE PRACTICE
Kelly P. Corrubia, Esq.
Norton Murphy Sheehy &
Corrubia, P.C.
1 Garrett Mountain Plz., Ste 502
Woodland Park, NJ 07424
973-881-1101
Kcorrubia@nashnj.com

Anthony Cocca, Esq.
Cocca & Cutinello, LLP
89 Speedwell Avenue, Suite 1450
Morristown, NJ 07960
973-532-7700 acocca@coccalaw.com

AUTOMOBILE LIABILITY
Juliann Alicino, Esq.
Hoagland Longo Moran Dunst &
Doukas, 40 Paterson Street
New Brunswick, NJ 08902
732-545-4717
jalicino@hoaglandlongo.com

Dawn M. Ritter, Esq.
Cooper Maren Nitsberg Voss &
DeCoursey
485 Route ! South, Bldge A, Suite 200
Iselin, NJ 08830
732-726-7180
Dawn_m_ritter@progressive.com

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

Mark D. Shifton, Esq.
Seiger Gfeller Laurie LLP
100 Overlook Center, Second Floor
Princeton, New Jersey 08540
(609) 375-2653
mshifton@sgllawgroup.com

EMPLOYMENT LAW
Brian Chabarek, Esq.
Davison Eastman Muñoz Lederman
& Paone
100 Willow Brook Road, Suite 100
Freehold, NJ 07728
732-462-7198
bchabarek@demlplaw.com

Leslie Koch, Esq.
Methfessel & Werbel
2025 Lincoln Highway, Suite 200
P. O. Box 3012
Edison, NJ 08817
(732)248-4200 Koch@methwerb.com

ENVIRONMENTAL LAW
Joanne Vos, Esq.
Maraziti Falcon, LLP
150 JFK Parkway
Short Hills, NJ 07078
973-912-9008 jvos@mfhenvlaw.com

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

Andrew Brewer, Esq.
Maraziti Falcon LLP
150 JFK Parkway
Short Hills, J 07078
973-912-9008
abrewer@mfhenvlaw.com

INSURANCE LAW
Nathan Buurma, Esq.
NJM, 301 Sullivan Way
West Trenton, NJ 08628-3496
609-883-1300 nbuurma@njm.com

PHILANTHROPY
Denise M. Luckenbach, Esq.
Sellar Richardson, P.C.
293 Eisenhower Parkway, Suite 170
Livingston, NJ 07039 973-992-6677
dluckenbach@sellarnj.com

PIP
Nicole R. Cassata, Esq.
Chasan Lamparello Mallon &
Cappuzzo, P.C.
300 Harmon Meadow Blvd.
Secaucus, NJ 07094
201-348-6000
ncassata@chasanlaw.com

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

PRODUCTS LIABILITY
Robert M. Cook, Esq.
Goldberg Segalla
301 Carnegie Center
Princeton, NJ 08540
609-986-1380
rcook@goldbergsegalla.com

H. Lockwood Miller, Esq.
Goldberg Segalla LLP
301 Carnegie Center
Princeton, NJ 08540
609-986-1380
hmiller@goldbergsegalla.com

Natalie H. Mantell, Esq.
McCarter & English
100 Mulberry Street
Newark, NJ 07102
973-639-7926
nmantell@mccarter.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

Katelyn E. Cutinello, Esq.
Cocca & Cutinello, LLP
89 Speedwell Avenue
Suite 1450
Morristown, NJ 07960
973-532-7700
kcutinello@coccalaw.com

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

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

TRUCKING LAW
Robert M. Cook, Esq.
Goldberg Segalla
301 Carnegie Center
Princeton, NJ 08540
609-986-1320
rcook@goldbergsegalla.com

WORKERS' COMPENSATION
Michele G. Haas, Esq.
Hoagland Longo Moran Dunst &
Doukas
40 Paterson Street
New Brunswick, NJ 08902
732-545-4717
mhaas@hoaglandlongo.com

George C. Roselle, III, Esq.
Lamb Kretzer, LLC
110B Meadowlands Parkway
Secaucus, NJ 07094
201-798-0400
gcr@lambkretzer.com

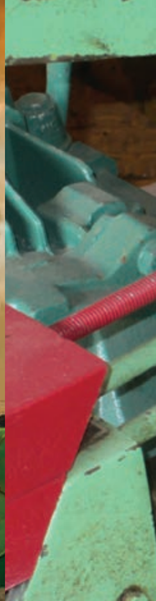
www.robsonforensic.com | 800.695.3139

THE EXPERTS

Robson Forensic

A NATIONAL LEADER IN EXPERT WITNESS CONSULTING, PROVIDING TECHNICAL EXPERTISE ACROSS MANY FIELDS WITHIN ENGINEERING, ARCHITECTURE, SCIENCE, AND AN EXPANSIVE RANGE OF SPECIALTY DISCIPLINES.

