

## **MINUTES OF COMMISSION MEETING**

**July 15, 2021**

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Virginia Long; Commissioner Andrew O. Bunn; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

### **In Attendance**

Maeve Cannon, Esq., of Stevens & Lee, representing Mitchell International Inc.; Mark Setaro, Esq., Chair of the Workers' Compensation Executive Committee, of the New Jersey State Bar Association, Workers' Compensation Section; Craig S. Gumpel, Esq., of Craig Gumpel, LLC; and Paul L. Kleinbaum, Esq., of Zazzali Fagella Nowak Kleinbaum & Friedman, were in attendance.

### **Minutes**

In the "Preliminary Matters" section of the Minutes, Commissioner Bunn requested that the word "acts" be inserted after the word "notarial" in the second paragraph. With this modification, the Minutes of the June 17, 2021, meeting were unanimously approved by the Commission on the motion of Commissioner Bunn, seconded by Commissioner Long.

### **Workers' Compensation – Statute of Limitations**

Samuel Silver discussed a Draft Final Report proposing modifications to clarify the statute of limitations in Workers Compensation actions as discussed in *Plastic Surgery Center, P.A v. Malouf Chev.-Cadillac, Inc.*, 241 N.J. 11 (2020).

In *Plastic Surg. Ctr. v. Malouf Chev.-Cadillac*, the Court considered whether disputed medical-provider claims for payment of services rendered to injured employees were subject to a two-year statute of limitation or the traditional six-year statute of limitation under contract. The medical providers filed their applications for payment two years after the date of employees' accidents but six years from the claim's accrual under contract law.

Mr. Silver explained that the Appellate Division indicated that the statute does not limit the dispute of medical provider claims to a two-year statute of limitation. The Supreme Court affirmed the appellate division decision and invited the Legislature to address the statute of limitations.

On April 15, 2021, Commission released a Revised Tentative Report with proposed modifications. Outreach was conducted that included: the New Jersey State Bar Association; New

Jersey Council on Safety & Health; New Jersey Compensation Association; the New Jersey Department of Labor; the New Jersey Self-Insurers Association; Insurance Council of New Jersey; and several private practitioners. Mr. Silver thanked commenters Lisa Chapland, Mark Setaro, Ann DeBellis, Susan Stryker, Maeve Cannon, and Richard Rubenstein for providing staff with both their time and expertise.

Mr. Silver noted that among the commenters there is a desire for clear legislative direction regarding the time frame within which a medical provider must file an application for payment. In addition, there is virtually universal opposition to a 6-year statute of limitation. The majority of commenters favored a 2-year statute of limitation.

Mark Setaro, Chairman of Workers' Compensation Section of the New Jersey State Bar Association, thanked the Commission for bringing this matter to their attention and for the time and effort that the Commission invested in this project. He stated that the Commission has the unanimous support of the Workers' Compensation Section of the State Bar. This issue, he continued, is beneficial to both sides and although they continue to advocate a two-year statute of limitation, they also understand that the exact time frame is a policy determination best suited for the Legislature. Furthermore, he stated that he would be happy to work with the Commission to find a legislator to introduce the Commission's work before the Legislature and thereafter on the Governor's desk.

Maeve Cannon stated that she would rely on her previously submitted substantive comments and thanked the Commission for all of the work that had been performed in producing this report.

Chairman Gagliardi thanked the commenters for their participation on this project.

On the motion of Commissioner Bell, seconded by Commissioner Bertone, the Commission unanimously voted to release the work as the Final Report of the Commission on this subject.

### **Traumatic Event**

Arshiya Fyazi discussed with the Commission an Update Memorandum containing proposed changes to the draft statutory language of N.J.S. 43:16A-7 which were made in response to suggestions by commenters.

Ms. Fyazi stated that during the March 2021 Commission meeting, a number of commenters appeared and provided the Commission with their insights regarding the clarification of the term "traumatic event" as it is used in N.J.S. 43:16A-7. Each of these commenters was invited to provide the Commission's staff with proposed statutory modifications that they believed would clarify the accidental disability pension statute.

