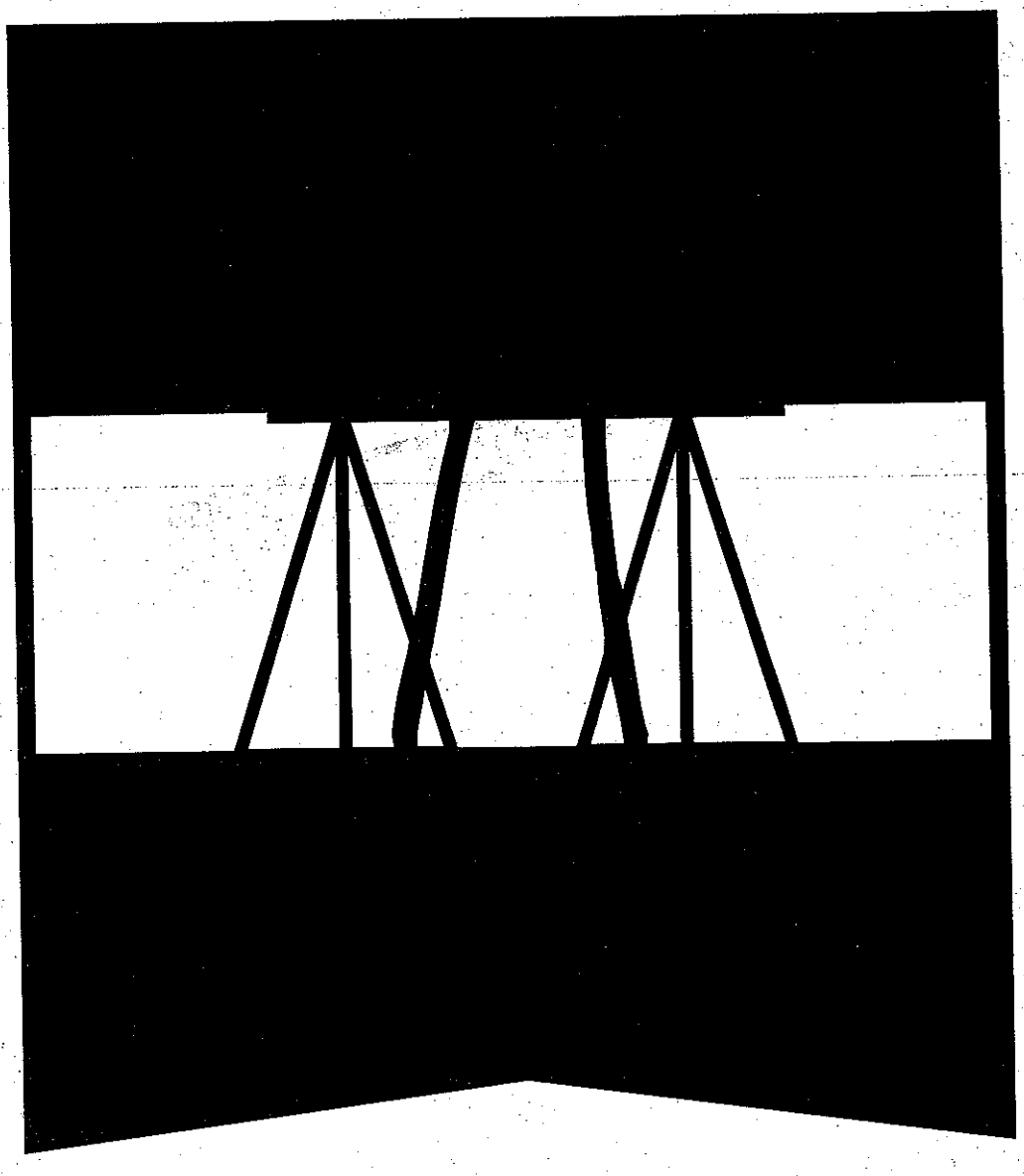
VOLUME 21
ISSUE 1

# New Jersey Defense

~~ A Publication of The New Jersey Defense Association~~



inside...

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# PRESIDENT'S MESSAGE

## *Philip R. Lezenby, Jr., Esq.*

### Becoming Known - Becoming Active

I am the beneficiary - as are all NJDA members - of the sterling efforts of my predecessors as President, the committee chairpersons, the Amicus Curia counsel and the Young Lawyers Committee, all of which have led to a much higher visibility and recognition and prestige for the NJDA.

In the last year we have been specifically requested by the Supreme Court to file amicus briefs in significant cases. The NJDA was asked by the Court to provide a representative to be a member of its Special Committee on Peremptory Challenges and Jury Voir Dire. The NJDA is increasingly recognized by judges and by the legal publications as the representative voice of the defense bar and defense interests.

As noted, I am a beneficiary of this development. But every member of the NJDA benefits and can benefit more personally and directly by becoming more active in the organization. We have a number of substantive committees that can use YOUR help as a member or officer. The Board is very desirous of having the committees more actively involved in the tasks of preparing amicus briefs, making substantive presentations at seminars, in the newsletter and, when asked (and we are), providing commentary to the Law Journal and the New Jersey Lawyer.

By becoming involved in these ways you help other defense counsel and claims professionals. You advance the interests of our branch of the profession. By becoming involved in these ways you help yourself - you have the opportunity to present yourself and the defense position to a statewide audience of judges, trial attorneys and claims professionals. A cynic once said all publicity is good publicity. But everyone can recognize that good publicity is good.

Please sign up for a substantive committee (or committees). They are not "closed shops." As a member you will get the opportunity for real involvement.

