

## **MINUTES OF COMMISSION MEETING**

**September 20, 2018**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Virginia Long (via telephone); 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 Michael T. Cahill.

### **Minutes**

Chairman Gagliardi noted that on page nine of the Minutes of the July meeting, his name had been inadvertently omitted from the group of Commissioners who voted to authorize additional research and outreach regarding the evidentiary standard for a final restraining order. With this correction, the Minutes of the July 19, 2018, Commission meeting were unanimously approved on the motion of Commissioner Bell, seconded by Commissioner Bertone.

### **New Business**

Chairman Gagliardi advised the Commission and Staff that Commissioner Hartnett is no longer serving on the Commission. The Chairman thanked Commissioner Hartnett for his years of service and his many contributions to the Commission, and welcomed Professor John Kip Cornwell to the Commission, representing Seton Hall University School of Law.

Laura Tharney introduced Jennifer Weitz and Joseph Pistritto to the Commission as Counsel and Legislative Fellow, respectively. The Commission's new Executive Assistant, Veronica Fernandes, was also presented to the Commission by Ms. Tharney. Each new staff member was welcomed by the members of the Commission and Chairman Gagliardi said that he looks forward to their contributions to the Commission.

### **Definition of Material**

Samuel Silver discussed with the Commission a Draft Final Report regarding the Definition of "Material" in the Insurance Fraud Statute. The absence of the definition of the word "material" was brought to Staff's attention by the New Jersey Supreme Court decision in the matter of *State v. Goodwin*.

According to Mr. Silver, the New Jersey Supreme Court was confronted with two issues in *State v. Goodwin*. The first was whether an insurance carrier was required to rely to its

detriment upon a defendant's material misstatement of fact in order for criminal liability to attach pursuant to the insurance fraud statute. The second issue involved an examination of whether a false statement of material fact that had the potential to influence a decision-maker was sufficient to uphold an insurance fraud conviction. Mr. Silver noted that to address these issues, the Court focused on the meaning of the word "material."

At the June 2018 meeting, Staff was authorized to engage in additional research and outreach to stakeholders who practice in this area of law. Staff sent a proposed definition of material to the following stakeholders: the Acting Insurance Fraud Prosecutor; each of the 21 County Prosecutors; the Office of the Public Defender; the New Jersey Association of Criminal Defense Lawyers; the leadership of the State Bar Association; and several criminal defense attorneys. Staff received a number of responses to the request for comments on this subject matter.

The individuals and entities that were contacted did not interpose any objection to the Commission's attempt to define the term "material" in the context of the Insurance Fraud Statutes. Two of the commenters who supported the change, however, requested further refinement of the proposed definition of "material." Those stakeholders asked the Commission to consider removing the phrase, "[...] that it would not have otherwise have tendered [issued or renewed] if inaccurate facts had not been provided by the claimant [applicant]."

One of the stakeholders observed that this phrase may imply, or be interpreted to mean, that a carrier *must reply* on the material misstatement of fact in order to sustain a conviction. The commenter noted that the "inaccurate facts" phrase is subsumed by the language of "[...] if it could reasonably affect the decision..." in the proposed definition of material. He concluded that proposed modification lends clarity and economy to the Commission's proposed definition while emulating the definition suggested by Justice Albin and the Model Jury Charge.

Commissioner Bell noted that the proposed revision truncated the definitional language in paragraph one. He suggested that in order to keep a parallel structure for each section of the definition that the phrase, "[...] that it would not otherwise have tendered [...]" be added to the latter portion of the first sentence, and the balance of the Commission agreed.

On the motion of Commissioner Bell, which was seconded by Commissioner Bertone, the Commission unanimously voted to release the project as a Final Report.

### ***Mens Rea* for Disorderly Persons Offenses**

John Cannel discussed with the Commission a Draft Tentative Report based on the work of Susan Thatch, who formerly served as Counsel to the Commission. The Report set forth the issues raised in *State v. Bessey*. In that case, the Appellate Division said that where a statute does not contain a *mens rea* requirement, N.J.S. 2C:2-2 provides a presumption that the crime must be committed “knowingly.” Mr. Cannel advised that the statute contains no such presumption for a “disorderly persons” offense.

According to Mr. Cannel, subsection (c)(1) of N.J.S. 2C:2-2 allows for strict liability elements and the culpability element applies “to all the material elements of the offense, unless a contrary purpose plainly appears.” During the course of his statutory review, he did not uncover any crimes for which strict liability as to all of the elements. The modifications contained in the Report leave room for the application of the strict liability standard.

Commissioner Long appreciated the parallel structure that this Report will provide to the Code of Criminal Justice. Commissioner Cornwell observed that the Model Penal Code phrase “contrary purpose” has to be left in the statute because the onus is on the Legislature to state whether a crime or offense is one of “strict liability.” Commissioner Rainone inquired whether the term “plainly appears” is atypical, noting that the phrase is not commonly used in the New Jersey statutes. The Commission then engaged in a brief discussion regarding statutory construction and legislative intent.