In response to the Commission's invitation, commenters representing New Jersey State Policemen's Benevolent Association (NJPBA) and the New Jersey Firefighters' Mutual Benevolent Association (NJFMBA) submitted a joint letter reaffirming their previously stated

position that it was not appropriate for the Commission to consider the modification of the statute. In addition, both associations reiterated their position that the Legislature has vested the PFRS Board of Trustees with the authority to modify the standards for accidental disability retirement benefits and requested that the Commission refrain from issuing any report concerning the traumatic event standard.

Ms. Fyazi advised the Commission that the appendix includes modifications to the proposed statutory language made in response to a commenter's proposals along with additional limited modifications to clarify issues identified during the Commission staff's ongoing review of this subject. The language included in the appendix is from the Memorandum prepared for the Commission's March meeting. She noted that the comments received by staff are shown after each section to which they apply, followed by any proposed staff recommendations.

Chairman Gagliardi asked Ms. Fyazi to discuss the proposed statutory modifications set forth in the Appendix in serial order and to pause after each section to facilitate Commission discussion of the proposed modifications.

- *Subsection a.*

Ms. Fyazi stated that the language contained in subsection a. originally consisted of one large block paragraph. The paragraph has been subdivided into subsections a. through g. to improve accessibility and for ease of reference. The only modification that is presented in the revised staff draft, she continued, is that the language of this subsection has been rendered gender-neutral. She advised the Commission that staff had not received any comments regarding these proposed modifications.

- *Subsection b.*

Subsection b. was created to define the term traumatic event and is based upon the exact language provided by the New Jersey Supreme Court Ct in *Richardson v. Bd. of Trustees, Police and Fireman's Retirement Sys.*, 192 N.J. 189 (2007). Ms. Fyazi advised the Commission that staff received proposed modifications to this subsection from one commenter.

The terms "undesigned" and "unexpected," in subsection b.(2), are "terms of art" that have evolved with the caselaw and are clearly prescribed by the *Richardson* Court. The additional term "unanticipated" was proposed by a commenter and although it appears in the *Richardson* opinion, it is not part of the test announced by the Court. Staff considered this term and was concerned that the term would lead to confusion.

Subsection b.(3) now contains the language from previously created section b.(4). Staff consolidated the two subsections based upon the notes received from a commenter who indicated that *Richardson* discusses these elements as a single factor. Ms. Fyazi stated that the proposed language in subsection b.(3), "the result of a specific duty related event," may not be necessary. This language appears in subsection a. of the original statute and was moved to subsection d.(1) to make the statute more accessible. The additional phrase in subsection b.(3), "solely," was

suggested to capture the series of cases where the applicant’s permanent disability may be due to the combined effect of a pre-existing condition and a traumatic event.

Commissioner Bell questioned whether the meaning of the subsection was easily identifiable. Commissioner Bunn stated that this subsection is designed to define the term “traumatic event.” This subsection, he continued, should be limited to defining this term. To add additional language to this subsection that is not part of the definition of this term may lead to confusion. Commissioner Bell concurred with this point. Commissioner Bunn added that the language in this subsection should be kept as close as possible to the language issued by the Court. He further noted that there is a subsection that deals with cardiac incidents and questioned whether the Commission was attempting to keep the two sections consistent with one another. The Chairman stated that the Commission would discuss subsection e. separately.

Commissioner Long questioned the origin of the phrase “that is known to the member,” and noted that it was not original to the *Richardson* opinion. Commissioner Bell stated that it would be helpful if staff would annotate the origin of language that has been added to the statutory text.

- *Subsection c.*

Ms. Fyazi stated that subsections c. and d. appeared in the reverse order in the Update Memorandum and were reordered in this Appendix in response to a commenter’s statement that an applicant claiming a “mental-mental” injury must satisfy the test articulated in *Patterson v. Bd. of Trs., State Police Ret. Sys.*, 194 N.J. 29 (2008) before applying the *Richardson* test.

Subsection c. is meant to address those matters arising from mental disabilities attributed exclusively to mental stressors, as suggested by the Commission, and clarifies that the “reasonable person” standard is to be applied in such situations. Although no comments were received from any interested party, Ms. Fyazi recalled that at the March 18, 2021, meeting of the Commission, one commenter stated that the term “in similar circumstances” as discussed by the *Patterson* Court was intended to be an example and not a limitation and that the additional language proposed by the Commission “with similar background and training” serves as a limitation. The commenter added that these types of cases involve a fact-sensitive inquiry that considers all of the member’s circumstances, including background and training.