On a second note, every organization seeks to increase its membership. I urge you to urge members of your firm who are not NJDA members to join. Application can also be made on-line at www.njdefenseassoc.com.

The Association conducted an educational seminar on October 23, 2004 on the Tort Claims Act and the Collateral Source Rule in New Jersey. A seminar on Imaging of the Spine and a PIP Arbitration Update was just held on November 23, 2004. Both seminars were excellent and well attended by the membership.

The Young Lawyers Christmas Party is open to all members and is a great get together. This year it is being held at Porzio, Bromberg & Newman in Morristown on Monday, December 20, 2004. Cocktails begin at 6 p.m. with dinner following at 6:30 p.m..

Finally, I mentioned the Jury Challenges/Voir Dire Committee. A questionnaire was e-mailed to the membership. It is intended to assemble and provide the views of the defense bar to the Court. If you haven't completed one please do so and send it to me at LZNLAW@aol.com. If you need one call me at (856) 482-9180. You can fax the response to me as well ast (856) 414-1033.

*Philip Lezenby*

# NJDA VICTORY IN BRODSKY v. GRINELL HAULERS, Inc. :

## Increasing Equitable Treatment of Parties in Tort Actions

***Edward J. Fanning, Jr., Esq. and Natalie S. Watson, Esq.***

On August 10, 2004, the New Jersey Supreme Court decided Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102 (2004). The Brodsky Court agreed with the NJDA, represented by Edward J. Fanning, Jr. and David R. Kott of McCarter & English, on three prominent issues impacting defendants. First, the Court held that a defendant's bankruptcy will not preclude the jury from allocating a percentage of fault to that defendant for the purposes of joint and several liability. Next, the Court found that because of the danger of jury manipulation, an ultimate outcome charge should not be used in cases that involve only joint tortfeasor fault, as opposed to cases regarding the operation of comparative fault of the plaintiff and the defendants. Finally, the Court found that in cases arising under New Jersey's Comparative Negligence Act, attorneys may suggest specific fault percentages to the jury, provided that there is evidence to support the suggestion.

With this ruling, the Brodsky Court adhered both to the legislative intent of the New Jersey Comparative Negligence Act and to the concerns of Federal Bankruptcy statutes. The Court's decision also reasserted that a jury's allocation of fault should be based upon evidence rather than the financial status of the parties. The Brodsky holding is, therefore, an important victory that will encourage equitable treatment of defendants, regardless of their financial status.

As mentioned in the last NJDA newsletter, Mr. Fanning brought the Brodsky case to the attention of NJDA's Amicus Curiae Committee and the Board of Directors in late January. The Board asked McCarter & English, LLP to seek leave for the NJDA to appear as amicus curiae. McCarter & English, LLP made the motion, which was granted soon thereafter, on February 6, 2004. The NJDA's amicus brief was filed one week later. At the March 1, 2004 oral argument, the Justices indicated that they carefully had considered the NJDA's position in conjunction with legislative intent and public policy arguments.

The Brodsky decision concurs with the reasoning presented in NJDA's amicus brief. The first issue the Court addressed was whether a jury should consider and compare the negligence of a bankrupt tortfeasor when allocating percentages of fault among joint tortfeasors. As argued in the NJDA brief, the Court used the Comparative Negligence Act's treatment of bankrupt parties in other situations to infer the legislature's plan for treatment of a non-settling party's insolvency. Specifically, the Court pointed to a provision in the Comparative Negligence Act that allows plaintiffs in environmental cases to seek a full recovery from financially sound defendants when a joint tortfeasor is insolvent. The Court reasoned that the Legislature's intentional omission from its reform package of a similar provision for insolvent parties in personal injury actions demonstrated that the Legislature intended bankrupt

*(Continued on page 4)*

# BRODSKY

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parties to be included in fault allocation.

The Court also turned to its decision in Young v. Latta, 123 N.J. 584, 585 (1991) in which the Court held that the trier of fact must allocate the percentage of fault between settling and non-settling tortfeasors to satisfy the purpose of the Comparative Negligence Act. Id. at 592, 594. The Court analogized Young to Brodsky, holding that "[i]mplicit in our construction of the Act in Young was our recognition that a defendant who settles and is dismissed from the action remains a 'party' to the case for the purpose of determining the non-settling defendant's percentage of fault." Brodsky, 181 N.J. at 113. Similarly, the Court analogized the situation in Brodsky to that of a defendant in a worker's compensation case who is permitted to point to the "empty chair" in which the statutorily immune employer would sit. Id. Finally, the Court found that including a bankrupt defendant for the purposes of fault allocation, not for collection, did not run afoul of the purposes of the bankruptcy statutes. The Court, therefore, "decline[d] to follow the approach advanced by plaintiffs, in which a defendant who is found to be one percent negligent would be held responsible for ninety-nine percent of the negligence caused by a joint tortfeasor dismissed from the case as a result of a bankruptcy discharge." Id. at 116.

The second issue decided by the Court involved the ultimate outcome charge. The Court's opinion touched on the same issues presented in NJDA's amicus brief. The Court noted that the ultimate outcome charge, in this fact situation, had to be viewed through the lens of the Comparative Negligence Act. The Court found that "[a]n ultimate outcome charge explaining how the Comparative Negligence Act operates between joint tortfeasors will not advance any of the legislative purposes of the Act. The Act calls for the jury to make a good-faith allocation of the percentages of negligence among joint tortfeasors based on evidence-- not based on the collectablility or non-collectability of a judgment." Id. at 121. The Court's reasoning is in line with the NJDA position that such an ultimate outcome charge poses the extreme risk of unfair prejudice by shifting to other defendants some percentage of fault that the jury would otherwise allocate to a bankrupt defendant. The purpose of the Comparative Negligence Act is to rectify the inequities of joint and several liability on deep pocket defendants. The Brodsky decision upholds the Act's attempt to prevent marginally culpable yet financially sound defendants from becoming de facto insurers for plaintiffs injured by financially irresponsible defendants.