On the motion of Commissioner Cornwell, seconded by Commissioner Long, the Commission unanimously voted to release the project as a Tentative Report.

### **Definition of “Legal Representative”**

Samuel Silver discussed his Memorandum analyzing the New Jersey Appellate Division’s decision in *Tompkins v. Thomson*. In that case, involving the Law Against Discrimination (LAD), at issue was whether a third-party ordered to assume the management, administration, and operation of a workplace was deemed to be an employer for purposes of the law.

In 2003, by way of a supercession order, the Attorney General directed the Camden County Prosecutor to assume control over the “daily management” of the Camden City Police Department. The Freeholders, by way of a third-party consulting agreement, hired a company to assume control over the daily management of the police department.

In the years that followed, the Plaintiff alleged that he was the victim of discrimination. The trial court released the County Prosecutor from the case on summary judgment motion. After a trial, the jury subsequently returned a “no cause” verdict as the remaining defendants.

On appeal, the plaintiff raised two issues. He noted that for purposes of protection under the LAD he was jointly employed by two entities. Alternatively, he argued that when the Prosecutor was ordered to take control of the police department, the Prosecutor became his employer. The Appellate Division noted that the Plaintiff's application hinged on the application of the term "employer." To determine what entity qualified as Plaintiff's employer, the court utilized an analysis typically reserved for determining whether an individual was an employee or an independent contractor. The Court did not, however, examine whether the defendants were the legal representatives of the department and therefore statutorily within the scope of the term employer.

Commissioner Long stated that this was a worthwhile project. Commissioners Bell and Cornwell concurred. It was the consensus of the Commission that Staff engage in additional research and outreach to determine whether it would be beneficial to define the term "legal representative" for purposes of the Law Against Discrimination.

### **Remarriage in the Alimony Context**

Rachael Segal, a Legislative Law Clerk, discussed the Memorandum prepared by Wendy Llewellyn which analyzed the Appellate Division decision in *Sloan v. Sloan*, which considered the effect of *remarriage* on alimony obligations and the question of what constituted "remarriage".

The trial court terminated the plaintiff's alimony based on a "remarriage" that did not meet the statutory requirements. The Appellate Division determined that the trial court erred in terminating the plaintiff's alimony and remanded the matter to the trial court to examine of the alimony issue in the context of "changed circumstances" and in light of recent amendments to the alimony statute.

Ms. Segal noted that the amendments to the alimony statute do not explicitly set forth whether they are to be applied retroactively. At this juncture, the courts appear to be divided on how to interpret the statutory amendments. Commissioner Long opined that in *Quinn v. Quinn* the New Jersey Supreme Court made it clear, albeit in a footnote, that the alimony provisions were not retroactive. She further observed that the fact that some courts are failing to follow the determination of the Supreme Court on that issue does not give rise to a project.

Laura Tharney acknowledged the Supreme Court's treatment of the issue in the *Quinn* case, and added that Staff raised this as a potential project because of the frequency with which it continues to arise. Commissioner Cornwell questioned whether the Supreme Courts treatment of this issue in a footnote was perceived, by the Superior Courts and members of the bar, as dicta. Commissioner Rainone observed that it is possible that the MSAs in the post-amendment cases may have provided that subsequent changes in the law would apply to these agreements.

Commissioner Bell expressed curiosity about whether the Supreme Court was going to take up this issue to bring clarity to the treatment of the amendments.

Laura Tharney asked for, and the Commission granted, authorization for Staff to reach to practitioners in the matrimonial bar to ascertain whether this appears to be a recurring issue that the Commission may wish to address.

### **Aggravated Assault**

Joseph Pistritto, a Legislative Fellow, discussed the Memorandum prepared by Eileen Funnell analyzing the decision in *State v. Majewski*, in which the Appellate Division considered whether the State was required to prove that the defendant intended to hit an officer with bodily fluid, or if transferred intent was recognized.

During a “routine move” of an inmate, the Defendant spat in the face of a corrections officer. The Defendant advised the authorities that she had been aiming for the inmate being transported and not the officer. After the trial court denied the Defendant’s motion to dismiss the indictment, she entered a guilty plea and subsequently filed an appeal contesting the ambiguity of the statute.

The Appellate Division acknowledged that the absence of an explicitly stated culpability requirement in the first portion of the statute could support an argument that “knowledge” applies under N.J.S. 2C:2-2(c)(3). In a footnote, however, the Model Criminal Jury Charge Committee explained that the subsequent statutory reference to “purpose” requires that “purpose” be applied to all material elements of the offense. Thus, in order for a defendant to be found guilty of aggravated assault pursuant to N.J.S. 2C:12-13, the State was required to prove that the defendant acted “purposely” with respect to all of the material elements of the offense.

