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New Jersey Defense

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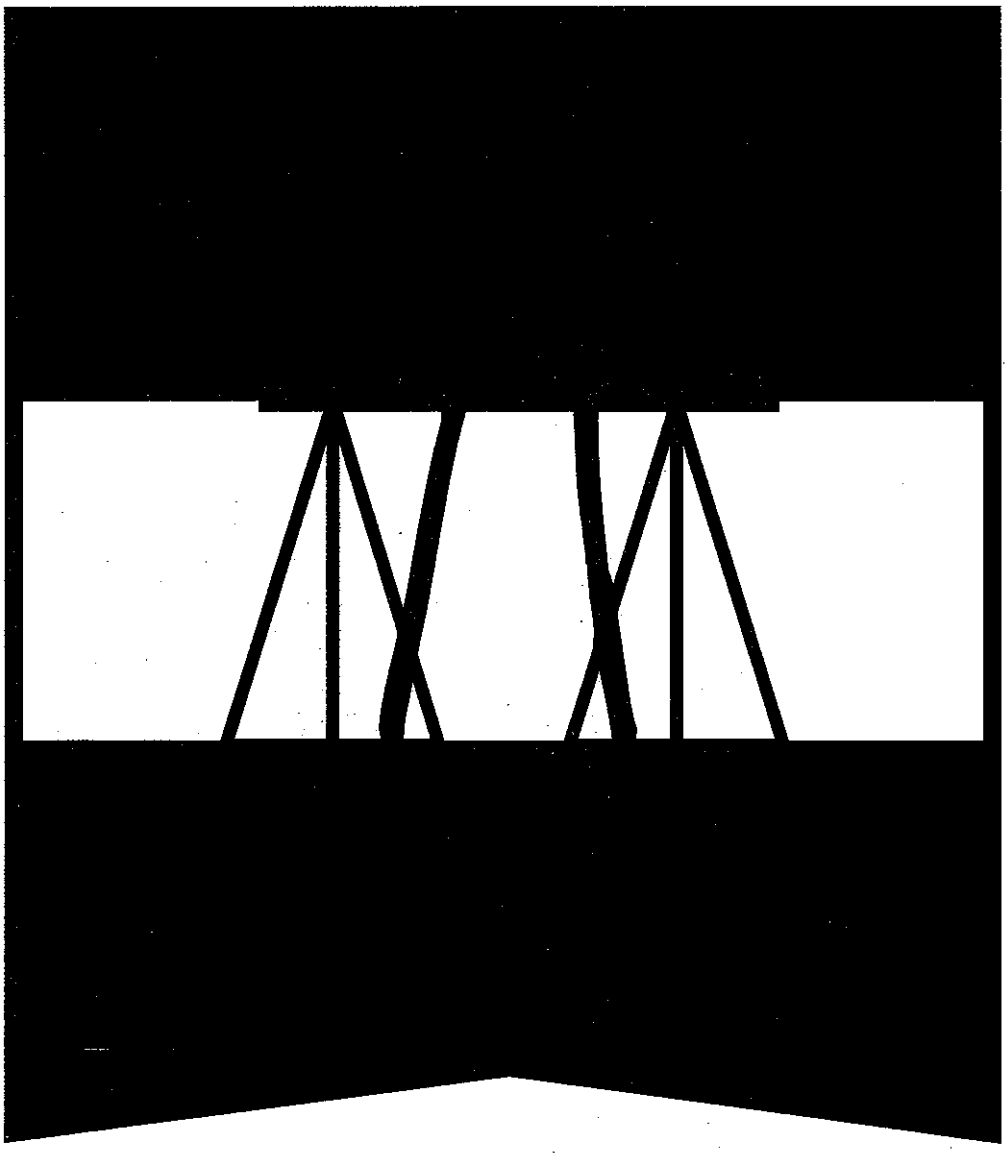

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CHAIRMAN OF THE BOARD'S MESSAGE

Philip R. Lezenby, Jr., Esq.

As I write this I am looking out my hotel room window at the Choptank River as it meanders down to the Chesapeake Bay. The Hyatt Regency Chesapeake is the site of our just competed Thirty-ninth Annual Convention. We will be returning to this resort for the 2007 Convention. I am certain that everyone who attended this gathering is looking forward to returning to this beautiful facility. The accommodations are spectacular. The setting is even more so. The seminars were entertaining and educational. I'm told the children's programs at Camp Hyatt were the best ever. The reception and dinner food was superb. Many thanks go to our travel agent, Claire Fitzgerald for letting Maryanne know about this place. Of course, I've taken full credit for the choice every time someone has come up to tell me how much they liked the place, which has been almost every time I've seen an NJDA member here.

As usual the young (and former young) lawyer seminar presentation on Friday was superb. The dynamic duo became a dynamic trio with the addition of Keith Jones to Bruce Helies and Steve Foley for Saturday's Case Law Update.

Friday, we had three presentations. The first was an update and strategy advice session on how to deal with plaintiffs' counsel attempts to stretch the Consumer Fraud Act beyond reasonable bounds and recognition. Members Keith Weingold and Dave Uitti are to be complimented as is Joe Aronds, member to be and our liaison to the New Jersey Corporate Counsel Association.

The second topic was federal preemption presented by David Sandoval & Elizabeth Brophy of Porzio, two lawyers who are superb additions to the roster of our Young Lawyers' Committee. The final presentation was the Mark Saloman & Rich Reig show on employment law. This has become an annual treat.

Of course the highlight of the Convention was the inauguration of Linda Pissott Reig as our fortieth President. Linda is a founding member of our Young Lawyers' Committee and the first of what will be many Young Lawyer alums to "move up the chairs". Anyone familiar with NJDA over the past several years is aware of Linda's tireless efforts, not only on that committee, but on numerous amicus efforts, and the initiative to the two corporate counsel associations which cover New Jersey. In addition to these initiatives, Linda has announced a diversity initiative to broaden our membership. Board member Joanne Vos has agreed to lead this effort and President Elect Art Leyden will be active in advancing it. Chuck Hopkins has already contacted DRI's Diversity Committee chair to solicit their assistance. It is clear that next year is going to be a good year for our organization.

Over the course of the Convention and in the days leading up to it I had occasion to hear commentary and to note that most of the time my cases, and I think, the cases most of us have on a day to day basis are not of earth shattering or great societal or constitutional importance. They are important only to the parties involved, for the most part. I recalled that I had recently read some biographical writing about a nineteenth century defense lawyer. The biographer noted that most of this lawyer's cases were of no great interest or consequence to anyone except the parties. In 1850, the lawyer had represented three defendants who were being sued for establishing an "unwholesome business", a lard factory, which was alleged to have been polluting the neighborhood. The lawyer lost, but kept the damages to a reasonable amount. He also represented a defendant on a debt. His client had paid a portion in cash and offered the balance in corn. Again, the defense lawyer was successful in keeping the verdict low. Not earth shattering cases.

The biographer noted that this defense lawyer did not push any consistent legal philosophy; nor did he leave behind a record of cases that made a major contribution to the development of American legal thought. He was, as his partner said accurately, "purely and entirely a case lawyer". While the partner did not say this as a compliment, the biographer thought this a fine thing to be.

Finally, the author noted that this was a lawyer never known to lie, who rejected the "vague popular belief that lawyers are necessarily dishonest", and who lectured that "...no young man choosing the law for a calling for a moment yield to this popular belief". If you cannot be an honest lawyer, choose another profession.

The defense lawyer was Abraham Lincoln. The words and stories cited are from David Herbert Donald's 1995 biography and can be found in Chapter 6 at pages 146 to 157.

Abraham Lincoln spent a substantial number of years as a defense lawyer and he was proud to be one. Sometimes, it is uplifting to remember in whose footsteps we walk.

Phil Lezenby

THE SUPREME COURT SPECIAL COMMITTEE ON PEREMPTORY CHALLENGES AND JURY VOIR DIRE

Philip R. Lezenby, Jr., Esq.