The third issue that the Court considered was whether counsel may suggest to the jury specific percentages of fault in opening or closing statements. The Court saw "no reason" why the subject of degree of fault "should be off-limits to the argument of counsel." Id. at 127-28. The Court reasoned that the jury's role in Brodsky was to allocate fault among parties so that the total amount of fault equaled one hundred percent. The Court did not believe that an attorney's closing argument, comporting with the evidence and suggesting a percentage of fault based on that evidence, would impede the jury's task of fault allocation. Therefore, the Court found that as long as evidence exists in the record supporting the suggestion, counsel may present specific allocations of fault to the jury.

The NJDA's participation in Brodsky contributed immensely to addressing the problem of inequitable treatment of defendants. The Brodsky decision protects the tort reforms of the Comparative Negligence Act. This is a great victory for fairness in tort actions and for the NJDA.

Edward J. Fanning, Jr. is a Partner in the Firm of

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# BRODSKY

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McCarter & English, LLP and a member of the Firm's Products Liability Group. Mr. Fanning has extensive experience in civil litigation, with particular emphasis on the defense of claims against manufacturers of consumer products, industrial equipment, and medical services. McCarter & English, LLP represented NJDA in Brodsky v. Grinnell Haulers, Inc. and has participated in other pro bono actions aimed at protecting business in New Jersey.

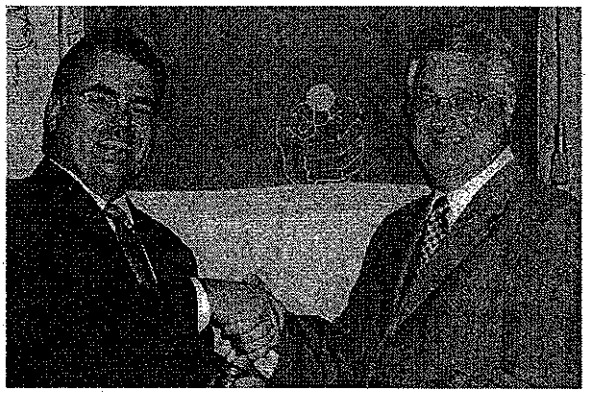
Natalie S. Watson is an Associate in the Firm of McCarter & English, LLP and a member of the Firm's Product Liability Group. She received her J. D. from Rutgers School of Law—Newark and her B.A. from Bryn Mawr College.

Join us for the next NJDA seminar

*Saturday, January 29, 2005*

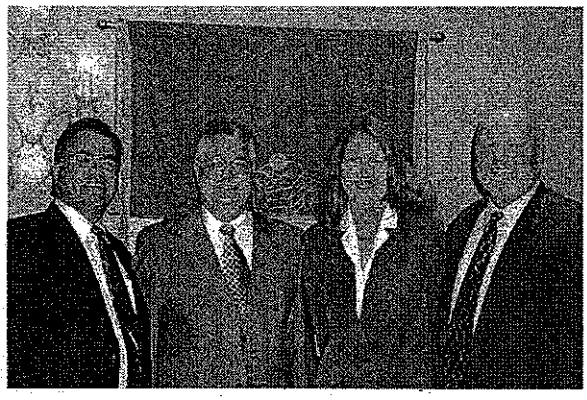
Woodbridge Hilton, Iselin, New Jersey

# NJDA PHOTOS



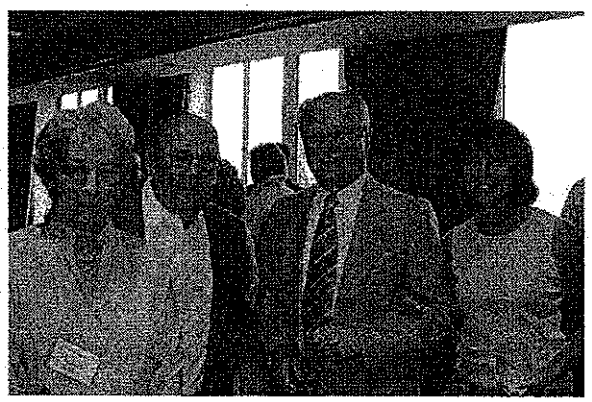
Chairman of the Board Thomas Hight presenting gavel to President Philip R. Lezenby, Jr.

Stephen Foley, Jr. presenting NJDA service award to Thomas Hight



Thomas Hight, Philip R. Lezenby, Jr. Linda Pissott Reig, Arthur F. Leyden, III

Charles Hopkins presenting DRI distinguished service award to Thomas Hight



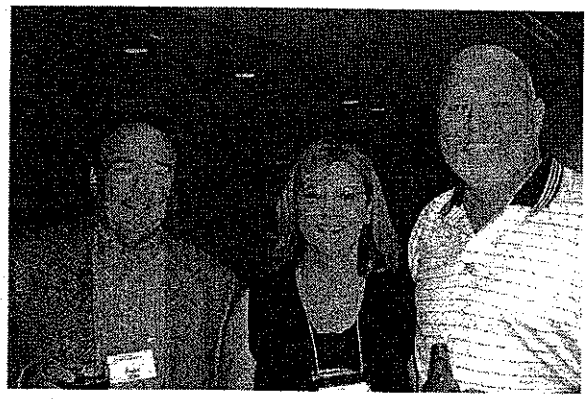
Frances Meyers, George Meyers, Bill Powers, Evie Powers

