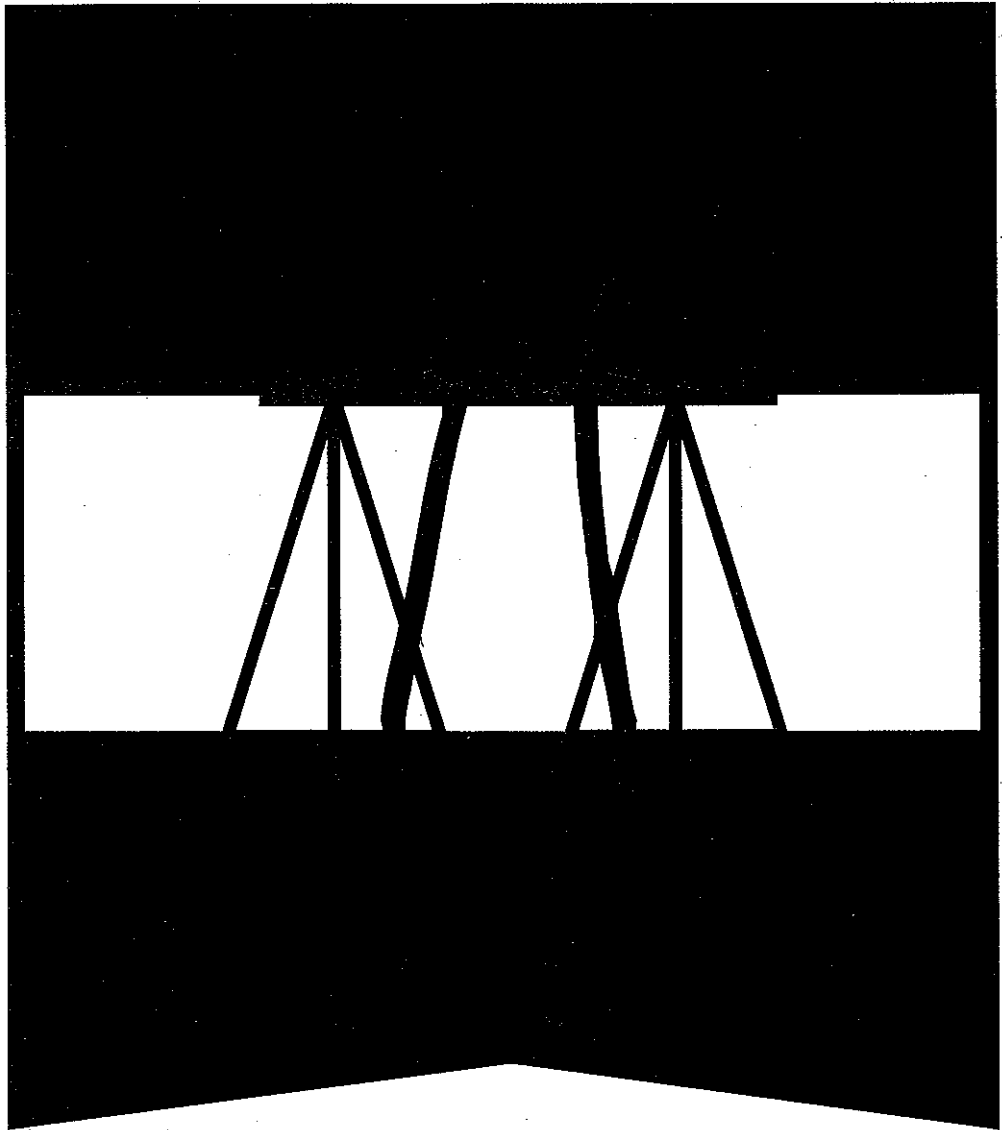


VOLUME 19  
ISSUE 4

# New Jersey Defense

~ A Publication of The New Jersey Defense Association ~



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Bruce Helies, Esq.**

# PRESIDENT'S MESSAGE

*Heidi Willis Currier, Esq.*



I'm going to begin this message by urging all of its readers to register for our 37<sup>th</sup> Annual Convention to be held June 26-29 in Washington, D.C. I invite you all to celebrate and discover our nation's history, heritage and traditions by coming to this wonderful city and simultaneously supporting our country together as a group of Americans.

