MINUTES OF COMMISSION MEETING

July 20, 2023

Present at the meeting of the New Jersey Law Revision Commission, held remotely, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Louis N. Rainone; Professor Edward Hartnett, attending on behalf of Interim Dean John Kip Cornwell; Professor Bernard W. Bell and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Dean Johanna Bond.

In Attendance

Alex Daniel, Counsel for the New Jersey Civil Justice Institute, was in attendance.

Minutes

The Minutes of the June 15, 2023, Commission Meeting were unanimously approved on the motion of Commissioner Bertone, seconded by Commissioner Bell.

Statute of Frauds – Mandatory Attorney Review Provision

In New Jersey, an action for palimony requires a promise by one party to a non-marital personal relationship to provide support to the other during the relationship or after its termination. The Legislature amended the Statute of Frauds in 2010 to require that such arrangements be reduced to writing and signed by the promisor. The statute further provides that the arrangement is not binding upon the parties "unless it was made with the independent advice of counsel for both parties."

In *Moynihan v. Lynch*, 250 N.J. 60 (2022) the New Jersey Supreme Court was asked to determine the validity of the mandatory attorney-review requirement for palimony agreements. The Court noted that no other law in this state conditions enforceability of an agreement between private parties on attorney review. Samuel Silver stated that the Court determined that the attorney-review requirement directly infringes on the right of parties to enter a palimony agreement without retaining an attorney. He further noted that the Court was constrained to strike down the attorney review requirement in N.J.S. 25:1-5(h). The palimony agreement between the parties was therefore upheld as written.

Samuel Silver advised the Commission that Debra E. Guston, Esq., C.A.E., an adjunct professor at Rutgers University Law School, offered support for the Commission's "valuable work" in this area. She advised the Commission that this simple adjustment will bring the statute into compliance with the opinion issued in Moynihan. In addition, Ms. Guston stated that she hopes that the Legislature will move the suggested revision promptly to make the public more aware that counsel is no longer required for an enforceable palimony agreement.

Associate Dean Solangel Maldonado of Seton Hall Law School thanked the Commission for putting together such a comprehensive report. She advised the Commission that she is hopeful that the Legislature will modify the current statute.

The day after filing day, the NJSBA conveyed its support for the Commission's work in this area. The members of the NJSBA who practice in this area concluded that the proposed change to the language of the SOF is appropriate given the inconsistency between the current statute and the recent decision in *Moynihan*.

Mr. Silver stated that as of the date of the meeting, the Commission had not received any opposition to the recommended modification and that there were no bills pending to modify the statute of limitations as discussed in *Moynihan*. Mr. Silver also noted that Commissioner Long had provided comments prior to the meeting and expressed her approval of the report as a Final Report.

Consistent with the Supreme Court's holding in *Moynihan*, Staff recommended the removal of the unconstitutional language from N.J.S. 25:1-5.

Commissioner Bell suggested that the Commission add language to the Report's conclusion advising the Legislature that if the stricken provision is retained, the Legislature should supply a rationale for its retention.

On the motion of Commissioner Bell, seconded by Commissioner Bertone, the Commission unanimously released the work as a Final Report.

Comprehensive Drug Reform Act – Joint Motions to Vacate Parole Ineligibility

Since the enactment of the Comprehensive Drug Reform Act of 1987, the Attorney General has promulgated a series of Directives to promote uniformity and avoid arbitrary or abusive exercises of discretionary power in sentencing. In 2021, the Attorney General issued a guideline intended to discontinue the imposition of mandatory parole ineligibility for non-violent crimes. This directive empowered prosecutors to utilize statutes or court rules to rectify any injustices stemming from previously imposed mandatory minimum drug sentences.

Samuel Silver explained that in *State v. Arroyo-Nunez*, 470 N.J. Super. 351 (App. Div. 2022), the Appellate Division determined that motions filed pursuant to a Directive of the Attorney General and the New Jersey Rules of Court were permissible.

In its current form, N.J.S. 2C:35-12 is a three-sentence block paragraph that is 193 words long. The proposed modifications divide the statutory language into subsections to improve accessibility. Mr. Silver explained that the proposed modifications in subsection (a) clarify the sentences and penalties a court must impose after conviction and contains a proposed internal cross-reference to the statutory exceptions set forth in subsection (b).

