

## **MINUTES OF COMMISSION MEETING**

**November 18, 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.

### **Minutes**

Commissioner Bell requested a modification to the Minutes pertaining to Standard Form Contract. He asked that the second-to-last paragraph in that section be amended to reflect that “Commissioner Bell argued that as a public body the Commission has an obligation to explain why it discontinued work on the project.”

With the addition of the language proposed by Commissioner Bell, the Minutes of the October 21, 2021, meeting were unanimously approved by the Commission on the motion of Commissioner Bertone, seconded by Commissioner Bell.

### **Mistaken Imprisonment Act**

John Cannel discussed a Draft Final Report proposing modifications to clarify the basis for determining when recovery under the Mistaken Imprisonment Act is appropriate in cases involving multiple sentences.

Mr. Cannel explained that the differences between the Draft Tentative Report and the proposed Draft Final Report reflect the clarifications suggested by a commenter from the Hudson County Prosecutor’s Office. The clarifications proposed by the commenter were incorporated into the Draft Final Report except for the suggestion that N.J.S. 52:4C-3 be modified to provide that conduct of the applicant’s counsel be attributed to the applicant. Mr. Cannel explained that this provision was not included since it could add additional complication to an already challenging area and that if a person can prove their innocence that should be sufficient, absent malfeasance by the applicant.

Commissioner Bunn agreed that error by an attorney that results in a wrongful conviction should be considered as part of a malpractice action. He asked Staff to highlight the statutory modifications that appear in the Appendix to the Report. Laura Tharney explained that the italicized words shown in the Appendix reflected changes made in response to comments received. Ms. Tharney stated that in N.J.S. 52:4C-5, the phrase “reasonable attorney fees and costs related to the litigation with the Department of Treasury as authorized by this act,” was modified to “reasonable attorney fees and costs incurred in the litigation against the Department of Treasury

as authorized by this act.” Further, she noted the addition of a new sentence that provides that “Attorneys’ fees and costs awarded pursuant to this subsection shall not include those incurred overturning any underlying criminal conviction.”

Ms. Tharney also noted the modification of N.J.S. 52:4C-6 on page nine of the Report. A new subsection a. was added to this section, which states that “A claimant may only recover damages under this Act for a period of imprisonment which is solely attributable to the crime for which the claimant was mistakenly convicted.” Ms. Tharney also noted the clarification to subsection b.(2), which addresses concurrently served sentences, and consists of the addition of the phrase “the entirety of” to modify “the period of imprisonment for which damages are sought.” Mr. Cannel noted that these modifications were consistent with the Commission’s intent.

Commissioner Bunn asked whether the current law allows for the recovery of the money expended in overturning a wrongful conviction. Mr. Cannel responded that pursuant to this Act, recovery of such funds was precluded, and that he was unsure if there were any other statutes that would permit such a recovery. Mr. Cannel added that the Appellate Division, in *Kamienski v. State Department of Treasury*, 451 N.J. Super. 499 (App. Div. 2017) determined that the Act only considers counsel fees associated with a claim brought pursuant to the Act and does not include provisions for counsel fees expended to overturn the wrongful conviction.

On the motion of Commissioner Bell, seconded by Commissioner Bunn, the Commission unanimously voted to release the Final Report.

### **Mentally Incapacitated**

Samuel Silver discussed with the Commission a project concerning “mentally incapacitated” as defined in N.J.S. 2C:14-1(i). Mr. Silver explained that the language is subject to two competing interpretations. One interpretation is that an individual may be “mentally incapacitated” if they were administered a narcotic, anesthetic, intoxicant, or other substance without their prior knowledge or consent. The statute may also be interpreted in such a way that a person may be “mentally incapacitated” if they are rendered temporarily incapable of understanding or controlling their conduct because they either voluntarily or involuntarily ingested a narcotic, anesthetic, or intoxicant.

The question turns on whether the phrase “administered to that person without his knowledge or consent” qualifies “other substances” or whether it also qualifies “narcotics, anesthetics, and intoxicants.” If the phrase qualifies all four, then a victim can only be mentally incapacitated if they ingested the substance that rendered them incapable of understanding or controlling their conduct without their knowledge. If the phrase only qualifies “other substances,” then an individual can be “mentally incapacitated” even when the consumption of a narcotic, anesthetic, or intoxicant is voluntary.

