

# Appellate Law Update

*A Newsletter by Budd Larner, P.C.*

## Representative Appellate Cases Handled by Budd Larner, P.C.

*By Donald P. Jacobs, Esq.*

Donald P. Jacobs regularly prepares appellate briefs and presents oral argument in a variety of areas, including employment discrimination, intellectual property, RICO, §1983 civil rights and consumer fraud. He was on the brief in *Beck v. Prupis*, a RICO case decided by the United States Supreme Court, and has argued many times before the New Jersey Supreme Court, the United States Court of Appeals for the Third Circuit, the Superior Court of New Jersey, Appellate Division, and other appellate courts.

### **Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010)**

In this highly publicized case, the New Jersey Supreme Court held that an employer had no right to possess or review attorney-client e-mails that were sent through an employee's personal, password-protected, web-based e-mail account via a company-owned computer. The decision is the first on the subject by the highest court of any state.

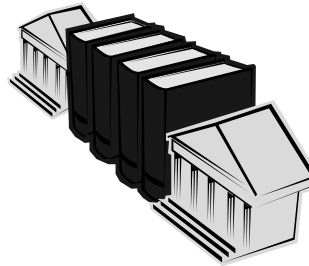
The employee communicated with her attorney after accessing her personal Yahoo account from a company-owned laptop. A Law Division judge ruled that the e-mails became the property of the company by virtue of an electronic communications policy the company claimed to have adopted. The Appellate Division reversed, concluding that even if the company had adopted the purported policy through the distribution of an employee handbook, and even if that policy applied to plaintiff, the personal e-mails did not become company property. Stengart v. Loving Care Agency, Inc., 408 N.J. Super. 54 (App.Div. 2009).

In affirming the Appellate Division, the Supreme Court held that the employee "could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them." The Court further concluded that the employee's expectation of privacy in the e-mails was objectively reasonable. Although employers may adopt lawful policies relat-

ing to computer use, they have "no need or basis to read the specific contents of personal, privileged, attorney-client communications in order to enforce corporate policy."

The Supreme Court also held that the employer's attorneys violated RPC 4.4(b) "by reading e-mails that were at least arguably privileged" and by "failing to notify the employee about them." The attorneys' actions may result in disqualification, reimbursement of the employee's attorneys' fees or other sanctions.

Budd Larner has represented plaintiff throughout this case. ■



### **Garrison v. Porch, No. 08-2453 (3d Cir. Apr. 16, 2010)**

In this §1983 case, the Third Circuit reversed the entry of summary judgment against plaintiff, who claimed that a police officer used excessive force when arresting him.

The district court held that because plaintiff pled guilty to simple assault and resisting arrest, recovery on his §1983 claim was precluded by the Supreme Court's decision in Heck v. Humphrey, which held that a plaintiff may not recover damages under §1983 if doing so would imply the invalidity of a prior conviction. In reversing, the Third Circuit concluded that although plaintiff acted in an unruly and threatening manner, the police officer "was still constrained to use only the level of force which was reasonable to bring [plaintiff] into custody."

Furthermore, because plaintiff's claim arose from the officer's use of excessive force in response to the simple assault

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committed by plaintiff, the fact that plaintiff did not claim self-defense in connection with the assault charge was irrelevant. Also irrelevant was “the theoretical availability of a self-defense claim in other simple assault cases.”

Budd Larner was retained of counsel to prepare the appellate briefs and to argue the appeal on behalf of plaintiff. ■

### Yousef v. General Dynamics Corp., No. A-0391-09T1 (App.Div. Mar. 3, 2010), lv. to appeal granted (N.J. May 7, 2010)

In this appeal, the Appellate Division affirmed a judge’s denial of a motion to dismiss on forum non conveniens grounds. The case involves personal injury and loss of consortium claims asserted by New Jersey residents against a Florida resident and an American corporation arising from a motor vehicle accident in South Africa. After weighing the relevant factors, the Appellate Division concluded that the judge did not abuse his discretion in denying defendants’ motion to dismiss, “notwithstanding the difficulties that may be encountered in accessing evidence in South Africa and notwithstanding defendants’ apparent inability to assert a claim against the municipality in which the accident occurred.”

Budd Larner was retained of counsel to prepare the appellate brief and to argue the appeal on behalf of plaintiffs. ■

### Wingmaster Plus, Inc. v. Meserlian, No. A-2144-04T3 (App. Div. 2006)

In an unusual case involving the application of federal trademark law to claims asserted in state court, the Appellate Division reversed a judgment entered in favor of the manufacturer of a tool used in the servicing of swimming pools. The court held that defendants, not plaintiff, were entitled to judgment.