Mr. Silver stated that the proposed modifications in subsection (b) eliminate the ambiguous language that permitted the statute to be read in a manner that could prohibit individuals who plead guilty from entering into post-conviction agreements with the State. The language in the newly created subsection (b)(2) incorporates the *Arroyo-Nunez* Court's requirement that when a trial court considers a joint motion filed pursuant to a Directive of the Attorney General and the New Jersey Rules of Court, the judge must make individualized determinations of whether good cause

exists for the requested relief. Mr. Silver sought the Commission's guidance regarding the references to the Court Rules contained in this subsection. He also relayed comments received from Commissioner Long prior to the meeting in which she requested that the reference to the "trial court judge" be modified to reference the "court" to conform to the rest of the statute.

Regarding subsection (c), Mr. Silver stated that the proposed language in this section contains a cross-reference to subsection (b).

Mr. Silver stated that the Office of the Attorney General thanked the Commission for the opportunity to review and comment on the Tentative Report. Deputy Director Demitro suggested that the Commission's recommendations are not necessary for three reasons. First, she stated that the revisions are a restatement of the Appellate Division opinion in *State v. Arroyo-Nunez*. In addition, she stated that since the decision, courts have had no problem implementing the decision or the Directive. Second, she noted that because the directive now mostly nullifies the proposed subsection (b) of N.J.S. 2C:35-12 statutory revisions to that subsection are unnecessary. Finally, she said that the possibility exists that additional judicial decisions about this Directive could further change the law and would impact these proposed revisions to the statute.

Mr. Silver noted that to this time, there were no bills pending to address the issue raised in the Report.

Commissioner Hartnett proposed a modification to the proposed introductory language set forth in subsection (a). The proposed new introductory clause would read "In the absence of an agreement described in subsection (b)." Commissioner Bertone indicated her support for this modification.

Commissioner Hartnett also suggested that the proposed language set forth in subsection (b)(2) be removed entirely. He reasoned that because a joint motion brought pursuant to R. 3:21-10(b)(3) will only be granted upon a demonstration of "good cause" thereby eliminating the need for a statutory reference to this requirement. With the removal of this subsection, Commissioner Hartnett stated that Staff would then be required to modify the format of subsection (c). Mr. Silver emphasized that subsection (b)(2) incorporates the holding in *Arroyo-Nunez* that the court must make an "individualized" finding of good cause.

Laura Tharney noted that the rule clearly allows for the filing of a motion, but raised the question of whether something important might be overlooked or lost if the reference to the motion is removed from the draft. She said that in *Arroyo-Nunez* hundreds of joint motions were filed by defendants and the State that were ultimately denied by the judge. Commissioner Hartnett commented that each of these denials were overturned by the appellate court, so the trial court's determination was not dispositive.

Commissioner Bell suggested that given the complexity of Commissioner Hartnett's suggested modifications, the Commission would benefit from seeing these changes in written form before passing upon them. Chairman Gagliardi suggested that Staff further discuss these

recommendations with Commissioner Hartnett and directed Staff to set forth the proposed modifications in two separate Appendices so the Commission can evaluate them.

Tort Claims Act: Applicability of Notice Provision to Contribution and Indemnification

The New Jersey Tort Claims Act (TCA) establishes a ninety-day notice of claim requirement for preserving tort claims against public entities in N.J.S. 59:8-8. In the case of *Jones v. Morey's Pier, Inc.*, 230 N.J. 142 (2017), the New Jersey Supreme Court clarified that the ninety-day notice of claim deadline is applicable to third-party contribution and common-law indemnification claims against a public entity. This deadline is triggered when the underlying cause of action accrues.

Whitney Schlimbach explained that, in *Jones*, the parents of an eleven-year-old who died after falling from a Ferris wheel during a school trip brought a lawsuit against the amusement park two years after the accident. The amusement park (Morey) defendants filed contribution and indemnification claims against the child's school, which was a public entity. No notice of claim was filed by any of the parties.

The New Jersey Supreme Court scrutinized the legislative intent of the TCA and N.J.S. 59:8-8, and considered the statute's plain language and the courts' interpretations of that language. The *Jones* Court dismissed the Morey defendant's claims due to their failure to serve a notice of claim on the school within ninety days of the accident. The Court acknowledged that the holding of *Jones* might result in the inability to bring contribution or indemnification claims at all, if a lawsuit is filed against the defendants after the ninety-day TCA deadline has elapsed.