Last year, the Supreme Court appointed a special committee to review all aspects of the jury selection process as it existed in the New Jersey courts. Judge Joseph Lisa was named as Chair. Additionally eight current judges, two retired judges and eight attorneys were appointed to the committee. The attorney members represented various segments of the trial bar including prosecutors, public defenders, private criminal defense counsel, ATLA, Trial Attorneys of New Jersey and the New Jersey Defense Association. I was the representative for NJDA.

The Committee was charged to undertake a thorough review of the entire jury selection process from the time jurors came into a courtroom. A large part of the Committee's focus was on the substance and procedures for questioning a panel and jury challenges, both peremptory and for cause. The Committee met regularly as a whole and there were subcommittees, including one chaired by Judge Linda Baxter of Camden County whose task was to propose a set of standard jury questions for civil trials and for criminal trials.

An initial, significant part of the Committee's work was to survey the judiciary, court administrators and practicing attorneys to obtain data and opinions on current jury selection practices in the state. The constituent attorney groups surveyed their respective memberships. The NJDA survey was e-mailed to the membership. Approximately thirty-five individual responses were obtained. Some of these represented the experience and observations of multiple members of the same firm. The NJDA member response was at the same rate, in general, as the responses from the other bar groups. I prepared a summary of the survey responses which was given to all Committee members. In terms of how judges were conducting jury selection and the preferred practices, there was more consensus among the trial attorneys of various interests than there were differences.

The Committee Report was adopted and it was submitted to the Supreme Court on May 16, 2005. The Court issued the Report for public comment on June 16. The period for comment runs until September 15, 2005. I encourage NJDA members to comment.

The text of the Report can be found on the judiciary web site at njcourtsonline.com.

Comments may be e-mailed to Mailbox@judiciary.state.nj.us.

Comments may be mailed to:
Hon. Philip S. Carchman, JAD
Acting Administrative Director of the Courts
Administrative Office of the Courts
Hughes Justice Complex Box 037
Trenton, NJ 08625-0037

The Special Committee developed ten Recommendations which constitute its proposals for the jury selection process. The goal is to set minimum mandatory standards. The hope is to increase uniformity in voir dire throughout all courts in the state. It is not a goal of the recommendations to speed up jury selection. The conclusion, both from the surveys of judges, attorneys and court administrators and from the experiences of the committee membership was that jury selection was not taking undue time. Since the Report clearly states a preference for better informed decision-making in voir dire, there is probably a recognition that the process

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may, in fact, take longer.

I will now review and comment on the ten Recommendations. As above, all opinions are purely my own and are neither the official position of the NJDA nor an authorized statement of the Special Committee.

RECOMMENDATION 1: Jury Selection Standards

Standard 1: Voir Dire Method: "Thorough & meaningful inquiry into jurors' relevant attitudes so the court and counsel can identify jurors who may possess a bias, prejudice, or unfairness with regard to the trial matter or anyone involved in the trial."

No method of juror questioning may rely on a juror's memory of questions previously posed to other jurors. Each juror must be asked each question either individually or en banc. Thus, the group seated initially will be asked questions en banc with individual affirmative responses followed up individually, either at side bar or in open court as the circumstances indicate. When replacement jurors are seated in the box, they must be asked all questions, again en banc questioning if multiple replacements are seated at the same time is permissible. No longer is a judge simply to ask a new prospective juror if he/she heard the questions and would have responded differently to any of them.

Standard 2: Standard Questions

A model Civil Jury Questionnaire (as well as model Criminal Questionnaire) has been developed. The standard Civil Questionnaire also includes additional questions for automobile, slip and fall, and medical malpractice cases. If adopted, these model questions will be mandatory. They represent a minimum, required standard. Any judge may propose additional questions, especially if suited to the particular case in front of her/him.

In some civil cases, the parties may wish to expedite voir dire, perhaps because a case is close to or is going to settle, or the matters in dispute are focused or the value of the case justifies expediency, or any other reason. With the consent of counsel and the approval of the court this may be done and use of the entire Model Questions waived. This agreement must be done on the record. The comments to this Standard note that these cases are "private disputes" and the parties may have their own good reasons to abbreviate the process in a particular case, which the court should ordinarily accommodate.

Finally, each juror who gets through the initial screening must be asked one or more open-ended questions designed to elicit narrative responses and to provide counsel, the parties and the court with more information about jurors than is currently the case. (See the commentary following the mandatory questions for all civil cases.)

These standard questions were the result of numerous meetings of Judge Baxter's subcommittee. On behalf of the defense bar I had proposed some questions it was felt could reveal anti-insurance and anti-business bias. There were specific neutral bias questions already approved. There were also a limited number of questions intended to uncover pro "tort reform" bias. Initially, most of these "defense" questions were not added to the standard. However, when a draft of the proposed questionnaire was discussed with trial judges at the Judicial Conference, there were comments made about the absence of such questions. Judge Baxter presented this information to both the subcommittee and the full Committee. I was pleased when some additional questions were added to cover this concern. The final product, in my view, is a reasonably balanced questionnaire.

Standard 3: Supplemental Questions

Counsel are encouraged to submit relevant supplemental questions (in writing at the

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pre voir dire conference). The judge shall rule on the questions. The determinations shall be put on the record.

Argument and discussion of the proposed supplemental questions need not be on the record. But, when concluded, the judge is to put on the record his/her ruling on the requests.

The Report notes that particular judges may have a set of questions they ask in particular cases or circumstances. This practice is encouraged.

Supplemental questions proposed by counsel should be "balanced and neutral", and should not be geared to "conditioning" a jury to a party's position in the case. Judges are urged to reject submissions which are a "long list of boilerplate" questions many or most of which are "repetitive, of little significance or relevance" to the case. Thus the computer generated multi-page plaintiffs' "tort reform" questionnaire should always be rejected. In fact, a number of that type of question were considered and only a reasonably small number found their way into the Standard Questions. The Report notes that proposed supplemental questions should be tailored to the facts and issues of the particular case.

Standard 4: Attorney Participation

If counsel request, at the discretion of the trial judge, at least some participation by counsel in questioning of the jurors should be permitted.

Very few attorneys who responded to the surveys asked for, and the Committee clearly is not in favor of a New York type system of voir dire. However, some increased attorney participation in questioning would be permitted. It is envisioned that this would be predominately in follow-up questioning of a single juror's response to a given question, with this occurring most often, but not necessarily exclusively, at side bar. Greater restraint is placed on attorney involvement in initial questioning. While not forbidden, it is expected that this would be unusual.

Standard 5: Challenges for Cause

Excuse a juror for cause, either sua sponte or upon request of counsel if "it appears it will be difficult or impossible for the juror to be fair or impartial".

While this standard seems little or no different from current practice, the Report clearly does contemplate a significant difference in challenges for cause, with an expected increase in the number of jurors excused for cause than is currently the case in some court rooms. Judges are encouraged to exercise "liberality" in ruling on cause challenges. Follow-up questioning of jurors who have answered in a way that raises the possibility of bias or unfairness should be probing and designed to "ferret out" the ability or inability to be fair and impartial. Judges are to evaluate the reliability of the juror's answer in light of his background, demeanor and the other answers the juror has given. The use of the conclusionary, perhaps suggestive question of "despite that do you feel you can be fair and impartial" is discouraged.

RECOMMENDATION 2: A Standing Committee on Jury Selection should be established by the Supreme Court.

RECOMMENDATION 3: A Jury Selection Manual should be drafted.

This should be done in a "cooperative" way by judges & attorneys and be updated as practice evolves. It should serve as a reference source for judges & attorneys.

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RECOMMENDATION 4: The Standing Committee on Jury Selection will be responsible for proposing any changes to the standard voir dire questions.

RECOMMENDATION 5: A jury selection training program should be instituted for judges including continuing education programs.

RECOMMENDATION 6: The Standing Committee will develop a jury selection training program for lawyers.

RECOMMENDATION 7: Change to R. 1:8-3(f)

The bulk of the changes are discussed above in the Supplemental Questions section. Questions are to be submitted in writing. As noted the judge is to express her/his rulings on the record. Reasons for rejecting proposed questions would include relevancy, undue prejudice or inflammatory matter, undue intrusion into jurors' privacy or repetitive nature. The requirement to place rulings on the record includes a ruling that a proposed question will be asked despite the opposing party's objection.