The Appellate Division has inconsistently interpreted what it means to be “mentally incapacitated” for purposes of the Sexual Assault statute. In *State v. Malik*, 2018 WL 6441507 (App. Div. Dec. 10, 2018), the Court determined that there was no evidence that the victim ingested

any substance without her knowledge or in a situation in which she did not have knowledge or control, and that it was improper to consider her mentally incapacitated. By contrast, in *CR v. MT*, 461 N.J. Super. 341 (App. Div. 2019), the Court recognized that the phrase is not defined in the sexual assault statute and relied upon the Doctrine of the Last Antecedent when it concluded that the absence of a comma after the phrase “other substance” indicates that the qualifying phrase applies only to the term “other substances.”

Mr. Silver noted that “mentally incapacitated” is only used twice in Chapter 14 of the Criminal Code -- the Definitions section (N.J.S. 2C:14-1) and the Sexual Assault statute (N.J.S. 2C:14-2), neither of which assists the reader in determining how to interpret the definition. The statute was enacted in 1978, and has been amended three times, but the legislative history does not provide any insight into how “mentally incapacitated” should be interpreted.

Commissioner Bunn expressed his support for the project. Chairman Gagliardi concurred and noted that it is the type of project that has historically been considered by the Commission because this punctuation can alter the meaning of a statute.

Commissioner Bell said that he thought the project made sense and shared two observations regarding the statute. First, he explained that the second clause of the definition provides that a person may be mentally incapacitated through acts committed upon that person which render them incapable. He suggested that this phrase clarifies that the intoxicants referenced in the first portion of the statute must be administered without the victim’s prior consent or knowledge. Commissioner Bell also expressed concern that there may be a policy question involved in situations where individuals have knowingly ingested an intoxicant. Although this may be a difficult area, he noted that it would be an appropriate project.

Commissioner Cornwell agreed that there is an important policy question involved, particularly in light of the recent opioid crisis. He stated that the project involved an important clarification in many ways and that the choice of interpretation was a significant one.

Commissioner Long concurred with Commissioner Bell’s point that the project involved a policy question. Chairman Gagliardi noted that the focus of this project involves the clarification of the Legislature’s intent and agreed that the Commission always has to tread carefully with regard to any issues of policy. Commissioner Bunn suggested that Staff consider what other states are doing to address this issue.

The Commission authorized work in this area.

### **Enforcement of Lost Notes**

Lauren Haberstroh, a Legislative Law Clerk, discussed a proposal for a project to clarify the language in N.J.S. 12A:3-309. Ms. Haberstroh explained that N.J.S. 12A:3-309 concerns the enforcement of lost, destroyed, or stolen instruments. The plain language of the statute does not address the rights of an instrument assignee when the original version of the instrument was lost before it was assigned.

In *Inv'rs Bank v. Torres*, 243 N.J. 25 (2020), the defendants signed and secured a note to AMRO Mortgage (AMRO), which merged with CitiMortgage, the latter succeeding AMRO's interest in the note. Citi discovered that it had lost the original note, filed a "Lost Note Affidavit" and established the terms of the original note. Citi used the note to serve a Notice of Default and Intention to Foreclose against Defendants and listed itself as the loan servicer and Investors as the lender before it conveyed its right to enforce the note to Investors. Investors filed a foreclosure action against Defendants.

The defendants argued that Investors was not a holder of the note because it did not possess the original note at the time it was lost and therefore lacked standing to pursue the matter. The trial court concluded that Investors proved the note's terms through the use of a digital copy, that Citi's assignment granted Investors the right to enforce the note and that Investors was required to indemnify the defendants. The Appellate Division affirmed the decision of the trial court noting that, consistent with the doctrine of unjust enrichment, if a party possessed a note and was entitled to enforce it when it was lost, that party can transfer its right to an assignee, who must only prove the note's terms and the assignee's own right to enforce the note under N.J.S. 12A:3-309.

The New Jersey Supreme Court interpreted the Legislature's treatment of N.J.S. 2A:25-1 and 46:9-9, involving the sale and mortgages of real estate, as supporting the principle that rights arising by contract are generally assignable. The Court also examined the legislative goals of 12A:3-309. It observed that U.C.C. § 3-309 was amended in 2002 to specify that assignees are not barred from enforcing a note because they did not possess it when it was lost. N.J.S. 12A:3-309, however, was not amended to conform to that U.C.C. amendment.

The Defendants argued that because the Legislature failed to amend N.J.S. 12A:3-309 to reflect the U.C.C. § 3-309 amendment, it did not intend for the statute to grant an assignee of a lost note the right to enforce it. The Court concluded that there was no evidence that the Legislature intended 12A:3-309 to displace New Jersey's common law regarding assignments. Explaining that to rule otherwise would contravene established statutory and common law and generate "arbitrary, unworkable, and unfair" case results.