Ms. Schlimbach explained that the Court conducted an examination of the Comparative Negligence Act (CNA) and the Joint Tortfeasors Contribution Law (JTCL) in the context of the TCA. Pursuant to the CNA, the jury assesses the total amount of damages and allocates fault among the defendants. The judge then molds the judgment based on the jury's allocation. Under the CNA, a plaintiff is permitted to recover the entire amount from any tortfeasor who is found to be 60% or more at fault. If a defendant pays more than his percentage of damages, the JTCL provides tortfeasors with a means of recovering from each other any amount paid in excess of their allocation of fault. An issue arises, however, when one of the tortfeasors is absent from trial.

Generally, allocating fault to an absent tortfeasor is not permitted, but there are exceptions. The *Jones* Court considered the goals of the three statutory schemes and concluded that authorizing the Morey defendants to seek an allocation of fault to the absent public entity tortfeasor was an equitable result in the circumstances of this case.

The Court noted that by the time the case, originally filed in Pennsylvania, was transferred to New Jersey, the TCA's notice of claim period was long expired. In addition, the Court stated that the parties were "on notice" of defendant's intent to seek apportionment and therefore, only limited discovery was necessary to raise and decide the issue at trial.

The *Jones* Court also considered whether the *Morey* defendants should be liable only for their allocated percentage of fault *regardless* of whether the percentage attributable to them was 60% or more, since they would be unable to obtain any contribution from the absent public entity tortfeasor. Considering that the CNA and the Joint Tortfeasors Law envision an equitable outcome, the Court concluded that the Morey defendants would only be liable as to their percentage of allocated fault even if it met the 60% threshold in the CNA. The Court reasoned that any other result would defeat the Legislature's clear objective of fairly apportioning liability for damages in accordance with the allocation of fault.

Ms. Schlimbach noted that there are currently no bills currently pending that address the notice provision in N.J.S. 59:8-8.

The proposed modifications add language to N.J.S. 59:8-8 to clarify that contribution and indemnification claims are subject to the ninety-day notice of claim requirement. The proposed language is identical to the language employed by the Supreme Court in *Jones*.

Based upon the reasoning in *Jones*, the question whether to allocate fault to absent tortfeasors, and relatedly, whether to reduce a plaintiff's full recovery by the absent tortfeasor's allocation of fault, appears to depend on the law governing the claims and the equities of the individual case. Therefore, no modifications have been proposed regarding this aspect of the *Jones* holding.

Ms. Schlimbach referred to the written comments submitted by Commissioner Bell and Vice-Chairman Bunn prior to the meeting. In his comments, Commissioner Bell suggested adding language that would prevent the allocation of the government's liability to a private party if it constitutes sixty percent or less, except in cases involving extraordinary circumstances. These extraordinary circumstances include instances where the defendant's conduct or statements indicate either that a public entity is not responsible, or that the defendant will fully assume liability for the damages. Vice-Chairman Bunn suggested alternative language as the introductory phrase: "absent reasonable reliance on an affirmative representation by the defendant, proven by clear and convincing evidence."

Comments were also received from Commissioner Long prior to the meeting, which indicated her approval of the release of the Tentative Report. With respect to the suggestions by Commissioners Bell and Vice-Chairman Bunn, Commissioner Long advised that she preferred Staff's approach.

Ms. Schlimbach requested that the report be released as a Tentative Report. She added that, if the Commission was inclined to consider additional modifications along the lines suggested by Commissioner Bell, she would like additional time to conduct research and provide supplemental information to the Commission on this issue. Ms. Schlimbach also noted that the phrase "extraordinary circumstances" appears in N.J.S. 59:8-9 and is already a well-established concept used to determine whether to permit a late notice of claim.

Commissioner Bell praised the Report, acknowledging its accuracy in faithfully reflecting the Court's holding in *Jones*. He emphasized the significance of both components of the *Jones* holding, and highlighted that, without the second component, the first could lead to unfair and misleading interpretations. Commissioner Bell described his recommendation as conservative, using the term "extraordinary circumstances" to account for the impossibility of foreseeing every situation in which the rule would be applicable. Additionally, he emphasized that this term grants the court the necessary flexibility to apply an exception to the rule when deemed appropriate.

Commissioner Hartnett raised a concern regarding the proposed language, noting that the statute does not distinguish between a claim and a cause of action. He also proposed the inclusion of the word "underlying" before "cause" to make clear that the deadline is triggered by the accrual of the underlying cause of action. With respect to the issue raised by Commissioner Bell, Commissioner Hartnett proposed adding language that provides appropriate notice to the defendant and plaintiff that the court may rely on, or look to, other law to eliminate or reduce the plaintiff's recovery. Therefore, he suggested adding a new sentence to the first paragraph reading: "This section applies to claims for contribution and common law indemnification, and the 90-day time limit runs from the accrual of the underlying cause of action and other law might limit recovery from a party whose claim is barred by some other section."