RECOMMENDATION 8: Reduction of Peremptory Challenges in Criminal Trials.

The proposal is eight peremptory challenges for the defendant and six for the prosecution. With multiple defendants, it is for four for each defendant and three per defendant for the prosecution. Both the defense and prosecutorial bar are strongly opposed to this significant reduction

RECOMMENDATION 9: Reducing the Number of Peremptory Challenges in Civil Cases:

The proposed Recommendation is to reduce the number from six to four in civil cases. Parties which are represented by the same attorney shall be deemed one party for thepurposes of this rule (Revised R.1:8-3 (c); NJSA 2 B:23-13a.).

See Recommendation 10, which deals with the number of challenges in cases in which multiple parties are represented by different counsel, but have a substantial "identity of interest" on one or more issues. The report is forthright in admitting that opposition to the reduction was unanimous among the attorney members of the committee. Support for the reduction was overwhelming among the judges on the Committee and the members of the judiciary who responded to the opinion survey.

Attorneys believed that there was no showing that there was any problem with the current number of peremptories. The surveys all showed that it takes between one and a half to two hours to select a jury in the routine two party civil case. Further, the data showed that not all peremptory challenges were used in most trials. Attorneys noted the strong desire to keep at least one challenge in the quiver and noted that there were, not infrequently, cases in which all challenges were used.

The reasons given for the reduction were as follows:

1. A reduction in peremptories will substantially reduce the number of persons who will have to be summoned for jury duty. My purely personal opinion is that the size of this reduction is highly overestimated. On average now the surveys indicate that for attorneys in standard type cases the number of challenges actually used are about three plus per side. I would contend that if counsel has four challenges instead of six, he or she will still use three plus. I concede that there will be cases in which fewer jurors will be challenged peremptorily than at present.
2. Reducing the number of peremptory challenges will enhance the "credibility of our system of administering justice by curtailing the 'turnstile' process by which juror after juror deemed acceptable by the court, is dismissed by the attorneys for no apparent reason."
3. New Jersey did not reduce the number of

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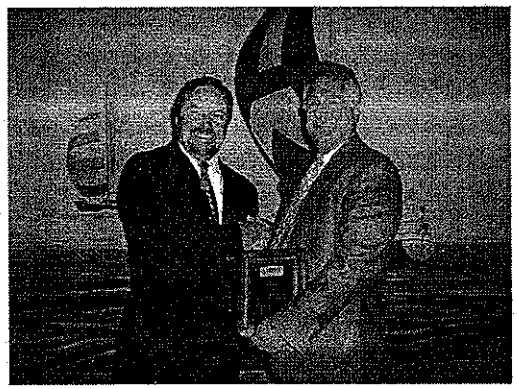
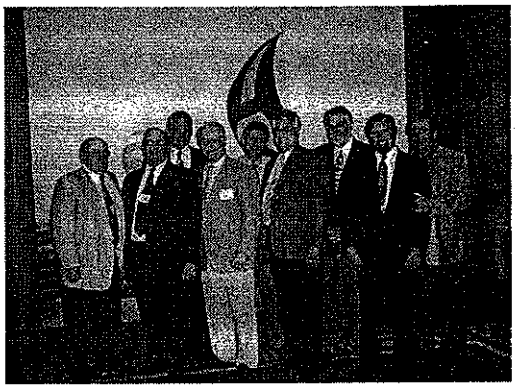
NJDA CONVENTION PHOTOS

Phil Lezenby presenting gavel to President Linda Reig

Brian O'Toole presenting the NJDA service award to Phil Lezenby



Chuck Hopkins presenting DRI Exceptional Performance award to Phil Lezenby



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Joe Garvey, Linda Garvey, Colleen Ellis, Roger Ellis, Kathy VanDyke, Peter VanDyke

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NJDA CONVENTION PHOTOS

additional photos available at www.njdefense.com

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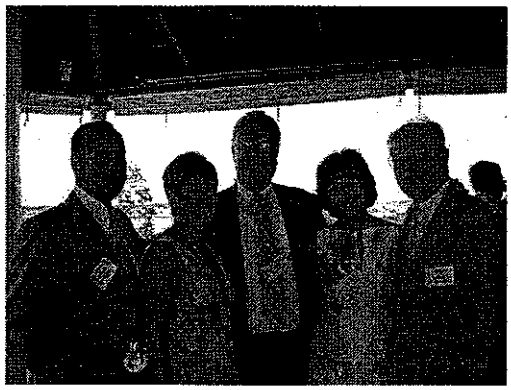
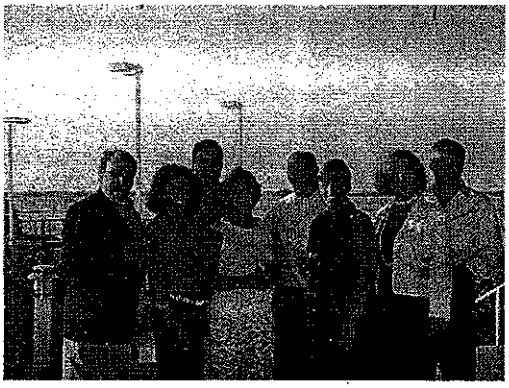
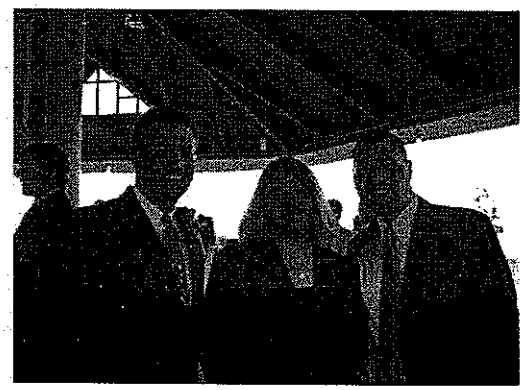


Chuck Corrigan, Pam Corrigan, Phil Lezenby, Evie Powers, Bill Powers

Mario Delano, Michelle Delano, Steve Foley, Betsy Kaplan, Pat Cernigliaro, Mike Cernigliaro



Brian O'Toole, Patti Couch, Kevin Couch, Sunny O'Toole, Kevin DeCoursey, Lenore DeCoursey Charlene Conrad, Alan Conrad



Mark Saloman, Joanne Vos, E.J. Kilpatrick

Kim Leegan, Mike Leegan, Joe Aronds, Mary Aronds

IT AIN'T BROKE

Brian O'Toole, Esq.

From time to time, I see articles criticizing the operation of the municipal courts. The argument that is proposed is that this caseload should be handled in the Superior Court, by a Superior Court Judge. The rationale is that this would take local politics out of the selection of municipal judges, thus eliminating what might be perceived as a built-in conflict a municipal judge might have because of his relationship with the local police. The critics believe the Superior Court would be more effective in handling these cases and create a greater sense of fairness in the eyes of the public.

The primary fallacy with these arguments is the misnomer that the Superior Court could actually handle the voluminous municipal court caseload. The municipal courts in our major cities dispose of thousands of cases each month and even the smallest municipal jurisdictions handle well over one hundred cases per month. The municipal courts are also bound by the Supreme Court's "60 day rule" which requires all traffic matters to be disposed of in 60 days. Based upon the existing structure in Superior Court, it seems impossible that this system could handle doubling and probably tripling their caseload and resolve 75 % of these (the traffic matters) within 60 days. Obviously, the number of Superior Court Judges would have to be significantly increased and each new Superior Court Judge would have to carry the load of six municipal court judges to make the economics balance out, based on present average municipal court judge's salaries.

The issue concerning the politics involved in selecting Judges is really a moot point, in that all Judges in New Jersey are selected, at least partially, for political reasons. This explains the phenomenon that almost half of our appointed Superior Court Judges have absolutely no courtroom experience when they are selected.

