SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

In this section, the Seton Hall Law Review *presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of practice.*

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PRODUCTS LIABILITY—INDEMNIFICATION—ULTIMATE DISTRIBUTOR INDEMNIFIED BY INTERMEDIATE DISTRIBUTOR IN STRICT LIABILITY ACTION WHERE BOTH WERE INNOCENT CONDUITS IN CHAIN OF DISTRIBUTION OF DEFECTIVE PRODUCT—*Promaulayko v. Johns Manville Sales*, 116 N.J. 505, 562 A.2d 202 (1989).

The decedent, John Promaulayko, died from asbestosis which he developed while working from 1934 to 1978 for the Ruberoid Corporation in New Jersey. 116 N.J. at 506, 562 A.2d at 202-03. Ruberoid purchased the asbestos from various suppliers including Leonard J. Buck, Inc. (Buck). 116 N.J. at 506-07, 562 A.2d at 203. All of the asbestos that Buck sold to Ruberoid was supplied through Amtorg Trading Corporation (Amtorg) who had contracted with a supplier in the Soviet Union. 116 N.J. at 507, 562 A.2d at 203. The asbestos was shipped directly from the manufacturer in the Soviet Union to Ruberoid in New Jersey in 100-pound bags which did not contain a warning about the dangers of asbestosis. 116 N.J. at 507, 562 A.2d at 203. The decedent's wife brought a survivor's action as well as a wrongful death claim seeking damages against both Amtorg and Buck.

The trial court awarded plaintiff a jury verdict of $100,000. *Id.* The jury fixed a greater percentage of the fault on Buck than on Amtorg. 116 N.J. at 508, 562 A.2d at 203. The trial court nonetheless directed Amtorg to indemnify Buck, based on the jury's response to a special interrogatory indicating that Amtorg was responsible for selling Buck *all* of the asbestos which had proximately caused the decedent's asbestosis. *Id.* (emphasis added).

The appellate court reversed, holding that indemnification could only be obtained from the manufacturer. *Id.* The appellate court reasoned that indemnity derives from the primary liability of the manufacturer for the making of the defective product, not merely the constructive or secondary liability of the distributor. 116 N.J. at 508-09, 562 A.2d at 203-04. The court noted that while the distributor is in the chain of distribution, it did not create the defect. *Id.* Since the purpose of indemnity is to prevent unjust enrichment by the active tort-feasor, in this case the Soviet manufacturer, the appellate court could see no reason to shift liability from one distributor to another. *Id.* at 509, 562 A.2d at 204. Therefore, the court held that the two blameless distributors, Buck and Amtorg, must each contribute

for their comparative fault. *Id.* The supreme court granted certification and reversed. *Id.*

Justice Pollock, writing for a unanimous court, ruled that in strict liability actions where multiple defendants are innocent conduits in the chain of distribution of a defective product, the ultimate distributor has the right "as a matter of law" to indemnification from the intermediate distributor. 116 N.J. at 516, 562 A.2d 207-08. Consequently, the court held that Amtorg must indemnify Buck to the full extent of Buck's liability. *Id.* Justice Pollock reasoned that the restoring principles of indemnification, relied upon by the appellate court, supported the allocation of liability "to the distributor closest to the manufacturer." *Id.* at 513, 562 A.2d at 206.

The supreme court began its analysis by noting that in strict liability actions "liability extends beyond the manufacturer to all entities in the chain of distribution." *Id.* at 510, 562 A.2d at 205. Justice Pollock opined that in the absence of the manufacturer the injured party would not be deprived of their cause of action. *Id.* at 511, 562 A.2d at 205. Consequently, the court concluded that distributors that were merely innocent conduits in the chain of sale remained liable in tort to the injured party. *Id.*, 562 A.2d at 205.

The court recognized that parties in the distribution chain were free to allocate the risk of loss between them, but absent an express agreement the equitable doctrine of common law indemnity arises to fashion a just remedy. *Id.* Specifically, the supreme court stressed that actions brought by retailers, against manufacturers, have long been recognized in the state and are consistent with the principles of indemnity. *Id.*, 562 A.2d at 205.

Justice Pollock advanced two basic principles underlying strict liability in tort: "the allocation of the risk of loss to the party best able to control it" and "the allocation of the risk to the party best able to distribute it." *Id.* at 509-10, 562 A.2d at 204. Recognizing that the New Jersey Supreme Court had not previously applied these principles to a claim for indemnity between two parties, neither of which was primarily liable, Justice Pollock acknowledged that few courts in other jurisdictions that had considered the issue had indemnified the party lower in the chain of distribution. *Id.* at 511-12, 562 A.2d at 205-06. Justice Pollock stated that "these courts have proceeded in a manner consistent with the principle of allocating the risk of loss to the party better

able to control the risk and to distribute its costs." *Id.* at 513, 562 A.2d at 206.