Commissioner Rainone questioned the rationale behind placing this language in the TCA rather than the CNA, given that the circumstances involve claims that could *not* be brought against a public entity. Second, he sought clarification on the interpretation of the phrase "extraordinary circumstances" in this context. Commissioner Rainone recommended amending the CNA to address situations where the defendant is allowed to allocate fault to an unidentified party because notice was not provided to a public entity.

Commissioner Bell concurred that the proposed revisions could be included in the CNA. He also noted that, logically, the proposed modifications fit well within the TCA, since it specifies the consequences of failing to file a timely claim. However, he acknowledged the need to emphasize that failure to file a notice of claim could result in the reduction of plaintiff's recovery in the amount of damages allocated to a public entity.

Regarding the phrase "extraordinary circumstances," Commissioner Bell clarified that he was open to alternative wordings and that his goal was to exercise caution. He expressed confidence in the clarity and compelling nature of the court decision, which he believed would lead to just remedies in cases where defendants' conduct raises concerns. Commissioner Bell agreed with Commissioner Hartnett's point that the statute should address that the deadline is triggered by the accrual of the underlying cause of action. However, he advised caution with the proposed language "as other law may limit," because it lacked precision.

Chairman Gagliardi concurred with Commissioner Bell's suggestion for further research by the Commission Staff, emphasizing the need to revisit this subject during a future meeting. He recalled the initial discussions held by the Commission when approving this project and

highlighted the potentially significant implications and complexities that could act as traps for the unwary. The decision to codify the Supreme Court's holding was driven by the Commission's aim to address these implications and assist those who may not be aware of the opinion.

Chairman Gagliardi stressed the importance of providing comprehensive information to the public. He said that beyond amending the TCA, the Commission should also consider modifications to the CNA to fully communicate the implications of the Court's decision. Chairman Gagliardi also concurred that the phrase "extraordinary circumstances" was unnecessary. He pointed out that any litigant seeking to justify a late filing before a judge must already articulate and demonstrate extraordinary circumstances making the statutory reference surplusage.

Commissioner Hartnett proposed that if Staff can identify other relevant laws, noting that those should also be modified accordingly. In case certain laws remain unidentified, he suggested proceeding with amending the ones already identified, acknowledging that there might be other laws that could come into play at a later time. Chairman Gagliardi supported this approach and invited Staff to suggest any additional laws in addition to the two already identified by the Court.

Non-Admitted Insurers Act: Jurisdiction Over Violations

Kyle Ryan, Legislative Law Clerk, proposed a project addressing ambiguity in the Non-Admitted Insurers Act ("Act"), which protects New Jersey residents by holding out-of-state insurers accountable when conducting business in New Jersey. Mr. Ryan explained that the New Jersey Department of Banking and Insurance (DOBI) and its Commissioner are responsible for regulating the activities of these insurers.

In N.J.S. 17:32-20, the Act instructs that "[w]henever it shall appear to the commissioner that any insurer, [etc.] has violated, . . . the provisions of this act, the Attorney General, upon the request of the commissioner, shall institute a civil action in the Superior Court for injunctive relief and for such other relief as may be appropriate under the circumstances." In *Applied Underwriters Captive Risk Assurance Co., Inc. v. N.J. Department of Banking & Insurance*, the Appellate Division held that N.J.S. 17:32-20 mandates that a dispute between an out-of-state insurer and DOBI be litigated in the Superior Court.

In *Applied Underwriters*, the Appellants were out-of-state insurance companies offering workers' compensation insurance in New Jersey. They became the subject of complaints received by the DOBI regarding exccessively high premiums. In response, the DOBI issued a letter requesting that the insurers address these concerns and rectify the harm caused. In addition, the DOBI exercised its administrative authority to enforce this demand. The Appellants filed a complaint in the Law Division asserting that the DOBI did not have jurisdiction over the dispute, which Appellants claimed must be resolved in a judicial forum pursuant to N.J.S. 17:32-20.

In reaching its decision that the DOBI Commissioner retains discretion to regulate out-of-state insurers using administrative *or* judicial remedies, the *Applied Underwriters* Court examined the legislative history of the Act and N.J.S. 17:32-20, as well as the statutory language and the

most efficient means of achieving compliance with the Act. The Court interpreted the phrase "upon the request of" as discretionary rather than mandatory language, thus affirming the Commissioner's ability to choose the appropriate course of action to address violations by out-of-state insurers.