Admiralty / Maritime
Aquatics
Architecture
Aviation
Biomechanics
Building Systems
Civil Engineering
Construction
Dram Shop
Electrical Engineering
Elevator & Escalator
Environmental
Equine Science
Fire & Explosion
Food Safety
Healthcare
Highway Engineering
Human Factors
Mechanical Engineering
Medical Device
Metallurgy
Meteorology
Police Practices
Premises Safety & Security
Product Liability
Questioned Documents
Railroad & Trains
Sports & Recreation
Structural Engineering
Supervision & Education
Tire Failure Analysis
Toxicology
Tree Forensics
Trucking & Warehousing
Vehicle Engineering
Workplace Safety



150 Experts | 16 Locations | More Than 50,000 Cases Since 1987

877.800.5888

SUPPORT CLAIM SERVICES™

RAISING THE BAR – REDUCING THE COST

Our mission at Support Claim Services (SCS) is to provide efficient medical cost containment services that utilize our state of the art technological systems in order to maximize savings for our clients. SCS is committed to raising the bar of quality service while reducing the cost of medical claims. Our dedicated medical management team and staff provide national service for No-Fault, Liability and Workers Compensation Claims in the area of Bill Review, Document Management Solutions, Functional Capacity Evaluations, Independent Medical Examinations, Peer Reviews (Medical Records Review, Surgical Review), MRI Referral Services and Radiology Reviews throughout the United States.

WE PROUDLY SUPPORT

THE NEW JERSEY DEFENSE ASSOCIATION

SUPPORT CLAIM SERVICES

125 BAYLIS RD. SUITE 100 MELVILLE NY 11747

SUPPORTCLAIMSERVICES.COM

NEW JERSEY
DEFENSE ASSOCIATION
P.O. BOX 463
LINWOOD, NJ 08221

PRESORTED
STANDARD
US POSTAGE
PAID
PERMIT #3389
LOS ANGELES CA

NEW MEMBERS

ELLEN CAMBURN
BENJAMIN HELLER
JASON LEVOY
JESSICA MAHONY
DANIEL SANTARSIERO
JAMES SHOVLIN
KELLY WEBER

CONTACT

MARYANNE R. STEEDLE
Executive Director
New Jersey Defense Association
P.O. Box 463
Linwood, NJ 08221
(609) 927-1180
njda@comcast.net

CONNECT

WWW.NJDEFENSEASSOC.COM

UPCOMING EVENTS

JUNE 27 - 30, 2019

53RD ANNUAL CONVENTION
Ocean Edge Resort & Golf Club
Cape Cod, Massachusetts

JULY 13

CO-SPONSOR OF NJSBA MUNICIPAL COURT SECT. HAPPY HOUR & NETWORKING SOCIAL
5:30 pm – 8:00 pm
Bar Anticipation, Belmar, NJ

JULY 16

DEPOSITION STRATEGIES FOR YOUNG LAWYERS
Co-sponsored by NJDA, NJSBA & Morris County Young Lawyers Div.
5:00 pm – 7:00 pm
Freeholder Assembly Room

AUGUST 22

NETWORKING EVENT ASBURY FESTHALLE & BIERGARTEN
6:30 pm – 8:30 pm
Asbury Park, NJ

OCTOBER 14

NJDA TRIAL COLLEGE
8:30 am – 12:30 pm
Union County Court House
4.0 CLE Credits

NOVEMBER 11

NJDA WOMEN AND THE LAW SEMINAR
8:30 am – 1:00 pm
APA Hotel Woodbridge
4.5 CLE Credits Including 2.0 Ethics

NOVEMBER 26

NJDA AUTO LIABILITY SEMINAR CO-SPONSOR WITH ICNJ
8:30 am – 1:00 pm
APA Hotel Woodbridge
4.7 CLE Credits, including 1.0 Ethics

DECEMBER 6

ANNUAL HOLIDAY PARTY
7:00 pm
Spring Lake Golf Club

DECEMBER 13

ANNUAL SEMINAR DAY
8:30 am – 1:00 pm
McCarter & English, Newark, NJ