Laura Connell, Peter Connell, Teresa Gierla

# NJDA PHOTOS

Mike Leegan, Tom Madden, Kathy Hight,
Mary Madden, Kim Leegan

Joe Garvey, Linda Garvey,
Kathleen Van Dyke, Peter Van Dyke



Roger Ellis, Colleen Ellis, Art Leyden

Children's Program

Donald Powell, Maria Incantalupi, Roger Steedle

Mike Cernigliaro, Pat Cernigliaro

# NEW JERSEY'S MASS TORT GUIDELINES

*Deanna L. Koestel, Esq. with contributions from Steven A. Karg, Esq., Esq.*

The centralization of multiple lawsuits involving the same product or event can have significant effects on both defense strategy and client reputation. Despite the serious ramifications of a mass tort designation, until as recently as a year ago, counsel for potential mass tort defendants in New Jersey had no real opportunity to oppose a proposed mass tort designation. Once the New Jersey Supreme Court decided to designate a category of cases as a "mass tort," the parties to the newly consolidated cases simply received notice that their cases would proceed through discovery in one court.

Fortunately, times have changed. In October, 2003, the New Jersey Supreme Court approved "Mass Tort Guidelines", promulgated under Rule 4:38A ("Centralized Management of Mass Torts"). [1] These guidelines, discussed below, provide an important insight into the judicial process of mass tort designation. More importantly from defense counsel's perspective, Rule 4:38A cures the most significant procedural defect in the former mass tort designation process by finally providing the parties an opportunity to be heard. Although this is an important step forward in the mass tort designation process, it does not eliminate many of the potentially negative effects of a mass tort designation for defendants.

**The New Rule**

The new guidelines under Rule 4:38A allow for the Assignment Judge in any forum or any attorney in any eligible case to request the Supreme Court to classify a category of cases as a mass tort and assign them to a designated judge for centralized management. In a significant departure from the prior practice, the current guidelines require service of this request on all interested parties. Moreover, a Notice to the Bar must appear in the legal newspapers and in the Mass Tort Information Center on the Judiciary's website. This notice must disclose where and when comments and objections to the application can be made.

After the required notice is given, the Administrative Director of the Courts then collects all comments and objections and submits them to the Supreme Court for review and decision. If the Supreme Court determines that a category of cases should be classified as a mass tort, the cases will be reassigned to a designated judge in a particular venue for centralized management based on issues of fairness, geographical location of the parties and attorneys, and the existing civil and mass tort caseload in a particular venue. The Court then enters an appropriate Order which is forwarded to all Assignment Judges and Civil Presiding Judges, published in the legal newspapers, and posted in the Mass Tort Information Center on the Judiciary's website. [2] At this time, New Jersey has three such "mass tort" courts presided over by the Honorable Charles J. Walsh in Bergen; the Honorable Carol E. Higbee in Atlantic County; and the Honorable Ann G. McCormick in Middlesex County.[3]

Once the initial order of the Supreme Court is entered, related actions are transferred from the counties in which they were filed to the designated mass tort court *without further application to the Supreme Court.* Thereafter, the assigned judge has discretion to review, sever and return to the original counties of venue any cases that no longer warrant centralization. The mass tort court also retains discretion to keep the centralized cases for trial or to terminate centralized management and return any unresolved matters to their original counties of venue. If the mass tort court determines that centralized management is no longer necessary or appropriate under the circumstances, it will send a written report to the Administrative Director, with copies to the Assignment Judge, Civil Presiding Judge, Trial

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# MASS TORT GUIDELINES

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Court Administrator and Civil Division Manager of the vicinage detailing the matters resolved as well as particulars concerning any unresolved matters being returned. This report is then presented to the Supreme Court for review.

The guidelines set forth criteria to be applied in determining whether designation of a case as a mass tort is appropriate. The following factors, among others, are considered by the New Jersey Supreme Court in making its determination:

1. Whether the cases possess the following characteristics:

a. they involve large numbers of parties;

b. they involve many claims with a common, recurrent issue of law and fact that are associated with a single product, mass disaster, or complex environmental or toxic tort;

c. there is geographical dispersement of the parties;

d. there is a high degree of commonality of injury or damages among plaintiffs;

e. there is value interdependence between different claims, that is, the perceived strength or weakness of the causation and liability aspects of the case are often dependent upon the success or failure of similar lawsuits in other jurisdictions; and

f. there is a degree of remoteness between the court and actual decision-makers in the litigation, that is, even the simplest of decisions may be required to pass through layers of local, regional, national, general, and house counsel.

2. Whether there is a risk that centralization may unreasonably delay the progress, increase the expense, or complicate the processing of any action, or otherwise prejudice a party;

3. Whether centralized management is fair and convenient to the parties, witnesses and counsel;

4. Whether there is a risk of duplicative and inconsistent rulings, orders or judgments if the cases are not managed in a coordinated fashion;

5. Whether coordinated discovery would be advantageous;

6. Whether the cases require specialized expertise and case processing as provided by the dedicated mass tort judge and staff;

7. Whether centralization would result in the efficient utilization of judicial resources and the facilities and personnel of the court;

8. Whether issues of insurance, limits on assets and potential bankruptcy can be best addressed in coordinated proceedings; and

9. Whether there are related matters pending in Federal court or in other state courts that require coordination with a single New Jersey judge.

Following its determination of whether a category of cases should be classified as a mass tort, the Supreme Court typically does not issue any opinion or statement explaining its decision. The Court simply issues a short notice that states whether the case has been designated as a "mass tort," pursuant to Rule 4:38A. If the application is rejected, the pending cases continue under individual management in the counties where previously venued.