In written comments submitted to Staff in anticipation of the meeting, Commissioner Long indicated that although she did not consider the statute to be ambiguous, she had no objection to considering clarifying language.

Mr. Ryan requested authorization to conduct additional research and outreach to determine whether it would be useful to modify N.J.S. 17:32-20 to clarify that DOBI's Commissioner has discretion to choose to pursue either an administrative action or to request judicial action from the Attorney General to remedy violations of the Non-Admitted Insurers Act.

Commissioner Hartnett had no objection to moving forward with this project and noted that, with respect to statutory drafting, the word "shall" should be avoided because of its inherently ambiguous nature. Commissioner Bell also expressed his support for the project as did Commissioner Bertone.

The Commission authorized Staff to move forward with additional research and outreach on this subject.

Affidavit of Merit Statute: Application to Respondeat Superior Claims

Sameer Ahmad, Legislative Law Clerk, proposed a project to address the Affidavit of Merit (AOM) statute found in N.J.S. 2A:53A-26 to -29 concerning vicarious liability claims against licensed healthcare facilities. The purpose of the AOM statute is to ensure that negligence claims against specific licensed individuals, such as doctors, lawyers, engineers, and others, are appropriate for consideration by a court. The statute requires an affidavit from a similarly licensed person, affirming that the claim has merit.

Mr. Ahmad explained that when a healthcare facility falling within the definition of "licensed person" in the AOM statute, is implicated by the conduct of an unlicensed employee, the statute does not make clear whether an AOM is required to maintain a vicarious liability claim. The New Jersey Supreme Court addressed this issue in *Haviland v. Lourdes Medical Center of Burlington County, Inc.*, 250 N.J. 368 (2022).

In *Haviland*, Plaintiff visited the Defendant's facility for an examination of his injured shoulder. During the x-ray procedure, a radiology technician instructed the Plaintiff to hold weights. This request was contrary to the Plaintiff's physician's instructions and worsened the Plaintiff's injury. The Plaintiff sued the radiology technician for negligence and asserted a claim of vicarious liability against the healthcare facility that employed the technician. The trial court dismissed the claim for failure to serve an AOM because Defendant healthcare facility was a "licensed person," and the Appellate Division reversed.

The Supreme Court determined that an AOM was not required, emphasizing that vicarious liability claims are tethered to the employee, rather than the employer. Additionally, the statutory language requires an AOM for damages or injury "resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation." The *Haviland* Court concluded that if the Legislature had intended to require an AOM for negligent acts by a radiology technician, it would have included that profession in the list of "licensed persons" in the AOM statute.

Mr. Ahmad advised the Commission that Staff received comments from Alex Daniel, Counsel to the New Jersey Civil Justice Institute (NJCJI) prior to the meeting. Mr. Daniel indicated the NJCJI is of the opinion that the statute should be modified to require an AOM in the situation addressed in *Haviland*.

Mr. Ahmad requested authorization to conduct additional research and outreach to determine whether it would be useful to modify N.J.S. 2A:53A-27 to clarify the scope of the AOM requirement in the context of vicarious liability claims against licensed healthcare facilities, as discussed by the Supreme Court in *Haviland*.

Ms. Tharney advised the Commission that Commissioner Long submitted comments before the meeting indicating that the case law pertaining to this matter is well-established but that she has no objection to conducting further study and analysis in this area if it proves beneficial.

Mr. Daniel opined that the *Haviland* decision exposed a gap in the AOM statute which deprives licensed healthcare facilities of the benefit of an AOM in the context of a vicarious liability claim based on the conduct of unlicensed employees. He indicated that case law prior to *Haviland* established that courts focused on the nature of the harm rather than the licensure status of the alleged wrongdoer and, therefore, NJCJI believes that codifying that in the statute is the appropriate course of action.

Commissioner Bell expressed his support for the project and clarified that the focus of the project should be on codifying the holding of *Haviland*. He explained that it should be left to the Legislature to determine whether the Supreme Court's holding in *Haviland* is an accurate expression of legislative intent with respect to the AOM statute. Commissioner Bertone agreed.

The Commission authorized Staff to move forward with additional research and outreach on this subject.

Adjournment

On the motion of Commissioner Bertone, seconded by Commissioner Bell, the meeting was unanimously adjourned.

The next meeting of the Commission is scheduled for September 21, 2023, at 4:30 p.m. at the office of the New Jersey Law Revision Commission.