On the perception of fairness, there probably are instances in which a very small percentage of municipal court judges might lean the state's way for job security reasons. This is overwhelmingly counterbalanced by the vast majority of municipal judges who just try to do the right thing. There is no doubt that the municipal courts are the "people's court," since 90 percent of the public never gets exposed to higher courts. The fact that municipal court is venued locally and accommodates the public by convening after working hours are decided plus factors in their public image, since a substantial number of tickets written are against local residents.

Another issue which really gets very little ink, but is worth consideration, is the jury trial option in drunk driving cases. Since New Jersey is one of only six states that has no type of conditional work license, conviction on a drunk driving charge can deprive a citizen of his license from 3 months to 10 years or more. In a state with little mass transit, this can translate into a lost job. Obviously, with stakes this high a defendant logically should have the right to a jury trial. This would add considerable trial time and the expense of over one thousand jury trials to the Superior Court case load. An addition which might cause the current system to break down. Obviously, the far simpler remedy is a conditional work license, but given the lack of backbone presently found in New Jersey legislators, the chances of this occurring are doubtful. In the meantime, it is not realistic to believe our present court system can accommodate drunk driving jury trials, no matter how much the public deserves this privilege.

NJDA LETTER TO COMMITTEE ON OPINIONS

Philip R. Lezenby, Jr. and Mark A. Saloman, Esq.

July 19, 2005

Ms. Lynne Houston
Administrator, Committee On Opinions
Counsel's Office
25 Market Street
P.O. Box 964
Trenton, New Jersey 08625

Re: Nardello v. Township of Voorhees
A-1811-03T2 (App. Div. April 4, 2005)

Dear Ms. Houston:

We write on behalf of the New Jersey Defense Association to respectfully oppose the recent requests for publication of the above referenced opinion. Contrary to the opinions expressed to the Committee on Opinions by certain members of NELA-NJ, the *Nardello* opinion fails to satisfy any of the criteria for publication identified in *R.* 1:36-2(d). Indeed, that opinion respectfully contradicts the litany of published and unpublished decisions which address the threshold proof requirements of New Jersey's Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* § 34:19-1, *et seq.*

The New Jersey State Legislature enacted CEPA "to protect from retaliatory action employees who 'blow the whistle' on organizations engaged in illegal or harmful activity." *Young v. Schering Corp.*, 141 N.J. 16, 23 (1995). The CEPA plaintiff has the initial burden of establishing, by a preponderance of the evidence, a *prima facie* case of retaliation by demonstrating: (1) an objectively reasonable belief that his employer violated a law or rule or regulation promulgated by law, or committed a fraudulent or criminal act, or acted in a manner incompatible with a clear mandate of public policy; (2) that he objected to or refused to participate in the subject activity, policy, or practice; (3) that he suffered an adverse employment action; and (4) a causal connection between the whistle-blowing activity and the adverse employment action. *See Cosgrove v. Cranford Bd. of Educ.*, 356 N.J. Super. 518, 521 (App. Div. 2003).

Nardello essentially indicates that an employee can satisfy the third prong of his *prima facie* case by merely proffering that he was asked by his employer to perform personally objectionable tasks or that he was laterally moved by the employer to another area. The notion that a plaintiff could satisfy any part of his *prima facie* burden by relying upon such minor personal inconveniences undermines the foundation of CEPA and unduly expands its scope.

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Rather, New Jersey has historically recognized that CEPA is not triggered absent a completed action akin to discharge because "[t]he definition of retaliatory action speaks in terms of completed action. Discharge, suspension or demotion are final acts." *Hancock v. Borough of Oaklyn*, 347 N.J. Super. 350, 360 (App. Div. 2002) (citing *Keelan v. Bell Communications Research*, 289 N.J. Super. 53, 539 (App. Div. 1996)). *See also Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58 (1980) (retaliation claim not cognizable for minor disciplinary actions by employer; rather, only formal disciplinary actions impacting compensation or job rank).

This well-settled principle is entirely consistent with New Jersey's limit of CEPA claims to those involving more than purely private disputes between an employee and his employer. *See Maw v. Advanced Clinical Communications, Inc.*, 179 N.J. 439, 445 (2004) (CEPA claim dismissed where employee's refusal to comply with employer's requirement to sign proposed non-compete agreement was purely "private in nature"); *Dzwonar v. McDevitt*, 177 N.J. 451, 464 (2003) (employee's refusal to agree to "the concealment of information from the general [union] membership" does not implicate CEPA concerns); *Mehlman v. Mobil Oil Corp.*, 153 N.J. 163, 188 (1998) ("[T]he offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee."); *Whiting v. Computer Assocs., Inc.*, 2001 U.S. Dist. LEXIS 23539, at *11, n.4 (D.N.J. Aug. 20, 2001) (allegation that employer "violated an internal policy when it fired [plaintiff] for escalating issues to senior executives" dismissed because violation of employer's "own policy cannot serve as a basis for a CEPA cause of action."); *Smith-Bozarth v. Coalition Against Rape and Abuse*, 329 N.J. Super. 238, 248-49 (App. Div. 2000) (employee's disagreement with director of social service agency viewing confidential client files not protected); *Schecter v. Div. of Gaming and Enforcement*, 327 N.J. Super. 428, 434-36 (App. Div. 2000) (employee's "policy dispute" with agency decision not protected); *Young*, 275 N.J. Super. 221, 237 (App. Div. 1994) (CEPA "was not intended to provide a remedy for wrongful discharge for employees who simply disagree with an employer's decision, where that decision is entirely lawful."), *affirmed*, 141 N.J. 16 (1995); *DeVries v. The Neil Consumer Prods. Co.*, 250 N.J. Super. 159, 171 (App. Div. 1991) ("opposition to corporate policy provides an insufficient foundation" for wrongful discharge claim); *Warthen v. Toms River Community Mem'l Hosp.*, 199 N.J. Super. 18, 28 (App. Div.), *certif. denied* 101 N.J. 255 (1985) (discharge of nurse for refusing to administer dialysis to terminally ill patient upheld because nurse acted on her own "moral, medical and philosophical objections"); *Schaefer v. Campbell*, Docket No. A-6786-00T5, Slip Op. at 19, 21 (App. Div. June 17, 2002) (plaintiff had no viable claim because CEPA requires more than mere "policy difference" between employee and employer); *Mutch v. Curtiss-Wright Corp.*, Docket No. A-5454-00T2 at 30 (App. Div. June 17, 2002) (affirming dismissal of plaintiff's CEPA claim because "private codes of conduct are not the equivalent of statutes or rules").

The very recent reported Appellate Division decision in *Klein v. University of Medicine and Dentistry of New Jersey*, Docket No. A-3070-03T2 (App. Div. April 20, 2005), a copy of which is annexed hereto, furthers these principles. Dr. Klein's contention that the conditional restora-

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tion of his clinical privileges at the defendant hospital was the functional equivalent of a suspension was flatly rejected by the Court. Following *Hancock*, as well as consistent precedent from other jurisdictions, *Klein* holds that "[t]he imposition of a minor sanction is insufficient to constitute a retaliatory action under the statute." *Id.*, Slip Op. at 23. That the *Nardello* decision is diametrically opposed to *Hancock* and *Klein* further justifies withholding its publication.

New Jersey's Supreme Court has made clear that "The legislative approach vis-à-vis a 'clear' mandate of public policy bespeaks *a desire not to have CEPA actions devolve into arguments between employees and employers* over what is, and is not correct public policy."). *Maw*, 179 N.J. at 444 (emphasis added). This expressed desire for clarity of all aspects of the CEPA cause of action should apply equally to the third prong of the *prima facie* standard. If, however, *Nardello* is published, future CEPA claims will undoubtedly "devolve into arguments" concerning the very nature of when a minor personal inconvenience becomes an adverse employment action. Such lack of clarity is counterintuitive to achieving the goal of clarity.

For these reasons, the New Jersey Defense Association respectfully urges the Committee not to approve the *Nardello* decision for publication.

On Behalf of the NJDA, we thank Your Honors for your consideration.

Respectfully submitted,

Philip R. Lezenby, Jr.
Philip R. Lezenby, Jr.
NJDA Chairman of the Board

Mark A. Saloman
Mark A. Saloman
Chair, Employment Law Committee

DEFENDING THE PEDIATRIC TRAUMATIC BRAIN INJURY CASE

Eric L. Probst, Esq.