Commissioner Long opined that the language was not limiting, but that it should not appear in the subsection. She further noted that the language “in the member’s circumstances” is the right formulation of the standard. Commissioner Bell recalled that this section was based on the experience of a hostage negotiator in which the unexpected event was that the hostage was killed or was killed in a gruesome way. Such a formulation, he continued, puts significant weight on the term “unexpected.” Commissioner Bunn stated that he would like staff to further modify the structure of this subsection perhaps using language such as: “[t]o receive benefits the member must satisfy....” Commissioner Long opined that subsections c. and d. should be combined into a single section. Commissioner Bunn concurred with Commissioner Long’s recommendation.

Commissioner Bell requested that the section be drafted separately and in the alternative to give the Commission the opportunity to compare the two.

- *Subsection d.*

Ms. Fyazi stated that the newly created subsection d. consists of language originally contained in subsection a. and is shown in strikethrough above its new location that was subdivided into two different sections for ease of reference.

Staff did not receive any comments regarding this proposed modification.

The term “willful negligence” has been stricken from subsections d.(2) as the provision relates to a member’s actions, and “willful misconduct” has been substituted pursuant to the Commission’s request.

- *Subsection e.*

The language contained in newly created subsection e. consists of an existing paragraph of the statute that was moved to make it more cohesive with subsection a. of the statute as it relates to specific disabilities not directly arising from the “traumatic event.”

The revised draft of subsection e. encompasses language of the original statute as well as the standards enumerated by the Gerba court. It also recognizes the commenters’ recommendation to codify this language.

In *Gerba v. Bd. of Trs. PERS*, 83 N.J. 174 (1980) the Court noted that the traumatic event must be the direct cause, that is, the essential significant or substantial contributing cause of the disability. Ms. Fyazi noted that the New Jersey Supreme Court addressed the issues of medical causation and whether the appellant’s permanent disability was the direct result of the traumatic event. She therefore recommended including this language to capture the essence of *Gerba* in the proposed modifications since this language is cited in many subsequent cases involving pre-existing conditions.

Commissioner Bunn questioned why this subsection was limited to cardiovascular, pulmonary, or musculoskeletal conditions. He questioned why a blood clotting disorder was not included within this section. Ms. Fyazi responded that those were the original conditions that were set forth in the original statute. Commissioner Bell noted that in the event of a disability from another condition, then you must refer back to subsection b. Commissioner Long concurred with Commissioner Bell. Commissioner Bunn suggested that he would like to see this subsection apply to pre-existing conditions. Commissioner Long suggested that staff examine the legislative history of this section to ascertain why these conditions were enumerated by the Legislature.

- *Subsections f-i.*

According to Ms. Fyazi, the provisions contained in subsections f. through i. have not been altered. The existing language, however, has been divided into sections and subsections to make

the statute more accessible. Ms. Fyazi also advised the Commission that no comments were received in response to the proposed modifications.

- *Subsection j.*

Reference in subsection j.(1) has been amended to reflect newly created applicable sections. The term “willful negligence” has been stricken from this subsection j. because the provision relates to a member’s actions. The term “willful misconduct” has replaced the original language. Commissioner Bunn commented that this modification was appropriate.

No comments were received regarding this proposed modification according to Ms. Fyazi.

Chairman Gagliardi asked Ms. Fyazi to prepare a Revised Draft Tentative Report based upon the comments and direction provided by the Commission. This revised report would then be considered by the Commission at a future meeting.

### **Final Protective Order Factors**

Samuel Silver explained that over the past seven weeks the Legislative Law Clerks have done an excellent job assisting the Commission in reviewing case law and identifying projects that present potential projects for the Commission. The potential projects that they identified have been solid choices for Commission consideration. In fact, the project that Lauren Haberstroh originally selected was such a good choice that just before she began preparing her memorandum the Legislature introduced a bill on the exact issue that she had identified for Commission consideration.

Mr. Silver mentioned that for some time, he had been aware of a statutory ambiguity raised in *C.R. v. M.T.* and discussed it with Lauren to see whether she was interested in raising an ancillary issue that he had noted while listening to oral argument. She graciously agreed and he provided her with background information.