The court further justified its holding as consistent with the principles underlying commercial law. *Id.* In particular, Justice Pollock indicated that a party could seek indemnification from one further up the distribution chain under the Uniform Commercial Code "for breach of implied warranties of merchantability, N.J. STAT. ANN. § 12A:2-314, or of fitness for a particular purpose, N.J. STAT. ANN. § 12A:2-315." 116 N.J. at 513, 562 A.2d at 206.

Finally, the court recognized that in some cases the ultimate distributor may be better able to bear the risks than an intermediate distributor. *Id.* at 515, 562 A.2d at 207. Justice Pollock summarily dispensed with this issue by noting that as a general rule indemnification will follow the distribution chain. *Id.*

Holding distributors strictly liable in tort is proper in the absence of jurisdiction over the manufacturer of the defective product. They have profited from their sales of the defective product and equity dictates that they should pay their share. The court's ruling in this case was equitable. Because the Soviet manufacturer could not be assessed damages, assessing liability to Amtorg was proper. Justice Pollock correctly identified the goal of strict liability as protecting the innocent consumer by allocating the risk of loss to those who can best control and distribute it. *See id.* at 509-10, 562 A.2d at 204.

Cases might arise, however, where applying indemnification will not produce an equitable result. A distributor higher in the chain of sale might not be better able to spread the risk or to put pressure on the manufacturer to correct the defect than the ultimate distributor. *Id.* at 515, 562 A.2d at 204. Further, a case could arise where the manufacturer is no longer in business. Under such circumstances, comparative liability, rather than indemnification, may be the most equitable means of allocating the liability among the individual distributors.

The ruling in *Promaulayko* indicates the continued commitment New Jersey courts have shown in breaking new ground in the area of products liability. Hopefully, however, courts will use discretion when faced with the situation where indemnification may be inequitable.

Paul G. Gizzi

TORTS—DEFAMATION—PUBLICATION OF A FALSE DEATH NOTICE WITHOUT ADDITIONAL DEFAMATORY INFORMATION IS NOT PER SE DEFAMATION ENTITLING PLAINTIFF TO DAMAGES FOR EMOTIONAL DISTRESS—*Decker v. Princeton Packet, Inc.*, 116 N.J. 418, 561 A.2d 1122 (1989).

On February 15, 1985, The Princeton Packet (The Packet), a newspaper, published the obituary of Marcy Decker. 116 N.J. at 420-21, 561 A.2d at 1123. While the obituary accurately reported Marcy Decker's age, family relationships and residence, it incorrectly pronounced her dead. *Id.* at 421, 561 A.2d at 1123. Two days after publication, Marcy Decker informed The Packet of the error and on February 19, 1985 The Packet printed a retraction.

On February 14, 1986, Marcy Decker, her son, and her mother filed a complaint against The Packet alleging defamation, negligent and intentional infliction of emotional distress, and gross negligence. The trial court summarily dismissed the complaint finding that the mere publication of an erroneous death notice is not defamatory per se. *Id.* at 423, 561 A.2d at 1124. The court also dismissed Marcy Decker's son's and mother's defamation claims concluding that an untrue notice concerning Marcy Decker's death could not defame them because the publication was not directed at them. *Id.* at 423, 561 A.2d at 1125. The trial court rejected all claims for negligent and intentional infliction of emotional distress.

The appellate court affirmed the trial court's decision holding that "the mere publication of an improvident obituary is not defamatory in the absence of additional material of a defamatory nature published in connection therewith." *Id.* at 424, 561 A.2d at 1125 (quoting *Decker v. Princeton Packet, Inc.*, 224 N.J. Super. 726, 541 A.2d 292 (App. Div. 1988)). While the court did not address the intentional infliction of emotional distress claims, it affirmed the dismissal of the claims for negligent infliction of emotional distress. *Id.* The New Jersey Supreme Court granted certification. *Id.*

Justice Handler, writing for a unanimous court, framed the issue as whether the printing of a false obituary can be deemed defamatory when the only inaccuracy contained in the publication was the announcement of death. *Id.* at 425, 561 A.2d at 1125. Justice Handler defined a defamatory statement as "one that is false and is injurious to the reputation of another or ex-

poses another person to hatred, contempt or ridicule or subjects another person to a loss of good will and confidence." *Id.* at 425-26, 561 A.2d 1126 (quoting *Romaine v. Kallinger*, 109 N.J. 282, 289, 537 A.2d 284, 287 (1988)). Justice Handler articulated that the alleged defamatory language should be evaluated "according to the fair and natural meaning which it would be given by persons of ordinary intelligence." *Id.* at 425, 561 A.2d at 1125 (quoting *Herrmann v. Newark Morning Ledger Co.*, 48 N.J. Super. 420, 431, 138 A.2d 61, 67 (App. Div. 1958), *aff'd on rehearing*, 49 N.J. Super. 551, 140 A.2d 529 (App. Div. 1958); *Molnar v. Star Ledger*, 193 N.J. Super. 12, 18, 471 A.2d 1209, 1212 (App. Div. 1984)). The justice explained that once the court determines the meaning that a reasonable person would give the language, the court must determine whether or not the language, considered in context and as a whole, would be interpreted as defamatory. *Id.* at 425, 561 A.2d 1125-26. He posited that where the language is susceptible to both interpretations a question of fact arises for the jury. *Id.* at 425, 561 A.2d at 1126 (citations omitted). Where, however, the language can only be interpreted as nondefamatory the court may summarily dismiss the action. *Id.* (citations omitted).