Each year millions of Americans suffer non-penetrating, or closed, head injuries. Some of the individuals are children. When lawsuits result, they involve complex medical, academic, and legal issues. When the plaintiff is a child, the defense attorney faces numerous challenges in defending the matter. The purpose of this article is to explain discovery tools necessary to simplify and defend the pediatric traumatic brain injury ("TBI") lawsuit. These tools, though used in traditional personal injury cases, take on added significance because of the age of the child and the nature of the injury.

I. **Defining the Plaintiff**: The first step is to define the plaintiff. The term pediatric encompasses birth through adolescence. Age cannot be the exclusive defining factor because the child's status as a student also plays a role. Thus, the discovery tools explained below apply to the college student as well. More important, counsel must be aware of factors – race, socioeconomic background, family relationships, education, state of residence, and health – besides the child's age that influence the child's development. As a result, counsel must treat the pediatric plaintiff as a complex individual whose development is shaped by these factors.

II. **Defining the Type of Injury**: The next step is to define a "traumatic brain injury." A traumatic brain injury can be defined as an injury from any source that "disturbs or damages brain function." Brain injuries are caused by a variety of events: assaults, strokes, tumors, motor vehicle accidents, sporting event injuries, falls, workplace accidents, medical malpractice, and illicit drug use. While the cause of the injury is certainly important, the defense attorney also must understand and appreciate the impact of the injury on the child's brain function. To fully develop the defense liability and damage strategy, the attorney has to examine the child's pre-accident medical history and the injury's effect on the child's academic, cognitive, mental, and emotional development. The defense attorney – and for that matter the plaintiff's attorney – must treat the pediatric-plaintiff as a unique individual and not stereotype the child's injury based upon other closed-head trauma cases the attorney has litigated.

III. **Discovery Tools**

The discovery tools explained below are not specific to the pediatric brain trauma case. However, the age of the child and the nature of the injury alter the focus of the discovery requests that needs to be considered when defending these cases.

(1) Interrogatories: As in all personal injury cases, interrogatories are an invaluable first tool to discover the basic information about the plaintiff: age, address, schools attended, pediatrician's name, identities of treating doctors and hospitals, pharmacies used by the family, employers, and the family's medical, academic, and employment history. The identities of medical, academic, and employer providers are needed to facilitate the collection of medical records.

(2) Medical Record Collection: The defense attorney must obtain every medical record prepared about the child. There are several goals of medical-record collection: to develop alternative causation theories, to identify witnesses to depose, and to build a plan to minimize damages. Using HIPAA-compliant authorizations, the attorney must send requests to every pediatrician, family doctor, hospital, and specialist who treated the child. Pediatrician records are an invaluable source of information for several reasons: (1) the records track the physical, emotional, and mental development of the child from birth to the event; (2) the records contain reports from specialists, allowing the defense attorney to obtain records directly from those providers; (3) they document any post-accident sequelae and the child's academic performance; and (4) the re-

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cords also reveal whether the child underwent diagnostic testing to allow counsel to obtain the films.

The medical record collection efforts should not be limited to the child. The mother's OBGYN records could reveal important information. Similarly, the medical records of the parents and siblings may be needed if a congenital abnormality is suggested as the cause of the event. The best approach is not to foreclose any avenues of potentially discoverable information.

(3) Academic Records: Academic records are vital to the defense of the pediatric closed head injury case. Records from nursery school through college should be obtained through an academic authorization. Because privacy interests are implicated, attorneys should consult the Federal Education Rights Privacy Act.

Academic records are more than report cards – the entire academic file has to be requested. The academic file will contain achievement and IQ test results, report cards, and notes from teachers and other school personnel. With head injuries, the potential for an impact on academic development and abilities is real. The child may be in a special needs class or require additional tutoring and monitoring. The school may have developed an Individual Education Plan ("IEP") for the child. An IEP is a written description of the child's special education program and can reveal the significance of the injury's impact on the child's cognition. The IEP also will reveal names of additional fact witnesses to interview or possibly depose.

Pre-accident and post-accident report cards and achievement test results must be compared to evaluate the effects of the injury. A post-event decline in grades in a certain subject may reveal whether the injury caused the drop. For example, the left hemisphere of the brain controls language. An injury to this area will affect the child's performance in language arts and spelling. If the language arts grades of the child have suffered post-incident, but the brain injury is isolated to the right hemisphere, another explanation, possibly unrelated to the event, may exist to explain the drop in grades. Further, if the child's post-event grades have not suffered, the defense's damages case has improved.

Yearbooks should be requested from middle and high school students. The yearbook will reveal the child's hobbies and extracurricular activities, while identifying friends and teachers who can be interviewed and deposed.

(4) Employment Records: If the teenage plaintiff works, employment records should be obtained. These records often contain policies and procedures the teenager-employee had to review and consent to before working, demonstrating the teenager's ability to understand and appreciate important safety information. The defense can use the records to bolster an argument that the event did not significantly affect the child's cognitive functioning. Further, supervisors and co-workers also are viable candidates for an interview or deposition.

(5) Depositions: Depositions of some witnesses will be needed. The record review should reveal potential deponents: mother, father, child, relatives, babysitter, friends, teachers, coaches, guidance counselors, family friends, neighbors, doctors, nurses, EMTs, and pharmacists. However, once the witness has been identified, counsel should not rush to prepare the deposition notice.

Defense counsel should cautiously select deposition witnesses to avoid developing bad deposition testimony. The first question should be – "do I need to depose this witness?" The answer depends on who the witness is and the type of information they may possess.

At first blush, treating physicians may be attractive deponent selections. But their medical records may not contain sufficient facts to justify the time and expense associated with the deposition, or worse, contain bad facts plaintiff's counsel can develop on cross. To circumvent the problem, the defendant can have its defense expert rely on

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PERSONAL LIABILITY OF CORPORATE OFFICERS: WHO IS RESPONSIBLE?

Joanne Vos, Esq.

An issue which is currently being raised in various environmental matters is whether the responsibilities and authorities conferred upon a particular corporate officer rose to a sufficient level of "corporate accountability" to effectively hold him personally liable for penalties assessed against his employer by the Department of Environmental Protection.

Generally speaking, personal liability for corporate penalties may be imposed upon "corporate officers," or "key employees" who are in control of the events that result in the violations. See New Jersey Department of Environmental Protection v. Camden Asphalt and Concrete Co., Inc., No. A-6786-02T5, July 15, 2004. A "key employee" is defined by N.J.S.A. 13:1E-127 (commonly known as the Solid Waste Management Act) as,

> any individual employed by the applicant, the permittee or the licensee in a supervisory capacity or empowered to make discretionary decisions with respect to the solid waste or hazardous waste operations of the business concern but shall not include employees exclusively engaged in the physical or mechanical collection, transportation, treatment, storage, transfer or disposal of solid waste or hazardous waste.

Although there is no bright line rule, the seminal case which guides the courts in determining whether personal liability of a corporate officer is appropriate is State of New Jersey, Department of Environmental Protection v. Standard Tank Cleaning Corp., 284 N.J. Super. 381 (App. Div. 1995). Succinctly stated, the Standard Tank Court held that in order for a corporate officer to be held personally liable for violations, it must be demonstrated that the corporate officer had "actual responsibility" for the condition resulting in the violation. Specifically, the Court discussed the concept of the term "responsible corporate officer" as applied by the U.S. Supreme Court in United States v. Dotterweich, 320 U.S. 277 (1943). The Standard Tank Court posited as follows:

> ...an individual may not be held liable for a Corporation's violation of the WPCA simply because he or she occupies the position of corporate officer or director. Instead, there must be a showing that a corporate officer had actual responsibility for the condition resulting in the violation or was in a position to prevent the occurrence of the violation but failed to do so. Stated another way, we ...impose liability upon ***only corporate officers who are in control of the events that result in the violation. Absent such a showing, a corporate officer cannot be said to be "responsible" for the violation.*** (Emphasis added)

In its agreement with the Commissioner's interpretation of "responsible corporate officer," the Court in New Jersey Department of Environmental Protection v. Camden Asphalt and Concrete Co. and Albert Pangia, Jr., No.A-6786-02T5, July 15, 2004, followed the reasoning set forth by the Standard Tank Court. In the Camden Asphalt case, a finding of joint and several liability for DEP penalties against Camden Asphalt and Albert Pangia, Jr., the President of Camden Asphalt, was affirmed. In affirming the determination of personal liability with respect to Pangia, the Court adopted the Commissioner's interpretation of "responsible corporate officer" as follows:

> Standard Tank...establishes that an individual may not be held Liable for a corporation's violation of law simply because he or she occupies the position of corporate officer or director. Status alone will not necessarily determine liability. Thus, for example, the treasurer of a

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the record and testify about the records' salient findings.