We will be staying at the Loew's L'Enfant Plaza Hotel, which is within walking distance to the Smithsonian museums and is on the Metro line giving easy access to the other attractions.

Our Annual Banquet is at the Old Ebbitt Grille Restaurant in its beautiful marble atrium on Friday evening. We've scheduled the educational programs for the early mornings on Friday and Saturday so you will be free to join your families for a full day of sightseeing and touring. My big pitch is that all the museums and attractions are free! Don't miss the U.S. Capitol, the Air and Space Museum, the National Zoo (with pandas), the Duck Boat tours and, of course, seeing all of the monuments by night.

We had terrific seminars this winter, and I thank Brian O'Toole for his help in organizing our Jury Selection Seminar in conjunction with ICLE and Steve Foley Jr. and Art Leyden in organizing and speaking at our recent Auto Insurance seminar.

Please send us your articles for submission to this newsletter. I urge you also to join one of our Substantive Committees which gives you a chance to network with others in your practice specialty.

See you in D.C.!

*Heidi Willis Currier*

# THE APPELLATE DIVISION EXPANDS SAFFER and FOLDI

*Bruce E. Helies, Esq.*

On February 7, 2003, an Appellate Division panel consisting of Judges King, Wefing, and Fuentes in relying on the case of Saffer vs. Willoughby, 143 N.J. 256 (1996) has decided that a duplicate recovery for the plaintiff was a better result than affording the defendant attorney in a legal malpractice case the benefit of a reduction of what would have been the defendant attorneys' contingency fee in a personal injury action.

The Court ruled that the plaintiff in DiStefano vs. Greenstone, A.-1098-01 could recover \$90,000.00 in her personal injury case with no reduction for the \$30,000.00 contingency fee that would have normally been payable to the defendant attorney if he had properly advanced the litigation on her behalf. The Court found that the duplicate recovery, even though a windfall to the plaintiff, is considered the lesser evil to crediting the defendant attorney with an undeserved fee where he has "botched" the job. In relying on Saffer the Appellate Division held "ordinarily an attorney may not collect attorneys' fees for services negligently performed". Plaintiff's counsel in the case indicated that the underlying personal injury action was not straight forward as it involved complicated damages under the law of Italy where the plaintiff was injured. Plaintiff's counsel had originally sought a load star fee of \$48,250.00 under Packard vs. Bamberger & Company vs. Collier, 167 N.J. 427 (2001). The Appellate Division denied that claim but held in favor that the defendant attorney should not gain the benefit of what would have ordinarily been his fee had he been successful on behalf of the plaintiff. The ground breaking ruling in the case is that the plaintiff not only gets the \$90,000.00 personal injury claim but the additional \$30,000.00 apparently awarding her \$120,000.00 rather than the

\$90,000.00 she would have received. The Court seems to rely on the fact that the double recovery would be the best result on the basis that plaintiff had to wait an additional extensive period of time to recover her damages. Such a finding would appear to fly in the face of the generally accepted case law that plaintiffs in legal malpractice cases may obtain prejudgment interest from the date their lawsuits should have originally been brought (and/or six (6) months thereafter) by the negligent attorney.

New Jersey attorneys had always known they could not take credit if they mishandled a personal injury case for what would be their fee if they had handled the case properly (the contingent fee would now go to the attorney who successfully handled the malpractice case), however, the DiStefano case breaks new ground in ruling that in a legal malpractice case involving an underlying personal injury case, the plaintiff would recover the full amount of her settlement (with no deduction for the contingent fee) plus what would be the contingent fee on top of the original settlement along with cost of suit. Thus, if plaintiff's original attorney had done his job and settled the case for \$90,000.00, Ms. DiStefano would have received \$60,000.00 and the defendant attorney \$30,000.00. Now that her original attorney had to be sued, Ms. DiStefano gains the benefit of getting the total amount of the settlement of \$90,000.00 plus \$30,000.00 to pay her malpractice attorney. The Court appears to think that the duplicate recovery for the plaintiff is considered the lesser evil rather than crediting the attorney with an undeserved fee where he has committed professional negligence. The concern with this case is that under similar circumstances rather than being compensated for damages approximately caused by the alleged

*(Continued on page 4)*

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# SAFFER AND FOLDI

malpractice,

*Continued from page 3*

plaintiff now receives that compensation plus the windfall of receiving the equivalent of the contingency fee twice thus arguably supplying the plaintiff with one-third more of a recovery than they would have received if their attorney had not malpracticed.