Plaintiff Wingmaster Plus, Inc. had entered into a contract with defendant Technical Products Co. whereby Technical Products became the exclusive distributor of a tool called the “Wingmaster Plus.” But WPI soon terminated the contract, leading Technical Products to manufacture and sell its own version of the tool, which it called the “Technical Products Co. Plug Service Tool.”

After a jury trial, the trial court entered a \$122,966 judgment against Technical Products and its owner and enjoined them from selling not only their competing version of the tool but also three other tools. The Appellate Division reversed, holding that defendants were entitled to judgment on all of WPI’s claims - for trademark infringement, counterfeiting and unfair competition under the Lanham Act and for unfair competition under state common law.

Budd Larner became involved in the case after the jury returned its verdict in favor of WPI. ■

### Marc Realty v. Profeta, No. A-5012-03T5 (App.Div. 2005)

This was an action by a commercial real estate broker against a property owner for a commission earned for procuring a lessee of a building in Maplewood. The owner’s sole basis for refusing to pay the commission was that the broker allegedly breached the parties’ commission agreement, which, on a prospective basis, prohibited “advertising” of “the real estate transaction referred to in [the] agreement.”

The supposed advertisement was a two-line entry in a “comparative lease survey.” The entry was part of a five-page investment information package relating to an entirely different property. The survey did not disclose the actual terms of the lease that the broker had procured.

The trial court entered summary judgment in favor of the broker for breach of the commission agreement. The Appellate Division affirmed, concluding that the information contained in the investment package did not reflect the details of the original transaction. The court stated that the information in the package was publicly available and not proprietary: “It simply constituted unexceptional background information offered for an entirely unrelated purpose.”

Budd Larner did not handle the matter in the Law Division but was retained to seek affirmance of the summary judgment. After the affirmance, Budd Larner moved for an award of attorneys’ fees incurred by the broker on appeal. The Appellate Division granted that motion, ordering the property owner to reimburse the broker for most of his attorneys’ fees. ■

### Mogull v. CB Commercial Real Estate Group, Inc., 319 N.J. Super. 53 (App. Div. 1999), rev’d in part and remanded in part, 162 N.J. 449 (2000), rev’d and remanded as to punitive damages, No. A-4501-96T1 (App. Div. 2000), certif. denied, 165 N.J. 607 (2000)

The Appellate Division reversed a \$5 million punitive damage award against an employer in a sex discrimination case arising under the New Jersey Law Against Discrimination. The Court held that punitive damages were unavailable because there was insufficient involvement of upper management.

Budd Larner did not represent defendants at trial but was retained to handle the appeal and cross-appeal. ■

### Beck v. Prupis, 529 U.S. 494 (2000)

This case, which began in the District of New Jersey, required the Supreme Court to interpret two sections of the civil RICO statute. The question was whether a person injured by an overt act done in furtherance of a RICO conspiracy may assert a civil RICO conspiracy claim under 18 U.S.C. §1964(c) for violation of §1962(d) even if the overt

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act does not constitute an act of racketeering.

The overt act claimed by plaintiff was the termination of his employment. Drawing upon common law principles of civil conspiracy, the Supreme Court held that injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO is not sufficient to give rise to a cause of action under 18 U.S.C. §1964(c) for a violation of §1962(d).

Budd Larner represented defendants throughout the case, including after the matter was transferred to the Southern District of Florida, on appeal to the Eleventh Circuit and in the Supreme Court. ■

**Showlin v. University of Medicine and Dentistry of New Jersey, No. 98-6346 (3d Cir. 1999)**

In this §1983 case, a retired university faculty member claimed that defendants retaliated against him for statements he made, and that they deprived him of due process by sanctioning him for scientific misconduct. The Third Circuit affirmed the entry of summary judgment in favor of defendants. Although plaintiff's statements were protected by the First Amendment, the public interest favoring the speech was outweighed by the interests of the university in efficient administration.

Furthermore, the Senior Vice-President for Academic Affairs did not violate plaintiff's rights by notifying journals of plaintiff's involvement in the misconduct investigation. "It is clear that an individual cannot claim a federally protected interest in his or her reputation alone," the court explained. "Therefore, allegations of damage to reputation or good name do not suffice to establish a due process claim."

Budd Larner represented the Senior Vice-President for Academic Affairs in the district court and on appeal. ■

**Samo by Samo v. Colfax, No. A-2538-94T1 (App. Div. 1996), certif. denied, 149 N.J. 34 (1997)**

In this medical malpractice case, plaintiff appeared at trial in traditional Arab dress, and the subjects of defendants' peremptory challenges were three African-American women and one Hispanic man. The trial judge declined to start the jury-selection process anew. The Appellate Division reversed and remanded for a new trial.