He further explained on November 13, 2019, staff was alerted to the decision of the Appellate Division in *C.R. v. M.T.*, 461 N.J. Super. 341 (App. Div. 2019). The case involved an action brought under Sexual Assault Survivor Protection Act (SASPA) to restrain the defendant from communicating with the plaintiff. While the parties did not dispute that sexual contact occurred, whether the plaintiff consented or was able to consent was the central issue before the Court.

The term “mentally incapacitated” as defined in N.J.S. 2C:14-1i. is subject to competing, plausible interpretations based on textual analysis. The ambiguity created by two possible, diametrically opposed interpretations of the statute and the absence of any legislative history served as the impetus for the continued monitoring of the project.

Through monitoring, staff confirmed that certification was granted on April 09, 2020. Additional monitoring confirmed that the matter was argued on November 30, 2020. During oral

argument, the Court noted that N.J.S. 2C:14-16 had strange way of setting forth elements for a court to decide whether to issue an order they referred to them as unenumerated elements.

An examination of the statute N.J.S. 2C:14-16 reinforced this ambiguity. The Supreme Court has not issued an opinion in this matter. Mr. Silver stated that staff expects to bring the underlying issue presented in *C.R.* to the attention of the Commission as a potential project in the Fall. He further stated that staff was excited to seek guidance from the Commission regarding the points raised in Lauren's Memorandum to allow staff to focus our research and prepare accordingly.

Chairman Gagliardi indicated that the Commission does not typically consider projects that are pending before the New Jersey Supreme Court. In this instance, however, he understood that Ms. Haberstroh's tenure with the Commission will end before the September Commission meeting. Under these circumstances, he invited her to present her Memorandum to the Commission.

After thanking Chairman Gagliardi, Ms. Haberstroh stated that she has reviewed N.J.S. 2C:14-16a., which includes the criteria for issuing final protective orders. At minimum, final protective orders prohibit a respondent from having contact with the victim and prohibits the respondent from committing future nonconsensual sexual contact against victim.

She explained that in the case *C.R. v. M.T.* the plaintiff sought a final protective order against the defendant. The plaintiff and defendant agreed that sexual contact occurred, but they disagreed over whether she consented to the encounter. The Appellate Division found that both versions "equally plausible," the plaintiff could prevail only if she was "incapable of consenting" during the sexual contact.

After examining the statutory definition of sexual assault victim, the Appellate Division ruled that to prove mental incapacity caused by intoxication, victims must show by preponderance of evidence that faculties were prostrated.

The case was then appealed to New Jersey Supreme Court were oral argument at minute 35, Justice Albin and amicus curiae party New Jersey Legal Services questioned the factors necessary to issue a final protective order pursuant to N.J.S. 2C:14-16a. The statute states, that after receiving application for a final protective order, the court must hold a hearing at which it shall consider, but is not limited to, the two factors enumerated within the statute. The first factor considers whether nonconsensual sexual contact, sexual penetration, or lewdness has occurred. The second factor examines the possibility of future risk to safety or well-being of the alleged victim. The statutory language permits the court to consider these two factors and suggests that the Court may consider other unenumerated factors. By contrast, subsection e., requires only a finding of factor number one and does not reference factor number two.

Commissioner Cornwell indicated concern regarding the lack of clarity as to whether factors one and two must both be considered by the trial court. If so, he continued, the drafting

does not make that clear and he disconnect between drafting and enforcement to be problematic. He further stated that he does not find the wording “factor” or “possibility” to be troubling.

Staff was advised to continue to monitor the matter and advise the Commission of future developments in this area of law.

### **Interpretation of the Receivership Act**

Arshiya Fyazi discussed with the Commission a Memorandum which proposed a project to modify the language of N.J.S. 2A:42-117 and was discussed by the Appellate Division in *Mfrs. and Traders Trust Co. v. Marina Bay Towers Urban Renewal II, LP*, 2019 WL 5395937 (App. Div. 2019).

In *Mfrs. and Traders Trust Co.*, the City of North Wildwood, the State of New Jersey and two of its agencies were parties to a suit that involved an income restricted senior citizen housing project that was built with the assistance of several sources of governmental funding and complex financing agreements. In October 2012, the housing project suffered significant damage as a result of Superstorm Sandy, with the estimated cost of repairs exceeding \$11 million. Litigation ensued between the owner of the building and the insurance carrier.