Reiterating the general rule recognized by most courts throughout the country, the court asserted that a death notice printed without malicious intent in which the only untrue statement concerns a person's death is not defamatory as a matter of law. *Id.* at 426, 561 A.2d at 1126 (citations omitted). Justice Handler held that an obituary falsely stating the death of an individual is not defamatory in and of itself "when viewed from the perspective of a reasonable person of ordinary intelligence and experience . . . as death is a natural state and demeans no one." *Id.* at 427-28, 561 A.2d at 1127. Justice Handler, however, noted an exception to the general rule where the erroneous death notice includes additional false information that may be defamatory. *Id.* at 427, 561 A.2d at 1126. He opined that a defamatory action may survive summary dismissal when the publication not only falsely declares a person deceased but also erroneously sets forth the circumstances surrounding their demise in a defamatory manner. *Id.* at 427, 561 A.2d at 1127.

The court noted that such a holding correctly recognizes the important public function of reporting deaths, while still protecting those persons defamed by notices which either include additional defamatory information or which are printed with an intent

to harm. *Id.* at 428, 561 A.2d at 1127 (citations omitted). Justice Handler emphasized the fact that The Packet retracted the erroneous obituary and that the retraction should have prevented any continuing injurious effects to the Decker family, thereby providing them with an adequate remedy. *Id.*

Next, Justice Handler addressed the claim of negligent infliction of emotional distress. *Id.* at 429, 561 A.2d at 1127. The justice defined the tort as "negligent conduct that is the proximate cause of emotional distress in a person whom the actor owes a legal duty to exercise reasonable care." *Id.*, 561 A.2d at 1128 (citation omitted). He further explained that "[l]iability should depend on the defendant's foreseeing fright or shock severe enough to cause substantial injury in a person normally constituted." *Id.* (quoting *Caputzal v. Lindsay Co.*, 48 N.J. 69, 76, 222 A.2d 513, 517 (1966)). Justice Handler stressed that the foreseeability of injury is an especially crucial element in the tort of negligent infliction of emotional distress in order to ensure the genuineness of the claim. *Id.* He maintained that the question of whether emotional distress can be found as a matter of law is for the court while it is for the jury to decide whether or not it has been proved. *Id.* at 430, 561 A.2d at 1128 (quoting *Buckley v. Trenton Sav. Fund Soc'y,* 111 N.J. 355, 367, 544 A.2d 857 (1988)).

Justice Handler held that any emotional distress suffered as a result of a false death notice is not compensable as a matter of law. *Id.* at 431, 561 A.2d at 1129. He found that while one may feel annoyed, embarrassed or irritated by a mistaken death notice, the injury experienced is not "sufficiently palpable, severe, or enduring to justify imposition of liability and the award of compensatory damages." *Id.* Thus, Justice Handler held that any serious and substantial distress Marcy Decker and her family suffered as a result of The Packet's inadvertent conduct was not particularly foreseeable. *Id.* Finally, the justice stressed that his findings were consistent with first amendment principles which require that a plaintiff show at least the same degree of intent needed to recover for the infliction of emotional injury as is required to find libel. *Id.* at 432, 561 A.2d at 1129 (citations omitted).

The New Jersey Supreme Court in *Decker* correctly recognized and gave credence to both the importance of protecting individuals from defamation and the important public interest of promoting the publication of obituaries. *Id.* at 428, 561 A.2d at 1127. The court, however, falls short of adequately stressing that

reporters and newspaper personnel should be more careful in verifying death notices and their contents before publication. While the court did emphasize that newspapers can be held liable for publishing additional information that is defamatory, the court should have stressed that while an incorrect death notice by itself is not libelous, announcing one's death prematurely should be prevented by the practice of responsible journalism.

The court rightfully noted that while a premature death notice may cause embarrassment and annoyance, it does not produce compensable damages. *Id.* at 437, 561 A.2d at 1129. Although allowing recovery may encourage more careful reporting, to do so would allow recovery where a cause of action was not sustained. The court's well-reasoned opinion reached all the logical legal conclusions. The court, however, should have sent a warning to reporters to be more careful in reporting deaths, as they are, by their nature, a sensitive subject.