Additionally, defense counsel should consider whether plaintiff will subpoena the witness to testify at trial. In out-of-state plaintiff cases, the chances are remote a teacher, doctor, or employer will testify in court; thus, a deposition may not be needed at all. Likewise, if the testimony is potentially damaging, counsel can interview the witness before deciding whether a deposition is needed. For in-state plaintiffs, each treater may need to be deposed.

Finally, the witness should not be deposed for deposition's sake. Deposing the witness to just obtain information is not wise — counsel must have a plan to obtain facts needed for causation and damages theories and for direct or cross-examination purposes at trial.

Having decided to depose the witness, counsel must then devise a deposition strategy. Deposition goals are important and tailored to each witness; the witness cannot simply be deposed to find out what he knows. Several goals for the TBI deposition are:

- Obtain the child's pre-event history: The child's pre-incident medical, academic, and employment histories are needed to build alternative causation theories, to assess damages, and to identify additional fact witnesses.

- Obtain the child's family history: The medical, academic, and employment histories of the child's family members are needed from parents and grandparents. The testimony will reveal possible alternative explanations for the injury and provide a forecast of academic and employment success because a parent's academic success is a strong indicator of the level of education the child will obtain.

- Assess the child's jury appeal: The child must be deposed for several reasons. First, counsel can evaluate the child's potential jury impact. The deposition can provide the defense attorney – and in turn the client – with a different perspective of the injury beyond medical records. This view can assist with settlement strategy.

- Convert the physician into a defense witness. Not all pediatric TBI cases are defense nightmares. The pediatric brain is more resilient to trauma than the adult brain and can compensate for an injury. Post-event medical and academic records may reveal that the child has little or no physical or cognitive limitations. Physicians and teachers can be turned into "star" damages defense witnesses by testifying about the child's recovery and academic success.

- Assess the damages case: Each witness, including the child, can reveal important damages testimony. When deposing the child, the defense attorney needs to talk to the child, as if his own, and learn what goes on in the child's life – from friends, to school, to pets, to hobbies. Counsel must have the witnesses describe the effects of the injury on the child.

(6) Experts: Pediatric TBI cases are expert-intensive. Type, quality, and quantity are issues the

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defense attorney must consider. The threshold issue is the type of expert to retain.

a. Type of expert: The type of expert is influenced by the two phases of litigation: liability and damages.

(1) **Liability**: TBI cases are first and foremost brain cases. A pediatric neurologist must be retained, if possible, but at the least, a neurologist. A pediatric neurologist can better address the nuances of the developing child brain, and its ability to compensate for an injury, than an adult neurologist. If the child underwent surgery, a neurosurgeon should be brought onto the defense team. Ideally, again, a pediatric neurosurgeon should be the choice. A radiologist, or better yet, a neuroradiologist, should examine the films to determine the cause of the injury. If a prescription or over-the-counter drug is blamed, a pharmacologist should make the defense expert team. In traditional trauma cases – *e.g.* involving a blow to the head, or injury resulting from a motor vehicle accident – accident reconstructionists and engineers may be needed to refute plaintiff's theory of how the accident occurred.

(2) **Damages**: Damages experts implicate the quantity issue – are experts needed in every field to match the experts plaintiff has retained? The answer is yes, but with some qualification as there is no requirement that the defendant match every expert report served by the plaintiff.

At times, a plaintiff's expert's methodology, reasoning, and conclusions are acceptable to the defendant – the child's injuries are not severe or the value of the life care plan is conservative. Similarly, sometimes a defense expert cannot undermine his counterpart's conclusions without proving or bolstering the plaintiff's case. In these situations, the defendant has two options: 1) consult with the expert to prepare for cross-examination: or 2) have the expert prepare a report limited to challenging the plaintiff's methodology, interpretation of test results, and conclusions, without providing the plaintiff a basis for recovery. For example, the defense economist can point out the inconsistencies with the plaintiff's report, yet not calculate a lost wage claim. This exercise must be done for each expert.

Several damages experts may need to be retained. One expert is the pediatric neuropsychologist. These experts evaluate the injury's impact on the areas and functions of the brain. They administer tests to evaluate the effects of a TBI on IQ, verbal and abstract/visual reasoning, quantative reasoning, short-term memory, vocabulary comprehension, recall, problem solving, processing speed, and cognition. The testing also evaluates depression, anxiety, and malingering. The pediatric neuropsychologist also can examine academic records and administer an independent neuropsychology test if required.

The defense expert should critically examine the plaintiff's report. The defense neuropsychologist should approach the plaintiff's report in several ways: (1) has the plaintiff's expert administered age-appropriate and current versions of tests; (2) has the plaintiff's expert properly scored the tests (a request for the plaintiff's expert's raw data is required); (3) did environmental factors influence the test; and (4) did the plaintiff's expert omit tests that should have been administered.

After the defense neuropsychologist has undertaken this review, the expert and attorney have to determine whether an independent neuropsychological examination is needed. The decision will turn on whether the expert believes the plaintiff's neuropsychologist's testing and scoring were accurate, valid, and proper, and a favorable result will be achieved by examining the child. In jurisdictions like New Jersey, a plaintiff will be entitled to discover the expert's findings even if the neuropsychologist does not serve a report. In these jurisdictions, counsel must carefully weigh the decision to conduct an independent medical examination.

Another expert to consider retaining is a life care planner. A life care planner (LCP) "provides a comprehensive summary of the therapeutic modalities, education, attendant care services, medical follow-up, equipment needs, supplies, and medication for individuals with TBI." They serve as liaisons between the medical professional caring for the

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child and the third-party vendors who supply medical and other services the injured child needs. LCPs can be medical doctors, registered nurses, nurse practitioners, and rehabilitation professionals. The LCP reviews the medical records, interviews the patient and doctors, and prepares a report or plan that outlines the services and equipment the plaintiff needs, with their purchase/replacement costs, and replacement schedule.

If the plaintiff retains a LCP, the defendant must retain one. The defense LCP should determine whether the plaintiff's plan is redundant, providing double and triple services. For example, the plaintiff LCP may provide for several yearly visits to a physiatrist, physical therapist, and pediatrician, when the pediatrician alone can provide the service. Similarly, the defense expert can determine whether the plaintiff's expert has inflated the cost of services, or, better yet, provided services not warranted by the medical records. Moreover, the plaintiff's plan may include medications taken before the event, and of which plaintiff should not recover the cost from the defendant. Finally, counsel should not hesitate to consult with its pediatric neurologist to determine if the services are medically appropriate to the injury.

Additionally, the defense LCP can advise counsel if the plan is conservative. In such a situation, the defense expert should consult for cross-examination purposes. A report should only be served when the plaintiff's expert has included redundant services and the cost of the defense LCP projected services is a floor the defense can accept.