**Potentially Negative Effects of a Mass Tort Designation**

As much of the defense bar is already aware, a mass tort designation can have poten-

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# MASS TORT GUIDELINES

*(Continued from page 9)*

tially negative ramifications for defendants and the public alike. For defendants, the publicity of a mass tort designation threatens business reputation and the bottom line. If a product is publicized as part of a "mass tort," not only does the product brand at issue suffer significant harm but the defendant itself may suffer harm by association. Unfortunately, the defendant incurs the costs associated with the negative press and the loss of good will long before the merits of the cases are sufficiently tested.

A mass tort designation can sometimes pressure a defendant into considering settlement regardless of the merits of a particular claim. The negative press and the associated costs of such a designation can be substantial. Moreover, when the Court centralizes cases under the program, the likelihood of marginal or baseless claims "piggybacking" on the merits and efforts of a few potentially legitimate claims increases. This can result in a defendant's obligation to defend an undue number of claims. After all, once a product or event is designated as a "mass tort," little more than a notice is required to join the group of existing plaintiffs.

A mass tort designation can have undue negative effects on the public as well. For example, in the pharmaceutical industry, once a medication is classified as part of a "mass tort" program, patients who need and benefit from the medication may become fearful and discontinue its use despite important benefits. In such a case, patients who need the medication suffer even though there has been no adjudication of a defect. Moreover, the medication may be the subject of multiple lawsuits as the result of an isolated issue affecting a small population of users. Even if the Court ultimately determines that the medication lacked an adequate warning for the isolated issue, a mass tort designation can result in its discontinued use by a much greater population of patients who benefit from the product and for whom the product is not defective.

A mass tort designation in New Jersey enables forum shopping and can negatively impact the docket of New Jersey courts. Centralization of claims often results in litigation in a forum in which the alleged tort and the alleged injury did not occur. As a result, defendants cannot obtain the live trial testimony of critical witnesses such as treating and prescribing physicians, and have the additional burden and expense of coordinating discovery across the country. Once a category of cases is designated as a mass tort in New Jersey, foreign plaintiffs feel more welcome to file cases here, which increases the burden of an already busy judiciary. When this occurs, careful consideration of forum *non-conveniens* dismissals is critical to avoid a *de facto* nationwide class action and the resulting prejudice to the defendant.

In sum, the "mass tort" designation of a category of cases poses many hurdles and threatens the business reputation of a defendant before any adjudication on the merits. The recent institution of guidelines provides counsel an opportunity to be heard before such a classification, as well as a framework from which to construct an argument. The new guidelines represent a significant improvement to the process.

Deanna L. Koestel, Esq. is an associate in the firm of Norris, McLaughlin & Marcus, P.A., in Bridgewater, NJ. Mr. Karg is an associate in the same firm. Both practice in the firm's Product's Liability Practice Group.

1. The Mass Tort Guidelines and Information Center can be found on the Judiciary's Internet website, http://www.judiciary.state.nj.us/mass-tort/index.htm.
2. http://www.judiciary.state.nj.us/mass-tort/index.htm.
3. Judge McCormick replaces the Honorable Marina Corodemus in Middlesex County. Judge Corodemus recently retired from the bench after a distinguished judicial career.

# What's New...

Look for Convention 2005 registration materials in early January.

**June 23—26, 2005**

**Chesapeake Bay**

**Cambridge, Maryland**

new NJDA email address:

**njda@comcast.net**

## *NJDA SUBSTANTIVE COMMITTEE CHAIRS*

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**Worker's Compensation**
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**Public Entity Law**
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# VERBAL UPDATE 2004


## *John M. Cinti, Esq. and Matthew K. Mitchell, Esq.*


Ever since its enactment, AICRA (the Automobile Insurance Cost Reduction Act *NJSA 39: 6a-1 et seq.* effective March 22, 1999) has spawned heated debate, conflicting trial court decisions, and a welter of published opinions from the Appellate Division. The clear legislative intent embodied in AICRA continues the trajectory of increasingly restrictive standards which has held since the inception of the first threshold in 1972. But as always, the devil is in the details, and it remains to be seen how the New Jersey Supreme Court will ultimately decide many of these issues.

THE SUBJECTIVE PRONG:

Not contained within the language of the pre-AICRA verbal threshold statute, the subjective prong is a judicial creation fashioned by the Supreme Court in *Oswin v. Shaw*. With the enactment of AICRA, which similarly contains no language addressing the subjective prong, the plaintiff's bar in general, and ATLA in particular, trumpeted victory over the verbal threshold.

Quickly there appeared a split in trial court published opinions on this issue [*Compere v Collins* and *Rogozinski v Turs*]. The trial bar was faced with a schism. The very standard to be applied in verbal cases varied from county to county, and indeed, judge to judge. Along came *James v Torres*, in which the Appellate Division (or at least one panel of it) professed their undying loyalty to the *Oswin* model. When the Supreme Court denied certification in *James*, the issue seemed to be settled once and for all.

But not so fast. In *Serrano v Serrano*, the Appellate Division was confronted with a plaintiff who allegedly suffered carpal tunnel syndrome, TMJ dysfunction and intermittent spasm. While MRI testing was normal, plaintiff, of course, testified he had trouble with prolonged standing, stooping, bending, kneeling, working, etc. The court in its holding essentially reaffirmed *James* by stating: "[w]e agree with the observation in James that in enacting AICRA, the Legislature clearly intended to require that an injury be both permanent and serious to permit a plaintiff to cross the amended verbal threshold." However, it dodged the serious impact issue by stating: "[w]e, however, find it unnecessary to discuss whether AICRA requires the second prong showing of serious impact on life because the record amply supports a finding that plaintiff's injuries, if believed, were not the serious type that would vault his case over the verbal threshold simply by reliance on medical opinions of permanency."