Mary Ann Kricko

CIVIL PROCEDURE—ENTIRE CONTROVERSY DOCTRINE—FAILURE TO JOIN A NECESSARY OR PROPER PARTY IN AN ACTION BARS THE INSTITUTION OF SUBSEQUENT SUIT AGAINST THAT PARTY—*Cogdell v. Hospital Center at Orange*, 116 N.J. 7, 560 A.2d 1169 (1989).

Ruth Cogdell gave birth to a child with cerebral palsy. 116 N.J. at 8, 560 A.2d at 1169. Cogdell, individually and as guardian ad litem for her child, filed a lawsuit against Dr. Brown, the obstetrician, and Dr. Snead, the emergency room pediatrician, asserting negligence for a delay in performing a cesarean section operation. *Id.* at 9, 560 A.2d at 1169. The plaintiff's expert witnesses stated that the delay in the delivery was a deviation from accepted medical standards and that the doctors were guilty of negligence. Dr. Brown countered that he had not varied from accepted standards, although he conceded that there was a delay in the surgery while awaiting the assembly of an operating team. *Id.* at 11, 560 A.2d at 1170. The defendant produced an expert witness who asserted that any negligence in performing the operation should be assessed against the hospital. *Id.* at 12, 560 A.2d

at 1171. The plaintiff, however, named only the doctors in the negligence suit.

The trial jury found in favor of both defendants. *Id.* at 9, 560 A.2d at 1169. The appellate court dismissed an appeal filed by the plaintiff on the ground that a settlement agreement reached by the parties barred the appeal. *Id.*

Following the jury finding, the plaintiff brought a negligence suit against the hospital and various members of the operating team. *Id.* at 13, 560 A.2d at 1171. These defendants contended that Ms. Cogdell had prior knowledge that the hospital could have been at fault and she should have amended the complaint to join them. *Id.* The defendants moved for dismissal, arguing that the entire controversy doctrine barred this second lawsuit since the hospital should have been joined in the original matter. *Id.* This motion was denied by both the trial court and the appellate division. *Id.* at 9, 560 A.2d at 1170. The Supreme Court of New Jersey granted a petition for certification. *Id.* at 10, 560 A.2d at 1170.

Justice Handler, writing for the court, first discussed whether the hospital was a required party-defendant in the prior litigation. *Id.* at 13, 560 A.2d at 1172. The court noted that New Jersey Court Rule 4:28-1(a), which delineates when a party is to be joined, is not self-defining. *Id.* The justice posited that a restricted reading of the rule would not have required the plaintiff to join the defendants in the prior action. *Id.* at 14, 560 A.2d 1172. However, the court maintained that Rule 4:28-1(a) must be read in conjunction with Rule 4:5-1. *Id.*

The justice stated that Rule 4:5-1 was adopted following the supreme court's decision in *Crispin v. Volkswagenwerk*, 96 N.J. 336 (1984). 116 N.J. at 14, 560 A.2d at 1172. Justice Handler acknowledged that although *Crispin* precluded the filing of simultaneous actions because of the entire controversy doctrine, *Crispin* did not establish whether the entire controversy doctrine precluded subsequent litigation against a party over the same dispute. *Id.* at 14-15, 560 A.2d at 1172.

The court pointed out that the entire controversy doctrine had been adopted into the state constitution to avoid "piecemeal decisions." *Id.* at 15, 560 A.2d at 1173 (citation omitted). The justice noted that the doctrine has aided judicial economy both before and after its codification in the constitution. *Id.* Justice Handler stated that the doctrine has continued to evolve into a rule mandating the joinder of almost every claim or defense re-

lating to a controversy at bar. *Id.* at 16, 560 A.2d at 1173. Thus, the justice declared that the entire controversy doctrine has grown to demand joinder of all affirmative claims and any representative parties needed to resolve such claims. *Id.* at 17, 560 A.2d at 1174.

Justice Handler further opined that the party-joinder rule has grown out of the policy to protect absent parties as well as society from repetitous and excessive litigation. *Id.* at 17-18, 560 A.2d at 1174. The court stated that the common law test for mandatory joinder of parties was whether a party was "indispensable", which is defined as a non-party with an interest in the matter before the court. *Id.* at 18, 560 A.2d at 1174. The court stated that defining a party as "indispensable" had depended on a case-by-case approach. *Id.* at 19, 560 A.2d at 1175. The court, however, noted that "indispensable" parties have traditionally been distinguished from "necessary" or "proper" parties. *Id.* at 20, 560 A.2d at 1175 (citations omitted).

The justice recognized that the entire controversy doctrine has manifested itself in the bifurcated concepts of party-joinder and claims-joinder. *Id.* The court stated that precedent recognizes several benefits of the mandatory joinder of parties, such as judicial economy and conclusive disposition of legal controversies. *Id.* at 21, 560 A.2d at 1176. Therefore, the justice decided that the entire controversy doctrine should apply to the mandatory joinder of parties as well as claims. *Id.* at 22, 560 A.2d at 1176.