## **COURT EXPANDS FOLDI**

On March 11, 2003, the Appellate Division decided Buono vs. Scalia, \_\_ N.J. Super. \_\_\_, 817 A.2d 400. In this case the minor pedestrian was injured when she was struck by a bicycle operated by another child. The defendant child's parents were sued for lack of supervision. The Appellate Division held that since the supervision of the infant bicyclist by his parents was not willfully or wantonly negligent the bicyclist's father was immune pursuant to the Doctrine of Parental Immunity as set forth in Foldi vs. Jeffries, 93 N.J. 533 (1983). The Appellate Division analyzed the history of parental immunity and beginning with its application and subsequent abrogation in

automobile cases. With regard to the development of parental liability as to third persons the Court reviewed Carey vs. Davison, 181 N.J. Super. 283 and Convery vs. Maczka, 163 N.J. Super. 411 essentially holding parental liability would not serve as a bar to a suit by their child under circumstances where the children were left unattended near dangerous instrumentalities or conditions.

The Buono Court found that the Foldi decision established a Doctrine of Parental Immunity for negligent supervision except when a parent acts willfully or wantonly in failing to watch over his or her child.

The Buono satisfied itself that Foldi retained parental immunity in areas of negligent supervision not only in suits brought by the children of the supervising parents but also by third parties. The basis of that decision was that the Foldi Court spoke of "suits generally" rather than about claims made in particular by or on behalf of children against their parents.

This decision will have great impact on parental supervision cases as many courts have strictly applied the Foldi willful and wanton doctrine only to suits brought against parents by

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# FRED W. JUNG, JR. CELEBRATES 85<sup>th</sup> BIRTHDAY !

Our Association's founder, Fred W. Jung, Jr., celebrated his 85<sup>th</sup> birthday on January 18, 2003 at the Vero Beach Country Club. We honored Fred by presenting him with a Resolution passed by the Board of Directors, which paid tribute to his dedication to our Association and honoring him on his birthday. Four Past Presidents of the Association, George Meyers, Michael Cernigliaro, Roger Steedle and William Powers, attended the reception in Vero Beach with their spouses. When the Resolution was presented, Mr. Cernigliaro informed the guests of the many achievements in Fred's distinguished career and his commitment and dedication to the New Jersey Defense Association, which continues to this day. Fred was quite moved by the gesture and in a letter to President Currier indicated "it was the thrill of the evening" to have four past presidents attend and read that Resolution to his guests. Fred also wrote "I am so proud of the accomplishments of our organization and of the standing that it has achieved." We are proud too, and thank Fred for his vision, leadership and dedication to our Association.

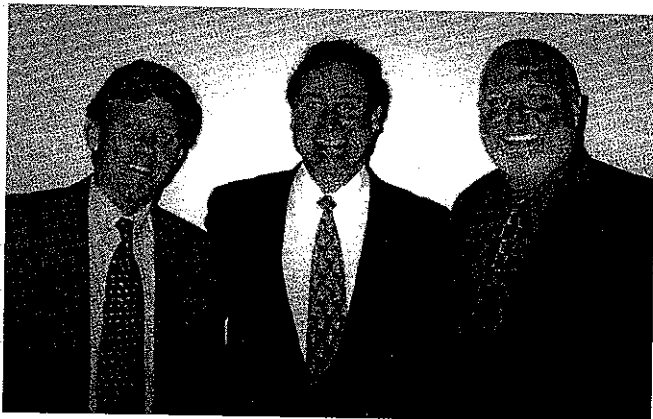


*Left to Right—Roger Steedle, George Meyers, Fred Jung, Mike Cernigliaro, Bill Powers*