A defendant may need to retain additional experts such as psychiatrists and economists. Depression is a common sequela of head trauma. Economists will be needed to calculate the cost of the life care plan to present value and to address a plaintiff's future-wage-loss claim. Again, the defense needs to be careful that the economist does not set a floor for a plaintiff verdict on damages.

b. Quality: Retaining well-credentialed experts is another important consideration. The potential for a significant settlement or jury verdict means considerable effort must be made when investigating experts. Quality also is dictated by the facts of the case. If the child underwent surgery, matching a defense neurologist against a plaintiff neurosurgeon could have a drastic impact at trial. Similarly, retaining a neuroradiologist to combat the plaintiff's neurologist's interpretation of the radiology films could favorably impact liability if the neuroradiologist can detect a brain abnormality the neurologist could not. As with all personal-injury cases, the well-traveled expert could undermine the defense when battling a phalanx of board

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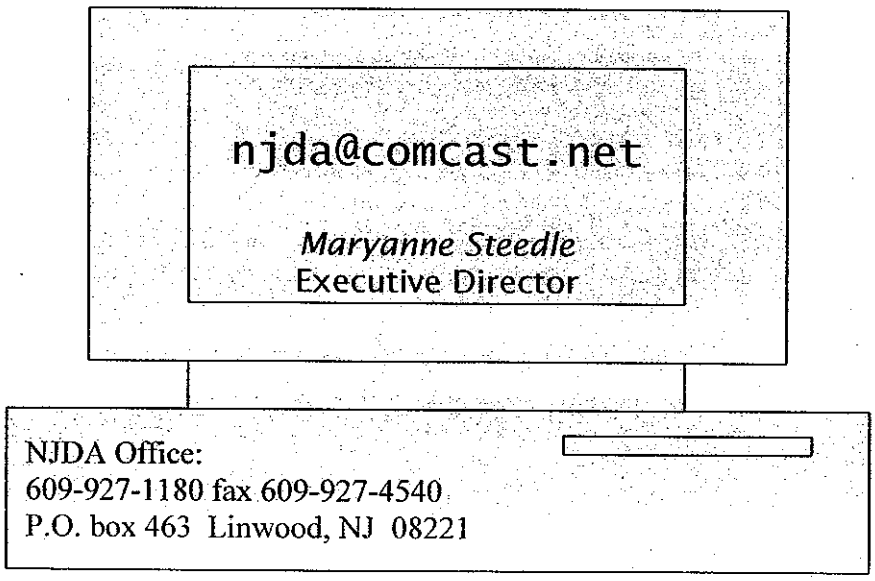

VERBAL RIP

John M. Cinti, Esq.

New Jersey's current incarnation of the Limitation on Lawsuit Threshold came into effect on March 22, 1999. That effectiveness ended on June 14, 2005 with the long anticipated release by the New Jersey Supreme Court of DiProspero v Penn (A-66-03) and Serrano v Serrano (A-99-03). Individually, either one of these cases would have seriously undermined the verbal threshold. Taken together, they have drastically altered the landscape of automobile negligence defense.

In DiProspero v Penn, the court considered whether the second or subjective prong introduced in Oswin v Shaw, 129 NJ 290 (1992), survived the revisions of the 1998 Automobile Insurance Cost Reduction Act (AICRA). The actual facts of the case are fairly straightforward. On November 30, 1999, plaintiff Christina DiProspero was involved in a car accident on the Rt. 73 traffic circle in Berlin, New Jersey. She allegedly developed neck and back complaints, and was diagnosed with TMJ and strain and sprain accompanied by ligamentous instability, myofascitis and "evidence of nerve root irritation." The chiropractor also read cervical, thoracic and lumbar MRIs and noted the "discs seem[ed] to be bulging." Both the chiropractor and the dentist certified that plaintiff's injuries were permanent. On a motion for summary judgment, the trial court dismissed the complaint based on a lack of significant impact on plaintiff's life under James v Torres, 354 NJ Super 586 (App. Div. 2002), a case the Supreme Court refused to review, 175 NJ 547 (2003). The Appellate Division, in a 2 to 1 opinion (Judge Weissbard dissenting), affirmed the trial court's decision, and plaintiff appealed to the Supreme Court as of right.

The Supreme Court spent several pages reviewing the torturous 30-year history of this State's no fault legislation, then turned its attention to various means of discerning the Legislature's intent in enacting the current law. Ultimately, the Supreme Court held that AICRA did not include the Oswin "significant impact" prong. Thus, plaintiffs need only prove that they fit within one of the six enumerated categories of NJSA 39:6A-8(a) to breach the threshold.

That same day, the Supreme Court released Serrano v Serrano. This was a review of an Appellate Court ruling, which admittedly refused to enter the fray over James, but instead imposed a new "serious injury" standard. Serrano arose out of an October 22, 1999 accident in Vineland, New Jersey. As a result of the accident, plaintiff alleged neck and back strain, and TMJ. X-rays and MRIs were negative. An EMG was positive for right-sided carpal tunnel syndrome (there was a prior history of impaired sensation to the right wrist). Plaintiff's doctor filed a permanency certification, regarding the neck and back injuries only. The trial court granted summary judgment based on plaintiff's failure to meet the subjective prong. The Appellate Division affirmed, based on the "serious injury" standard. The Supreme Court granted plaintiff's petition for certification.

In overruling the Appellate Division, the Supreme Court held that an injury meeting one of the six enumerated categories of NJSA 39:6A-8 (a) is "serious" by definition.

So where do we go from here? In the short term, the Appellate Division will be remanding to the trial level all the verbal appeals it had held pending resolution of DiProspero by the Supreme Court. Both DiProspero and Serrano are silent on the issue of retroactive application, but clearly those plaintiffs who had perfected their appeals will benefit from the newly articulated standard.

And just what defenses are left? Plaintiffs must still prove that they have sustained one of the following types of injuries identified in N.J.S.A. 39:6A-8a:

1. Death;
2. Dismemberment;
3. Significant disfigurement or significant scarring;
4. Displaced fracture;
5. Loss of fetus;
6. Permanent injury within a reasonable degree of medical probability.

Categories 1, 2, 4, and 5 are clear-cut, and not subject to a lot of debate (or litigation). The use of the term "significant" in category 3 will almost always result in a jury question. That leaves category 6 as the most likely battleground.

Despite DiProspero's rejection of the significant impact prong, no change was made in plaintiff's burden of establishing within a "reasonable degree of medical probability" a permanent injury. "An injury

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shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment" N.J.S.A. 39:6A-8(a). The presence of a permanent injury must be established by "objective" proof. Significantly, in DiProspero, the Supreme Court made specific mention of the fact that the trial judge made no ruling on permanency.

In Jacques v. Kinsey, 347 NJ Super 112 (Law Div 2001) the court found that in order to pass the verbal threshold for a permanent injury, the plaintiff must demonstrate, "within a reasonable degree of medical probability" four factors:

(1) qualifying injury-plaintiff has a body part or organ which no longer functions normally;
(2) permanency-the body part or organ will neither heal nor function normally in the future even with further medical treatment;
(3) causation-the accident caused the injury to the body part or organ; and
(4) *objective clinical evidence*–the physician must rely on objective clinical evidence to support these findings

The Jacques court stated that a motion for summary judgment is resolved by focusing on the "objective clinical evidence" in support of plaintiff's claim. The plaintiff bears the burden of producing medically credible objective proof that the categories have been met. This standard explicitly requires that the medical conclusion may not be based on subjective accounts of pain; instead it must be based on objective clinical evidence. Oswin, Branca v Matthews, 317 F. Supp.2nd 533 (USDC-NJ 2004); Thompson v Potenza, 364 N.J.Super. 462 (App. Div. 2003).

AICRA also burdens plaintiff with the requirement to serve a Physician's Certification, attesting, under penalty of perjury, that plaintiff's injuries are permanent. In Casinelli v Manglapus, 181 N.J. 354 (2004), the Supreme Court held that failure to serve a Physician's Certification should be treated as a discovery violation.

Additionally, nothing in either of the two Supreme Court cases limits plaintiff's burden of comparative analysis articulated in Polk v. Daconceicao, 268 N.J. Super. 568 (App. Div. 1993) and Foti v. Johnson, 269 N.J.Super. 198 (App. Div. 1993).

Only time will tell what effect DiProspero and Serrano will ultimately have on motion judges and, more importantly, on juries. For the foreseeable future, this much is likely; a lot more marginal cases will get filed, and a lot more will survive the return date of a motion for summary judgment.