The court commented that the joinder of known parties should be the norm for single actions. *Id.* The justice then charted the growth of the mandatory joinder of parties in light of the entire controversy doctrine. *Id.* Justice Handler enumerated some of the considerations supporting the application of a mandatory joinder rule. *Id.* at 23, 560 A.2d at 1177. The rule attempts to further the following goals: a complete adjudication to assure that legal controversies are properly decided; party fairness to assure that parties involved are afforded the opportunity to participate in an action which threatens their interests; and judicial economy to assure that the courts are not burdened with fragmented litigation. *Id.* With these goals in mind, the court stressed that all courts have the obligation and the power to require proper joinder of parties. *Id.* at 24, 560 A.2d at 1177.

The court stated that the facts of this case exemplify the need for a joinder of parties. *Id.* at 25, 560 A.2d at 1177. The

justice noted that the trial would have been more comprehensive had all parties been involved, the parties would have been in a better position to put forth their defenses, and the court would not have been subjected to multiple adjudication of what was essentially the same lawsuit. *Id.* at 26, 560 A.2d at 1178. Therefore, all the policy concerns of the entire controversy doctrine were involved in both cases. *Id.*

The court concluded that the mandatory joinder of parties is consumed within the entire controversy doctrine. *Id.* Justice Handler advocated a mandatory party-joinder rule and shunned prior reasoning to the contrary. *Id.* at 27, 560 A.2d at 1178. The justice stated, however, that the adoption of this rule does not mandate automatic joinder, nor will its criteria be established solely by this decision. *Id.* at 27-28, 560 A.2d at 1179. Due to the rulemaking aspect of the decision, the court decreed that the implementation will only have prospective application and therefore denied the defendants' motion for dismissal. *Id.* at 28, 560 A.2d at 1179.

In his dissent, Justice Clifford asserted that, while he agreed with the majority decision, it should have been applied retroactively. 116 N.J. at 28, 560 A.2d at 1179 (Clifford, J., dissenting in part). The dissent stated that in applying the traditional joinder tests of judicial economy, comprehensive adjudication, and fairness, the court should have implemented their decision immediately to assure consistency with the entire controversy doctrine. *Id.* at 29, 560 A.2d at 1180 (Clifford, J., dissenting in part). Justice Clifford opined that the *Crispin* decision had provided a plaintiff with adequate notice of a possible joinder of parties requirement and the prospective application of this rule was flawed. *Id.*

The majority decision seems to establish a more efficient court procedure while attempting to afford a permanently injured child some form of recompense. It should be noted that this decision is procedural. The plaintiff must still attribute the negligence to the hospital. If the finger of guilt points again to the operating surgeons, they should be shielded from retrial by the prior decision. Therefore, despite the caveat of the dissent, the benefit of this holding in clarifying the joinder of parties requirement in New Jersey must overshadow any conflict over its implementation.

Edward Walsh

CIVIL PROCEDURE—DISCOVERY RULE—STATUTE OF LIMITATIONS DID NOT BEGIN TO TOLL DESPITE PLAINTIFF'S IMMEDIATE SUSPICION THAT DEFENDANT'S PRODUCT HAD CAUSED INTERNAL INJURY—*Graves v. Church & Dwight Co.*, 115 N.J. 256, 558 A.2d 463 (1989).

Sometime after midnight on August 22, 1979, the plaintiff, William Graves, drank several swallows of an Arm & Hammer Baking Soda and water mixture to remedy a case of mild indigestion. 115 N.J. at 258, 558 A.2d at 464. He immediately collapsed; writhing in pain. Graves required emergency surgery to repair a life threatening tear in his upper stomach. *Id.* at 259, 558 A.2d at 464. The surgical diagnosis was listed as a perforated ulcer of unknown etiology, despite the fact that ulcers are normally much smaller in size and appear on the bottom portion of the stomach. *Id.*, 558 A.2d at 465.

At the time of Graves' initial emergency admission and at subsequent medical examinations, he related a history of baking soda ingestion prior to the onset of sudden abdominal pain. *Id.* at 259, 273, 558 A.2d at 465, 472. Medical records, however, did not suggest any causal relationship between the baking soda and stomach perforation. *Id.* at 259, 558 A.2d at 465.