In August 2014, the Litigating Tenants filed numerous documents seeking equitable, declaratory, and injunctive relief with the Superior Court, Chancery Division. They alleged habitability problems and repeated code violations for which the owner had been cited by enforcement officials. Pursuant to the Multifamily Housing Preservation and Receivership Act (Receivership Act) the Litigating Tenants also sought the appointment of a receiver

After the filing of the receivership petition, the trustee for the company that purchased the bonds issued by the Essex County Improvement Authority to help finance the project filed a foreclosure action. Ultimately, the Chancery Division approved a plan to restructure and rehabilitate the housing project pursuant to the foreclosure litigation and denied the appointment of a receiver. The trial court’s determination that it had the discretion to deny the appointment of a receiver raised the issue of apparent internal inconsistencies within the Receivership Act.

On appeal, the court found that the statutory language in N.J.S. 2A:42-117 was internally inconsistent. In mandatory language, section 117 provides that a building shall be eligible for receivership if either of the two criteria are met. The statute further provides that if a court determines that either of the conditions exist, it shall appoint a receiver. The Court also examined section 123 of the Receivership Act, and its legislative history, to resolve the statutory ambiguity. N.J.S. 2A:42-123a. contains language that permits a court to appoint a receiver if the court determines, after its summary hearing, that the grounds for relief...have been established. The mandatory language of a portion of N.J.S. 2A:42-117 and the permissive language of N.J.S 2A:42-123, within the same Act, led the Court to examine the legislative history of the Receivership Act.

The Sponsor’s Statements to the legislation that became the Receivership Act indicate a legislative intent to supply the court with broad discretion to appoint the most appropriate entity to act as receiver. The court in *Mfrs. and Traders Trust Co.* concluded that the legislative history



of N.J.S. 2A:42-117 evinces a legislative intent to construe the statutory language in a permissive fashion and that the trial court did not abuse its discretion by denying a receiver.

Ms. Fyazi noted that there are no bills pending that would address the issue raised by the Court.

Commissioner Bunn stated that as long as there is no petition for certification, he supports further work in this area. Commissioner Bell concurred, stating that the issue presented by this Memorandum makes sense as a Commission Project. Chairman Gagliardi also expressed support, stating that this seemed like a “quintessential” Commission project. The Commission authorized staff to conduct work in this area.

### **Vehicular Homicide Sentencing**

Jasmin Rodriguez discussed with the Commission a Memorandum proposing a project to clarify the intersection of N.J.S. 2C:11-5.3 and N.J.S. 2C:44-1, subsection b.(5) with regard to the sentencing of a defendant for vehicular homicide as discussed in *State v. Passucci*, 463 N.J. Super. 203 (App. Div. 2020).

In the State of New Jersey, when an individual drives under the influence of alcohol and subsequently strikes and kills someone, he or she may be charged with strict liability vehicular homicide. Subsection d. of N.J.S. 2C:11-5.3 provides that it shall not be a defense to a prosecution under this section that the victim contributed to his or her own death by reckless or negligent conduct or operation of a motor vehicle or vessel. While defendant is statutorily estopped from arguing that the victim’s conduct contributed to his or her own death, the sentencing court is not precluded from considering the victim’s behavior as a mitigating factor pursuant during a sentencing hearing.

In *State v. Pascucci*, the Defendant was driving under the influence of alcohol when he struck and killed a pedestrian. As a result of plea negotiations, he pleaded guilty to third-degree strict liability vehicular homicide, and waived his right to have his case presented to a grand jury. During the sentencing hearing, the court considered information contained in pre-sentence investigative report and also considered several mitigating factors. The court, however, refused to consider mitigating factor five – whether the victim’s conduct induced or facilitated the incident because it interpreted the strict liability vehicular homicide statute to preclude it from consideration.

The Defendant appealed his sentence and the appellate division reversed and remanded the lower court’s decision. The Court stated that the plain reading of the strict liability vehicular homicide statute shows that the legislature intended to preclude the Defendant from presenting evidence of the victim’s conduct as an affirmative defense in prosecution of the offense. It concluded that the sentencing court erroneously construed the language of subsection b. to preclude it from considering whether the victim’s conduct induced or facilitated her own death. The court determined that the sentencing court must consider all the mitigating factors and failing to do so deprived the defendant a qualitative assessment of all relevant mitigating factors.