*Left to Right—Bill Powers, Evie Powers, Fred Jung, Roger Steedle, Maryanne Steedle, George Meyers, Frances Meyers*

# NJDA PHOTOS



NJDA Seminar—Auto Insurance Law Updates and Preparation for Trial—March 20, 2003  
*L to R*—Stephen J. Foley, Jr., Marshall Mintz, Arthur F. Leyden, III



Mid-Winter Dinner  
*L to R*—Jerry Hanson, Randy Currier, Heidi Currier



Mid-Winter Dinner  
Michelle and Mario Delano



Joint NJDA/ICLE—February 12, 2003  
*L to R*—Frank Cofone, John B. Collins, Peter L. Korn, Hon. Douglas T. Hague, Gerald B. O'Connor, Brian R. O'Toole



Mid-Winter Dinner  
Members of O'Toole and Couch



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**June 26 - 29, 2003**  
**37<sup>th</sup> Annual NJDA Convention**  
**Loews L'Enfant Plaza Hotel in Washington, D.C.**

## ***Member News***

**Edward J. Fanning, Jr.**, has become a partner in the firm of McCarter & English, LLP effective April 1, 2003. Mr. Fanning represents defendants in products liability, personal injury, general negligence, contract and insurance coverage suits.

**Charles T. McCook, Jr. and Jared P. Kingsley**, of Bumgardner, Ellis, McCook & Kingsley, P.A. have been certified as Civil Trial Attorneys by the Supreme Court of New Jersey. Mr. McCook concentrates his practice in the areas of products liability, transportation, construction and commercial premises matters. Mr. Kingsley concentrates his practice in the areas of professional liability, commercial and automobile litigation.

**Mark A. Saloman** has joined the Labor & Employment Department of Proskauer Rose LLP, where he will continue his employment litigation practice and his assistance to employees with labor relations and human resource concerns.



# WORKERS' COMPENSATION

*Edward H. Herman, Esq.*

Both the Legislature and our Courts have been busy dealing with various Workers' Compensation issues over the past several months. Both the Senate and the Assembly passed an amendment to the Workers' Compensation Act increasing the maximum fees for a witness from \$250.00 to \$400.00. This covers a written report, appearance fee for testimony and written opinion regarding the need for medical treatment. The fee to be paid to a treating physician, giving testimony concerning causal relationship, ability to work or the need for treatment, was increased from \$250.00 per hour to \$300.00 per hour with a total maximum amount increased from \$1,500.00 to \$2,500.00 while the additional fee to a treating physician for a deposition concerning causal relationship, ability to work or the need for treatment was increased from \$250.00 per hour to \$300.00 per hour with a total maximum amount from \$750.00 increased to \$1,500.00. This fee increase, of course, applies to the petitioner's doctor and not to the respondent's doctors.

Several cases have been reviewed by the Appellate Division dealing with the "exclusivity" rule. These cases arise out of liability claims filed by an employee. The first is Falzo, et ux., etc. v. Barilla, Jr. et al. In this case a Livingston Police Officer, who was working off duty with permission of the Police Department, was injured while performing traffic control duties for a construction company. He brought a liability claim against the construction company. The Appellate Division affirmed the decision below finding that the police officer was working for joint employers and thus is Civil Suit against the construction company was barred by the exclusivity rule of the Workers' Compensation Act. The Court went on to find that a Police Officer working for a private employer is still considered an off duty Police Officer thus

entitled to compensation benefits jointly from both the private employer and the Police Department and therefore may not sustain an action in the liability courts against the construction company.