Graves' condition was finally stabilized after six corrective operations. Although hospital records referred to Graves' history of stomach perforation as secondary to sodium bicarbonate (baking soda) ingestion, no physician believed the two were causally related. *Id.* at 259-60, 558 A.2d at 465. Four years after this incident, one of Graves' co-workers viewed a television news report on spontaneous stomach rupture following baking soda ingestion and immediately notified the plaintiff. Shortly thereafter, Graves brought suit against the manufacturer of Arm & Hammer Baking Soda. *Id.* The manufacturer moved to dismiss Graves' complaint because the statute of limitations had run. *Id.* The trial court ultimately granted this motion and dismissed the complaint *Id.*

According to the trial court, the plaintiff knew all the facts necessary to bring an actionable claim when the injury occurred. *Id.* Indeed, given Graves' inclusion of baking soda ingestion in his medical history, the court did not give credence to the notion that Graves had never attributed his ailment to the baking soda. *Id.* at 261, 558 A.2d at 466. Furthermore, the trial court noted

that available medical literature could have supported such a claim. *Id.* at 260-61, 558 A.2d at 465.

The appellate division reversed, disagreeing with the legal implications of the lower court's factual findings. *Id.* at 261, 558 A.2d at 466. More specifically, the appellate court ruled that a layman should not be charged with constructive awareness of the role baking soda had played in his illness when such a causal connection had been discounted by his physicians. *Id.*

The supreme court, in a per curiam opinion, affirmed the decision of the appellate division. *Id.* at 271, 558 A.2d at 471. Justice O'Hern's concurrence stressed the equitable nature of the discovery rule, which tolls the statute of limitations when an individual is either unaware that he has been injured or is unaware that his identifiable injury is, or may be due to the fault of another. *Id.* at 262, 558 A.2d at 466. Justice O'Hern emphasized that a plaintiff's awareness that he has been injured does not automatically signify the accrual of a cause of action, particularly where the awareness of fault is not self-evident. *Id.*

The concurring opinion approached this "essentially factual" dispute regarding the application of the discovery rule from the standpoint of a plaintiff who had been surrounded by physicians who never believed that baking soda could have had this adverse effect. *Id.* Additionally, Justice O'Hern noted that this product had generated an air of safety as a 140-year-old common household staple. *Id.* at 262-63, 558 A.2d at 466-67.

According to Justice O'Hern, Graves would have been no better off had he diligently presented his claim to Arm & Hammer. *Id.* at 263, 558 A.2d at 467. A number of consumers had previously done so and had been assured of the product's safety and Food and Drug Administration (FDA) approval. *Id.* Furthermore, the concurrence indicated that even the chief chemist at Arm & Hammer had never considered, prior to 1980, the possibility of spontaneous stomach rupture following baking soda ingestion. *Id.* at 265, 558 A.2d at 468. Accordingly, Justice O'Hern reasoned that such knowledge should not be imputed to a consumer, albeit of considerable education and experience, who was injured in 1979. *Id.* at 266, 269, 558 A.2d at 468, 470.

While recognizing that Graves may have suspected that the baking soda was the cause of his injury, Justice O'Hern did not find this to be the determinative factor. *Id.* at 267, 558 A.2d at 469. The more important consideration, according to the concurrence, was whether Graves was aware of any fault or defect in

the baking soda. *Id.* Absent evidence of such awareness, Justice O'Hern characterized Graves as a plaintiff who had been effectively misled by the longstanding reputation of this medicinal product. *Id.* at 267-68, 558 A.2d 469. Accordingly, Justice O'Hern reasoned that Graves could have assumed that his ailment was attributable to other factors. *Id.*

Justice O'Hern cautioned that the sudden, traumatic nature of Graves' ailment should not bar the application of the discovery rule, given the fact that New Jersey does not have a black letter rule forbidding its application in this context. *Id.* at 268, 270, 558 A.2d at 469-70. Furthermore, the concurrence indicated that allowing Graves' suit to proceed would not prejudice Arm & Hammer, yet would promote an important goal of our legal system—safeguarding the public from the manufacture and distribution of unsafe medicinal products. *Id.* at 269-70, 558 A.2d at 470. Finally, Justice O'Hern declared that this opinion was not an unwarranted extension of prior case law interpreting the discovery rule. *Id.* at 270, 558 A.2d 470-71.

Justice Clifford's dissenting opinion emphatically rejected the "novel idea" espoused by the concurrence of allowing the treating physicians' skepticism of Graves' theory of causation to revive this time-barred complaint. *Id.* at 271, 558 A.2d at 471 (Clifford, J., dissenting). Justice Clifford stressed that the discovery rule operates to postpone the "accrual of a cause of action [only] until a plaintiff learns, or reasonably should learn, the existence of a state of facts [that] may equate in law with a cause of action." *Id.* (quoting *Burd v. New Jersey Tel. Co.*, 76 N.J. 284, 291, 386 A.2d 1310 (1978)).