Ms. Rodriguez informed the Commission that there is no legislation presently pending concerning this statute and asked the Commission for authorization to engage in further research and outreach to determine whether N.J.S. 2C:11-5.3 subsection d. should be modified to address the issue raised by *State v. Pascucci*.

Commissioner Bunn stated that the statutes are unambiguous, and the law was clearly articulated by the Appellate Division in this case. He recommended that the Commission take no further action on this project. Commissioner Long concurred with Commissioner Bunn. Commissioner Bell questioned whether this was an aberrational error by the trial court or whether this is an error that is commonplace during sentencing proceedings for these types of cases. If this is an error that is frequently being made then it may need clarification. Alternatively, if this case was an isolated incident that has been corrected by this case, then it does not warrant further consideration by the Commission.

Laura Tharney asked whether the Commission would like staff to conduct preliminary research to determine whether there is case law on the issue that seems to suggest that other courts have followed the same direction as the sentencing court. Ms. Tharney suggested that the staff can present its finding on the preliminary research at a future meeting and a decision can be made at that time. Commissioner Bunn responded that if the criminal section of the New Jersey State Bar Association says that this is an issue, nobody knows how to interpret the statute, and it is raised frequently, then he would revisit his view. Currently, his decision is solely based on the court's decision which said that there is a clear distinction enumerated in this statute.

Chairman Gagliardi agreed that he would like to see if there is confusion on this issue or this is an isolated error that was corrected by the court. Commissioner Cornwell added that he would agree with Commissioner Bunn that he would make a hard stop if it were determined that there were no conflicting appellate decisions on this issue. Mr. John Cannel said that he knew of no other cases on this subject, but there may be some. Ms. Tharney said that if it is acceptable to the Commission, staff would conduct initial outreach to the Bar to determine whether this issue requires the Commission's attention.

Commissioner Bell stated that he sees the language "induced or facilitated" as problematic. He questioned whether a pedestrian who runs across a busy street and is hit by a vehicle has "induce or facilitate" the commission of the crime. Commissioner Bunn contemplated whether a pedestrian who ran across a street while shooting over his shoulder because he had just robbed a store and was then struck by a drunk driver has induced or facilitated his own death. Commissioner Bell replied that his interpretation of the term "induce or facilitate" meant that an individual lent the car to the person who then got hit or told the person that they were drunk, and they take the wheel, and they injure the victim. Commissioner Cornwell commented that he read the term to mean a pedestrian who ran across a busy intersection in an attempt to beat the traffic, thereby facilitating their own death when hit by a drunk driver. Chairman Gagliardi concurred with Commissioner Cornwell's interpretation of the phrase.

Staff was authorized by the Commission to engage preliminary research and outreach.

## Tort Claims and Wrongful Imprisonment Claims

Angela Febres discussed with the Commission a Memorandum proposing a project to modify the Tort Claims Act, N.J.S. 59:9-2 in response to the issues raised in *Nieves v. Off. of the Pub. Def.*, 241 N.J. 567 (2020).

The New Jersey Tort Claims Act sets forth the procedural and substantive requirements for bringing a claim against the State, public entities, and public employees. It holds public employees liable if they proximately cause an injury by an act or omission within the scope of their employment. The Act, specifically, N.J.S. 59:9-2d., provides that damages will not be awarded against a public entity for pain and suffering unless the plaintiff can demonstrate an objective permanent injury and substantial permanent loss of bodily function.

In *Nieves*, the plaintiff had been represented by the Office of the Public Defender during a criminal trial. He was convicted and later granted post-conviction relief based upon a claim of ineffective assistance of counsel and DNA evidence that demonstrated that he was not the perpetrator. At the time that his requested relief was granted, he had already served 12 years of a state prison sentence.

Pursuant to the Mistaken Imprisonment Act, Mr. Nieves received \$608,333.33 in money damages. Subsequently, he filed a legal malpractice action against the Office of the Public Defender seeking loss of liberty damages, alleging that their “deficient” representation was the proximate cause of his wrongful conviction and imprisonment.

Although the trial court found that the Tort Claims Act was inapplicable, the appellate division determined that the Act did apply in this case. Ultimately, the New Jersey Supreme Court was asked to consider whether loss of liberty damages were a subset of pain and suffering damages under N.J.S.A. 59:9-2d. in an action for legal malpractice brought against a public entity.