PEDIATRIC TRAUMA

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certified neurologists on the plaintiff's side. Finally, with the jury sympathy the plaintiff will attract an almost foregone conclusion, the defense experts must be skilled jury communicators and have an excellent "bed side manner" on the stand.

IV. **Conclusion**: These discovery tools are by no means exhaustive, but are fairly consistent considerations when defending a pediatric TBI case. At each step, the discovery tools will reveal to the defense attorney new facts, liability theories, and damages explanations that require additional witness investigation, depositions, and expert review. Not until the case is tried or settled can the defense attorney stop discovering the pediatric TBI case.

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peremptory challenges when civil juries were reduced from 12 to 6.
4. With a greater liberality in granting challenges for cause, reducing peremptories will not adversely affect fairness.
5. New Jersey is above the overwhelming number of jurisdictions in the number of peremptory challenges it allows.

A number of judges on the Committee were in favor of the elimination of peremptory challenges altogether. Of course these discussions preceded the United States Supreme Court opinion in Miller-El v.Dretke. This is the most recent opinion overturning a verdict on the basis of improper use of peremptory challenges on a racial basis. In his concurring opinion Justice Breyer called for the elimination of peremptory challenges. The New Jersey Committee report does say that allowing a "reasonable number" of peremptory challenges provides litigants with a "safety net" in the process and engenders confidence in their acceptance of the final verdict because they have been given a direct role in selecting those who will decide their fate.

One might question whether rejected jurors are going to feel better about the system when more are rejected for cause and less can blame it on the whims of attorneys. But the structure recommended by the Committee is for fewer peremptories and greater liberality (and respect for) objections for cause. I would again note that trial judges are admonished not to just seek the pro forma, "I can be fair" answer.

RECOMMENDATION 10: Peremptory Challenges in Multi-Party Cases

In cases in which there are multiple parties, represented by different counsel, who have a "substantial identity of interest in one or re issues", the court, on application of counsel may increase or decrease the total number of peremptory challenges as it deems appropriate to achieve fairness.

Under the current rule the court is permitted to give additional challenges to the adverse party. The proposal would allow this or, instead, a reduction of challenges allowed per party with identical interest. However, in no case shall a party have less than 3 peremptory challenges. This recommendation is made independently of Recommendation 9 to reduce the number from six to four.

The judge is still permitted to grant additional challenges to the adverse party and not reduce the other parties' number.

Counsel will have to aggressively argue whether there are truly identities of interest and not miss the opportunity to point out when there is an identity of interest between the plaintiff and one or more of the co-defendants. For example, where the case involves weak liability against a "deep pocketed" defendant, the plaintiff and the defendants with clear liability and low limits may be those with identity of interest.

In conclusion, I again urge all NJDA members to review the Report and to submit comments to the Court. It is my view that the overall thrust of the recommendations is positive and should result in trial attorneys and their clients having more information with which to evaluate potential jurors and more bases to challenge potentially unacceptable jurors for cause. While I disagree with the reduction proposed for the number of peremptory challenges, the proposal is not as Draconian as it could have been. Certainly, I was impressed with the dedication and effort of the Committee members and the willingness to hear all arguments and points of view. Overall, I do believe that much of the Committee's work will lead to improvements in the quality of jury selection in New Jersey.

CORPORATE OFFICERS

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> corporation, whose only job function is to arrange for corporate loans, will not be held personally liable for the dumping of toxic waste on the company's property even if he saw it happening, as long as he himself did not participate in the unlawful activity...(Emphasis Added)

Standard Tank also establishes that it is Plaintiff's burden to prove that Defendant was such a "responsible corporate officer." The Court instructed that,

> the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.

Standard Tank, at 402.

In evaluating whether the imposition of personal liability upon a corporate officer is justified, it must first be determined whether he had the responsibility and authority to either (1) prevent the violations which led to the penalties in the first instance or (2) to promptly correct those violations. As a threshold matter, if these questions are resolved in the negative, it cannot be deemed that the corporate officer had the requisite corporate "accountability" for the conditions which gave rise to the penalties.

NJDA Seminar Dates

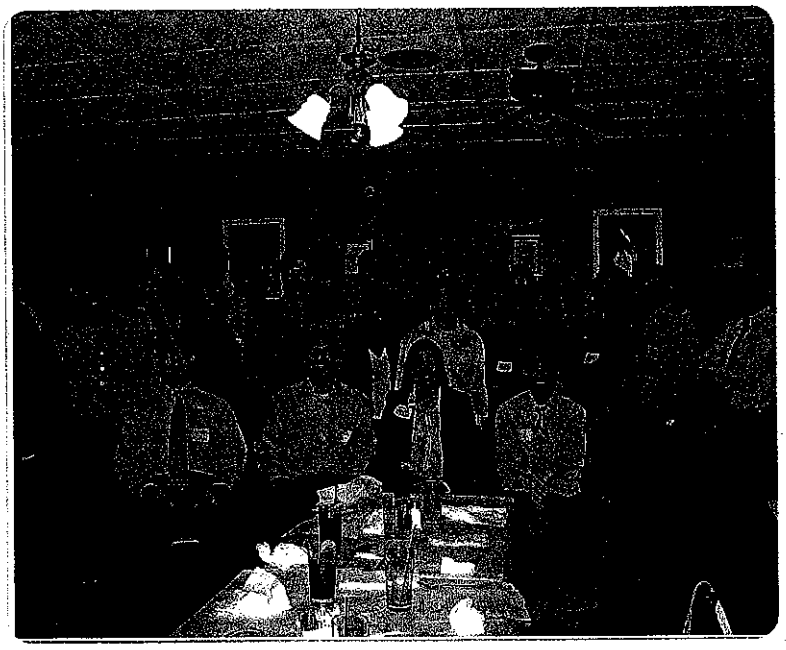
Friday, October 14, 2005
9:00 a.m.—12:30 p.m. Laurel Creek Country Club, Mt. Laurel, NJ
Employment Law Seminar
Co-sponsored with the Delaware Valley Corporate Association

Tuesday, November 22, 2005
9:00 a.m.—12:30 p.m. Hilton at Woodbridge, NJ
Electronic Discovery, Document Retention Policies & Alternate Dispute Resolution Seminar
Co-sponsored with the NJ Corporate Counsel Association

Young Lawyer Committee

Please contact Chairperson *Dave Uitti* for more information or to join the Young Lawyers Committee.
david.uitti@dechert.com
(609) 620-3200

The YLC hosted the annual NJDA Summer Associate Luncheon held at Clyde's in New Brunswick on July 20, 2005. As always, it was a smash success with attendees from Dechert, Porzio Bromberg & Newman, McCarter & English, Proskauer Rose, Hoagland Longo, and CNA.



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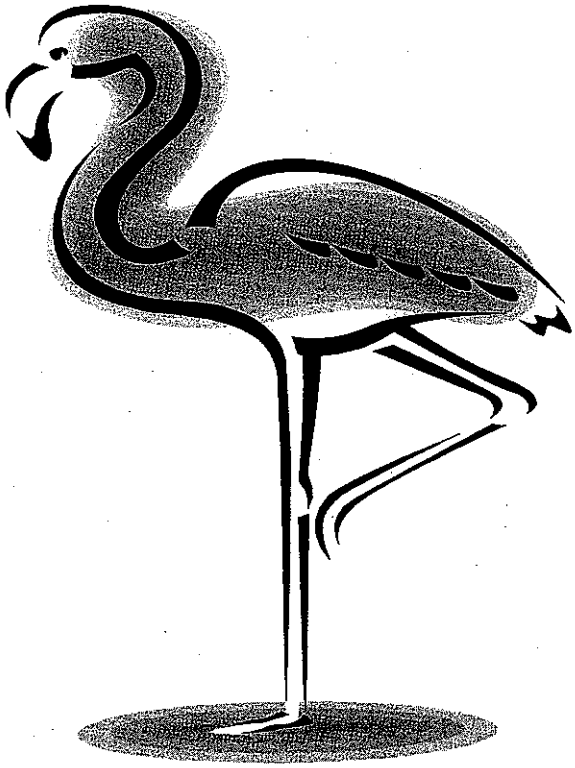

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