Ms. Haberstroh noted that the confusion at the trial level suggests that N.J.S. 12A:3-309 may still be difficult for affected parties to interpret.

Commissioner Bunn opined that the involvement of the U.C.C. gives cause for caution because of the importance of uniformity, and the Commission's focus should be on the amended version of U.C.C. § 3-309. He continued that since the New Jersey Supreme Court adopted the amended version of the U.C.C., the Commission should stay close to language of U.C.C. § 3-309. Chairman Gagliardi concurred with Commissioner Bunn's recommendation.

Commissioner Bell stated that the Commission has a statutory mandate to review the work of the Uniform Law Commission and that while the Commission's review of this subject matter may have been delayed, it should be undertaken at this juncture. Commissioner Bunn concurred and noted further that it would be important for the Commission to review Article 3 in its entirety to determine which sections should be considered by the Commission. Chairman Gagliardi

concurrent and asked Staff to determine what work the Commission has performed in this area and incorporate that as part of this project.

The Commission authorized work in this area.

### **Transfer of Jurisdiction in Tax Challenges**

Whitney Schlimbach discussed with the Commission a Memorandum proposing a project to clarify the language of N.J.S. 54:3-21 to address the procedural mechanism for transferring jurisdiction to the Tax Court in cases of dual filings by opposing parties as discussed in *30 Journal Square Partners, LLC v. City of Jersey City*, 32 N.J. Tax 91, 96 (N.J. Tax 2020).

The jurisdiction over property assessment challenges brought by taxpayers or taxing districts is governed by N.J.S. 54:3-21. If the property is valued at over one million dollars, the statute permits a party to file a petition with either the County Board of Taxation (County Board) or an appeal directly with the New Jersey Tax Court (Tax Court). If one party elects to file an action with the Tax Court, N.J.S. 54:3-21 grants the Tax Court exclusive jurisdiction over the entire matter which includes any petition pending with the County Board at that time. The statute, however, does not provide any guidance regarding how to transfer the County Board filing to the Tax Court.

In *30 Journal Square Partners*, Jersey City (City) and the building owner (30 Journal Square) both challenged assessments of eleven properties. The City filed a petition with County Board and 30 Journal Square filed with Tax Court. The parties did not dispute that pursuant to 54:3-21a.(1), the Tax Court had exclusive jurisdiction over entire matter, including the City's filing with the County Board, but the parties disagreed about how to resolve the County Board petition so that the Tax Court would have jurisdiction over the matter. The City wanted the County Board to dismiss or affirm the petition without prejudice so that it could initiate an appeal of the County Board's determination in the Tax Court. Journal Square wanted the County Board to dismiss the petition with prejudice for lack of jurisdiction. In that case, the City would be limited to filing a counterclaim to Journal Square's appeal already pending in the Tax Court.

In *Township of South Brunswick v. Princeton Orchards Assocs., LLC*, 2013 WL 1787160 (N.J. Tax 2013), the Court determined that N.J.S. 54:3-21 provided each party with a separate and independent right to challenge a property assessment and that one party's choice of forum should not affect the substantial rights of the other party. The Court in *South Brunswick* wanted a procedural mechanism that disposed of the County Board filing in a manner that did not impair that filer's rights under the statute. The solution in *South Brunswick* and in *30 Journal Square* was to adopt the County Board's practice of dismissing or affirming without prejudice so that a County Board filer can file its own appeal in the Tax Court and is not limited to filing a counterclaim to the other party's pending appeal.

In its decision, the *30 Journal Square* Court suggested that legislative action could clarify the procedure for transferring jurisdiction to the Tax Court when there are dual filings by opposing

parties. Ms. Schlimbach advised the Commission that there are two bills pending in the Legislature and that neither addresses the issue raised by the Court in *30 Journal Square*.

Commissioner Bunn asked Staff to confirm whether the New Jersey Rules of Court address the procedural mechanism involved in the transfer of matters from one entity to another. He advised Staff to be mindful of the separation of powers issues raised in *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406 (1950). He also noted that if the modification is made to Title 54 then the issue may come up again in another circumstance not covered by Title 54 and asked Staff to determine whether this issue exists under any other statutory framework.

Commissioner Bell questioned whether the Administrative Office of the Courts was aware of this issue and whether they are already working on a remedy for this problem. If so, the Commission should defer to their work in this area. John Cannel mentioned a prior instance in which the Commission has made a recommendation to the Judiciary to enact a rule. Chairman Gagliardi agreed with Mr. Cannel and Commissioner Bell.