The New Jersey Supreme Court determined that the Office of the Public Defender was a “public entity” within the meaning of N.J.S. 59:1-3. As such, the Tort Claims Act applies in cases of legal malpractice claims involving public defenders. The Court analyzed the claim as a nonpecuniary damage claim and determined that the plaintiff did not meet the requirements for the Torts Claim Act because loss of liberty damages are subjective subsets of pain and suffering damages.

In his dissenting opinion Justice Albin agreed with the majority that the Tort Claims Act applied, and that nonpecuniary recovery should be limited to instances of egregious or extraordinary circumstances. He noted that pain and suffering damages did not apply to loss of liberty damages based upon his examination of the Model Civil Jury Charges, the common law, and principles of statutory construction.

Commissioner Bell agreed that there was a conflict between the compensation section of the wrongful conviction statute and the Tort Claims Act involving legal malpractice. He stated that because there exists a specific wrongful conviction statute, the New Jersey Supreme Court was correct in finding that plaintiffs could not recover both with the wrongful conviction statute and

attorney malpractice relating to that wrongful conviction. Commissioner Bunn agreed and found that a minor revision would resolve the interpretive issue addressed by the Court in *Nieves*. Def. Chairman Gagliardi commented that the case raised an interesting issue that would be a solid basis for a Commission project.

Staff was authorized by the Commission to engage in additional research and outreach.

### **Farmland Assessment Act**

Samuel Silver discussed with the Commission a Memorandum proposing a project to modify The Farmland Assessment Act of 1964 to clarify whether the cessation of farming activity subjects the landowner to “roll-back” taxes as discussed in *Balmer v. Twp. of Holmdel*, 2019 WL 6716716 (Tax Ct. 2019).

Mr. Silver stated that from 1960- to 1964 the New Jersey Legislature sought to “counter the adverse impact of property taxation upon agriculture and to provide farmers with some measure of tax relief. The attempted relief involved: a legislative enactment; a constitutional question regarding the taxation of real property; a Commission of State Tax Policy; input from the New Jersey Grange and New Jersey Farm Bureau; a concurrent resolution; a constitutional amendment; and ultimately the Farmland Assessment Act of 1964.

The Farmland Assessment Act of 1964 was enacted to preserve family farms by providing farms with some measure of economic relief from taxation. The Act permits land that is actively devoted to agricultural or horticultural use to receive special tax treatment provided that the minimum gross sales requirement set forth in the statute is met. The Act also provides separate and independent financial consequences if the land is applied to a use other than agriculture or horticulture, subjecting the landowner to “roll-back taxes.” Mr. Silver explained that a County Board of Taxation has the ability to recoup taxes when the land that was previously assessed as farmland is applied to a use other than agriculture. However, the phrase “applied to another use”, does not readily suggest the conditions that subject the owner to roll-back taxes. Mr. Silver explained that the Act should be understood in terms of its evident intent and purpose of easing the tax burden on farmlands, and the absence of explanatory language resulted in common law filling the void.

In *Jackson Twp. v. Paolin*, 181 N.J. Super 293 (Tax 1981) roll-back taxes were imposed by the County Board of Taxation because of a cessation of farming activity. The farmer, suffering from poor health had his leg amputated leg and spent months in the hospital. The tax assessor imposed roll-back taxes on several parcels of land due to the cessation of farming activity. The issue presented was whether the loss of farmland assessment automatically triggers the imposition of roll-back taxes. The Court examined the language of the Act, the legislative history of the Act, scholarly works, and the treatment of the subject by of other states. The Court found it difficult to imagine that the intent of any roll-back provision was to impose an extra tax burden on a landowner who simply grew old or became disabled and no longer could actively devote the property to agriculture and held that the Act is designed to preserve family farms; the failure of a landowner to devote the property actively to agriculture during a given year was not an application of the

property to a use other than agriculture and was not a change in use of the property within the intent of the Act so as to trigger the imposition of roll-back taxes upon the property owner.