The Appellate Division concluded that there was a "pattern of impermissible exclusion in the defendants'

peremptory challenges." The trial judge had found such a pattern after the fourth peremptory challenge, but instead of declaring a mistrial had simply denied the fourth challenge. The Appellate Division held that the proper course was to dismiss all of the jurors selected up to that point, quash the entire venire, declare a mistrial and start the jury selection process anew. The Appellate Division also concluded that the trial court's jury instructions were impermissibly confusing and unclear.

Budd Larner was retained of counsel to prepare the appellate briefs after the jury returned the verdict against plaintiff. ■

**General Motors Corp. v. City of Linden, 143 N.J. 336, cert. denied, 519 U.S. 816 (1996)**

In this case, General Motors claimed federal civil rights violations stemming from allegedly excessive tax assessments. Agreeing with defendants, the New Jersey Supreme Court held that General Motors could not maintain the action under the federal civil rights statute because state law provides an adequate remedy for such claims.

Budd Larner represented the City of Linden and its tax assessor. ■

**Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464 (1988)**

Because of a defective engine, the power boat plaintiff purchased failed to reach a speed of 80 miles per hour. He claimed breach of contract and treble damages under the New Jersey Consumer Fraud Act. Disagreeing with the trial court, the Appellate Division imposed treble damages against the defendant corporation and its president in his individual capacity. The president then retained Budd Larner to prepare a petition for certification.

The New Jersey Supreme Court granted certification and, after additional briefing, dismissed the Consumer Fraud Act claim. The Court found substantial evidence in the record to support the trial court's "implicit finding" that plaintiff was not induced to purchase the boat by any unconscionable commercial practice. Furthermore, defendants' conduct with respect to a bank loan did not cause plaintiff to sustain any ascertainable loss. Therefore, "it was error for the Appellate Division to have substituted its view of the record for that of the trial court on these issues." ■

**About Budd Larner, P.C.**

Budd Larner, P.C. is a firm of approximately 75 attorneys with offices in Short Hills, NJ; Cherry Hill, NJ; New York, NY; and Philadelphia, PA. Founded in 1934, the firm provides a full range of legal services to a diverse group of clients, both domestic and foreign. Budd Larner's clients include individuals, partnerships, corporations - ranging in size from start-up ventures to Fortune 100 multinationals - municipalities, educational institutions, financial institutions, insurers and reinsurers. The firm counsels its clients on how to avoid problems, provides representation in negotiations, and handles all phases of litigation. ■

### Other Practice Areas of Donald P. Jacobs

**General Litigation** Don handles commercial litigation matters involving RICO, trademarks, discrimination, contracts and other issues. He is experienced in writing briefs at all stages of trial court litigation. For example, in *Jazz Photo Corp. v. Imation Corp.* – a federal case in which Budd Lerner's client obtained a settlement of more than \$26 million – Don wrote or oversaw the preparation of more than 30 briefs, addressing discovery, summary judgment, evidentiary and appellate issues.

**Marketing Law** Don reviews promotions for compliance with applicable law, responds to problems that arise with the US Postal Service and state attorneys general, and handles litigation. Besides selling merchandise, Don's clients have offered sweepstakes, telephone trivia games and puzzle contests. Don also reviews Internet promotions for compliance with applicable law, writes sweepstakes rules and terms and conditions, drafts and negotiates contracts, and addresses privacy, trademark, copyright, customer service and other issues.



### DONALD P. JACOBS

#### Education

Cornell University B.S. , 1973  
Rutgers University School of Law J.D. , 1981

#### Bar Admission

New Jersey, 1981  
U.S. District Court, District of New Jersey, 1981  
Pennsylvania, 1981  
U.S. District Court, Eastern District of Pennsylvania, 1982  
New York, 1988  
U.S. Court of Appeals, Third Circuit, 1982  
U.S. Court of Appeals, Eighth Circuit, 1985  
U.S. Court of Appeals, Ninth Circuit, 1989  
U.S. Court of Appeals, Seventh Circuit, 1992  
U.S. Supreme Court, 1993  
U.S. District Court, Southern District of New York, 1997  
U.S. Court of Appeals, Federal Circuit, 2003  
U.S. Court of Appeals, Second Circuit, 2009

#### Professional Profile

Member:

- New Jersey State Bar Association
- The Association of the Federal Bar of the State of New Jersey
- Direct Marketing Club of New York
- Appellate Practice Committee of the New Jersey State Bar Association
- Bar Association of the Third Federal Circuit
- Former Mediator, Community Dispute Resolution Project
- Managing Editor, Rutgers Law Journal, 1980-81
- Former Senior Editor, Labor Relations Guide
- Certificate of Merit, American Bar Association, Gavel Awards program

In his spare time, Don has constructed crossword puzzles published in The New York Times and The National Law Journal.

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