Commissioner Cornwell stated that one possible reading of the statute would apply the mental element of “knowledge” to the first part of the statute because no mental element is expressly stated in that portion of the statute. John Cannel commented that his interpretation of the statute would apply the latter element to both portions of the statute. Commissioner Long stated that she does not believe that the language of the statute is ambiguous and that “purposeful” is implicit in the statute. She stated, however, that the differing perspectives among members of the Commission give rise to the necessity for further study. Commissioner Bertone concurred with Commissioner Long’s rationale for further study of this subject matter.

Chairman Gagliardi expressed concern as to what “clarity” on this topic means. He questioned whether the Commission’s effort in this area will lead to a place where the Commissioners are comfortable making a recommendation on this topic.

After a brief discussion regarding the scope of the project, Staff was authorized by the Commission to engage in additional research and outreach to determine whether clarity could be brought to this statute.

### **Imputed Negligence**

In *City of Perth Amboy v. Interstate Industrial Corp.*, the Appellate Division considered whether a contractor's negligence could be imputed to the municipality thereby precluding the enforcement of an exculpatory clause in the New Jersey Statutes. Jennifer Weitz, Counsel, discussed this issue, replying upon a Memorandum prepared by former Legislative Law Clerk Wendy Llewellyn.

The City of Perth Amboy awarded contracts to multiple parties for the construction of a municipal complex. After the project fell behind schedule, there were numerous disputes over who was at fault. The Appellate Division noted that, in 2001, language was added to the public contracts law declaring as void and unenforceable provisions that limit a contractor's remedy to an extension of time for delays due to the municipalities' negligence.

The Court noted that the term "contracting unit" is defined in the statute to include county, municipal and certain local governmental boards, commissions, authorities, and agencies – but not agents or independent contractors of the contracting unit. Ms. Weitz advised the Commission that because the negligence of third parties could not be imputed to the City, the exculpatory clause was enforceable and barred claims for delay damages caused by the negligence of third party contractors.

Commissioner Long suggested that this was a worthwhile project. Commissioner Rainone and Commissioner Bell concurred with Commissioner Long's assessment. Commissioner Rainone added that local public contracts often include multiple "primes," "contractors," and an architect, and it becomes difficult to assess liability. Commissioner Rainone recommended that Staff conduct some initial outreach to ascertain whether this is an issue that is likely to re-occur, and the Commission agreed.

Subject to the limitations set forth by the Commission, Staff was authorized to conduct initial outreach and research and provide the Commission with an update memorandum on this topic.

### **Definition of Tumultuous**

Joseph Pistritto discussed the Memorandum prepared by Wendy Llewellyn analyzing the decision in *State v. Finneman*, in which the Appellate Division considered the definition of the words "tumultuous" and "public" as they appear in N.J.S. 2C:33-2(b).

In the matter of *State v. Finneman*, the defendant yelled obscenities and directed obscene hand gestures toward employees of a local drug store. His behavior was observed by the local police and described as “irate and angr[y].” The defendant then entered a store and continued to yell and cause a scene. The defendant was convicted of disorderly conduct and resisting arrest by both the municipal court and then by the Law Division judge in a trial *de novo*. On appeal, the defendant contended that, among other issues, this behavior did not rise to the level of “tumultuous.”

The word tumultuous is not defined within the New Jersey statutes. The definitions provided in various dictionaries provided little assistance to the Appellate Division in determining whether the defendant’s conduct fell within the ambit of the statutory definition. In addition to an examination of the word tumultuous, the Court attempted to determine whether the definition of “public”, found in subsection (b) of the statute, applied to subsection (a). Mr. Pistrutto advised the Commission that the ambiguity surrounding the definition of the word “public” has been commented upon in at least two Appellate Division decisions.

Laura Tharney mentioned that there is proposed legislation that would enhance the penalties for individuals who engage in improper behavior while in places of public accommodation. This proposed amendment would leave the current language of the statute unchanged, but would add a subsection that would subject those who engage in tumultuous behavior to a sentence that includes: imprisonment, community service; a fine; restitution; and, a judicial order banning them from the locale.

Commissioner Long said that the statute could be clarified. Commissioner Rainone said that there are cases that overturn municipal “peace and good order” ordinances and that it might be worthwhile to examine those cases. Commissioner Cornwell observed that the word tumultuous is usually seen in the context of home invasion cases in which the defendant enters a person’s home in “tumultuous manner” giving rise to claims of self-defense by the homeowner. Chairman Gagliardi and Commissioner Bell agreed that this is a good project, and cautioned Staff to be mindful of possible First Amendment implications.

The Commission authorized Staff to engage in additional research and outreach on this subject-matter.

### **Adjournment**

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

The next Commission meeting is scheduled to be held on October 18, 2018, at 10:00 A.M.