Six years later, in *Burlington Twp. v. Messer*, 8 N.J. Tax 274 (1986), aff'd, 9 N.J. Tax 634 (Super. Ct. App. Div. 1987), the Tax Court began to require that farmers engage in continued farmland activity to avoid the roll-back provision contained in the Act. Mr. Silver noted that nothing in the history, constitutional amendment, or enactment that indicates that the roll-back feature was intended to apply automatically upon termination of the active devotion of the property to agricultural use and that certain circumstances where cessation is the result of illness does not equal to imposition of roll-back taxes. In addition, he stated that under certain circumstances the cessation of farming that is the result of illness did not result in the imposition of roll-back taxes. Finally, he noted that the automatic imposition of roll-back taxes where farming has ceased could lead to unintended consequences. By way of example Mr. Silver questioned the result in an instance where a farmer allowed the land to lie fallow in order to improve the soil for future crops.

In *Balmer v. Twp. of Holmdel*, 2019 WL 6716716 (Tax Ct. Dec. 9, 2019), the Court considered whether a landowner's cessation from farming absent using the land for another purpose, constituted a change in use sufficient to trigger the roll-back provision of N.J.S. 54:4-23.8. The plaintiff, in *Balmer*, was the sole property owner of land that was assessed as farmland up to and including the year 2013. She became ill and was unable to find a replacement for her farmer, who recently retired. She did not seek the statutory farmland assessment for the tax year 2014 because she recognized that her land was not "actively devoted" to agriculture or horticulture, and in 2015 the Township of Holmdel sought roll-back taxes. The Board granted the roll-back taxes, and the plaintiff appealed, arguing that the property was vacant and available for farming; that similar to Paolin, the "use" of her land had not changed; and that the imposition of roll-back taxes violated the Act's legislative intent. The court determined that the word "change" – doing something different – constituted a change and that not farming is different from farming and constitutes a change for the purpose of roll-back taxes.

Mr. Silver articulated that during a given year, a property may fall short of the minimum gross sales requirement set forth in the Act and no longer be considered "actively devoted" to agriculture or horticulture. Under such circumstances, the property will forfeit its preferential farmland assessment. However, there is a question about whether subjecting it to roll-back taxes is consistent with the intent of the Legislature.

Commissioner Long commented that this would be an interesting project. Professor Bell inquired about the number of cases concerning this particular issue. Mr. Silver responded that he did not have the information on hand but would be happy to look into it. He continued that there is a bit of a history on these particular cases that date back to the Jackson case in 1981, followed by the Messer case in 1987 and the most recent Balmer case in 2019. Commissioner Bell stated that it may not be worth the effort if this issue does not come up often. Chairman Gagliardi added that part of the outreach should be the answer to that question. Feedback from practitioners and a review of appellate cases may provide the Commission with a better sense of how frequently this issue arises.

Commissioner Bunn sought to understand whether the outcome of these matters is predictable or whether the people are at risk of losing their family farm without knowing that they are at risk. He suggested that additional outreach is important because of the arbitrary way in which the law was applied. It is a cause for concern, even if this issue arises just once a year and the individual is at risk of losing their family farm. Mr. Silver noted the contrast between *Jackson* and *Balmer* cases.

Commissioner Gagliardi commented that the original purpose of the statute was to preserve the family farm and questioned how many farmers would perceive a difference between not farming this year and doing something else with what used to be the farm. Commissioner Bunn commented that it is important that the outcomes of these types of matters be predictable. If we can do something that helps with predictability in this area, that could be a positive for people trying to plan in a situation like the one presented in *Balmer* case.

Justice Long stated that she is curious about the outcome where the owner of the farm leaves the field fallow for two or three years so that the soil may be improved and be better in few years for crops. According to the reasoning in *Balmer*, that would be considered a change and the farm owner and roll-back taxes could be levied. Commissioner Bunn added that if that is a true agricultural technique that is valid in the field then that should not be the outcome based on the legislative intent of the statute. Chairman Gagliardi noted that the *Balmer* case seemed to have deviated from the legislative intent and considered this issue worthy of Commission's resources.

The Commission authorized staff to conduct work in this area.

### **Miscellaneous**

Laura Tharney advised the Commission that the Uniform Voidable Transactions Act has been signed into law by Governor Murphy. In addition, legislation regarding notarial acts and common interest ownership were awaiting action by the Governor.

Ms. Tharney further advised the Commission that her Legislative outreach is ongoing.

She also advised the Commission that the New Jersey Law Revision Commission was in the State Budget for the coming fiscal year.

### **Adjournment**

The meeting was adjourned on the motion of Commissioner Long, seconded by Commissioner Bell.

The next Commission meeting is scheduled for September 16, 2021, at 4:30 p.m.