Justice Clifford proceeded with a careful review of the undisputed facts prior to highlighting why Graves should not benefit from the application of this fact sensitive rule. *Id.* at 271, 558 A.2d at 471 (Clifford, J., dissenting). The dissent characterized Graves as a highly educated individual who instantaneously dropped to his knees after drinking a mixture of the defendant's baking soda and water. *Id.* at 272, 558 A.2d at 471 (Clifford, J., dissenting). Not only did Graves attribute his pain to the defendant's product in the presence of an emergency room physician, reminded Justice Clifford, but he had no reason to suspect an ulcer and repeatedly gave a history of gastric rupture secondary to sodium bicarbonate ingestion at subsequent medical examinations. *Id.* at 272-73, 558 A.2d at 471-72 (Clifford, J., dissenting).

The dissenting opinion sharply disagreed with Justice

O'Hern's characterization of this case as a "little old 'factual controversy.' " *Id.* at 275, 558 A.2d at 473 (Clifford, J., dissenting). Rather, Justice Clifford viewed the concurrence's application of the discovery rule in *Graves* as a "major departure from settled law." *Id.* Indeed, the dissent argued that the concurrence had twisted the discovery rule into a test which gauges when the plaintiff and his entourage of physicians are ready to prove the claim. *Id.* Justice Clifford emphasized that the plaintiff knew from "instant one" that the defendant's product was responsible for his difficulties. *Id.* After all, the dissent reasoned, there must be something wrong with an antacid which produces immediate stomach distress. *Id.* at 275-76, 558 A.2d at 473 (Clifford, J., dissenting).

Finally, the dissent argued that there was nothing arcane about the element of causation in this case: "Graves drank the stuff and dropped to the floor." *Id.* at 277, 558 A.2d at 474 (Clifford, J., dissenting). According to the dissent Graves' action should be time-barred because he undoubtedly perceived the connection immediately. *Id.*

In *Graves*, the contours of the discovery rule have been stretched beyond recognition to save the time-barred complaint of William Graves. It is inconceivable that Graves was not immediately aware of the facts, as opposed to medical proof, that equated in law with a cause of action as he dropped to the floor, glass of baking soda and water in hand, on that fateful summer night. The concurring opinion which, in the name of equity, has saved William Graves' complaint, has also blurred the meaning of the discovery rule.

Kathleen D. West

CONSTITUTIONAL LAW—EMINENT DOMAIN—DESIGNATION OF PROPERTY AS POTENTIAL SITE FOR HAZARDOUS WASTE FACILITY DOES NOT CONSTITUTE A COMPENSABLE TAKING—*Littman v. Gimello*, 115 N.J. 154, 557 A.2d 314 (1989).

In March 1985, the New Jersey Hazardous Waste Siting Commission (Commission) formulated the New Jersey Major Hazardous Waste Facilities Plan (Plan) which anticipated the con-

struction of a land storage facility and one or more rotary kiln incinerators. 115 N.J. at 157, 557 A.2d at 316. The Commission is responsible for identifying appropriate sites for the construction of hazardous waste facilities. Following the completion of a suitability study on the proposed site, an administrative hearing is conducted to determine whether the site is appropriate for the construction of a hazardous waste facility. The administrative law judge may recommend a site for development where clear and convincing evidence establishes that the development of the site will not substantially impair public health, safety or welfare. *Id.* at 158, 557 A.2d at 316. Subject to judicial review, the Commission may accept or reject the administrative law judge's recommendation. If the Commission finds the land suitable for development, it will negotiate for the purchase of the site. Where negotiations are unsuccessful, the Commission is empowered to condemn the property.

In February 1986, the Commission proposed eleven facility sites including sites in East Greenwich and Millstone. Landowners and municipal officials of the East Greenwich and Millstone sites alleged in independent suits that the designation was a taking of property without due process or just compensation in violation of the New Jersey and United States Constitutions. The cases were consolidated following interlocutory appeals questioning the Commission's authority to enter the land and conduct suitability tests. *Id.* at 159, 557 A.2d at 316-17. The plaintiffs subsequently moved for summary judgment alleging that the Plan constituted a taking and that the Commission lacked authority to enter property and conduct testing.

On the Commission's cross-motion, the trial court dismissed plaintiffs' complaints rejecting their argument that loss of financing and diminution in market value constituted a taking. *Id.* The trial court dismissed the complaint without prejudice recognizing that inverse condemnation may occur in situations where the government authority delays extraordinarily in determining whether to condemn the property. *Id.*

On appeal, the appellate division affirmed the determination of the trial court. *Id.* The plaintiffs subsequently filed a petition for certification requesting review of the lower courts' finding that there was no compensable taking. *Id.* at 160, 557 A.2d at 317. The New Jersey Supreme Court granted certification. *Id.*

The supreme court, in a unanimous opinion authored by Justice Garibaldi, affirmed the lower courts' judgments. *Id.* The

court began its analysis by noting that the court reviews a dismissal for legally insufficient claims in terms most favorable to the plaintiff. *Id.* (quoting *Portee v. Jaffee*, 84 N.J. 88, 90 (1980)). After considering the damages alleged by the two property owners, Justice Garibaldi noted that the New Jersey Constitution and the United States Constitution prohibit the government from requisitioning property without providing just compensation. *Id.* at 161, 557 A.2d at 317-18. Although a taking traditionally required a physical invasion, Justice Garibaldi noted that in New Jersey it is generally held that compensation will be awarded in noninvasive takings including governmental regulations which cause a diminution in value and diminutions caused by pre-taking activities. *Id.* at 161, 557 A.2d at 318.