Commissioner Bell stated the preferred solution is for the court to work on this issue; but if the court does not, the Commission should issue a report. Commissioner Bunn concurred. Chairman Gagliardi stated that Staff should research this issue to determine what the status of the issue is within the court system and submit an interim report to identify whether any action will be taken by the Judiciary, by way of the Civil Practice Committee or elsewhere. If not, the Commission will then decide whether it wishes to act in on this subject. Commissioner Long questioned why a person challenging an assessment is given a choice of forums. Ms. Schlimbach responded that the statute was amended 1999 to add the exclusive jurisdiction, and that she was unsure when it was amended to include choice of forum. Commissioner Long stated she would be very interested to learn more about the legislative history of this section.

Chairman Gagliardi instructed Staff to proceed in accordance with the Commission's discussion and provide a memorandum at an upcoming meeting.

### **Treatment of an Injured Worker**

Samuel Silver discussed a proposal for a project to modify the Workers' Compensation Act to clarify the time within which an employer must furnish medical, hospital, or other treatment pursuant to N.J.S. 34:15-15.

The New Jersey Workers' Compensation Act provides a no-fault system of compensation for workers who are injured during employment. Since 1911, these remedial statutes relieve injured employees from the burden of paying for their own medical care and replace lost wages. New Jersey Courts have liberally construed these statutes to accomplish their humanitarian ideals.

The Workers' Compensation Statutes require the employer to furnish an injured worker with medical, surgical, and other treatment, and hospital service as necessary to cure and relieve the worker of the effects of the injury and to restore the injured worker to the extent possible. The duty to provide adequate medical treatment to an injured worker is absolute.

A member of the public brought to the Commission's attention the fact that the medical and hospital service provision of the New Jersey Workers' Compensation Act does not set forth the time within which an employer must furnish medical treatment to an injured employee.

The statute addresses the refusal and neglect of an employer to provide treatment, but does not address situation where an employer agrees to provide treatment but does not designate an authorized, competent treatment provider. Absent from the Workers' Compensation statutes is a time beyond which an employer will be found to have unreasonably delayed the furnishing of treatment.

An employee may, under certain circumstances, wish to apply for sanctions as a result of an employer's failure to provide timely medical treatments. There are impediments to an application for sanctions. First, a plenary hearing will delay the adjudication of the underlying case. Next, the employer may refuse to settle claim unless petition for sanctions is withdrawn. Finally, there is no objective standard for what constitutes an unreasonable delay. Thus, an employer may argue that the delay is not unreasonable because the New Jersey statutes do not define the term "reasonable." The reviewing court will not find a precedent defining "reasonable."

Mr. Silver advised the Commission that, shortly after filing day, Staff received communication from a member of the public expressing interest in this project as well an indication of interest from the State Bar Association. There is no pending Legislation in this area.

Commissioner Bunn stated he was confused by the discussion of employer liability because it was his understanding that generally employers were immunized from liability by providing Workers' Compensation coverage to their employees and that the existence of Workers' Compensation was a bar to employer liability when an employee is injured.

Chairman Gagliardi clarified that the term liability in this context does not denote civil liability. Rather, the current statute does not set forth a time period in which medical services must be provided by an employer or their insurer. He noted that although it is an important subject, a modification of the statute may involve a policy issue. Therefore, the Commission may wish to bring the statutory deficiency to the attention of the Legislature and identify the absence of a time period, affording the Legislature the opportunity to address the issue if they so choose to. He suggested that it may be helpful to the Commission to understand how other states address this subject matter since the Commission may wish to make a recommendation based upon that information.

Commissioner Bell stated that the definition of what is reasonable is very fact specific and that it would be difficult to set one deadline that would cover all medical conditions. He added that, ideally, the Workers' Compensation Board would come up with a nuanced rule that specifies particular medical conditions and establishes specific time periods for them. He also stated that he agrees with Chairman Gagliardi that Staff should examine other states and see how they handle this issue.

The Commission authorized additional research and outreach to determine whether work in this area would be of use.

### **Miscellaneous**

Laura Tharney advised that on November 8, 2021, the New Jersey Senate received an absolute veto of S2261 from the Governor. This bill, which would have revised the law relating to common interest communities, was based upon the work of the Commission.

She also advised the Commission that three bills based on the work of the Commission were recently introduced in the Assembly: A6064, which requires a municipality to return taxpayer property taxes paid in error due to assessor's or owner's mistake; A6065, which provides certain volunteer and other workers with maximum compensation benefit for workers' compensation claim regardless of outside employment; and A6066, which concerns eligibility for unemployment benefits when the offer of employment is rescinded.

### **Adjournment**

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

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