Unsatisfied with mere avoidance, the *Serrano* court muddied the waters further in dicta. "We can clearly perceive circumstances where a person sustains a soft tissue injury, which, though permanent, is not al all serious. For example, a soft tissue injury to the neck or back can result in morning stiffness, which then dissipates upon movement. Likewise, we can envision serious soft tissue injuries such as herniated discs or a tear of a medial meniscus, which result in pain but do not seriously impact life because the affected person has a sedentary lifestyle and endures pain better than the average person."

This language created a firestorm in cases with injuries similar to those specifically noted in *Serrano*. However, in recent unpublished Appellate Division decisions, the courts have downplayed the viability of the "self-defining soft tissue injury" *Serrano* test and affirmed the *Oswin* standard. *Vogle v Antonini*, A-3493-02, and *Simon v McCombe*, A-6260-02, both decided September 27, 2004.

Briefly, *Villanueva v Lesack*, raised some

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# VERBAL UPDATE

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eyebrows because it contained language which seemed to indicate the subjective prong was not required. However, the Appellate Division limited its holding to specifically defined injuries under the AICRA statute (in *Villanueva*, a displaced fracture) and was merely expressing a continuation of the pre-AICRA doctrine spelled out in *Puso v Kenyon* and *Fowler v Crystal Motors*.

In *DiProspero v J. Penn*, No. A-3162-02T1 (unpublished opinion of the Appellate Division decided Jan. 30, 2004) the majority affirmed the application of the two prong *Oswin* test. However, Judge Weissbard dissented, relying on *Compere*, and stating that the rationale of the *James* court was "unconvincing". Curiously, Judge Weissbard had previously joined in opinions which relied on James, and two months after his dissent in *DiProspero*, affirmed the serious impact requirement in the unpublished decision of *Shah v Coch*.

Weissbard's dissent in *DiProspero* automatically entitled plaintiff to Supreme Court review. Also, on May 21, 2004, the Supreme Court granted certification in *Serrano*.

PHYSICIAN'S CERTIFICATION:

Part of the overhaul that the Verbal Threshold received with the enactment of AICRA was the requirement of the physician's certification.

In order to satisfy the tort option provisions of this subsection, plaintiff shall, within 60 days following the date of the answer to the complaint by the defendant, provide the defendant with a certification from the licensed treating physician or a board-certified licensed physician to whom the plaintiff was referred by the treating physician.

The certification shall state, under penalty of perjury, that plaintiff has sustained an injury described above. The certification shall be based on and refer to objective clinical evidence, which may include medical testing...Such testing may not be...dependent entirely upon subjective patient response.

The court may grant no more than one additional period not to exceed 60 days to file the certification pursuant to this subsection upon a finding of good cause.

Initially, many analogized the Physician's Certification requirement to the Affidavit of Merit requirement in professional malpractice actions, which it resembles. But in *Watts v Camaligan*, the Appellate Division held that the Physician's Certification is merely "procedural" and as such, dismissals should be without prejudice

Along came *Konopka v Foster*, in which plaintiff failed to timely file the required certification. The court rejected a substantial compliance argument advanced by plaintiff, but adopted an equitable estopple test to prevent plaintiff from suffering the ultimate sanction.
*Hernandez v Stella*, adopted the *Konopka* rationale, citing *White v Karlsson*, a statute of limitations case.

In *Casinelli v Manglapus*, plaintiff again failed to file the required certification. This time, the Appellate Division adopted a 'substantial compliance' test to stave off the dismissal of plaintiff's complaint. The Supreme Court granted certification, and on September 22, 2004 pulled the few remaining fangs out of the time requirement of the statute. The court found the "physician certification is neither a fundamental element of the AICRA cause of action nor analogous to a pleading and therefore, that neither dismissal with nor without prejudice is compelled. Rather we view the late filing of the physician certification as akin to a discovery violation, with

*(Continued on page 14)*

(Continued from page 13)
respect to which the court may resort to any of a full panoply of remedies, ranging from an order to compel production through dismissal, depending on the facts."

Astoundingly, the Court does not even address the issue of the 60 day requirement, which is expandable by one, and only one, 60 day extension. Nor does it explain how a plaintiff may cure a failure to timely file the certification if more than 120 days have passed since the filing of the answer. Regardless of *Casinelli*'s deficiencies, and absent any legislative amendments, it is clear that from here on out, the physician certification will be treated simply as Answers to Interrogatories or a Notice to Produce.

ECONOMIC LOSS:

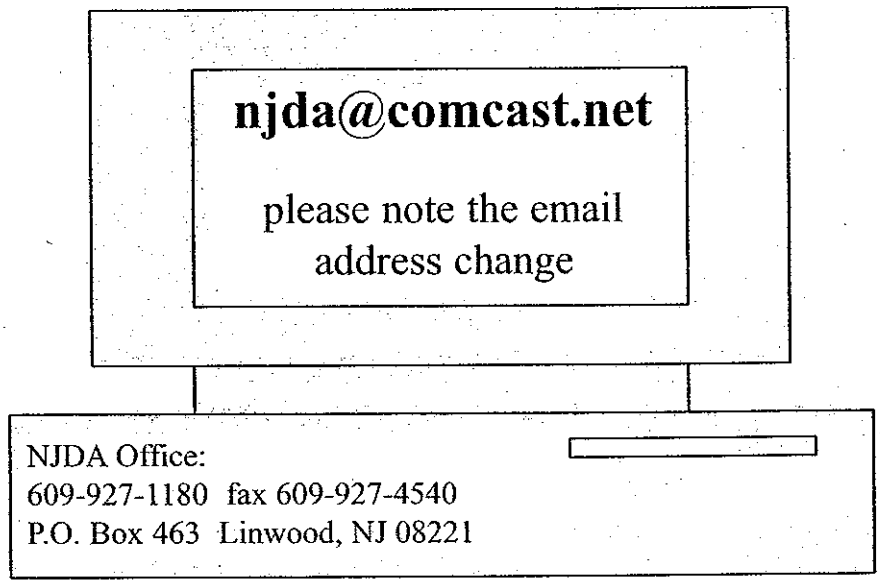
AICRA amended the old definition of 'economic loss' to include medical expenses. The plaintiff's bar immediately began to assert that co-pay and deductibles were now recoverable as damages. On October 12, 2004, the Appellate Division decided *D'Aloia v Levy*, which spoke directly to that issue. While acknowledging AICRA's specific inclusion of medical expenses under the rubric of 'economic loss", the *D'Aloia* court found that the amendment did not alter the basis upon which *Roig v Kelsey*, had been decided by the Supreme Court (that such amounts are not admissible under NJSA 39:6A-12). "We are persuaded that, with respect to the recovery of PIP co-payments and deductibles, neither the purpose nor the essential wording of the statute has changed. Whether a plaintiff is covered by the verbal threshold or the "no threshold" option NJSA 39:6A-12 continues to bar lawsuits to recover PIP co-payments and deductibles." *D'Aloia* was approved for publication on October 12, 2004.

CONCLUSION:

As with the physician certification issue in *Casinelli*, soon we will have the Supreme Court's ruling on the subjective prong issue. For good or ill, it will settle the matter once and for all. That is, until the Legislature decides to tinker with the statute again.

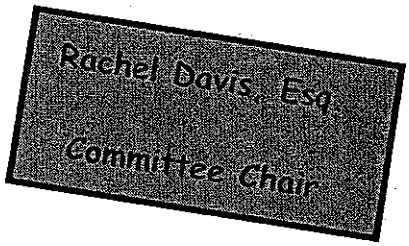
Mr. Cinti is with the Law Offices of Patricia McGlone.

Mr. Mitchell is with Green, Lundgren & Ryan, Esq.



# 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 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 Co-Chairperson: David Uitti*
*Publications: Mark Saloman*
*Membership: Ed Fanning*

## Annual YLC Holiday Party

Monday, December 20, 2004
at
Porzio, Bromberg & Newman in Morristown. NJ
Cocktails at 6 p.m. with dinner following at 6:30 p.m.
The cost is $25 per person.
Donations will also be collected for the Market Street Mission.

# DRIVING IN NEW JERSEY - RISKY BUSINESS

## Brian O'Toole, Esq.

New Jersey is one of only several states that does not have some form of conditional driver's license to allow people to work during their license suspension period. As we all know, New Jersey has very limited public transportation and is the most densely populated state in the nation. As a result, people who lose their licenses for any substantial period of time are faced with the prospect of losing their jobs. As a Municipal Judge, I regularly have people tell me that they would willingly pay any fine, no matter how great, if they could keep their licenses. The collateral damage the motor vehicle defendant suffers is the impact his sudden loss of income has on his family. It is also reasonable to believe that with motorists experiencing more difficulties in obtaining insurance, despite insurance company public relations to the contrary, and the lowering of New Jersey's legal alcohol limit to .08, that more citizens of New Jersey will be facing driving suspension in the future than at any previous time.

Of course, there is an element of the population that believes if people choose to drive without insurance or after consuming too much alcohol, that they deserve what they get. This is probably a valid argument with respect to repeat offenders, but it does not ring true as to first offenders. For a first offense driving without insurance, the mandatory loss of license is one year. For a first offense driving while intoxicated, the minimum loss of license is seven months. With the realities of public transportation in New Jersey, these penalties are more severe than penalties of much more serious criminal matters. It should also be noted that criminal defendants have rights to jury trials which are not afforded to motor vehicle defendants. The result is that New Jersey has an underground subculture of "motor vehicle outlaws" who have no choice but to drive illegally to support their families.

The answer is obvious, New Jersey needs a form of conditional license of employment only, at least for first offenders. Since this is not politically correct, the legislature has religiously avoided the issue. Nobody wants to be branded as being on the side of the drunks. But this begs the question of what about all the innocent people who suffer for no other reason than they happen to have a parent with a drinking problem. It would also be interesting to find out how many households who have a suspended driver are now collecting some form of state aid. Unfortunately, until some brave legislator asks the questions, we won't learn any of the answers.

As an aside, the Governor has recently imposed a $250.00 surcharge payable directly to the State Treasury for any person pleading guilty to N.J.S.A. 39:4-97.2, unsafe operation. The reason this statute was instituted several years ago was to give the driver the opportunity to plead guilty to a lesser driving offense which carried with it no motor vehicle points. The driver could then avoid a three-year surcharge, which has a minimum of $100.00 per year. With the new $250.00 surcharge this benefit has now been effectively negated. God forbid New Jersey motorists should catch a break!

Mr. O'Toole is a partner in the firm of O'Toole and Couch in Morristown, NJ.

# ARE WORK RELATED, SOCIAL OR RECREATIONAL ACTIVITIES COMPENSABLE?

## They are if an employee participates at their employer's behest.


### Stephen Banks, Esq.


An employee injured in a company softball game, recreational activity at a company picnic, or any number of company sponsored social activities now has an easier standard to create a compensable claim. The question being: was the injured employee compelled to participate?