After identifying the instant matter as a pre-condemnation activity, the court noted that government plans usually do not constitute a taking. *Id.* at 161-62, 557 A.2d at 318 (citing *Wilson v. Long Branch*, 27 N.J. 360, *cert. denied*, 358 U.S. 873 (1958); *Danforth v. United States*, 308 U.S. 271 (1939)). The court additionally noted that no precise formula has developed to determine whether a noninvasive taking has occurred. *Id.* Using a fact sensitive approach, the court determined that the plaintiffs' allegations did not establish a compensable taking. *Id.* The court found that the identification of potential sites did not prevent the property owners from developing the land and that the Plan posed no legal impediment thereto. *Id.*

Considering the plaintiffs' allegation that their inability to obtain financing constituted a taking, the court determined that lost economic opportunities are not compensable under the New Jersey or United States Constitutions. *Id.* at 162-63, 557 A.2d at 318 (citing *Barsky v. Wilmington*, 578 F. Supp. 170, 173 (D. Del. 1983); *Schoone v. Olsen*, 427 F. Supp. 724, 725 (E.D. Wis. 1977); *East Rutherford Indus. Park v. State*, 119 N.J. Super. 352, 361 (Law Div. 1972)). The court also dismissed plaintiffs' allegations that the pre-condemnation activities compromised their use of the land for farming. *Id.* Justice Garibaldi acknowledged that it is commonly held that a diminution in the value of property which occurred during government deliberations is an incident of ownership not constituting a taking absent extraordinary delay. *Id.*

Noting strong policy considerations which bar recovery for diminutions arising from government proposals, Justice Garibaldi reviewed prior decisions which permitted recovery when government action substantially impaired the beneficial use of

the property. *Id.* at 164, 557 A.2d at 319 (citing *Schiavone Constr. Co. v. Hackensack*, 98 N.J. 258 (1985); *Lomarch Corp. v. Mayor of Englewood*, 51 N.J. 108 (1968); *Morris County Land Improvement Co. v. Parsippany-Troy Hills*, 40 N.J. 539 (1963)). The court easily distinguished the instant case from cases where the government placed a direct restraint on the beneficial use of the property. *Id.* at 164-65, 557 A.2d at 319. Comparing the facts in the instant matter to those addressed in *Washington Market Enters. v. Trenton*, Justice Garibaldi concluded that the plaintiffs failed to establish that the Commission's selection destroyed the beneficial use of the property. *Id.* at 165, 557 A.2d at 320 (citing *Washington Mkt. Enters. v. Trenton*, 68 N.J. 107 (1975)). The court additionally noted that the decision in *Washington Market* contemplated pre-condemnation activities during a ten-year period and a complete diminution in value. *Id.* at 166-67, 557 A.2d at 320 (quoting *Schnack v. State*, 160 N.J. Super. 343, 349-50 (App. Div.), *certif. denied*, 78 N.J. 401 (1978)).

Justice Garibaldi enumerated several factors which should be considered in evaluating a compensable-taking claim. *Id.* at 167, 557 A.2d at 320-21. Justice Garibaldi gave primary importance to whether the government exercised extraordinary delay in deciding whether to condemn the property or was engaged in other unreasonable conduct. *Id.* Additionally, the supreme court advocated that courts consider the imminence of condemnation, the hardship to the landowner and the severity of the injury. *Id.* at 167-68, 557 A.2d at 321 (citations omitted). Justice Garibaldi noted that public policy should be considered in conjunction with the above enumerated factors. *Id.* at 168, 557 A.2d at 321. Characterizing the plaintiffs' claims as projections on future facts, the court rejected the plaintiffs' assertion that the Plan provided for excessive delay. *Id.*

The supreme court in *Littman v. Gimello* placed a substantial burden on property owners affected by the New Jersey Major Hazardous Waste Facilities Plan. Although pre-condemnation activities may not disturb the beneficial enjoyment of the land, the activities will directly impair a commercial owner's ability to finance the property, forcing the owner to maintain a costly mortgage while awaiting the government's determination. The Plan permits delays between forty-one and 101 months. *Id.* at 168, 557 A.2d at 321. Certainly, time is required for the Commission to evaluate the site and for the public to be appraised of the proposed site. It seems, however, that pre-condemnation activities

which encompass eight years satisfy the unreasonable delay test contemplated in *Washington Market*, a case on which the supreme court relied in making its determination.

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