The next case decided by the Appellate Division is Wanat v. Farmland Dairies and Parmalat and Baltic Conveyor et al. Again, this was a liability action in which the defendant sought to overcome the "exclusivity rule". The employee was working in a pit beneath the floor to repair a conveyor belt at the employer's premise. There was no shut off switch or other safety device in the pit and someone in another area of the plant turned the belt on while the plaintiff was in the pit. The plaintiff sought to overcome the exclusivity rule on the grounds that the employer was guilty of an intentional act from which the employer would know that its consequence would cause harm to the employee. Based on the Court's review of the facts, the Appellate Division reversed the trial judge and granted Summary Judgment to the defendant stating that the Plaintiff failed to satisfy the two prong test as set out in Laidlow v. Hariton Machine Company Inc. 170 N.J. 602 (2002).

A third case decided by the Appellate Division is Brodeur, et ux v. Capodanno Electric. In this case two Plaintiffs were employed by a Michigan company to work on a project in New Jersey. The two employees were injured in separate construction site accidents in New Jersey. Each brought an action against the employer. The Court found that the Plaintiffs were "special employees" and therefore their sole remedy was through a claim for Workers' Compensation and their personal injury suits were thus barred by the exclusivity rule.

Another Appellate Division case of interest to respondents is Lorenzo v. Lance

*(Continued on page 9)*

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# WORKERS' COMPENSATION

*(Continued from page 8)*

**Plastics, Inc.** This was decided February 7, 2003. It arises out of an Application to Review or Modify a prior Award. The Workers' Compensation Court denied the claim for increased benefits and the Appellate Division affirmed. The Court found a lack of objective medical evidence present to show an increase or modification in disability resulting from the original accident. The Court discusses the burden of proof issue and held that the petitioner maintains the burden of proving causal connection between any increase in disability and the original accident. The burden of proof does not shift to the employer once an increase in disability alone is

shown by the employee.

Our Supreme Court recently reviewed two cases involving occupational pulmonary disease claims in Lindquist v. City of Jersey City Fire Department and Culbert v. City of Jersey City. Both of these cases involved long term employment with alleged exposure to various toxins. In each case the Court found sufficient facts to sustain an Award of disability. In the Lindquist opinion the Court does a very comprehensive review of occupational exposure law in general leading to it's decision in this case.

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## The Young Lawyers Committee



### **Providing educational, social and professional opportunities within the defense community.**

We are actively searching for new members to become involved with the N.J.D.A. as young lawyers. Our Committee provides an excellent opportunity for young lawyers to take a more active role in the profession by participating in seminars, writing substantive articles for the N.J.D.A. newsletter and interacting with veteran members of the N.J.D.A.

As young lawyers, we need to take an affirmative role in ensuring our development and education. The Young Lawyers Committee of the N.J.D.A. provides the vehicle in which one can learn and mature into an experienced attorney within the civil defense litigation field.

Below is a list of our Committee Chairs and highlights of past and upcoming events. Please feel free to contact me with any questions or comments regarding the Young Lawyers Committee of N.J.D.A. Thank you.

#### Committee Chairs:

YL Chair: Edward J. Fanning, Jr.	YL Vice-Chair: Mark A. Saloman
Membership: Edward J. Fanning, Jr.	Social Events: Joanne Vos
Publications: Mark A. Saloman	Seminars: Connie Matteo

### ***2003 Meeting Schedule***

Thursday, June 12 6:00 p.m. at Hack, Piro, O'Day, Merklinger, Wallace & McKenna  
30 Columbia Turnpike, Florham Park, NJ 07932

all current and prospective members are welcome to attend events

Among other agenda topics, the YLC will discuss nominations for committee leadership and sub-committee chairs. Our sub-committees include those listed above. If you are interested in participating in the YLC leadership or serving on one of our sub-committees, please contact Ed Fanning, the current YLC Chairman, in advance of the meeting.

The Young Lawyers Committee will also be presenting the Annual Case Law Update at this year's N.J.D.A. Convention in Washington, D.C.. The YLC speakers comprising the seminar panel are Michael Leegan, Linda Pissott Reig, Mark Saloman, Richard Reig and Ed Fanning. The seminar will highlight recent developments in the areas of tort defense, motor vehicle liability and insurance, consumer fraud, employment and products liability. The Convention will be held at the Loew's L'Enfant Plaza Hotel from June 26-29. It promises to be a great time in a great city!

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**WASHINGTON D.C. 2003**



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