**HISTORY**

Prior to 1979, there was no legislative boundary defining the compensability of an accident at a company recreational activity. The Workers' Compensation Act of 1911 awarded compensation for injuries or death from accidents arising out of and in the course of employment, so all injuries regardless of their origin fell within this broad definition.

In 1979, N.J.S.A. 34:15-7 was amended with the intent to limit or preclude claims originating from recreational or social activities. The final sentence of this Statute section is a recreational or social activity must be a regular incident of employment and produce a benefit to the employer beyond improvement in employee health and morale and be the neutral or proximate cause of injury or death.

The test for determining a compensable injury from a recreational activity is:

1) The recreational or social activity must be a regular incident of employment (AND)
2) The recreational or social activity must produce a benefit to the employer beyond improvement in employee health and morale.

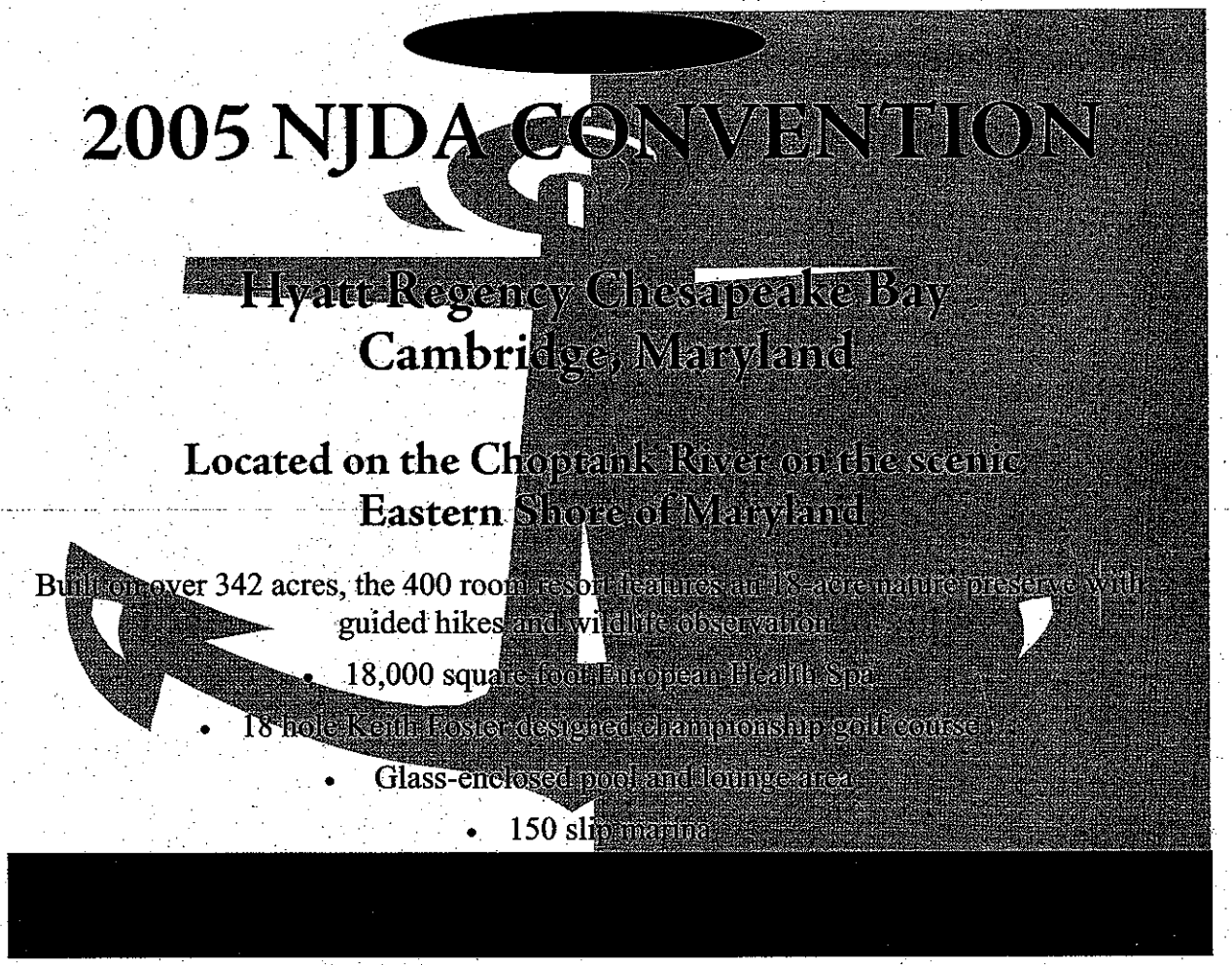
**ESTABLISHED CASE LAW**

Two well known cases interpreting these tests are: McCarthy v. Quest International, 285 N.J. Super. 469, 667 A.2d 379 (1995) and Quinones v. P.C. Richard and Sons, 310 N.J. Super. 63, 707 A.2d 1372 (1998).

McCarthy was a bookkeeper for Quest, which had just purchased an existing company and sponsored a picnic during business hours to introduce the now merged employees. McCarthy asked if she could not attend, and she was told it was mandatory and her salary could be deducted if she did not. During the picnic, the President of her company asked her to participate in a tug of war, which resulted in her suffering a physical injury. The Court determined "that the Statute did not provide for different treatment, when an employee is ordered or assigned to participate in the activity" Id. at 470. However, under application of the two statutory tests, this event was an incident of employment as everyone was required to attend. And, by introducing the employees of these companies, a benefit was derived over the improvement of mere morale.

In the inverse, Quinones, 310 N.J. Super. 63, 707 A.2d 1372 (1998), was injured in an arm wrestling

*(Continued on page 20)*

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